



Standard of review: Investment arbitration

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A. Introduction

1 This entry concerns the → *standard of review* in → *international investment arbitration*. Within investment arbitration, the term 'standard of review' is commonly understood to refer to the intensity of the scrutiny applied by an international arbitral tribunal to prior determinations of fact and/or law made by a host state (Henckels, 2015, 29–30; Werner and Gruszczynski, 2014, 1–2). For the purposes of analytical clarity, it is useful to distinguish the standard of review from particular methods of review, or legal tests used to balance competing interests, such as → *proportionality* [MPEPIL] analysis (→ *Balancing test: Investment arbitration*); and from the grounds of adjudicatory review, or substantive obligations, established by investment treaties, such as → *fair and equitable treatment* [MPEPIL] (Henckels, 2015, 31–32; Schill, 2012, 582). That said, as these related questions influence what falls within the scope of adjudicatory review, and thus indirectly influence the intensity of adjudicatory review, they can be incorporated within a broader understanding of the term 'standard of review' (Shirlow, 2014, 598, 607; Ortino and Mersadi Tabari, 2016, 507–9). As in other areas of national or international adjudication, the standard of review applied by investment arbitrators can fall on a large variety of points 'on a continuum bounded by total deference to justifications provided or analysis performed by a primary decision-maker at one end, and substitutionary (*de novo*) review of the relevant measure and its justification at the other' (Henckels, 2013, 201; see also Van Harten, 2013, 34). A related concept which should be defined at the outset is → *deference*, which 'refers to a limitation in a ... tribunal's level of scrutiny concerning decisions taken or determinations made by a host state institution because the adjudicator respects the reasons for a state's decision or conduct even if its own assessment was different' (Schill, 582; see also Henckels, 2015, 34–37).

1. Prominence of the 'Standard of Review' Question in Investment Arbitration

2 The standard of review applied by investment arbitrators affects the allocation of decision-making authority between adjudicators and other types of actors (such as elected politicians), and, relatedly, the division of powers between the national and international levels (Henckels, 2015, 30; von Staden, 2012b, 3). In investment arbitration, the standard of review is an issue that is felt acutely because this is a particularly intrusive form of international adjudication from the perspective of domestic politics and governance (Urueña, 2016, 101–2; Schill, 577–78). As this adjudication mechanism enables investors to directly access international arbitration, typically without a requirement to exhaust local remedies (→ *Local Remedies, Exhaustion of* [MPEPIL]; → *Previous exhaustion of local remedies: Investment arbitration*), the 'governance function' performed by investor-state tribunals, in reviewing the legality of government conduct, is more immediate than that of other international tribunals (Schill, 590; → *International adjudication as governance*). Another reason the standard of review is a pressing issue is that the obligations contained in investment treaties have traditionally been formulated in highly general terms, meaning they can apply to a broad range of conduct that is attributable to the host state. A common diagnosis within contemporary literature is that



investment arbitrators have often employed inappropriately strict standards of review, which have failed 'to allow States a sufficient margin to determine and implement various policy goals', and this 'has contributed to the legitimacy crisis in which the investment treaty system currently finds itself' (Roberts, 2012, 172). Accordingly, many have suggested that the use of more deferential standards of review in investment arbitration, drawing on experience in comparable systems of international and domestic public law adjudication, may be one way to address such legitimacy concerns (see eg Henckels, 2015, 21–22, 194; Burke-White and von Staden, 2010). Indeed, beyond investment arbitration, some authors condition the legitimacy of international adjudication on whether it utilizes standards of review which are sensitive to the fact that domestic decision-makers may be the 'democratically more appropriate' level for deciding certain issues (von Staden, 2012a, 1026; von Bogdandy and Venzke, 2014, 198–99). This is an application of the principle of → *subsidiarity* [MPEPIL], or the idea that decision-making should preferably occur at the lowest level of governance unless good reasons exist for shifting decision-making upwards (Jachtenfuchs and Krisch, 2016, 6–7). On the other hand, concerns exist that such proposals could weaken investment arbitration as an independent mechanism for controlling host state conduct, which is arguably the key rationale of investor-state arbitration (Fahner, 2014, 478–92; Tallent, 2010, 129–30; Vasani, 2010, 163–64, 167–68). More broadly, Foster has warned that placing emphasis on the concepts of standards of review and deference may weaken international adjudication as a mechanism for securing shared international interests (2014, at 357, 374; 2012, at 557–58).

2. Legal Basis for Determining the Applicable Standard of Review in Investment Arbitration

3 Investment treaties (→ *Investments, Bilateral Treaties* [MPEPIL]) typically do not explicitly state the relevant standard of review for international arbitral tribunals to apply when scrutinizing prior determinations made by host states—for a rare example from another context of a treaty which explicitly addresses the applicable standard of review see Article 17.6 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Instead, as in other areas of international adjudication, in investment arbitration the standard of review is determined by arbitrators exercising their → *inherent powers* to regulate their own procedures (Werner and Gruszczynski, 1; Shany, 2005, 911). For this reason, the view that investment tribunals should only employ deferential standards of review when there is an explicit basis in the relevant treaty text (Burke-White and von Staden, 293) is questionable. Nevertheless, a tribunal's determination of the appropriate standard of review for a particular determination should take into account, and will often be influenced by, the wording of an applicable treaty (Henckels, 2015, 189). To give an example, some investment treaties contain 'essential security' clauses which state, for example, that the treaty does not prevent a party from 'applying measures that it considers necessary for ... the protection of own essentially security interests' (Art 18(2) Treaty between the Government of the United States of America and the Government of [...] concerning the Encouragement and Reciprocal Protection of Investment (2012) ('US Model BIT 2012')). The use of the language 'that it



considers necessary' will affect the appropriate standard of review for adjudicating on the application of such a provision, by limiting an adjudicator's role to confirming that it has been invoked in good faith (Schill and Briese, 2009). Another example of treaty wording which may influence the appropriate standard of review are provisions which affirm the continuing right of the treaty parties to adopt public interest regulation and exercise discretion in enforcing such regulations. For example, in *Al Tamimi v Oman* the tribunal found that various treaty provisions under the United States–Oman Free Trade Agreement, which concerned the treaty parties' right to adopt and enforce environmental regulation, widened the degree of deference owed when scrutinizing the host state's conduct under the international minimum standard (at paras 387–90). More generally, some types of international norms are recognized to be relatively indeterminate in their application, and thus to 'provide limited conduct-guidance and preserve a significant "zone of legality" within which states are free to operate' (Shany, 910, 913). In particular, 'standard-type norms, discretionary norms and result-oriented norms' all tend to have this characteristic (Shany, 914–17).

