

DO INVESTMENT TREATIES PRESCRIBE A DEFERENTIAL STANDARD OF REVIEW?

A Comparative Analysis of the U.S. Administrative Procedure Act's Arbitrary and Capricious Standard of Review and the Fair and Equitable Treatment and Arbitrary or Discriminatory Measures Treaty Standards

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INTRODUCTION

The dramatic rise in foreign investment in recent decades has brought with it a corresponding increase in the number of bilateral investment treaties (BITs)¹ and, in turn, the number of international investment disputes arising under those treaties.² Investment treaty arbitration is the predominant method used to settle those disputes and has certain advantages for both foreign investors and host states compared to available alternatives, but it can tread on delicate issues typically within the *domaine réservé* of states.³ The concern about due regard for sovereign interests in this context is far from purely academic. In the past twenty years, the International Centre for Settlement of Investment Disputes (ICSID) settled nearly ten times as many investor-state disputes as it settled in the previous twenty-five years, and the number of disputes currently pending before ICSID is more than half the number it has settled *in toto*.⁴ Backlash against the system appears to be on the rise and pullback by states is evident in their efforts to renegotiate or terminate existing BITs, to include novel provisions intended to safeguard their regulatory space in new BITs, and, most dramatically, to exit the sys-

1. The number of bilateral investment treaties (BITs) grew from about five hundred in 1990 to approximately two thousand in the year 2000. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 1 (2008) (citing U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], *WORLD INVESTMENT REPORT* 2001, at 100, U.N. Doc. UNCTAD/WIR/2001, U.N. Sales No. E.01.II.D.12 (2001)). By the end of 2011, the number of BITs had grown to 2833. UNCTAD, *WORLD INVESTMENT REPORT* 2012, at 84, U.N. Doc. UNCTAD/WIR/2012, U.N. Sales No. E.12.II.D.3 (2012).

2. The International Centre for Settlement of Investment Disputes (ICSID) had concluded only twenty-two investment disputes, including those that settled, by 1992; as of the date of this Article, it had concluded 249 disputes. *List of Concluded Cases*, INT'L CENTRE FOR SETTLEMENT INV. DISPS., <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (last updated Sept. 25, 2012).

3. See Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 953, 964 (2005).

4. See *List of Concluded Cases*, *supra* note 2. As of the date of this Article, 157 disputes were pending before ICSID. *List of Pending Cases*, INT'L CENTRE FOR SETTLEMENT INV. DISPS., <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last updated Sept. 25, 2012).

tem altogether.⁵ On January 24, 2012, Venezuela became the third state in five years to denounce the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).⁶

While the tension between securing compliance with states' international obligations and respecting sovereignty is nothing new in international law, investment treaty arbitration is notable among international dispute settlement systems because it rarely, if ever, settles disputes between parallel entities.⁷ Almost all investment treaty arbitrations are initiated by private investors against states.⁸ The system's "vertical" structure distinguishes it

5. Numerous observers have noted and discussed the backlash against the international investment legal regime. See, e.g., Susan D. Franck, *Development & Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 435–37 (2009); Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. INT'L L.J. 725, 726–35 (2008); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 58–67 (2011); Asha Kaushal, Note, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491, 491–97 (2009); see also UNCTAD, WORLD INVESTMENT REPORT 2011, at 100, U.N. Doc. UNCTAD/WIR/2011, U.N. Sales No. E.11.II.D.2 (2011) ("States continue to negotiate [international investment agreements], sometimes with novel provisions aimed at rebalancing the rights and obligations between States and investors and ensuring coherence between [international investment agreements] and other public policies."); UNCTAD, WORLD INVESTMENT REPORT 2010, at 85–88, U.N. Doc. UNCTAD/WIR/2010, U.N. Sales No. E.10.II.D.2 (2010) (noting that numerous countries either have revised, or have plans to revise, their Model BITs, and that others have begun to terminate or renegotiate existing BITs).

6. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention]. Pursuant to Article 71 of the ICSID Convention, Venezuela's denunciation became effective on July 25, 2012, six months from the date of its notice. News Release, ICSID, Venezuela Submits a Notice Under Article 71 of the Convention (Jan. 30, 2012), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>. Bolivia and Ecuador submitted Article 71 notices in 2007 and 2009, respectively. News Release, ICSID, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>; News Release, ICSID, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

7. See Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 10 (Stephan W. Schill ed., 2010) ("[International investment law] combines public international law . . . with arbitration which, even though not unknown in international law to settle state-to-state disputes, is most wide-spread as a mechanism to settle disputes between private parties . . .").

8. See *id.* at 14–15. Further, the disputes often arise out of host-state regulatory actions and can involve claims for hundreds of millions of dollars. See Franck, *supra* note 5, at 435 (describing typical claims).

from traditional commercial arbitration, which settles disputes between private contracting parties, and from World Trade Organization (WTO) disputes, which are exclusively interstate, to name two examples.

Its vertical structure is, however, akin to the structures of various public law systems, including international human rights law and many states' systems of administrative law, both of which similarly impose limitations on the exercise of governmental authority and provide a means for private parties to pursue claims against states under prescribed circumstances.⁹ Given that fact, it has been argued that investment treaty arbitration would be improved by the incorporation of public law standards and principles designed, at least in part, to protect sovereign interests.¹⁰ One specific suggestion in that vein calls for the incorporation of a public law standard of review.¹¹ In this context, a *standard of review* refers to a standard of scrutiny applied by the initial dispute settlement body, here the arbitral tribunal, to the complained-of governmental action.¹² As discussed in more detail in Part III, William Burke-White and Andreas von Staden have argued that the margin of appreciation doctrine applied by the European Court of Human Rights (ECtHR) is the international public law standard of review best suited to investment treaty claims.¹³

This Article explores the possibility that a public law standard of review for *fair and equitable treatment* and *arbitrary or discriminatory measures* treaty claims is to be found in the treaty provisions themselves. Those imprecisely worded guarantees provide a means for foreign investors to seek redress for the impacts of a wide array of governmental action on their investments. They also particularly fuel concerns about the extent to which investment arbitration may interfere with the governmental choices of states. Indeed, the fair and equitable treatment standard has been identified as the

9. See Steven Greer, *What's Wrong with the European Convention on Human Rights?*, 30 HUM. RTS. Q. 680, 682 (noting that the European Convention on Human Rights permits individuals to bring complaints to the European Court of Human Rights [ECtHR]); see also Chester Brown, *Procedure in Investment Treaty Arbitration and the Relevance of Comparative Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 7, at 659, 672 (discussing domestic judicial review worldwide); Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 7, at 721, 721–54 (discussing individuals' rights to various remedies in domestic administrative law).

10. See, e.g., Schill, *supra* note 7, at 35–36 (suggesting a “public law approach” to investment treaty arbitration that considers, among other things, the limitations on “state power[s]”).

11. See William Burke-White & Andreas von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 7, at 689, 689–720.

12. This Article does not consider the separate, interesting question of what standard should be applied to requests for annulment of an arbitral award.

13. Burke-White & von Staden, *supra* note 11, at 717–20.

standard with the greatest potential to intrude into the sovereign sphere.¹⁴ Similar guarantees, however, are made at the national level by any government grounded in the rule of law and are routinely secured, at least in part, by the availability of judicial review of governmental action. In the United States, for instance, the Administrative Procedure Act (APA)¹⁵ authorizes federal courts to hold unlawful and set aside “final agency action” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁶ As discussed below, the latter phrase is understood to prescribe the governing standard of review, commonly referred to as the *arbitrary and capricious standard*, and is some of the most important language in U.S. administrative law.

To explore whether the fair and equitable treatment and arbitrary or discriminatory measures standards might help to draw the line between permissible and impermissible review in investment treaty arbitration, as the arbitrary and capricious standard is widely regarded to do in APA review, this Article compares the two systems, focusing on the roles of the respective standards within them. To provide a focused basis for comparison, the provisions of the ICSID Convention¹⁷ and Rules of Procedure for Arbitration Proceedings in ICSID (ICSID Rules)¹⁸ are often used to illustrate investment arbitration practices and procedures. It is not argued here that U.S. administrative law is representative of domestic administrative law generally, or that other domestic judicial review systems and international law should not be considered.¹⁹ Similarly, it is not contended that ICSID

14. See Dolzer, *supra* note 3, at 964 (discussing the fair and equitable treatment standard).

15. 5 U.S.C. §§ 551–559, 701–706 (2011).

16. *Id.* §§ 704, 706(2)(A).

17. ICSID Convention, *supra* note 6.

18. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, *ICSID Convention, Regulations and Rules*, ICSID/15 (Apr. 2006) [hereinafter *ICSID Rules*], available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

19. A full discussion of existing standards of review in domestic and international legal systems is well beyond the scope of this Article. It bears mentioning, however, that many national and international legal bodies routinely review governmental action for consistency with the law. While European states largely rejected U.S.-style constitutional “judicial review” after the U.S. Supreme Court decided *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in 1803, most if not all eventually adopted a form of it, and today most national legal systems worldwide provide for one or more forms of judicial review. See Alec Stone Sweet, *Why Europe Rejected Judicial Review and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2744–80 (2003); see also Brown, *supra* note 9, at 672 (discussing judicial review worldwide). Further, numerous international bodies, including the World Trade Organization (WTO) Dispute Settlement Body and the ECtHR, routinely review governmental action for consistency with treaty obligations. See Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 16 (describing the similarity of the ECtHR’s case law and practice to those of the U.S. Supreme Court); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, 194 (1996) (noting concerns about the degree to which the WTO Dispute Settlement Body should second-guess national government-agency decisions regarding domestic economic regulations that are alleged to be inconsistent with

arbitration is representative of investment treaty arbitration generally. The limited aim of this Article is to compare two dispute settlement frameworks designed to protect private entities from governmental action that fails to comport with fundamental rule-of-law standards in order to determine whether they contain comparable mechanisms to protect the state parties involved from intrusion into their policy-making prerogatives.

Part I provides an overview of each system, highlighting the role of the arbitrary and capricious standard in APA review and the role of the fair and equitable treatment and arbitrary or discriminatory measures standards in investment treaty arbitration. In Part II, two recent decisions—one decided under the APA and one decided under an international investment treaty—that apply the relevant standards to similar regulatory subject matter, are compared and analyzed. Part III considers William Burke-White and Andreas von Staden's argument that the ECtHR's margin of appreciation doctrine should be adapted and applied as an investment treaty arbitration standard of review. The conclusion reached in Part III is that the doctrine is not well suited to the two treaty claims because it is akin to a constitutional-review doctrine and the function performed by investment arbitration tribunals when they decide these treaty claims is not akin to constitutional review. In Part IV, the three relational considerations that have shaped the meaning of the arbitrary and capricious standard in APA review—namely, that agencies possess expertise that courts do not, that courts should not unduly interfere in agency functioning, and that agencies are politically accountable whereas courts are not—and the extent to which they pertain to investment treaty arbitration are discussed. The Conclusion proposes a standard of review for fair and equitable treatment and arbitrary or discriminatory measures investment treaty claims.