4 This entry largely concerns investment treaty arbitration; that is, cases where the host state's consent to jurisdiction, and the substantive obligations a tribunal can make ultimate findings on, are contained in an investment treaty. This reflects that the publicly available arbitral awards relevant to this issue have predominantly arisen from treaty-based arbitrations, and the scholarly debate has focused on treaty-based arbitration. However, the analysis undertaken can largely apply analogously to contract-based investor-state arbitrations (→ *Contract claims: Investment arbitration*), or disputes arising under national investment laws, to the extent that the relevant considerations, discussed below, are pertinent in a particular dispute. Such considerations include the relative expertise or institutional capacity of national-level decision-makers, as compared to international arbitrators, to make certain types of determinations, and, relatedly, the potentially greater legitimacy and accountability of domestic authorities. As Ortino and Mersadi Tabari highlight, in considering the appropriate standard of review for contract-based arbitrations a threshold question will be whether the host state conduct being scrutinized involves the exercise of public functions (at 514–15). This reflects that many of the considerations which may warrant a degree of deference by arbitrators arise because of a concern with the comparatively greater expertise or legitimacy of governmental decision-makers in exercising public authority. Where public functions are in issue, then a tribunal hearing a contract-based dispute may be warranted in affording a degree of deference to the host state based on the considerations outlined below. Van Harten makes a similar point, suggesting that since it is possible for states to agree through contracts to international adjudicative review of 'sovereign conduct with potentially wide-ranging implications for other actors and for the host state's population', contract-based arbitration may at times constitute a form of 'regulatory adjudication' with public law characteristics (2013, 7–9; see also Van Harten, 2007, 381–86). In general, investor-state contracts, compared to treaties, are less likely to contain open-ended 'standard-type norms', and thus to leave substantial discretionary room for manoeuvre to host states. However, this is simply one relevant consideration which will



inform the standard of review question; it does not mean that the variety of factors concerning potential arbitral deference are irrelevant to contract-based disputes (Ortino and Mersadi Tabari, 515).

B. Factors relevant to Determining the Appropriate Standard of Review

5 This section focuses on two key normative considerations which are relevant to determining the appropriate standard of review in investment arbitration: the relatively greater expertise and institutional capacity of host state authorities to make certain types of determinations, and their greater legitimacy and accountability compared to international arbitrators.

1. Relative Expertise and Institutional Capacity

6 One crucial consideration in calibrating the appropriate standard of review is the relative expertise or institutional capacity of investment arbitrators, vis-à-vis other (typically national-level) decision-makers, to resolve certain types of questions which can arise in this area of international adjudication (Schill, 602). For example, arbitrators may be comparatively poorly placed to make determinations which require 'gathering and evaluating complex information (including in relation to risk or harm), monitoring developing situations, engaging in consultation and investigating alternative courses of action' (Henckels, 2015, 39; see also Leonhardsen, 2014, 147). To a significant degree, these factors reflect inherent limitations of adjudication, compared to other institutions for decision-making. Adjudicators make decisions 'in the context of a specific dispute, on the basis of information supplied to them by the parties, and through the prism of legal norms'. All of these features 'constrain judicial perspectives, limit courts' sources of information and introduce a circumscribed time-frame' for decision-making (Shany, 918). Even where adjudicators have access to relevant information, they will often lack the subject-specific expertise required to analyse it (Shany, 918; Van Harten, 2013, 80). For these reasons, even in a domestic context, administrators may be better placed to make decisions which involve polycentric problems, 'the resolution of which would have complex, wide-ranging, and unpredictable consequences in the economy or society' (Shany, 918; Van Harten, 2013, 80). This lack of expertise is exacerbated by the detachment of international adjudicators from the national societies in relation to which they hear disputes, which means they are relatively unfamiliar with the local conditions that are often relevant to the application of international norms (Shany, 919; Burke-White and von Staden, 330–33).

7 Three qualifications should be noted in regard to relative expertise as a factor relevant to calibrating the standard of review and possibly affording national-level decision-makers some deference. First, in some areas international adjudicators will be well-equipped to make the relevant determinations and this will militate against deference to the national level, such as with regard to the interpretation of international norms (Schill, 602; Shany, 919). Second, the



relatively greater expertise of host state authorities should only be relevant as a factor warranting some deference where such authorities can demonstrate that they have expertise in the relevant area and that the expertise was applied in making the relevant determination (Henckels, 2015, 40). Thus, adjudicators should not afford deference 'simply because a particular government agency has responsibility for a particular area' (Henckels, 2015, 40; *Chemtura Corporation v Canada*, 2010, para 123 (*Chemtura v Canada*)). Third, an argument can be made that in areas where domestic regulators hold relevant expertise—which makes them better equipped to answer a contested question than arbitrators—rather than deferring to the respondent state's expertise, tribunals should utilize their power to appoint independent experts (→ *Experts: Investment arbitration*), which may help avoid the appearance of favouring one of the disputing parties (Fahner, 2014, 487–88).

2. Greater Legitimacy and Accountability of Domestic Authorities

8 A second normative consideration which is relevant to determining the appropriate standard of review in investment arbitration is the greater legitimacy and accountability of domestic institutions, as compared to international tribunals, from the perspective of self-government and democracy (Schill, 599–600). In other systems of domestic or supranational judicial review adjudicators often exercise some restraint based on the 'relative democratic or political accountability of another decision-maker' (Van Harten, 2013, 3–4). From an international law perspective, arguments in favour of 'the desirability of regulatory autonomy and decision-making by actors that are proximate to or embedded in the national polity' can be justified on the basis of the host state's inherent right to regulate, as a basic attribute of its sovereignty (Henckels, 2015, 36, 42; *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, 1986, paras 258, 263). Elevating the democratic character of national-level decision-makers to a criterion for determining the appropriate standard of review in investment arbitration would be problematic, as it would lead to differential treatment of states based on their internal political system, which is inconsistent with the traditional approach of public international law (Roberts, 177). It is also questionable whether ad hoc investment arbitrators would be well-placed to engage in such sweeping evaluations of political systems. Nevertheless, where a host state measure has been adopted after a deliberative processes, which, for example, involved consideration of alternative measures and the impact on investor interests, this may be grounds for relaxing the intensity of international adjudicatory scrutiny (Leonhardsen, 143; Henckels, 2015, 150). In contrast, where a decision-making process exhibits a lack of impartiality, the presence of discriminatory motives, or a failure to afford affected interests basic due process rights, this can be valid grounds for refusing to afford domestic processes deference (Leonhardsen, 150; *Deutsche Bank v Sri Lanka*, 2012, paras 478–91).