I. JUDICIAL REVIEW UNDER THE APA VERSUS INVESTMENT TREATY ARBITRATION

A. *APA Review*

1. Background and Text

Enacted in 1946 to address the expanding powers of U.S. agencies, the APA establishes procedural standards for agency rulemakings and adjudications and provides for judicial review of administrative action.²⁰ It is well known that the Act's judicial review provisions codified principles that then existed in U.S. common law.²¹ As amended in 1976, those provisions

international rules). Similar to U.S. courts, many national and international forums apply public law standards of review to demarcate the line between permissible and impermissible review. See Burke-White & von Staden, *supra* note 11, at 699–719.

20. 5 U.S.C. §§ 553, 554, 701–706.

21. TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93 (1947) ("The [APA's judicial review] provisions . . . constitute a general

broadly waive the United States' sovereign immunity and provide a cause of action for claims based on "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court."²² The Act defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."²³ The definition of "agency" is likewise expansive but expressly excludes a number of entities, including the President of the United States,²⁴ the U.S. Congress,²⁵ and U.S. courts.²⁶ APA review is not available when a statute precludes it or if "agency action is committed to agency discretion by law."²⁷ Otherwise, a claim seeking relief "other than money damages" may be brought by any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."²⁸ The reviewing court is empowered to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁹

restatement of the principles of judicial review embodied in many statutes and judicial decisions."); *see also* Cynthia Tripi, *Availability of Judicial Review of Administrative Action*, 55 GEO. WASH. L. REV. 729, 729 (1986). For a good history of the APA, *see* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); *see also* Walter Gelhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219–33 (1986).

22. 5 U.S.C. §§ 702, 704.

23. *Id.* § 551(13).

24. *Dalton v. Specter*, 511 U.S. 462, 476–77 (1994) (holding that the President does not fall within the APA's definition of "agency").

25. 5 U.S.C. § 701(b).

26. *Id.*

27. *Id.* § 701(a), (b).

28. *Id.* § 702. It bears mentioning that takings claims, the United States' version of expropriation claims in international law, are not brought pursuant to the APA and are not reviewed under its arbitrary and capricious standard. Such claims differ from APA claims in the important respect that they seek monetary relief, which the APA does not authorize. *Id.* (waiving the United States' sovereign immunity for claims "seeking relief other than money damages"); *see also* *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) ("[T]here is no doubt that [in 5 U.S.C. § 702] Congress lifted the bar of sovereign immunity in actions not seeking money damages."). They are also constitutional claims. The just compensation clause of the Fifth Amendment to the U.S. Constitution succinctly prohibits the taking of private property "for public use, without just compensation." U.S. CONST. amend. V. Similar to expropriation claims, U.S. takings claims do not necessarily involve a seizure of title. Takings claims based on title seizures are known as eminent domain claims in the United States. Regulatory taking claims are cognizable when, as Justice Holmes famously stated in *Pennsylvania Coal v. Mahon*, and numerous subsequent cases have interpreted in one way or another, a regulation goes "too far." 260 U.S. 393, 415 (1922).

29. 5 U.S.C. § 706(2)(A). The APA authorizes federal courts to set aside agency action for additional reasons too, including findings that such action is "contrary to constitutional right, power, privilege, or immunity," *id.* § 706(2)(B), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C). The "arbitrary and

2. Procedure

The great majority of APA cases are commenced in federal district courts, which have “original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.”³⁰ Because federal courts are governed first and foremost by Article III of the U.S. Constitution, APA cases, like all federal court cases, are subject to a number of threshold justiciability doctrines.³¹ Some of those doctrines are based explicitly on Article III, which grants federal courts limited power to decide “cases” and “controversies,” while others have a related prudential basis in safeguarding the separation of the three branches of the U.S. government. A controversy must be “ripe” for adjudication,³² for instance, and cannot have become “moot.”³³ A plaintiff must also have both Article III and prudential “standing” to sue.³⁴

The APA does not itself prescribe detailed procedural rules for judicial review.³⁵ Its provisions, however, have been interpreted and applied in tens of thousands of federal court cases.³⁶ Through that extensive practice, courts have interpreted the limitations it does impose in light of the separation-of-powers principle on which the U.S. system of government is founded and

capricious” basis contained in § 706(2)(A) is by far the most invoked by APA plaintiffs and will be the focus of this Article.

30. 28 U.S.C. § 1331 (2011). Some statutes, such as the Natural Gas Act, require particular APA cases to be brought in the first instance in a U.S. court of appeals. *See, e.g.*, 15 U.S.C. § 717r(b) (2011). Absent such a specific provision, original jurisdiction lies in federal district court. *See Watts v. Sec. & Exch. Comm’n*, 482 F.3d 501, 505 (D.C. Cir. 2007) (“Initial review occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action.”).

31. *See* U.S. CONST. art. III, § 2, cl. 1; *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (holding that Congress cannot give the federal courts judicial power beyond “the right to determine actual controversies arising between adverse litigants” conferred by Article III).

32. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967) (explaining that ripeness is a justiciability doctrine designed to “prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties”); *see also Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808 (2003) (citing *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993)) (explaining that the ripeness doctrine is drawn from both Article III of the U.S. Constitution and prudential judicial concerns).

33. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)) (stating that a case becomes moot if “an event occurs while a case is pending . . . that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party”).

34. *See Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153–54 (1970); *see also Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 488 (1998).

35. *See* 5 U.S.C. § 703 (2011) (providing that “in the absence or inadequacy” of a specific statutory review provision, the form of proceeding may be “any applicable form of legal action”).

36. As of the date of this Article, Shepardizing “5 U.S.C. § 706” on LexisNexis resulted in more than 28,000 hits.

have fashioned some additional limiting rules in light of that principle as well.

Broadly, the U.S. Supreme Court has stated that the “principal purpose” of the APA’s limitations is to “protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements, which courts lack both expertise and information to resolve.”³⁷ Consistent with that principle, it is understood that the Act’s agency action and final agency action requirements are intended to ensure an appropriate focal point for judicial review and prevent courts from reviewing actions that do not mark the consummation of an agency’s decision-making process or have legal consequences.³⁸ The U.S. Supreme Court has thus explained that the APA does not permit broad programmatic challenges seeking “wholesale improvement of [an agency] program by court decree, rather than in the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made.”³⁹

One significant limiting rule shaped by courts is that of review “on the record” prepared by the agency to document its decision-making process and the basis for its decision.⁴⁰ That limitation is intended to ensure that the court’s review is based on the same evidence that was before the agency when it made the decision and not new evidence presented for the first time in court.⁴¹ Accordingly, APA cases as a rule do not involve discovery or

37. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004).

38. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990).

39. *Lujan*, 497 U.S. at 891; *see also Norton*, 542 U.S. at 64–65 (applying the same principle to an alleged “failure to act” APA claim).

40. Section 706 of the APA provides that a court shall consider “the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. Interpreting that provision, the Supreme Court held that “review is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision.” *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). Because the APA prescribes certain procedures agencies must follow when taking various actions, those procedures should, in theory, produce an administrative record illustrating the agency’s decision-making path and the basis of its decision. *See, e.g.*, 5 U.S.C. § 553(c) (prescribing the procedure for “informal rulemaking”); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 547 (1978) (finding that the record produced by an agency following the APA’s informal-rulemaking procedures is adequate for purposes of judicial review); *Overton Park*, 401 U.S. at 419–20 (holding that the lower court erred when it based its decision on litigation affidavits, and remanding for review based on the “full administrative record” that was before the agency at the time of its decision). Notably, the rule generally precludes not only APA plaintiffs, but also federal-agency defendants, from adducing additional evidence in support of their arguments. *Chenery v. Sec. & Exch. Comm’n*, 318 U.S. 80, 94–95 (1943).

41. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”); *Overton Park*, 401 U.S. at 419 (finding that the litigation affidavits presented were “merely ‘post hoc’ rationalizations which have traditionally been found to be an inadequate basis for review” (citation omitted)). This limitation also serves to prevent reviewing courts from “prob[ing] into the subjective predispositions of agency decisionmakers.” *Nat’l Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 198 (4th Cir. 2005). For a discussion

evidentiary hearings. The great majority are decided by federal district courts on summary judgment following the submission of the administrative record and briefs based on it, as well as oral argument by counsel.⁴² The court might also consider amicus curiae briefs.⁴³

A final district court judgment may be appealed as of right to a U.S. circuit court of appeals.⁴⁴ The appellate court's judgment becomes final unless the court grants rehearing, which is rare, or the Supreme Court grants certiorari, which is even rarer.⁴⁵ A single APA case may spend years in the federal court system, but that has more to do with the heavy caseloads of U.S. courts than any particular feature of APA review.⁴⁶ In APA cases, the appellate court reviews the administrative record pursuant to the same arbitrary and capricious standard of review that the district court applied; it does not defer to the district court's findings or conclusions.⁴⁷ Final, published decisions in APA cases are binding on the parties and constitute binding precedent.

of the early case law on this limitation, see Paul R. Verkuil, *Judicial Review of Informal Rule-making: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 418–24 (1981). For a more recent critique, see Gordon G. Young, *Judicial Review of Informal Agency Action on the Fifth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record,"* 10 ADMIN L.J. AM. U. 179 (1996).

42. The Federal Rules of Civil Procedure permit district courts to grant summary judgment if a movant demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). If a case cannot be decided on summary judgment, then a trial generally must be held. In APA cases, it is common for both parties to move for summary judgment and for the court to grant one party's motion and deny the other party's motion. Motions for summary judgment may also be granted and denied in part. *See id.*

43. It is generally accepted that federal district courts have discretion to accept amicus briefs, although neither the APA nor the rules governing civil district court proceedings address them specifically. The rules governing federal appellate court and Supreme Court proceedings expressly permit amicus curiae briefs if the other side consents or the court grants leave. FED. R. APP. P. 29; SUP. CT. R. 37.

44. FED. R. APP. P. 4.

45. *See* FED. R. APP. P. 35 ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered."); SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."). According to the most recent Annual Report on the Judicial Business of the U.S. Courts, 5528 petitions for certiorari were filed and 122 were granted during the Supreme Court's October 2010 term. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 71 tbl.B-2 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

46. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 45, at 83 tbl.B-4 (showing, for the twelve-month period ending September 30, 2011, a median interval of 29.3 months between commencement of district court proceedings and completion of final appellate court merits review).

47. *See* *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009) ("Our standard for reviewing the [agency's] decision is governed by section 706(2)(A) of the [APA], which provides that a 'reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2) (2011))); *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007) ("We are bound by the same ground rules

3. Judicial Interpretation of the Arbitrary and Capricious Standard of Review

The extensive judicial practice referred to above has also given significant content to the APA's less than precise "arbitrary" and "capricious" terms. As interpreted in a long line of case law, the arbitrary and capricious standard of review, as it is now widely known, is arguably one of the most significant limitations imposed by the APA on reviewing courts.⁴⁸ Section 706 of the Act, entitled "Scope of Review," provides that the reviewing court shall, taking "due account" of the "rule of prejudicial error," "hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴⁹ In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court explained that the court's role under that standard is limited to determining whether the agency

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁵⁰

The court's "inquiry into the facts is to be searching and careful," but "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."⁵¹ With respect to an agency's factual determinations, a particularly deferential "substantial evidence" standard is applied. As one court has explained:

as the district court in assessing agency decisions. Thus, the district court's decision in this case engenders de novo review." (citation omitted)).

48. It should be noted that not everyone agrees that APA review is highly or appropriately deferential. Subscribers to the "ossification hypothesis" posit that the prospect of APA review has the harmful effect of chilling agencies' willingness to regulate through informal-rulemaking procedures. See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 Nw. U. L. REV. 393, 393-95 (2000) (setting forth argument and making the counterargument). Other observers, on the other hand, contend that APA review is too deferential. See, e.g., Alan Charles Raul & Julie Zampa Dwyer, *Regulatory Daubert: A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles into Administrative Law*, LAW & CONTEMP. PROBS., Autumn 2003, at 7-8 (arguing for "reviewing judges to be less deferential").

49. 5 U.S.C. § 706(2)(A). Section 706 also authorizes the court to take other actions, for example, to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

50. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("[T]he ultimate standard of review is a narrow one."):

51. *Overton Park*, 401 U.S. at 416.

Evidence is substantial in the APA sense if it is enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact. The substantial-evidence standard does not allow a court to displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.⁵²

Further, agency decisions of “less than ideal clarity” are to be upheld if the agency’s path “may reasonably be discerned.”⁵³ The Supreme Court has also recently clarified that agency actions that mark a change from a previous policy are not subject to a more exacting review than agency actions that represent a continuation of an existing policy.⁵⁴ The Court’s statement in that case that the APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness” reflects the starting point from which the Court typically approaches any perceived expansion of the scope of APA review.⁵⁵

Deference to the agency’s judgment on certain matters is particularly warranted, including the agency’s interpretation of a statute it is charged with administering, its interpretation of its own regulations, and scientific or technical questions within the agency’s area of expertise.⁵⁶ With respect to statutory interpretations, the seminal case is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in which the Supreme Court established a two-part test. Under what is commonly known as *Chevron* step one, the reviewing court must first ask “whether Congress has directly spoken to the precise question at issue.”⁵⁷ If the intent of Congress is clear, then the court must give effect to that intent and may not proceed to *Chevron* step two.⁵⁸ If, however, the statute is silent or ambiguous with respect to the question presented and the agency charged with administering the statute has interpreted the matter, then the court must proceed to *Chevron* step two and give controlling weight to the agency’s interpretation as long as it is “based on a permissible construction of the statute.”⁵⁹ *Chevron* thus clarifies that a re-

52. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010) (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994); *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000)) (internal quotation marks omitted).

53. *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

54. *Id.*

55. *Id.*

56. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 261–64 (2009) (regulatory interpretation); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) (area within the agency’s expertise); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (statutory interpretation).

57. *Chevron*, 467 U.S. at 842.

58. *Id.* at 842–43.

59. *Id.* at 843.

viewing court may not overrule an agency's interpretation of an ambiguous statutory provision simply because it believes its interpretation to be better than the administering agency's interpretation, unless the latter is "arbitrary, capricious or manifestly contrary to the statute."⁶⁰ Stated simply, the holding of *Chevron* is that the agency charged with administering a statute gets to fill any gaps that Congress left in that statute, so long as the agency's interpretation meets a low, "permissible" threshold.⁶¹

The facts of *Chevron* illustrate both how the two-part test works in practice and the administrative legal principles on which it is based. At issue in the case was a regulation promulgated by the U.S. Environmental Protection Agency (EPA) that contained the agency's interpretation of the statutory term "stationary source."⁶² That term is contained in the Clean Air Act Amendments of 1977, which the EPA is charged with administering.⁶³ The question presented was whether the term referred to an entire pollution-emitting plant (the "bubble" concept) or instead to a single smokestack.⁶⁴ The EPA's regulation reflected its plant-wide interpretation, and the lower court had set it aside on the ground that such an interpretation was "inappropriate" in programs designed to improve air quality.⁶⁵ In reversing the lower court, the Supreme Court stressed both that the EPA is in a better position than federal courts to interpret the language given its technical expertise and responsibility for administering the provision, and that the EPA, unlike the court, is accountable to the people because it is an agency within the executive branch of the U.S. government.⁶⁶

Chevron may be the most well-known U.S. administrative law case, but not all administrative law cases involve statutory ambiguities that are resolved by clear regulatory language. Some cases involve ambiguous *regulatory* language, and, when faced with such language, the reviewing court is to defer to the agency's interpretation of it, as long as that interpretation is not "plainly erroneous or inconsistent with the regulation[s]."⁶⁷ The interpretation may take a number of forms, including agency "practice and policy,"⁶⁸ and is not necessarily required to have the force of law.⁶⁹

60. *Id.* at 844.

61. *Id.* at 843.

62. *Id.* at 840.

63. *Id.* at 839–40.

64. *Id.* at 839. *Chevron* was not an APA case because the Clean Air Act contains its own judicial review provision, 42 U.S.C. § 7607 (2011), which also prescribes an arbitrary and capricious standard. *See id.* § 7607(d)(9)(A). The administrative law principles on which the decision is based are equally applicable to APA cases.

65. *Chevron*, 467 U.S. at 841.

66. *Id.* at 865–66.

67. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 278 (2009) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

68. *See id.* at 283.

69. In *Coeur Alaska*, the Supreme Court deferred to the interpretation of an ambiguous regulation contained in a U.S. Environmental Protection Agency memorandum and thus

Many APA cases do not involve statutory or regulatory interpretations at all. Decisions by various agencies to authorize projects or issue licenses, for example, are routinely challenged on the alleged ground that the agency failed to adequately consider the environmental impacts of its action or reasonable alternatives pursuant to the National Environmental Policy Act of 1969 (NEPA).⁷⁰ In reviewing such actions, the court may be required to opine on any number of technical issues, such as whether the agency considered sufficient data on a particular topic.⁷¹ Such issues often implicate the agency's expertise and decisions regarding the allocation of limited resources and warrant substantial deference to the agency's judgment.⁷²

Other points illustrated by the cases discussed here are that substantive APA claims must generally be tied to some other statute, such as NEPA, that informs the court's review, and the plaintiff must identify one or more specific ways in which the agency's action was arbitrary and capricious from, for example, the Supreme Court's list in *State Farm*.⁷³ The other statute to which an APA claim is tied is also important for standing purposes. As the Supreme Court has explained, "[f]or a plaintiff to have prudential standing under the APA, 'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the

clarified that deference to an agency's interpretation may be warranted even if the interpretation does not have the force of law, as regulations do, and even if the agency did not adopt it through a formal process. *See id.* ("The Memorandum, though not subject to sufficiently formal procedures to merit *Chevron* deference, is entitled to a measure of deference because it interprets the agencies' own regulatory scheme." (citation omitted)).

70. 42 U.S.C. §§ 4321–4347 (2011). The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to prepare environmental impact statements for proposed "major federal actions significantly affecting the quality of the human environment." *Id.* § 4332(C)(i). It is similar to the APA in that it "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also* *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003) (quoting *Robertson*, 490 U.S. at 349) (comparing NEPA to the APA).

71. *See, e.g.*, *City of Dallas v. Hall*, 562 F.3d 712, 720 (5th Cir. 2009) (rejecting argument that the Forest Service needed to obtain updated data to comply with NEPA because plaintiffs failed to show that the data was so flawed that it prevented the agency from assessing the reasonably foreseeable impacts of its proposed action); *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 341–47 (D.C. Cir. 2002) (recognizing that agencies have discretion to determine whether an environmental impact statement is required, but finding that the agency lacked sufficient data to determine whether one was required in the particular instance).

72. *See* *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1361 (11th Cir. 2008) ("A court can only find a federal agency's attempted NEPA compliance inadequate where it is arbitrary, capricious or an abuse of discretion in violation of the APA. This standard requires substantial deference to the agency, not only when reviewing decisions like what evidence to find credible and whether to issue a [Finding of No Significant Impact] or [Environmental Impact Statement], but also when reviewing drafting decisions like how much discussion to include on each topic, and how much data is necessary to fully address each issue." (citation omitted)).

73. *See supra* note 50 and accompanying text.

statute . . . in question.’⁷⁴ As an example of an APA claim, an environmental group might argue that a rule promulgated under authority delegated in the Endangered Species Act of 1973 (ESA)⁷⁵ is arbitrary and capricious because the agency considered factors other than those that Congress intended it to consider in administering the ESA.⁷⁶ The court’s review of that claim would necessarily be informed by the ESA itself. In *Forest Guardians v. U.S. Fish & Wildlife Service*, for example, the Tenth Circuit found that the Fish and Wildlife Service “did not act arbitrarily or capriciously in promulgating [a particular] rule under the ESA” because that rule “is not in conflict with the plain language of the ESA and is a reasonable interpretation of [the relevant statutory] language.”⁷⁷ In the same case, the court considered an APA claim tied to NEPA and found that the agency did not arbitrarily or capriciously undertake its NEPA analysis.⁷⁸

B. *Investment Treaty Arbitration*

1. Background

The origins and purposes of investment treaty arbitration are, of course, very different from those of APA review. The system developed alongside the proliferation of BITs as an alternative to host-state courts that foreign investors may choose in the event of a dispute with the host state.⁷⁹ Like BITs, investment arbitration became prominent rapidly and recently.⁸⁰ While Germany and Pakistan signed the first BIT in 1959 and the ICSID Convention entered into force in 1966, the system was barely used before the 1990s.⁸¹ Indeed, by 1992, only twenty-two disputes had been concluded by ICSID, including those that settled.⁸² By contrast, 249 ICSID disputes had been concluded and a remarkable 157 were pending as of September 30, 2012.⁸³ An unknown number of additional investment arbitrations have been and are being facilitated by other arbitral institutions or conducted ad hoc.

74. *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970)).

75. 16 U.S.C. §§ 1531–1544 (2011).

76. *See, e.g.*, *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 717 (10th Cir. 2010) (noting that agency actions must be based on “relevant” findings).

77. *Id.* at 710.

78. *Id.* at 710–19.

79. *See* Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 *BROOK. J. INT’L L.* 405, 405 (2008).

80. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1521–35 (2005) (setting forth the history and evolution of investment treaties).

81. *See* ICSID Convention, *supra* note 6; Yackee, *supra* note 79, at 428 n.86.; *List of Concluded Cases*, *supra* note 2.

82. *List of Concluded Cases*, *supra* note 2.

83. *Id.*; *List of Pending Cases*, *supra* note 4.