9 In considering this ground for possible deference, it must be remembered that in relation to investment treaty norms the relevant constituency extends beyond the host state's polity, to also cover other affected parties and specifically foreign investors who arguably may not



be adequately represented within domestic political and legal processes (Roberts, 177–78; Shany, 920; Fahner, 2014, 485). Relatedly, the wider international interest in the consistent interpretation and application of international law can also weigh against deference to the views of national level decision-makers (Schill, 601). For these reasons, the greater legitimacy and accountability of domestic authorities is generally a weaker reason for affording deference to such decision-makers than their comparatively greater expertise and institutional capacity (Henckels, 2015, 38). The tribunal in *Clayton and ors v Canada* recognized the qualified nature of this argument when it noted that while ‘domestic authorities ... enjoy distinctive kinds of legitimacy, such as being elected or accountable to elected authorities’, international adjudicators ‘may have their own advantages including independence and detachment from domestic pressures’ (*Clayton and ors v Canada*, 2015, para 439).

10 The relevance of the greater legitimacy and accountability of domestic authorities, and particularly elected officials, will also vary depending upon the type of domestic decision-maker, and type of determination, which is in issue. This factor is more relevant where the domestic institution whose conduct is being scrutinized is a legislator, and is less relevant for domestic institutions, such as administrators or courts, which have a weaker claim to democratic legitimacy and accountability (Schill, 600; Katselas, 2012, 147–48). Furthermore, the relatively greater legitimacy and accountability of domestic authorities is most likely to be important where the determination in question involves a value judgment on contentious social or economic issues (Van Harten, 2013, 4; Henckels, 2015, 38). Examples of such judgments include determining the desired level of environmental or health protection to be pursued on a society-wide basis or determining what is in the domestic public interest (Schill, 601; von Staden, 2012a, 1037–38). Thus, in applying the protection against expropriation contained in investment treaties, some tribunals have emphasized that a host state is entitled to a degree of deference in determining whether a measure is in the public interest (*Kardassopoulos v Georgia*, 2010, para 391; *Teinver SA and ors v Argentina*, 2017, para 985; *Técnicas Medioambientales Tecmed SA v Mexico*, 2003, para 122). Even where deference is afforded over certain value judgments, arbitrators will scrutinize the means selected by a regulating state to pursue a particular public policy aim. For example, in *International Thunderbird Gaming Corporation v Mexico*, which concerned the application of domestic laws against gambling, the majority of the tribunal began its analysis by emphasizing that ‘Mexico has in this context a wide regulatory “space” for regulation ... reflecting national views on public morals’ (2006, at para 127). Despite this recognition of Mexico’s policy space, the majority noted that Mexico’s measures were subject to the relevant investment treaty disciplines, which it subsequently found had not been breached. A comparison which might be drawn here is with World Trade Organization (‘WTO’) jurisprudence concerning general exceptions under the → *General Agreement on Tariffs and Trade (1947 and 1994)* [MPEPIL] and the → *General Agreement on Trade in Services (1994)* [MPEPIL], where adjudicators have been deferential to regulating states regarding the question of which kinds of issues may concern public morals within a particular society. Nevertheless, this case law has involved close scrutiny of the means which can be utilized to pursue such goals, once they have been



selected by a domestic regulator (see for overview Panel Report, *Brazil – Taxation*, paras 7.517–7.542). In the context of contentious value judgments, deference may be a useful tool for adjudicators who wish to limit their own assumption of decision-making responsibility in order to ensure their legitimacy in the eyes of the states who design investment treaties and are typically concerned about any reduction of regulatory autonomy (Leonhardsen, 138–39).

11 It should be noted that how one conceives of the role performed by investment arbitrators is likely to affect how much weight one gives to arguments based on the relative legitimacy and accountability of domestic decision-makers. For example, some argue that investment arbitrators perform a limited role of determining the host state's compliance with investment treaties and awarding compensation in cases of breach. This role, it is contended, is much more confined than the role of domestic public law adjudicators in determining the legitimacy of governmental conduct and potentially invalidating the conduct of other branches of government (Fahner, 2016, 80–84). Thus, in this view, the greater legitimacy and accountability of other types of decision-makers is less of a concern than in domestic constitutional adjudication, where the idea of the separation of powers comes from (Fahner, 2016, 84). Investment arbitrators have often endorsed something similar to this reasoning by stating that their role is only to determine compliance with international obligations, and they do not 'sit in judgment' over the policies of a host state (see eg *Enron Corporation and Ponderosa Assets LP v Argentina*, 2004, paras 29–30; *Continental Casualty Company v Argentina*, 2008, para 199). Yet others would characterize the adjudicative role performed by investment arbitrators as far more significant, and precisely as determining the ultimate permissibility of democratically enacted domestic laws (Van Harten, 2013, 49–50). On this view, the greater legitimacy and accountability of domestic authorities, particularly elected authorities, is likely to be seen as of greater importance in calibrating the standard of review.

C. Analysis of Arbitral Practices in relation to the Standard of Review

12 The standard of review has arisen as an issue in a wide variety of contexts across publicly available investment arbitration awards, including:

- arbitral scrutiny of host state measures purportedly based on scientific or other forms of specialized knowledge;
- arbitral statements concerning the high threshold which must be met for investment treaty standards to be breached;
- awards addressing whether a 'margin of appreciation' doctrine applies in investor-state arbitration;
- cases concerning emergency or crisis situations;
- the potential deference due to domestic court decisions, particularly in relation to interpretations of domestic law;



- the standard of review in annulment proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention').

These areas will be addressed in turn.