Whether the availability of investment arbitration contributes to an increase in foreign investment is subject to debate.⁸⁴ Its availability is, however, generally thought to improve a host state's climate for foreign investment.⁸⁵ The ICSID Convention, for instance, was adopted under the auspices of the World Bank to address the "need for international cooperation for economic development, and the role of private international investment therein."⁸⁶ To that end, the World Bank established ICSID, an optional arbitral forum for the settlement of international investment disputes between contracting states and nationals of other contracting states, and a set of rules to govern such arbitrations.⁸⁷ ICSID is not the only forum where international investment disputes may be arbitrated, but it is the only one dedicated to such disputes and the one where most are brought.⁸⁸

2. Procedure

Where APA review is characterized by a number of limiting principles and fixed procedural rules, investment treaty arbitration is characterized by flexibility. Investment arbitration adheres to the classical arbitration model in that the parties are permitted to determine, by agreement, the tribunal's terms of reference or *compromis*, composition, seat, and procedural rules,

84. See, e.g., DOLZER & SCHREUER, *supra* note 1, at 8 (noting that there is scant evidence that the conclusion of a BIT causes an increase in foreign investment); Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 340 (2007) (suggesting that the availability of investment treaty arbitration may not directly trigger foreign direct investment but is one factor in the decisional matrix); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567, 1582 (2005) (arguing that BITs have significant positive impacts on foreign direct investment); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 400 (2011) (arguing that BITs do not meaningfully influence foreign investors' decisions to invest in particular countries).

85. The best evidence of this is arguably the large number of BITs that states have concluded. As Julian Davis Mortenson has explained, the international investment legal regime is premised on the empirical assumption that states can "encourage foreign investment by linking together a two-part structure" consisting of substantive rights for foreign investors and an effective dispute resolution system in which the foreign investors can enforce those rights. Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 258 (2010).

86. ICSID Convention, *supra* note 6, pmb1.

87. *Id.* art. 1; see also *ICSID Rules*, *supra* note 18.

88. As explained in more detail below, traditional arbitration differs from traditional adjudication in that the parties may choose to keep not only the filings and decisions, but also the existence of the dispute, secret. While ICSID arbitration differs from traditional arbitration in that respect, that fact makes it impossible to know how many investment arbitrations have been facilitated by other bodies. Given that 147 states have adopted the ICSID Convention, however, it is safe to assume that the majority of investment arbitrations are facilitated by ICSID. *Member States*, INT'L CENTRE FOR SETTLEMENT INV. DISPS., http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home (last visited Sept. 30, 2012) (stating the current number of ICSID member states).

albeit subject to certain limitations.⁸⁹ ICSID's subject-matter jurisdiction, for instance, extends to "any legal dispute arising directly out of an investment," but the parties are free to define investment in narrow or broad terms.⁹⁰ Similarly, ICSID jurisdiction requires the parties' consent,⁹¹ and the parties may limit the scope of their consent.⁹² Thus far, the parties to the ICSID Convention have generally defined investment and consented to ICSID jurisdiction in expansive terms.⁹³

As in traditional arbitration, ICSID tribunals are typically composed of three arbitrators, one appointed by each party and the third appointed by agreement of the parties.⁹⁴ Unless the parties appoint all of the arbitrators by agreement, a majority must be nationals of states other than the state party to the dispute and the state of the investor's nationality.⁹⁵ Flexibility is also granted with respect to the location of the proceedings.⁹⁶

With respect to procedure too, the ICSID Convention affords the parties significant flexibility. "[E]xcept as the parties otherwise agree," ICSID

89. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 703 (7th ed. 2008) (discussing the history of arbitration); PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 293 (7th ed. 1997) (discussing the differences between traditional arbitration and traditional adjudication); see also Charles H. Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 *DUKE J. COMP. & INT'L L.* 259, 301–02 (2008) (discussing the similarity of ICSID arbitration to arbitration facilitated by the Permanent Court of Arbitration).

90. ICSID Convention, *supra* note 6, art. 25(1). Most ICSID tribunals require the "investment" at issue to meet both the definition contained in the applicable treaty or other instrument and Article 25(1). See, e.g., *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 6 ICSID Rep. 400 (2003); *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 68 (May 24, 1999), 5 ICSID Rep. 335 (1991).

91. ICSID Convention, *supra* note 6, art. 25(1) (requiring the written consent of both parties).

92. *Id.* art. 25(4) ("Any Contracting State may . . . notify the Centre of the class or classes of disputes which it would or would not consider submitting.").

93. The 2012 U.S. Model Bilateral Investment Treaty, for instance, defines investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment" and lists a number of examples, including enterprises, shares, intellectual property rights, and licenses. Office of the U.S. Trade Representative & U.S. Dep't of State, 2012 U.S. Model Bilateral Investment Treaty, art. 1, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. It permits foreign investors to allege violations of investment authorization and investment agreement provisions in addition to the treaty standards and contains only three limitations: 1) a three-year limitations period, 2) an agreement to arbitrate in accordance with the procedures specified in the treaty, and 3) a waiver of the claimant's right to institute or continue proceedings involving any measure alleged to constitute a breach in a domestic forum. *Id.* arts. 24–26.

94. See ICSID Convention, *supra* note 6, art. 37(2)(b) (stating that three arbitrators is the default arrangement in absence of the parties agreeing otherwise).

95. *Id.* art. 39.

96. *Id.* arts. 62–63. Proceedings may be held at ICSID's seat or, if the parties agree, at the seat of another institution with which ICSID makes arrangements or at any other location approved by the tribunal in consultation with the ICSID Secretary-General. *Id.*

tribunals may “call upon the parties to produce documents or other evidence,” visit the scene of a dispute and conduct inquiries there, and “recommend” provisional measures.⁹⁷ The ICSID Convention does not limit the remedies that may be sought or the evidence on which decisions may be based.

In addition to the Convention itself, a set of rules governs ICSID arbitrations.⁹⁸ Pursuant to those rules, ICSID arbitration proceedings consist of two phases, a written phase followed by an oral phase, unless the parties otherwise agree.⁹⁹ During the written phase, each side typically files two briefs.¹⁰⁰ The oral phase consists of argument by counsel and may also include testimony by witnesses and experts.¹⁰¹ The ICSID Rules do not specify a standard of review or address the issue of burden of proof. On the issue of evidence, the Rules provide only that “[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.”¹⁰² In practice, tribunals have admitted various types of evidence, including factual testimony by government officials and expert legal testimony, but often do not explain either the bases for their admissibility decisions or the reasons for any (usually implicit) probative-value determinations.¹⁰³

As ICSID’s caseload grew and it became increasingly apparent that investment treaty arbitration frequently implicates issues of significant public importance, calls for greater transparency and efficiency intensified.¹⁰⁴ ICSID responded to those calls, at least in part, and amended the ICSID

97. *Id.* arts. 43, 47.

98. *See ICSID Rules*, *supra* note 18.

99. *Id.* at 114, r. 29.

100. *Id.* at 114, r. 31(1).

101. *Id.* at 115, r. 32(2).

102. *Id.* at 115, r. 34(1).

103. *See, e.g.,* ATA Construction, Industrial & Trading Company v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, ¶ 24 (May 18, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1491_En&caseId=C264 (indicating that each side presented one fact witness and one expert witness, but not explaining how the admissibility determination was made); *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 27–28 (May 29, 2003), 10 ICSID Rep. 130 (2004) (listing names of witnesses but not the issues to which they testified, and stating that the “[t]ribunal decided to agree to the inclusion of documents introduced by either the Respondent or Claimant during the hearing”); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 12, 81–82 (Aug. 30, 2000), 5 ICSID Rep. 212 (2001) (referring to a battle of the parties’ legal experts with respect to the permit requirements for hazardous-waste landfills in Mexico, and stating that “[n]umerous requests for production of documents were exchanged by the parties, some of which were allowed, and some of which were disallowed, particularly those that came later in the proceedings”).

104. *See* Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 22 ICSID REV.—FOREIGN INV. L.J. 55, 65 (2007).

Rules in a number of respects in 2006.¹⁰⁵ As amended, the ICSID Rules grant the tribunals discretion to accept amicus curiae briefs,¹⁰⁶ mandate the publication of certain parts of every award, including the tribunal's legal reasoning,¹⁰⁷ and require greater disclosure by potential arbitrators of information relevant to their independence.¹⁰⁸ The amended ICSID Rules thus incorporate certain features typically associated with litigation and, in particular, public law litigation.¹⁰⁹

ICSID awards are published in their entirety if the parties consent to such publication.¹¹⁰ If they do not, excerpts containing the tribunal's legal reasoning are published, although that has not always been the case.¹¹¹ Before the 2006 amendments, tribunals were authorized but not required to publish excerpts containing their legal reasoning; under the amended rules, the publication of such excerpts is mandatory.¹¹² Non-ICSID investment arbitration awards may remain secret if the parties so choose.¹¹³ Investment arbitration awards are

105. Citations to the ICSID Rules in this Article are to the Rules as amended. For an explanation and discussion of the 2006 amendments, see Andrew P. Tuck, Note, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 892–902 (2007).

106. *ICSID Rules*, *supra* note 18, at 117, r. 37.

107. *Id.* at 122, r. 48.

108. *Id.* at 106, r. 6.

109. The U.N. Commission on International Trade Law (UNCITRAL) Rules are used by other arbitral institutions to facilitate investment disputes, namely the Permanent Court of Arbitration (PCA), and are likely preferred by some parties because they permit greater confidentiality and do not provide for amicus participation. See *UNCITRAL Arbitration Rules*, PERMANENT CT. ARB., http://www.pca-cpa.org/showpage.asp?pag_id=1064 (last visited Sept. 30, 2012) (specifying that the 2010 UNCITRAL Rules are presumed to apply to PCA arbitrations). As of the date of this paper, more than thirty investor-state arbitrations were pending before the PCA. *List of Pending Cases*, PERMANENT CT. ARB., http://www.pca-cpa.org/showpage.asp?pag_id=1145 (last visited Sept. 30, 2012). Its list of pending arbitrations is available online; however, because parties to PCA arbitrations may choose to keep the proceedings confidential, it is not possible to know exactly how many investment treaty disputes it has handled. See *id.* Parties can also opt for ad hoc arbitrations, which are not connected to any institution, and may use the UNCITRAL Rules in those arbitrations. See DOLZER & SCHREUER, *supra* note 1, at 222.

110. *ICSID Rules*, *supra* note 18, at 122, r. 48(4).

111. *Id.*; see also Tuck, *supra* note 105, at 899–900.

112. See *supra* text accompanying notes 104–109.

113. Arbitration rules commonly provide for publication of awards only if the parties consent. The original 1976 UNCITRAL Rules, for example, provided that an award “may be made public only with the consent of both parties.” U.N. Commission on International Trade Law [UNCITRAL] Arbitration Rules, G.A. Res. 31/98, art. 32(5), U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>. In 2010, UNCITRAL adopted a set of amended rules under which an award “may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.” UNCITRAL Arbitration Rules As Revised in 2010, G.A. Res. 65/22, art. 34(5), U.N. GAOR, 65th Sess., U.N. Doc. A/65/17 (Dec. 6, 2010), available at <http://www.uncitral.org/pdf/>

binding on the parties but have no precedential effect.¹¹⁴ The principle of finality is important in investment arbitration and arguably takes precedence over the correctness of the decision.¹¹⁵ ICSID awards cannot be appealed but may be annulled for a limited number of reasons.¹¹⁶ Further, ICSID awards are not subject to review by national courts, and the parties to the ICSID Convention are obligated to recognize the awards and enforce their pecuniary aspects as if they were final judgments issued by one of their own courts.¹¹⁷ Perhaps in part because the enforcement obligation is limited to an award's pecuniary aspects, the great majority of ICSID awards are monetary.¹¹⁸

3. Origins and Context of the Fair and Equitable Treatment & Arbitrary or Discriminatory Measures Standards

The ICSID Convention established an optional arbitral forum for investment disputes between foreign investors and host states but did not establish any obligations on the part of host states vis-à-vis foreign investors or foreign investments. Those obligations are contained primarily in the nearly three thousand BITs states have concluded among themselves in which they have promised, among other things, to accord to each other's investors or investments fair and equitable treatment and to refrain from arbitrary or discriminatory measures.¹¹⁹ The fair and equitable treatment standard has a

english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. Parties to non-ICSID arbitrations may choose the rules they prefer or fashion their own.

114. ICSID Convention, *supra* note 6, art. 53(1) (awards are binding on the parties). There is no principle of *stare decisis* in investment treaty arbitration. Moreover, the tribunals interpret and apply various treaties, rather than a single one.

115. In 2004, ICSID's Secretariat proposed the adoption of an appellate procedure in part to improve consistency among awards. *See* Tuck, *supra* note 105, at 902. That an appellate procedure was not adopted arguably reflects a prioritization of finality over consistency. *Id.*; *see also* Christoph Schreuer, *From ICSID Annulment to Appeal: Half Way Down the Slippery Slope*, 10 LAW & PRAC. INT'L CTS. & TRIBUNALS 211, 211–25 (2011) (arguing that treating annulment requests as appeals risks compromising efficiency and economy, "the main virtues of arbitration").

116. ICSID Convention, *supra* note 6, art. 52(1). The five bases for annulment are 1) the tribunal was not properly constituted, 2) the tribunal manifestly exceeded its powers, 3) a member of the tribunal exercised corruption, 4) the tribunal seriously departed from a fundamental rule of procedure, and 5) the tribunal failed to state the reasons on which the award was based. *Id.* There are also a limited number of additional postaward remedies that address specific circumstances. *See id.* art. 49(2) (supplementation and rectification); *id.* art. 50 (interpretation); *id.* art. 51 (revision).

117. *Id.* art. 54. The obligation to enforce an award does not affect a state's immunity from enforcement. *Id.* art. 55.

118. Whether ICSID tribunals have the authority to issue nonmonetary awards, and, if so, whether they should exercise that authority, is subject to debate. *See* Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT'L 325, 325–32 (2004). For an interesting discussion of the considerations surrounding pecuniary and nonpecuniary remedies, *see* van Aaken, *supra* note 9, at 721, 721–54.

119. DOLZER & SCHREUER, *supra* note 1, at 173 ("The prohibition of arbitrary treatment belongs to the classical standards contained in investment treaties."); *see supra* note 1 (regard-

long history and may have first appeared in its current form in one of the United States' bilateral treaties on friendship, commerce, and navigation (FCN treaties).¹²⁰ Beginning in 1778 during the American Revolutionary War, the United States concluded numerous FCN treaties, which addressed commerce, navigation, and some military issues such as access to ports.¹²¹ Because international commerce generally consisted of trade by merchants when these early FCN treaties were concluded, post-World War II treaties are generally regarded as more similar to modern-day BITs.¹²² For example, it is known that investment provisions in U.S. FCN treaties concluded in the 1950s with Ethiopia, Germany, Oman, and the Netherlands provided for "fair and equitable treatment" and that investment provisions in other FCN treaties concluded during that decade provided for "equitable treatment."¹²³ The "equitable" standard may have first appeared in a U.S. treaty in the economic-development context. In November 1948, the United States concluded the first of what was then hoped to be a series of treaties on "friendship, commerce

ing the number of BITs that have been concluded); *see also* Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43, 44 (2010) (noting that the fair and equitable standard is included in the "vast majority" of BITs). *See generally* Abkommen zwischen der Bundesrepublik Deutschland und dem Haschemitischen Königreich Jordanien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Agreement Between the Federal Republic of Germany and the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investments], Ger.-Jordan, Nov. 13, 2007, BUNDESGESETZBLATT, Teil II [BGBL. II] at 469, art. 2 (Ger.) ("Each Contracting Party shall in its territory promote as far as possible the investment by investors of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."); Verdrag inzake bevordering en wederzijdse bescherming van investeringen tussen het Koninkrijk der Nederlanden en de Federale Republiek Brazilië, met Protocol [Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Federative Republic of Brazil], Braz.-Neth., art. 3, Nov. 25, 1998, 1998 Trb. 283 (Neth.) ("Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."); Agreement for the Promotion and Protection of Investment, Arg.-Can., art. 2(4), Nov. 5, 1991, 2467 U.N.T.S. 97 (providing for "fair and equitable treatment in accordance with principles of international law"). Investment provisions are also contained in some multilateral agreements. *See, e.g.*, Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 95 (1999) [hereinafter ECT]; North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

120. *See* DOLZER & SCHREUER, *supra* note 1, at 120.

121. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 180 (3d ed. 2010).

122. *See id.*

123. UNCTAD, *SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS: FAIR AND EQUITABLE TREATMENT*, at 7–8, U.N. Doc. UNCTAD/ITE/IIT/11, U.N. Sales No. E.99.II.D.15 (1999) [hereinafter UNCTAD Series]. The FCN treaties containing "equitable" treatment provisions include those concluded between the United States and Belgium, Luxembourg, France, Greece, Ireland, Israel, Nicaragua, and Pakistan. *Id.*

and economic development” with Uruguay.¹²⁴ That treaty is reportedly similar to the FCN treaties of the time, except that it contained additional “development” provisions, including the following one:

Each High Contracting Party shall at all times accord equitable treatment to the capital of nationals and companies of the other Party. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests of such nationals or companies in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied. Neither Party shall without appropriate reason deny opportunities and facilities for the investment of capital by nationals of the other Party; nor shall either Party unreasonably impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills, modern technology and equipment it needs for its economic development.¹²⁵

Notably, the provision above also contains a variation of the arbitrary or discriminatory treatment standard similar to that found in some modern BITs.¹²⁶ Thus, both the forerunner of the modern fair and equitable treatment standard and a variation of the arbitrary or discriminatory measures standard date at least to 1948. It is also known that a “just and equitable treatment” provision was contained in Article 11(2) of the Havana Charter for an International Trade Organization of 1948, which never entered into force but was nonetheless influential on subsequent investment-related agreements.¹²⁷

Today, the fair and equitable treatment standard is contained in most BITs.¹²⁸ It is also the most important treaty standard invoked in investment treaty arbitration, as it is raised in most disputes and is the basis for most successful claims.¹²⁹ The arbitrary or discriminatory measures standard is

124. William Adams Brown, Jr., *Treaty, Guaranty, and Tax Inducements for Foreign Investments*, 40 AM. ECON. REV. 486, 486 (1950).

125. Treaty of Friendship, Commerce and Economic Development, U.S.-Uru., art. 4, Nov. 23, 1949, 96 CONG. REC. 12,082, 12,083 (1950), *quoted in* Brown, *supra* note 124, at 487.

126. Some BITs prohibit “unreasonable or discriminatory” measures instead of arbitrary or discriminatory measures, and both variations sometimes appear, like the provision here, in the context of a promise not to impair certain rights. *See* Christoph H. Schreuer, *Protection Against Arbitrary or Discriminatory Measures*, in *THE FUTURE OF INVESTMENT ARBITRATION* 183 (Catherine A. Rogers & Roger P. Alford eds., 2009).

127. Havana Charter for an International Trade Organization art. 11(2)(a)(i), Mar. 24, 1948, U.N. Doc. E/Conf. 2/78, *available at* http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (not in force); *see also* UNCTAD Series, *supra* note 123, at 3–4, 7.

128. *See* Vandeveld, *supra* note 119, at 44.

129. Christoph Schreuer, *Fair and Equitable Treatment*, in *PROTECTION OF FOREIGN INVESTMENTS THROUGH MODERN TREATY ARBITRATION—DIVERSITY AND HARMONIZATION* 125 (A.K. Hoffman ed., 2010).

likewise common in BITs and frequently invoked in investment arbitration, often in conjunction with the fair and equitable treatment standard.¹³⁰

4. Arbitral Practice

Despite their fairly lengthy history as treaty standards, the fair and equitable treatment and arbitrary or discriminatory measures standards have been interpreted and applied by investment tribunals for a relatively short period of time and in a relatively small number of awards. As mentioned above, ICSID had concluded 249 disputes as of the date of this Article, including those that settled.¹³¹ Compared to the nearly thirty thousand decisions that have interpreted the APA's judicial review provisions, that number is indeed small. Given the relative and recent prominence of investment treaty arbitration, the absence of binding precedent, and the fact that tribunals interpret various treaties rather than one statute, it is not surprising that the meanings of the treaty standards are not yet clear, as illustrated below. Moreover, the treaty standards are far from models of precision. As one tribunal has stated, "[t]he 'ordinary meaning' of the 'fair and equitable treatment' standard can only be defined by terms of almost equal vagueness."¹³² Further, the terms are not only vague but may overlap; the term "fair," for example, is often defined to include notions of equity.¹³³ The inexact quality of the standards permits investment treaty claimants to invoke them in a wide range of circumstances when claims requiring proof of more specific elements, such as expropriation and national treatment, are not available.¹³⁴ In turn, they give arbitral tribunals substantial discretion to formulate interpretations on a case-by-case basis.¹³⁵

130. For a discussion of a number of arbitral awards addressing the arbitrary or discriminatory measures standard, see Schreuer, *supra* note 126, at 183–98.

131. See *supra* notes 2, 83 and accompanying text.

132. Saluka Invs. BV (Neth. v. Czech), Partial Award, ¶ 297 (Perm. Ct. Arb. 2006), http://www.pca-cpa.org/showfile.asp?fil_id=105.

133. See Peter Muchlinski, 'Caveat Investor'? *The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L.Q. 527, 531 n.13 (2006) (referring to the definition of "fair" contained in the *Oxford Concise Dictionary*).