1. Scrutiny of Host State Measures Relying on Scientific or Technical Expertise

13 The question of the appropriate standard of review has often arisen in investor-state arbitrations where a host state's measures have been purportedly justified on the basis of scientific or other forms of specialized knowledge, and this justification has been disputed by the investor (→ *Scientific evidence*; → *Evidence: Investment arbitration*). As we will see below, overall these cases suggest that investment arbitrators have not engaged in determining whether host state measures are scientifically or technically well-founded, or otherwise substituting their 'own judgment of underlying factual material ... for that of a qualified domestic agency' (*Glamis Gold Limited v United States*, 2009, para 779 ('*Glamis Gold*'). Instead, investment arbitrators' focus has largely been on the regulatory process employed by domestic regulators, and, for example, whether the process afforded an affected investor sufficient due process rights (Gruszczynski and Vadi, 2014, 169–70; Fukunaga, 2012, 572–73). This reflects the focus of the international norms which investment arbitrators must apply: these norms do not establish 'scientific criteria for assessing the legality of regulatory measures', but they do set out increasingly detailed requirements concerning the process through which a state adopts and adjusts its regulation, for example through tribunals' interpretation and application of the fair and equitable treatment ('FET') standard (Gruszczynski and Vadi, 169–70; Fukunaga, 576; Ortino and Mersadi Tabari, 513–14). Several prominent examples will be considered to illustrate these points.

14 *Chemtura v Canada* concerned an investor's challenge to Canada's ban on lindane, a pesticide which it produced. The tribunal began by noting that it was 'not its task to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context' (at para 134). Instead, the tribunal's analysis focused on whether the regulatory process employed by the Canadian authorities had been conducted in bad faith or otherwise breached the due process rights of the claimant, such that Canada's conduct would constitute a breach of the international minimum standard (*Chemtura v Canada*, paras 137, 145; → *Minimum Standards* [MPEPIL]), which the tribunal found was not the case (*Chemtura v Canada*, paras 133–225). In reaching this conclusion, the tribunal noted, among other factors, that the regulator had acted 'in pursuance of its mandate as a result of Canada's international obligations' (*Chemtura v Canada*, para 138); that the regulator had followed its standard practices, and treated the claimant in the same way as other affected industry participants (*Chemtura v Canada*, paras 191–92); and that delays in the regulatory process which were attributable to the regulator were not sufficient to constitute bad faith or unfair treatment (*Chemtura v Canada*, paras 219, 224). The existence of some scientific divergence



within the Canadian authorities, which was found to be reasonably justifiable on the evidence, could not of itself constitute a breach of the international minimum standard, and, again, it was not for the tribunal to judge the 'correctness or adequacy of the scientific' results relied upon (*Chemtura v Canada*, paras 153–54).

15 The award in *Glamis Gold* also reveals a focus on ensuring the regulatory process employed by the host state did not violate standards of due process imposed by investment treaty obligations, rather than adjudicating on scientific or technical correctness. This case concerned a challenge to a cultural review process which was employed by the American authorities in relation to the investor's mining proposal in an area adjacent to sites of indigenous cultural significance. The tribunal accepted the United States' argument that it was not the "Tribunal's task to become archaeologists and ethnographers", in order to reach its own judgment on the questions asked by the cultural review process (*Glamis Gold*, para 779). Instead, the tribunal, in determining whether the international minimum standard had been breached, only had to decide whether the cultural review process exhibited 'gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons' (*Glamis Gold*, para 779). In finding that the process did not violate these standards, the tribunal noted that the government had relied upon qualified professionals with relevant expertise, and that it had acted 'without arbitrariness, with sufficient reasons, and fairly' in designing the public hearings and site visits undertaken (*Glamis Gold*, paras 783, 787).

16 *Methanex Corporation v United States*, which concerned a challenge to California's ban on a methanol-based gasoline additive, was another case in which the disputing parties debated at length the merits of the scientific evidence on which the regulatory measure was based. Having been presented with this evidence, including the cross-examination of California's experts, the tribunal accepted the report relied upon as reflecting:

a serious, objective and scientific approach to a complex problem in California. Whilst it is possible for other scientists and researchers to disagree in good faith with certain of its methodologies, analyses and conclusions, the fact of such disagreement, even if correct, does not warrant this Tribunal in treating the UC Report as part of a political sham by California. In particular, the UC Report was subjected at the time to public hearings, testimony and peer-review; and its emergence as a serious scientific work from such an open and informed debate is the best evidence that it was not the product of a political sham engineered by California (*Methanex Corporation v United States*, 2005, pt III, ch A, para 101 ('*Methanex*')).

Again, the key point is that the tribunal did not itself seek to answer the question of whether the report was scientifically correct, although it did note that it was 'not persuaded that the UC Report was scientifically incorrect' (*Methanex*, pt III, ch A, para 101). Instead, the tribunal's



focus was on the regulatory process which the host state had employed, such as whether it was transparent, subject to peer review, and undertaken in good faith rather than on a discriminatory basis.

17 A final case where the greater expertise and institutional capacity of domestic regulators was given significant weight was *Apotex Holdings Incorporated v United States*, in which the investor challenged a determination of a domestic drug regulator. The tribunal began by noting that while there was 'no permissible margin of appreciation' for the host state below the international minimum standard owed to investors, it was also necessary 'for international tribunals to exercise caution in cases involving a state regulator's exercise of discretion, particularly in sensitive areas involving protection of public health and the well-being of patients' (*Apotex Holdings Incorporated v United States*, 2014, para 9.37). The tribunal 'by inclination, qualification and training,' could not 'possibly act as a drug regulator', and conduct a *de novo* review of the specialized regulatory discretion which had been exercised at the national level and involved a variety of 'professional judgments as to public health for which there are no mechanical rules' (paras 9.39, 9.48). The tribunal did, however, review the regulator's conduct in relation to whether the investor's due process rights in the particular regulatory context had been breached, finding this was not the case (paras 9.48–9.65).