134. In this respect, it has been argued that the standards fill gaps left by the more specific BIT provisions, which is a function analogous to the gap-filling function of APA review. See Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 365–67 (2005). Peter Muchlinski, on the other hand, advocates an interpretation of the fair and equitable treatment standard that is supplemental in the different sense that it accounts for the investor's conduct by balancing it and the host state's conduct. Muchlinski, *supra* note 133, at 530–31.

135. See Schreuer, *supra* note 129, at 133 (explaining that fair and equitable treatment has replaced expropriation as the most important international investment claim in part because it does not require claimants to show that they have been deprived of the economic benefit of their investment in whole or in part); see also PSEG Global Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, ¶ 238 (Jan. 19, 2007) (describing the relationship between the fair and equitable treatment and expropriation standards).

Although arbitral tribunals are not bound by precedent, they frequently cite earlier awards in their analyses. One arbitral award that is often cited for the content of the fair and equitable treatment standard is *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, which involved a series of governmental permitting decisions that culminated in the closure of a hazardous-waste landfill.¹³⁶ In that award, the tribunal stated that the fair and equitable treatment standard required

the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.¹³⁷

The above interpretation is not a narrow one; the host state's obligation to act "totally transparently" and the expectation that the investor should know "any and all" rules that "will" govern its investments seem to leave little room for either governmental error or future changes in governmental policy.¹³⁸ In formulating it, the tribunal relied on the relevant treaty provision and preambular language expressing the treaty parties' intent to "intensify economic cooperation for the benefit of both countries" and "create favorable conditions for investments made by each of the Contracting Parties in the territory of the other."¹³⁹ Applying its interpretation to its factual conclusions that Mexico failed to act transparently and actually closed the landfill in order to eliminate a political nuisance rather than for any legitimate operational reasons, the tribunal easily found a violation of the standard.¹⁴⁰

Other tribunals have likewise interpreted the fair and equitable treatment standard based on a combination of the relevant treaty provision and more general language expressing the treaty's investment-promotion objectives. In *Metalclad Corp. v. United Mexican States*, another dispute involving a hazardous-waste landfill in Mexico, the tribunal read North American Free Trade Agreement (NAFTA) Article 1105(1), which requires "treatment in accordance with international law, including fair and equitable

136. See *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 27–28 (May 29, 2003), 10 ICSID Rep. 130 (2004).

137. *Id.* ¶ 154.

138. See Ryan, *supra* note 5, at 739–40 (opining that the *Tecmed* tribunal's interpretation of the fair and equitable treatment standard is expansive and that under it, a host state is not insulated from liability even if its actions are consistent with its own laws, serve broad interests of the country, and are implemented in good faith and in a nondiscriminatory manner).

139. *Tecmed*, 10 ICSID Rep. ¶¶ 152–156. Paragraph 4(1) of the treaty provided that "[e]ach Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party." *Id.* ¶ 152. The tribunal concluded that it expressed "the bona fide principle recognized in international law." *Id.* ¶ 153.

140. *Id.* ¶¶ 164–173.

treatment and full protection and security,” in conjunction with NAFTA Article 102(1), which sets forth the objective, among others, of promoting and increasing cross-border investment opportunities.¹⁴¹ Similarly and more recently, two tribunals took similar approaches to fair and equitable treatment claims based on actions taken by Argentina to address its economic crisis. In both *LG&E Energy Corp. v. Argentine Republic* and *CMS Gas Transmission Co. v. Argentine Republic*, the tribunals interpreted the fair and equitable treatment standard in light of preambular language expressing the treaty parties’ intent “to maintain a stable framework for investments and maximum effective use of economic resources.”¹⁴² In the latter award, the tribunal went on to state:

In entering the Bilateral Treaty as a whole, the parties desired to “promote greater economic cooperation” and “stimulate the flow of private capital and the economic development of the parties.” In light of these stated objectives, this Tribunal must conclude that stability of the legal and business framework is an essential element of fair and equitable treatment in this case, provided that they do not pose any danger for the existence of the host State itself.¹⁴³

Again, the interpretation set forth above is not narrow. That the host state is expected to ensure a stable legal and business framework unless doing so would endanger its existence appears to leave little room for sacrifices of such stability necessary to pursue governmental objectives other than investment promotion.

The awards discussed above and arbitral practice more generally reflect that the meaning of the fair and equitable standard is not yet clear. While tribunals commonly consider both the specific treaty provision involved and the treaty’s broader investment-promotion objectives, the awards do not reflect a clear or consistent jurisprudential basis for tribunals’ determinations of the elements the standard embodies or the point at which conduct becomes unfair or inequitable. For example, the path of the *Tecmed* tribunal’s reasoning from the treaty language to the specific interpretation it

141. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 74–75 (Aug. 30, 2000), 5 ICSID Rep. 212 (2000).

142. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 124 (Oct. 3, 2006), 21 ICSID Rev. 203 (2006) (citing the preambular language); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274, (May 12, 2005), 44 I.L.M. 1205 (2005) (concluding, in light of the same preambular language, that “[t]here can be no doubt . . . that a stable legal and business environment is an essential element of fair and equitable treatment”). Notably, on Argentina’s request for annulment of the original *CMS* award, an ad hoc panel found that it lacked jurisdiction but nonetheless criticized the original panel’s reasoning on a separate, but outcome-determinative, issue regarding Argentina’s necessity defense under the applicable BIT. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ¶¶ 123–136 (Sept. 25, 2007), 46 I.L.M. 1136 (2007).

143. *LG&E Energy Corp.*, 21 ICSID Rev. ¶ 124.

formulated is not evident. Similarly, it is not clear how the *LG&E* tribunal determined that the relevant provision and the broader treaty objectives combined to produce a promise of stability except when the host state's existence is placed in jeopardy.

For their part, observers generally posit that the standard has been interpreted by tribunals to encompass a number of elements, including transparency, stability, protection of the investor's legitimate expectations, compliance with contractual obligations, procedural propriety and due process, good faith, and lack of coercion or harassment.¹⁴⁴ While there is considerable overlap in the elements identified by observers, there is not uniformity.

There are also broader disagreements about the meaning of the fair and equitable treatment standard. One well-known debate, for instance, is whether it is equivalent to or more exacting than the customary international law "minimum standard." That standard, at least as described in the well-known 1926 *Neer v. Mexico* case concerning the murder of a U.S. citizen in Mexico, is indeed low:

[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency.¹⁴⁵

Some tribunals have avoided the question of the fair and equitable treatment standard's relationship to the minimum standard by stating that the answer does not affect the outcome of a particular case.¹⁴⁶ Overall, the current approach to the standard is arguably similar to Justice Stewart's famous approach to the identification of pornography. Arbitral tribunals "know [unfair and inequitable conduct] when [they] see it" but are not nec-

144. *Id.* ¶¶ 121–131; see also Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, *supra* note 7, at 151, 159–60 (identifying the following principles: "(1) the requirement of stability, predictability, and consistency of the legal framework; (2) the principle of legality; (3) the protection of legitimate expectations; (4) procedural due process and denial of justice; (5) substantive due process and protection against discrimination and arbitrariness; (6) transparency; and (7) the principle of reasonableness and proportionality"); Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, in *STANDARDS OF INVESTMENT PROTECTION* 118 (August Reinisch ed., 2008) (identifying the following categories: "(a) vigilance and protection; (b) due process including non-denial of justice; (c) lack of arbitrariness and non-discrimination; and (d) transparency and stability including the respect of the investors' reasonable expectations").

145. *L.F.H. Neer v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 60 (Gen. Claims Comm'n 1926).

146. See, e.g., *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 364 (July 14, 2006), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=C5 (noting the debate but questioning its practical import); *Saluka Invs. BV (Neth. v. Czech)*, Partial Award, ¶ 297 (Perm. Ct. Arb. 2006), http://www.pca-cpa.org/showfile.asp?fil_id=105 (noting the same).

essarily able to describe or identify a basis for all the conduct it encompasses or the point at which conduct becomes unfair or inequitable.¹⁴⁷

The arbitrary or discriminatory measures standard, which is sometimes phrased as “unreasonable or discriminatory” or “unjustified or discriminatory” measures, and sometimes characterized as a “nonimpairment” obligation, is likewise imprecise and important in investment treaty arbitration.¹⁴⁸ Like the fair and equitable treatment standard, it is frequently invoked by claimants and allows them to seek redress for the effects of various governmental actions without having to prove the elements of more specific claims.¹⁴⁹ It is also similar to the fair and equitable treatment standard in that its meaning remains uncertain. The starting point for interpreting the arbitrary or discriminatory measures standard is often the International Court of Justice’s opinion in *Elettronica Sicula SpA*, which interpreted the arbitrary or discriminatory measures provision in the FCN treaty between the United States and Italy.¹⁵⁰ In that case, the International Court of Justice stated,

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.¹⁵¹

Dictionaries are of limited help given the imprecision of the terms, although they do illustrate that arbitrary action is generally understood to be action that is based on preference or prejudice rather than reason.¹⁵² And once more, observers have posited, based on arbitral awards interpreting the standard, that it encompasses a number of categories, including: 1) action that cannot be justified by rational reasons related to the facts; 2) action that is not based on legal standards but on discretion, prejudice, or personal

147. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In *Jacobellis*, the U.S. Supreme Court held that a French film entitled “The Lovers” was not obscene and was thus protected by the First Amendment to the U.S. Constitution. *Id.* at 186–87 (majority opinion). In a concurrence, Justice Stewart opined that the First Amendment protects all obscenity except “hard-core pornography” and then famously stated:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id. at 197 (Stewart, J., concurring).

148. The standard is sometimes referred to as a “nonimpairment” obligation because it occasionally appears in the context of a promise not to impair certain rights (by arbitrary or discriminatory measures). See Schreuer, *supra* note 126.

149. For a discussion of a number of arbitral awards addressing the arbitrary or discriminatory measures standard, see *id.*

150. *Elettronica Sicula SpA (U.S. v. It.)*, Judgment, 1989 I.C.J. 15 (July 20).

151. *Id.* ¶ 128.

152. See Schreuer, *supra* note 126, at 183–84 (setting forth various dictionary definitions).

preference; 3) action that was taken for reasons other than those put forward by the decision maker, in particular action purportedly but not actually taken to advance a public interest; and 4) action taken in willful disregard of due process and proper procedure.¹⁵³

Finally, with respect to the treaty standards, it is generally accepted that the arbitrary or discriminatory measures standard is related to the fair and equitable treatment standard, but the precise relationship of the two standards is unclear.¹⁵⁴ At least one observer has argued that any conduct that violates the arbitrary or discriminatory measures standard automatically also violates the fair and equitable treatment standard, and at least one arbitral award reflects that view.¹⁵⁵ On the other hand, at least one other tribunal has suggested that conduct that violates the fair and equitable treatment standard will also violate the arbitrary or discriminatory measures standard.¹⁵⁶ Both views seem to render one of the two treaty standards superfluous in the many BITs that both require fair and equitable treatment and prohibit arbitrary or discriminatory measures. The awards further illustrate, however, the difficulty that arbitral tribunals face in interpreting and distinguishing the inexact standards, especially when claimants choose to invoke both in the same dispute.