18 The category of investment awards just considered, which have presented investment arbitrators with contested scientific or technical questions, are sometimes compared to the approaches developed by WTO adjudicators to the standard of review (→ *Standard of review: World Trade Organization (WTO)*) when adjudicating disputes raising contested scientific questions, in particular under the Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement') (Gruszczynski and Vadi; Fukunaga). By way of context, scientific determinations are relevant under the SPS Agreement because it *inter alia* requires that → *sanitary and phytosanitary measures* [MPEPIL] be 'based on scientific principles' and 'not maintained without sufficient scientific evidence' (see Arts 2.2, 5.1–5.2, 5.7 SPS Agreement). In the case law developed under the SPS Agreement, there are certain convergences with the investment awards discussed above, including that WTO adjudicators, like investment arbitrators, tend to be conscious of 'their limited epistemic competence in scientific matters ... [and] concentrate on reasonableness rather than correctness of specific scientific claims' (Gruszczynski and Vadi, 169). For example, the WTO Appellate Body has held that the scientific basis for a member's measure 'need not reflect the majority view within the scientific community but may reflect divergent or minority views', so long as it is 'considered to be legitimate science according to the standards of the relevant scientific community' (Appellate Body Report, *US – Continued Suspension*, 2008, para 591). On the other hand, the WTO case law has tended to involve closer scrutiny of whether the conclusions drawn by a domestic regulator, when assessing a risk, are sufficiently supported by the underlying scientific evidence. For example, the Appellate Body has stated that while 'a panel is not well suited to conduct scientific research and assessments itself, and should not substitute its judgement for that of a risk assessor', nevertheless it 'must be able to review whether the



conclusions of the risk assessor are based on the scientific evidence relied upon, and are, accordingly, objective and coherent' (Appellate Body Report, *Australia – Apples*, 2010, paras 224–25). This approach likely reflects the relevant treaty context, given that, as noted, the SPS Agreement establishes a variety of science-based criteria for national decision-making, unlike investment treaties which do not explicitly address scientific matters (Gruszczynski and Vadi, 154, 170). A criticism which has been made of the relevant WTO jurisprudence is that while it may avoid adjudicating upon the correctness of the underlying scientific evidence, the tendency to scrutinize the reasoning and methodology of domestic risk assessors brings it close to conducting a form of *de novo* review (see eg Gruszczynski, 2013, 755–56). To date, investor-state tribunals seem to have largely avoided this 'trap' of being drawn into *de novo* review (Gruszczynski and Vadi, 170). However, the debate in the WTO context should serve as a reminder that it is potentially impossible to separate fully scrutinizing the decision-making process employed by a domestic regulator and engaging in a *de novo* review of the relevant decision itself (see eg Gruszczynski, 755–56). Relatedly, the more established debate in the WTO setting highlights that science-based risk assessment in a regulatory context 'is not a purely scientific task' but includes a range of normative concerns which can vary depending upon the relevant socio-cultural context (see eg Gruszczynski and Vadi, 166).

2. Awards Emphasizing the Relatively High Threshold before Investment Treaty Standards Will be Breached

19 A substantial number of investment tribunals have noted, in various formulations, the relatively high threshold which must be reached before state conduct will be held to breach investment treaty norms. While these are not categorical statements, they demonstrate a concern on the part of many investment arbitrators to avoid too easily engaging in substitutionary *de novo* review of discretionary determinations made by host state authorities. An influential early decision in this regard is *SD Myers Inc v Canada*, where the tribunal noted that:

When interpreting and applying the "minimum standard", a ... tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections (*SD Myers Inc v Canada*, 2000, para 261 ('*SD Myers*').

The tribunal further noted that the 'determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders' (*SD Myers*, para 263). Arguably, the



tribunal's concrete application of the international minimum standard was relatively intrusive, since, by majority, it found a breach of this obligation simply on the basis that the obligation to afford investors national treatment had been violated (see *SD Myers*, paras 264–68). Nevertheless, subsequent tribunals have often expressed similar sentiments to those of the *SD Myers* tribunal. For example, in *Lemire v Ukraine*, in scrutinizing Ukrainian language requirements imposed on radio broadcasters, the tribunal noted that the 'high measure of deference' referred to in *SD Myers* was 'reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community' (*Lemire v Ukraine*, 2010, para 205 ('*Lemire*'). The same tribunal, when applying the FET standard to another part of the relevant regulatory process, noted that: 'arbitrators are not superior regulators ... A claim that a regulatory decision is materially wrong will not suffice. It must be proven that the State organ acted in an arbitrary or capricious way' (*Lemire*, para 283). In a similar vein, in *Paushok v Mongolia*, the tribunal, in rejecting a claim that a windfall profits tax violated the relevant investment treaty, emphasized that while legislative conduct is not 'beyond the reach of bilateral investment treaties', 'the fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred' (*Paushok and ors v Mongolia*, 2011, paras 298–99). Likewise, the *Eastern Sugar BV v Czech Republic* tribunal held that '[s]ome attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT' (2007, at para 272).

20 The above statements reflect the idea that, as the *Philip Morris v Uruguay* tribunal put it, investment treaty tribunals are not courts of appeal and '[t]he fair and equitable treatment standard is not a justiciable standard of good government' (*Philip Morris Brands Sàrl and ors v Uruguay*, 2016, para 417 ('*Philip Morris*'). In that case, a majority of the tribunal emphasized that 'investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health', and "[t]he sole inquiry for the Tribunal ... is whether or not there was a manifest lack of reasons for the legislation" (*Philip Morris*, para 399, citing *Glamis Gold*, para 805). In finding that Uruguay's tobacco-control measures did not breach the FET standard, the majority noted that the relevant question for the tribunal was whether the regulation was 'entirely lacking in justification or wholly disproportionate' and besides this 'the balance to be struck between conflicting considerations was very largely a matter for the government' (*Philip Morris*, paras 417–19, see also paras 409–10). While Arbitrator Born found that one of Uruguay's measures breached the FET standard, he too emphasized the 'substantial deference to Uruguay's regulatory and legislative judgments' under the FET standard, which nevertheless required 'a minimum level of rationality and proportionality between the state's measure and a legitimate governmental objective' (*Philip Morris*, Concurring and dissenting opinion of Arbitrator Born, para 139, generally paras 137–45, 172–76). Another example of an investor-state tribunal refusing to engage in a *de novo* review of a state's exercise of a regulatory discretion is provided by



Electrabel v Hungary, where the claimant argued that Hungary's re-introduction of regulated pricing for the electricity market breached various investment treaty standards (*Electrabel SA v Hungary*, 2012). In explaining its decision not to engage in a full review of the contested data presented by the parties, the tribunal noted that Hungary's 're-introduction of price regulation ... was a rational and reasonably appropriate measure in the prevailing circumstances'. Furthermore, it was not 'the Tribunal's task ... to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith', which involved 'many complex factors' (*Electrabel SA v Hungary*, paras 8.32–8.35).

21 The idea that host states may enjoy a 'margin for error' in making certain regulatory determinations is consistent both with the content of investment treaty disciplines—which typically do not require such determinations to be correct or ideal from a public policy perspective—and with the comparatively greater institutional competence of host state governments in making such determinations (Henckels, 2015, 140–42; see also *Generation Ukraine Incorporated v Ukraine*, 2003, para 20.33). On the other hand, a criticism which can be made of awards, such as those just considered, which incorporate a degree of deference within particular standards of treatment is that the potential rationales for deference, including the greater expertise or legitimacy of domestic decision-makers, usually apply equally to a domestic-level decision irrespective of the investment treaty norm under which it is challenged (Van Harten, 2013, 99–100). As Van Harten has argued, a risk of employing deference as 'in-built' within particular standards of treatment is that it overlooks the underlying rationales for arbitral restraint, and can lead to tribunals employing an unduly strict standard of review when applying other standards of treatment to the same domestic decision (2013, at 98–99). What this highlights is that arbitrators should try to explicitly address the considerations which have influenced the standard of review they have employed, such as their relative expertise or legitimacy compared to host state authorities (Henckels, 2015, 191).

3. The 'Margin of Appreciation' Doctrine in Investment Arbitration

22 Respondent host states have in various investment treaty arbitrations sought to rely on the → *margin of appreciation* [MPEPIL] doctrine as developed by the → *European Court of Human Rights (ECtHR)* [MPEPIL] (→ *Standard of review: European Court of Human Rights (ECtHR)*), in order to provide support for a more deferential standard of review. Investment treaty arbitrators have approached this analogy in different ways. It is important to bear in mind that while some of the underlying reasons supporting this doctrine may be transferable to investment arbitration, there are significant contextual differences between this adjudication setting and the ECtHR. Unlike investment arbitration, the ECtHR operates in a system which is founded on the idea of subsidiarity, as reflected in the requirement to exhaust local remedies and the practice of affording deference to a respondent state in areas where there is no common standard among member states (Tallent, 112; Leonhardsen, 144–45;



Boudouhi, 2015, 17–18). Relatedly, the ECtHR's practice of affording deference to determinations made through democratic domestic processes does not readily translate to the investment context where a much more diverse set of states appear as respondents and foreign investors may lack representation within domestic processes (Tallent, 112; Leonhardsen 142–43; Vasani, 166–68). Thus, to the extent that the ECtHR's case law is drawn upon in the investment context, the focus should be on that Court's underlying rationales for affording deference in a particular context and the extent to which they apply in a particular investment dispute (Arato, 2013–2014, 575–78). In *Philip Morris*, discussed above, the majority of the tribunal accepted Uruguay's argument 'that the "margin of appreciation" is not limited to the context of the [European Convention on Human Rights] but "applies equally to claims arising under BITs," at least in contexts such as public health' (*Philip Morris*, para 399). Notably, however, the majority did not make any further reference to the ECtHR's case law, but instead referred to other investment awards supporting the idea that a degree of deference may be owed where host states are exercising a regulatory discretion involving a range of complex factors (*Philip Morris*, para 399). This suggests that the majority did not intend to import the ECtHR's 'margin of appreciation' doctrine wholesale, but the wider idea of some degree of adjudicatory respect for complex policy determinations which domestic authorities may be better placed to make, for example because of their greater expertise and proximity to local conditions. Arbitrator Born, in his dissent, drew this kind of distinction, holding that while 'a substantial degree of deference for sovereign regulatory judgments' was due under the relevant investment treaty, the standard of review had to be focused on the terms of the treaty, meaning transposition of the ECtHR's 'margin of appreciation' doctrine was unwarranted (*Philip Morris*, Concurring and dissenting opinion of Arbitrator Born, paras 189–91).

23 Other investment treaty awards have rejected attempts to rely upon the ECtHR's 'margin of appreciation' doctrine, for example on the basis that the doctrine was not found within the applicable investment treaty or customary international law (*Siemens AG v Argentina*, 2007, para 354); or on the basis that investment treaty protections, which are designed to induce investment, should not be diluted by this doctrine, in contrast to non-absolute human rights norms which can be balanced in a variety of ways (*von Pezold v Zimbabwe*, 2015, paras 465–66; *Quasar de Valores SICSA SA and ors v Russian Federation*, 2012, para 22). Neither of these arguments is wholly convincing. As regards the question of a textual basis within investment treaties, others have highlighted that the ECtHR developed the 'margin of appreciation' doctrine without a textual basis, and the key question is instead the underlying rationales for deference and the extent to which these apply in investment arbitration (Henckels, 2015, 183–84; Boudouhi, 15). As noted above, in many areas of international adjudication the appropriate standard of review will not be explicitly resolved by treaty text and will need to be determined through the exercise of a tribunal's inherent powers. As regards the claim of a difference between the absolute nature of investment protections and human rights norms, as has already been touched on, even investment treaty norms which set an absolute standard, such as FET, can typically be complied with in a variety of ways, and thus leave host



states a zone of discretion (Fahner, 2014, 476). This reflects that investment protection is not the unqualified goal of investment treaties, and must be balanced against other legitimate regulatory interests (Fahner, 2014, 476; Ortino, 2013, 440–46).