C. Comparative Analysis

In the APA, the U.S. Congress drew the line between permissible and impermissible judicial review in large part by combining a broad waiver of sovereign immunity and broad cause of action with a narrow standard of review. Host states may have drawn a similar line in their BITs by combining

153. *Id.* at 188–89.

154. *See id.* at 189–92.

155. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 290 (May 12, 2005), 44 I.L.M. 1205 (2005) (“Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.”); S. Vasciannie, *The Fair and Equitable Treatment Standard in Investment Law and Practice*, 70 BRIT. Y.B. INT’L L. 99, 133 (1999).

156. Saluka Invs. BV (Neth. v. Czech), Partial Award, ¶¶ 461–465 (Perm. Ct. Arb. 2006), http://www.pca-cpa.org/showfile.asp?fil_id=105. Article 3, para. 1 of the relevant treaty provided that “[e]ach Contracting party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, maintenance, use, enjoyment or disposal thereof by those investors.” *Id.* ¶ 280. The tribunals reasoned that

[i]nsofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the “fair and equitable treatment” standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, maintenance, use, enjoyment or disposal of the investment by the investor.

Id. ¶ 461. The tribunal therefore concluded that “the Czech Republic, by violating the ‘fair and equitable treatment’ standard of Article 3.1 of the Treaty, at the same time violated its non-impairment obligation under the same provision.” *Id.* ¶ 465.

broad consents to jurisdiction *ratione materiae* with narrow treaty standards.¹⁵⁷ The fair and equitable treatment and arbitrary or discriminatory measures standards are similar to the APA's arbitrary and capricious standard of review in at least two respects. First, they are available in a wide range of circumstances when other claims are not. As mentioned above, APA review is available for "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court."¹⁵⁸ That provision reflects a policy choice to make judicial review generally available in circumstances where it is not specifically provided for in another statute. The fair and equitable treatment and arbitrary or discriminatory measures standards serve a similar gap-filling function in that they permit claimants to complain of conduct that does not fall within a more specific treaty standard, such as expropriation or national treatment. It is thus not surprising that arbitrary and capricious claims are ubiquitous in U.S. administrative law, just as fair and equitable treatment and arbitrary or discriminatory measures claims are ubiquitous in investment treaty arbitration.

A second similarity is that all of the standards are imprecise and pertain to fundamental principles associated with the rule of law. That is true regardless of whether fair and equitable treatment is understood as being equivalent to, or more exacting than, the customary international law minimum standard, and regardless of the specific principles that fair and equitable treatment and arbitrary or discriminatory measures are thought to embody. The terms arbitrary, capricious, fair, equitable, unjustified, unreasonable, and discriminatory all reflect rather basic notions of what government according to the rule of law is and is not.¹⁵⁹

A notable difference between the fair and equitable treatment and arbitrary or discriminatory measures standards and the APA's arbitrary and capricious standard, however, is that the former are not consistently understood to be narrow or deferential, while the latter is so understood. Tribunals sometimes describe the fair and equitable treatment standard as "evolving," by which they mean that it is becoming stricter over time.¹⁶⁰ Also, as mentioned above, the fair and equitable treatment standard has been identified as the treaty standard with the greatest potential to intrude into the sovereign sphere.¹⁶¹ While the APA's arbitrary and capricious standard of review is

157. For an argument that arbitral tribunals should exercise "near-total deference" to host states' definitions of "investment," see Mortenson, *supra* note 85.

158. 5 U.S.C. § 704 (2011).

159. See BLACK'S LAW DICTIONARY 1448 (9th ed. 2009) (defining "rule of law" as "[t]he supremacy of regular as opposed to arbitrary power").

160. See, e.g., LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 123 (Oct. 3, 2006), 21 ICSID Rev. 203 (2006); Eureko v. Republic of Poland, Partial Award, ¶ 234 (Aug. 19, 2005), 12 ICSID Rep. 335 (2006); Mondev Int'l Ltd. v. United States, ICSID Case No. ARB/99/2, Award, ¶¶ 124–125 (Oct. 11, 2002), 6 ICSID Rep. 192 (2004).

161. See *supra* note 14 and accompanying text.

similarly imprecise and broadly applicable, it is widely regarded as an important safeguard against such intrusion.¹⁶² One reason for the difference may be that the meanings of the fair and equitable treatment and arbitrary or discriminatory measures standards are still evolving while the meaning of the arbitrary and capricious standard is now generally settled. Although there are still disagreements among courts, the ways in which agency action can be arbitrary and capricious under the APA are generally delineated, and further content is typically supplied in specific cases by other relevant statutes, such as NEPA and the ESA.¹⁶³ Neither the relevance of other sources of law nor the categories of illegal action are as clear in investment tribunals' application of the fair and equitable treatment and arbitrary or discriminatory measures standards.¹⁶⁴

Another possible reason for the difference relates to the contexts in which the standards are found. The arbitrary and capricious standard is a prescribed standard of review in a statute enacted to address the expanding powers of U.S. agencies. The fair and equitable treatment and arbitrary or discriminatory measures standards, on the other hand, are found in treaties intended to encourage foreign investment and are sometimes characterized by observers as "standards of protection."¹⁶⁵ A *standard of review* is directed at the decision-making entity and connotes restraint. A *standard of protection* is oriented toward a beneficiary or object, here foreign investors or foreign investment, and quite obviously expresses a protective function.

Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, the context in which a treaty term appears, as well as the object and purpose of the treaty, must be taken into account in interpreting the term.¹⁶⁶ In interpreting BIT standards, tribunals sometimes focus exclusively on the economic-cooperation or investment-protection object and purpose of BITs, which is not an object and purpose of the APA.¹⁶⁷ Ultimately, however, the contexts in which the APA's standard and the treaty standards appear, and the objects and purposes of the instruments containing them, are quite similar. Indisputably, the APA's arbitrary and capricious standard not only restrains reviewing courts but also protects persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."¹⁶⁸ Furthermore, both the APA and the treaty standards appear in the context of governmental promises to

162. See generally *supra* Part I.A.3.

163. See *supra* Part I.A.3.

164. See generally *supra* Part I.B.4.

165. See DOLZER & SCHREUER, *supra* note 1, ch. 4 ("Standards of Protection"); see also STANDARDS OF INVESTMENT PROTECTION, *supra* note 144.

166. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter 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 the light of its object and purpose.").

167. See generally *supra* Part I.B.4.

168. 5 U.S.C. § 702 (2011).

adhere to certain standards of conduct and to make remedies available for their failure to do so. Stated more simply, both standards appear in an administrative law context. As Thomas Wälde explained in his separate opinion in *International Thunderbird Gaming v. Mexico*,

[M]ore appropriate for investor-state arbitration [than the commercial arbitration analogy] are analogies with judicial review relating to governmental conduct—be it international judicial review . . . or national administrative courts judging the disputes of individual citizens' [sic] over alleged abuse by public bodies of their governmental powers. In all those situations, at issue is the abuse of governmental power towards a private party that did and could legitimately trust in governmental assurances it received . . . Abuse of governmental powers is not an issue in commercial arbitration, but it is at the core of the good-governance standards embodied in investment protection treaties. The issue is to keep a government from abusing its role as sovereign and regulator after having made commitments . . .¹⁶⁹

Given the similarities between the systems of law, it is posited here that the administrative law context in which the treaty standards appear must be taken into account in their interpretation, pursuant to Article 31 of the Vienna Convention on the Law of Treaties. Further, because the treaty standards themselves contain the content of a public law standard of review, it would seem that there is no need to borrow such a standard from another system of law. Arguably, the administrative law context must be taken into account in the interpretation of all BIT standards because it is not unique to the fair and equitable treatment and arbitrary or discriminatory measures standards; however, those standards are the focus here because they are the most analogous to the APA's standard and are also the most likely to be applied in a manner that infringes the sovereignty of a host state. In APA cases, the reviewing courts commonly set forth the governing standard of review at the beginning of their decisions in order to frame the analysis and clarify their role vis-à-vis the executive branch.¹⁷⁰ A similar statement in investment treaty arbitration awards would serve the analogous purpose of framing the analysis and clarifying the tribunal's role vis-à-vis the host state. Investment arbitration tribunals would simply set forth the fair and equitable treatment or arbitrary or discriminatory measures standards instead of the APA's arbitrary and capricious standard.

Conceptualizing and applying the treaty standards as a standard of review may help tribunals to interpret and apply them in a narrow and

169. *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Award, ¶ 13 (Jan. 26, 2006), <http://italaw.com/sites/default/files/case-documents/ita0432.pdf> (separate opinion of Thomas Wälde) (citation omitted).

170. *See, e.g., Citizens for Smart Growth v. Sec'y of the Dep't of Transp.*, 669 F.3d 1203, 1210 (11th Cir. 2012); *United States v. Snoring Relief Labs, Inc.*, 210 F.3d 1081, 1084–86 (9th Cir. 2000); *Davidson v. Dep't of Energy*, 838 F.2d 850, 853 (6th Cir. 1987).

deferential manner that accounts for sovereign interests, similar to the manner in which the APA's arbitrary and capricious standard is interpreted and applied. Importantly, the narrow normative interpretation advocated is not meaningless or even materially different from the interpretations contained in a number of arbitral awards involving regulatory host-state actions. In *S.D. Myers, Inc. v. Canada*, for instance, the claimant challenged a Canadian ban on the export of polychlorinated biphenyl waste on the alleged ground (among others) that it violated NAFTA's fair and equitable treatment standard.¹⁷¹ In that context, the tribunal explained that the standard, which it equated with the customary international law minimum standard,¹⁷² does not give tribunals

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.¹⁷³

The tribunal went on to state that the claim must be decided "in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate within their own borders."¹⁷⁴ A comparable interpretation is found in the *Pope & Talbot, Inc. v. Canada* award. That dispute arose out of Canada's imposition of quotas on exports of softwood lumber from the four provinces that had historically been the United States' largest suppliers.¹⁷⁵ In that context, the tribunal stated that "it is not the place of this Tribunal to substitute its judgment on the choice of solutions for Canada's, unless that choice can be found to be a denial of fair and equitable treatment."¹⁷⁶ More recently, in *Parkerings-Compagniet AS v.*

171. *S.D. Myers, Inc. v. Canada*, First Partial Award, ¶¶ 129–130 (Nov. 13, 2000), 40 I.L.M. 1408 (2001).

172. The fair and equitable treatment standard contained in the North American Free Trade Agreement (NAFTA) is generally interpreted to be equivalent to the customary international law minimum standard. In July 2001, shortly after *S.D. Myers* was decided, the NAFTA Free Trade Commission issued Notes of Interpretation to that effect. NAFTA, *supra* note 119, ch. 11 notes of interpretation (2011), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d>.