4. Standard of Review in Emergency or Crisis Situations: Examples from Argentina's Financial Crisis

24 The numerous investor-state arbitrations arising from Argentina's financial crisis of 2001–2002 (→ *Argentine Debt Crisis* [MPEPIL]) have given rise to some notable issues concerning the standard of review. In adjudicating on measures adopted during an emergency or crisis situation, the standard of review may need to be relaxed to take account of the uncertainty facing policy-makers and the limited information which may be available to them when deciding how to respond (Henckels, 2015, 139–40; Leonhardsen, 147–49). Several of the Argentina tribunals have recognized this point, for example by noting that adjudicators, in conducting ex post scrutiny, should determine whether host state actions were necessary 'on the basis of information reasonably available at the time that the measure was adopted' (*Enron v Argentina*, 2010, para 372), bearing in mind the 'disadvantage of hindsight' (*Continental Casualty Co v Argentina*, 2008, para 181). The key question in this area is how readily investment arbitrators should substitute their own assessment of whether a measure adopted during an emergency situation was necessary, or otherwise permissible, for a determination made by the host state authorities. Some of the first Argentine awards were quick to come to their own determination that Argentina's measures were not necessary after a brief analysis of the crisis situation and possible alternatives (*CMS Gas Transmission Co v Argentina*, 2005, paras 319–24; *Enron v Argentina*, 2007, paras 305–9; *Sempra Energy International v Argentina*, 2007, paras 346–51). These awards, however, wrongly applied the comparatively restrictive customary international defence of necessity, without first applying the non-precluded measures clause in the applicable investment treaty, and were thus annulled or criticized by annulment committees (*Enron v Argentina*, 2010, paras 368–95, 405; *Sempra v Argentina*, 2010, paras 208–9, 214–19; *CMS Gas v Argentina*, 2007, paras 129–36; → *Necessity, State of* [MPEPIL]). In contrast, other awards, which found that some of Argentina's measures were covered by the relevant non-precluded measures clause, sought to adapt the standard of review to the emergency context, for example by holding that Argentina's measures were one of several possible permissible responses to a situation demanding a swift reaction, which had been adopted with consideration of the impact on investors (see eg *LG&E Energy Corporation v Argentina*, 2006, paras 239–41, 257–58 ('*LG&E v Argentina*'); *Suez and ors v Argentina*, Separate opinion of Arbitrator Nikken, 2010, paras 36–37, 42); or that proposed alternative responses were not reasonably available to Argentina (*Continental Casualty*, paras 181, 227–33). Importantly, these more deferential approaches have emphasized that emergency situations come to an end, and thus have not hesitated to impose liability for measures maintained by Argentina after the crisis conditions had abated (see eg *LG&E v Argentina*, paras 228–30; *Suez and ors v Argentina*, Separate opinion of Arbitrator Nikken, 2010, paras 43–44).



5. Standard of Review and Domestic Law as Applicable Law

25 Within investment arbitration the host state's → *domestic law* is often part of the → *applicable law*, alongside international law, which must be applied by the international tribunal. This raises the question of how investment arbitrators should resolve questions concerning the content of the host state's domestic law, and in doing so, how arbitrators should treat the host state's interpretations of its own law (Hepburn, 2017, 106–9). In order to interpret domestic law in a contextually sensitive manner, it will generally be appropriate for investment tribunals to give 'considerable weight' to relevant domestic case law (Hepburn, 131–32, generally 109–32). Investor-state tribunals, following the approach taken by the Permanent Court of International Justice ('PCIJ'), have noted that while they retain their 'independent powers of assessment and decision', decisions of domestic courts interpreting domestic laws which the international tribunal must apply 'are likely to be of great help' (*Emmis International Holding BV and ors v Hungary*, 2014, paras 175–76, citing *Payment in Gold of the Brazilian Federal Loans Contracted in France (France v Brazil)*, 1929, 124; similarly *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, 2010, para 236 ('*Fraport*'); *Soufraki v United Arab Emirates*, 2007, paras 96–97 ('*Soufraki*'). However, as the preceding quote indicates, this is not a situation of unqualified deference. An investment tribunal may, for example, need to satisfy itself of the impartiality of a domestic decision-maker, before giving weight to the body's interpretation of domestic law (*Fraport*, para 242; Hepburn, 128–29). The fact that investment arbitrators are selected for their expertise in international law, rather than their knowledge of the host state's law, also provides some support for the suggestion that weight should be given to the views of qualified domestic interpreters (*Fraport*, para 236), although arbitrators' comparative lack of expertise is less pronounced in this area given it is legal rather than other forms of expertise that is in issue (Hepburn, 135–36). A development which could have a major impact in this area is provisions within recent European Union investment treaties which provide either that the international tribunal 'shall follow the prevailing interpretation given to' the domestic law of a state party by its courts or authorities (Art 8.31(2) Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union [and its Member States] of the Other Part ['CETA']), or that the international tribunal 'shall be bound' by such domestic interpretations (sec 3, Art 16 (2) European Union–Vietnam Free Trade Agreement ['EU–Vietnam FTA']). Such provisions could in certain circumstances be overly definitive, for example if a domestic interpretation gives rise to concerns around impartiality.

6. Standard of Review and Challenges to Domestic Court Decisions before Investor-State Tribunals

26 A related area where the issue of the standard of review and potential deference has arisen are cases where investors have challenged the decisions of domestic courts or tribunals before an international arbitral tribunal. This area of practice raises fundamental



questions about the relationship between investment arbitration and domestic adjudicatory systems, including whether the former is a complete alternative to the latter or a more subsidiary mechanism (Sattorova, 2012, 241–42). Traditionally international law and international adjudication has afforded some deference to domestic adjudicatory decisions by holding that such decisions can only be held to constitute a → *denial of justice* [MPEPIL] on the grounds of procedural aspects of the domestic adjudication, rather than on the basis that a substantively incorrect decision was reached; and by providing that a state is only responsible for the final result produced by its domestic system of justice, thus allowing for corrections within that system (Douglas, 2014, 872, 877, 881–82, 895). Some statements by investment arbitrators have reaffirmed such deference, for example by emphasizing that claimants are not entitled to ‘international review of the national court decisions as though the international jurisdiction ... has plenary appellate jurisdiction’ (*Azinian and ors v Mexico*, 1999, para 99; see also *Mondev International Limited v United States*, 2002, para 136; *Loewen Group Inc v United States*, 2003, para 134). Yet investment treaty practice has also provided a significant opening for more intrusive international scrutiny of domestic adjudicatory processes because multiple investment tribunals have held that such processes can be challenged under other investment treaty standards, besides denial of justice, which do not set as high a threshold of liability, nor impose a requirement that only a final domestic result can give rise to liability (*Chevron Corp v Ecuador*, 2010, paras 242–44 (*‘Chevron’*); *Saipem SpA v Bangladesh*, 2009, paras 181–82; *White Industries Australia Ltd v India*, 2011, paras 11.3.2–3; *OAO Tatneft v Ukraine*, 2014, paras 360–61, 392, 411, 475, 481; Douglas, 871; Sattorova).

27 Domestic adjudicatory procedures may deserve a degree of deference for several reasons, including the distinctive features of adjudication as a reasoned decision-making procedure; the substantial discretion enjoyed by states in designing a system of domestic adjudication which must balance a variety of interests; and domestic adjudicators’ comparatively greater familiarity with domestic law (Douglas, 876–78, 887; Bjorklund, 2005, 867, 875–76). As touched on above, there will not be a rationale for affording deference where a domestic procedure does not commit itself to a reasoned process of adjudication, for example where questions arise about partiality or corruption (Douglas, 869–70; *OAO Tatneft v Ukraine*, paras 476, 479, 480). To the extent that one views domestic adjudicatory procedures as being of a special nature and deserving a degree of deference, then the rule that only a final outcome can be challenged should apply to any attempt to challenge domestic adjudicatory conduct under investment treaties, irrespective of the standard of treatment invoked (Sattorova, 241; see also Douglas, 894–95). At times investment arbitrators have found that deference can be afforded to host state adjudicatory decisions by asking whether a decision was ‘juridically possible’ within the national legal system (*Chevron*, para 379); or whether a domestic court’s interpretation of an international norm, applicable in the domestic system, was ‘*reasonably tenable and made in good faith?*’ (emphasis in original) (*Frontier Petroleum Services Ltd v Czech Republic*, 2010, para 527). Douglas suggests that framing the issue in this way is problematic as a domestic court’s incorrect interpretation of domestic or international law is never of itself sufficient to give rise to host state liability



towards an investor. Instead, 'the focus must be on whether the domestic court denied the national's substantive rights (whether their source is international law or domestic law) *in a manner that was violative of that national's procedural rights as protected by international law* (at 898–900, emphasis added).

7. Standard of Review in ICSID Annulment Proceedings

28 A final distinctive context in which the question of the standard of review arises is in relation to annulment proceedings under the ICSID Convention (→ *Annulment: International Centre for Settlement of Investment Disputes (ICSID)*; → *Arbitration: International Centre for Settlement of Investment Disputes (ICSID)*), where the focus is on the threshold which must be met for an ICSID tribunal's award to be annulled under the grounds contained in Article 52 of the ICSID Convention (see eg *Azurix Corporation v Argentina*, 2009, para 53 and sec D(c), citing *Maritime International Nominees Establishment v Guinea*, 1989, paras 5.08–5.09 ('*MINE v Guinea*')). As with other manifestations of the standard of review issue considered above, the question of the appropriate standard or intensity of review in annulment proceedings is closely related to, although analytically distinct from, the scope of review that annulment committees are permitted to undertake (Caron, 1992, 26, 54). The limited scope for annulment of ICSID Convention awards and the substantial deference owed by annulment committees to original tribunals result from a combined reading of Articles 52 and 53 of the ICSID Convention. Article 52 provides for five potential grounds for annulment, which are concerned with minimum standards of procedural fairness or integrity that must be observed by the arbitral process (Bishop and Marchili, 2012, paras 3.12, 3.14; *Soufraki*, paras 23–24; Scheurer et al, 2009, 901). Article 53 further specifies that awards are binding on the parties and not 'subject to appeal' or other remedies beyond those provided for in the ICSID Convention. Given this treaty context, it is widely agreed that ICSID annulment committees are not entitled to 'review the merits of tribunal decisions as appellate courts' nor 'substitute their views for those of the previous panel because they disagree with the substantive outcome of challenged decisions' (Bishop and Marchili, paras 3.11, 3.14; *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, 2007, paras 52–54; *MINE v Guinea*, paras 4.02–4.06). For example, substantial deference has been built into the ground of annulment for failure to state reasons under Article 52(1)(e) of the ICSID Convention, by holding that it 'concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons' (*Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, 2002, paras 64–65; *MINE v Guinea*, paras 5.08–5.09). Nevertheless, there is a variety of viewpoints in this area, and commentators have criticized a number of recent annulment decisions as going too far in the direction of conducting a *de novo* review of the merits of the case (Bishop and Marchili, paras 3.41–3.65; Schreuer, 2011; Reisman, 2010, 245–50; contrast Bottini, 2016). For present purposes it is sufficient to note that the intensity of the scrutiny applied by annulment committees, and relatedly, the scope of the review they engage in, has a direct effect on the allocation of decision-making power. As an annulment committee's scrutiny of the original arbitral process becomes more searching, decision-making power is



reallocated away from the original tribunal, which is largely appointed by the disputing parties, and to the annulment committee, which is appointed by ICSID (Bishop and Marchili, para 1.05; Reisman, 251–52).

29 The potential future use of standing appellate mechanisms in the investment context is likely to affect this area of practice in significant ways. For example, recent EU investment treaties, in providing for standing appellate tribunals, broaden the basis on which initial awards may be reviewed, beyond the grounds for annulment in the ICSID Convention, to include 'errors in the application or interpretation of applicable law' and 'manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law' (Art 8.28 CETA; ch 8(II) 'Investment', sec 3, Art 28 EU-Vietnam FTA). These provisions also empower the standing appellate tribunals to 'uphold, modify or reverse' awards, or refer issues back to first instance tribunals. In contrast, in the ICSID annulment process an annulment committee is only able to annul the award and if this occurs the dispute can be submitted to a new tribunal at the request of either party (Arts 52(3) and 5(6) ICSID Convention). Similarly, in ongoing discussions over the potential creation of a multilateral investment court, a crucial question in designing any appellate instance will be the grounds for appeal and the applicable standard of review (Kaufmann-Kohler and Potestà, 2016, para 118).

D. Conclusion

30 The standard or intensity of review is a challenging aspect of investment arbitration because it is heavily fact-specific and eludes doctrinal restatement. As shown above, the issue has arisen in a wide variety of different contexts across investment arbitration, and is shaped *inter alia* by the nature of the particular host state determination at issue and the relevant norms an investment tribunal is called on to apply. Compared to some other areas of international adjudication, such as WTO dispute resolution or the ECtHR, the approaches of investor-state tribunals to the standard of review are heterogeneous, reflecting that the investment regime lacks a central standing tribunal and has developed rapidly over a short period. Questions around the standard of the review go to the heart of concerns over the relatively intrusive nature of investment arbitration from the perspective of domestic regulatory autonomy, and consequently, the legitimacy of this adjudication mechanism. Put differently, the appropriate balance between the international control imposed by the investment regime and the regulatory decision-making power retained by states is precisely what is at issue in debates over the standard of review. The wide range of tribunal practices and scholarly interventions considered above suggest that the standard of review will remain a crucial question in investment arbitration, including in the context of ongoing efforts to reform this area of international dispute settlement and the balance of interests it strikes.

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