173. *S.D. Myers*, 40 I.L.M. ¶ 161. *S.D. Myers* was a NAFTA case that was not arbitrated under the ICSID Convention because Canada is not a party to that Convention.

174. *Id.* ¶ 263. The tribunal nonetheless found a violation of the standard under the particular facts of the case. *See id.* ¶ 322.

175. *Pope & Talbot, Inc. v. Canada*, Award on Merits, ¶¶ 18, 30 (Apr. 10, 2001), 7 ICSID Rep. 102 (2002).

176. *Id.* ¶ 155.

Republic of Lithuania, the claimant argued that Lithuania violated the applicable BIT's "equitable and reasonable" standard by amending various laws after it had entered into a contract with Parkerings.¹⁷⁷ The tribunal rejected that argument and explained:

It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.¹⁷⁸

Further, at least one arbitral tribunal has recognized that focusing exclusively on the investment-protection objective of a BIT is not only too narrow but may also be counterproductive:

The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.¹⁷⁹

The tribunal's statement above implicitly recognizes that host states have interests other than investment promotion that must be taken into account in interpreting and applying BIT provisions. Thus, tribunals have included statements in a number of awards that reflect their understanding that the treaty standards should not be applied in a manner that infringes the policy-making discretion of host states. There is not yet, however, a consistent

177. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB 05/8, Award on Jurisdiction and Merits, ¶¶ 199, 327–329 (Sept. 11, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC682_En&caseId=C252.

178. *Id.* ¶ 332.

179. Saluka Invs. BV (Neth. v. Czech), Partial Award, ¶ 300 (Perm. Ct. Arb. 2006), http://www.pca-cpa.org/showfile.asp?fil_id=105.

practice in this regard or an established decisional principle to account for such interests.¹⁸⁰

Given the above, conceptualizing the treaty standards as a deferential standard of review and stating that fact at the beginning of fair and equitable treatment and arbitrary or discriminatory measures analyses, similar to the practice of U.S. courts in APA review, would not necessarily modify the content of the standards nor change the analysis. It may, however, help to ensure that tribunals consistently take into account the administrative law context in which the treaty standards appear and in which they themselves operate. That would be beneficial in light of the similarities between the systems of law and the sovereign interests at stake. The need to consistently account for such interests in investment arbitration appears to be at least equal to the need in APA review, but it is arguably even greater in investment arbitration given the still-evolving meaning of the standards and the lack of other safeguards, such as standing, finality, and ripeness requirements, that constrain U.S. courts in APA review. Additionally, greater consistency in this regard may partially address questions about the legitimacy of investment arbitration, questions that appear to be on the rise and that primarily, if not exclusively, concern the perceived failure of the system to account for and protect sovereign interests.¹⁸¹ The lack of appellate review in investment arbitration also weighs in favor of the use of a standard of review because a host state does not have the same opportunity to try to correct an incorrect decision that the United States has in APA cases. Finally, the conceptualization of the treaty standards as a standard of review may also contribute to greater coherence among awards and better-reasoned decisions.

II. ILLUSTRATIVE CASES

The primary purpose of this Part is to further explore the possibility that the APA's arbitrary and capricious standard and the fair and equitable treatment and arbitrary or discriminatory measures standards contained in investment treaties serve similar functions by comparing their operation in two cases involving similar regulatory subject matter. A secondary, related purpose is to illustrate the extent to which APA review and investment arbitration can wade into analogous legal territory. The two cases presented here involve similar challenges to governmental energy-rate decisions and com-

180. See *supra* Part I.B.4 (discussing awards in which the tribunals focused on the treaty provision at issue and the investment-protection objectives of the relevant treaty, seemingly leaving little room for other governmental interests).

181. See *supra* note 5; see also SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION ch. 3 (2009) (exploring various theories of legitimacy and their problems); Schill, *supra* note 7, at 7 (noting that some Latin American countries have expressed interest in withdrawing from investment treaties and the ICSID Convention, that some states appear increasingly reluctant to comply with investment treaty arbitration awards, and that some states are in the process of revising their model BITs).

parable allegations that the government lacked a reasonable basis for its action and failed to follow the proper procedures.

A. *APA Review*—Interstate Natural Gas Ass’n v. Federal Energy Regulatory Commission (INGAA II)¹⁸²

In 2008, the Federal Energy Regulatory Commission (FERC) eliminated price caps for short-term releases of natural gas by natural gas shippers but retained them for capacity sales by pipelines. The Interstate Natural Gas Association and two pipelines (collectively INGAA) challenged FERC’s action pursuant to the APA and argued that the rule 1) violated a Natural Gas Act (NGA) requirement that all market participants be treated alike, 2) was inconsistent with FERC’s stated conclusion that the short-term release market was “generally competitive,” 3) created a bifurcated market that would lead to artificial inflation of the uncapped prices, and 4) was procedurally flawed because FERC failed to respond to an expert’s affidavit and did not adequately consider proposed alternatives.¹⁸³ The case was decided in the first instance by the U.S. Court of Appeals for the D.C. Circuit, which has exclusive jurisdiction over “petitions for review” of certain agency rule-makings, following briefing and oral argument by counsel.¹⁸⁴

As in many APA cases, the court began its analysis by setting forth the APA’s arbitrary and capricious standard of review:

This court reviews FERC’s orders under the [APA’s] arbitrary and capricious standard and upholds FERC’s factual findings if supported by substantial evidence. We generally limit our review under the NGA to assuring that the Commission’s decisionmaking is reasoned, principled, and based upon the record. And we afford FERC broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines. In particular, when FERC’s orders

182. Interstate Natural Gas Ass’n v. Fed. Energy Regulatory Comm’n (*INGAA II*), 617 F.3d 504 (D.C. Cir. 2010).

183. *Id.* at 509–11. The Interstate Natural Gas Association and two pipelines (collectively INGAA) also made one additional argument that the court declined to consider. *Id.* at 510–11.

184. John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 389 (2006). APA review does not differ significantly depending on whether it is conducted in the first instance by a U.S. district court or a U.S. court of appeals, such as the D.C. Circuit. In both circumstances, the general procedure is as follows: 1) the agency “lodges” the administrative record with the court, 2) the parties brief the case based on the administrative record, 3) the court hears oral argument by counsel, and 4) the court issues its decision and judgment. If a case is decided by a U.S. district court in the first instance, an extra layer of appellate review is available to the parties compared to the alternative, but, otherwise, the procedure is quite similar. Compare *Davis v. Pension Benefit Guar. Corp.*, 815 F. Supp. 2d 283, 288–89 (D.D.C. 2011) (explaining that APA review must be based on the administrative record, and finding it “problematic” that the plaintiffs initially proceeded as if the case were not an APA case by filing a statement of facts not in dispute and numerous exhibits), with *Safe Extensions, Inc. v. Fed. Aviation Admin.*, 509 F.3d 593, 598–99 (D.C. Cir. 2007) (setting forth the same principles in a petition for review of agency action it decided in the first instance).

involve complex scientific or technical questions . . . we are particularly reluctant to interfere with the agency's reasoned judgments. Nevertheless, [FERC] must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.¹⁸⁵

The court then discussed the case's relationship to an earlier dispute, also titled *Interstate Natural Gas Ass'n v. Federal Energy Regulatory Commission (INGAA I)*, in which it had upheld FERC's temporary suspension of the price ceilings.¹⁸⁶ In that case, it had stated that "special deference" is owed to agency experiments due to the advantages of data developed in the real world.¹⁸⁷ The court rejected INGAA's argument that the prior decision was irrelevant.¹⁸⁸ The relevant distinction between the cases, the court explained, was that the earlier case entailed review of the administrative record for substantial evidence justifying a *temporary* change in policy, while the new case entailed review for substantial evidence justifying a *permanent* change.¹⁸⁹ The court further stated that the "extra layer of deference" was not dispositive in *INGAA I*.¹⁹⁰

The court ruled in favor of FERC on all claims. It rejected INGAA's claims that FERC's action violated an NGA requirement and created a bifurcated market because it found that the NGA prohibits only "unreasonable differences" in rates between classes of service, such that FERC may treat categories of market participants differently if it does so "based on relevant, significant facts which are explained."¹⁹¹ The court found that FERC had reasonable bases for its distinction—namely, concerns that natural gas pipelines could exert market power or withhold the construction of new capacity to benefit from the market rates for short-term capacity—and had adequately explained those bases.¹⁹² INGAA argued that it did not base its construction decisions on such factors, but the court rejected that argument because INGAA had not adduced any evidence sufficient to overcome "FERC's plausible concern, informed by economic theory." Therefore, the court deferred to FERC's view on the matter.¹⁹³ The court further found that the agency had reasonably erred on the side of heightened protection against

185. *INGAA II*, 617 F.3d at 508 (citations omitted) (internal quotation marks omitted).

186. *Id.* at 509; *see also* *Interstate Natural Gas Ass'n v. Fed. Energy Regulatory Comm'n (INGAA I)*, 285 F.3d 18, 29, 35 (D.C. Cir. 2002).

187. *INGAA II*, 617 F.3d at 508–09; *INGAA I*, 285 F.3d at 30.

188. *INGAA II*, 617 F.3d at 509.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 509–10 (quoting 15 U.S.C. § 717c(b)(2) (2011)).

193. *Id.*

market power, consistent with the NGA's fundamental purpose of protecting consumers from "the monopoly power of natural gas pipelines."¹⁹⁴

With respect to INGAA's claim that the action was inconsistent with FERC's stated conclusion about the competitiveness of the short-term release market, the court concluded that INGAA had taken the statement out of context and that there was no inconsistency between "FERC's evidentiary finding and the regulatory choice it made" when the statement was properly considered.¹⁹⁵ The relevant context was an explanation by FERC, contained in the record and based on the data collected during and after the experimental period, that it could not conclude that the short-term market would remain competitive if it removed the price ceilings from pipeline sales.¹⁹⁶ The court commended the data as "just the sort of 'real world' information [it] expected FERC to glean from its experiment" and found that it provided "substantial support for [FERC's] policy."¹⁹⁷

Finally, the court rejected INGAA's procedural claim based on its own precedent that FERC's procedural duty is limited to providing a "reasoned response to all significant comments" and its conclusion, based on the record, that FERC had fulfilled that duty by responding to the specific comments to which the affidavit was attached.¹⁹⁸ Based on record evidence, the court further determined that FERC had adequately considered and rejected alternatives proposed by one of the pipelines before the agency made its decision.¹⁹⁹

*B. Investment Treaty Arbitration—AES Summit Generation Ltd.
v. Republic of Hungary*²⁰⁰

In 2006 and 2007, the Republic of Hungary amended its 2001 Electricity Act and issued two Price Decrees reintroducing "administrative" energy

194. *Id.* at 511 (quoting *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 468 F.3d 831, 833 (D.C. Cir. 2006)).

195. *Id.* at 510.

196. *Id.*

197. *Id.*

198. *Id.* at 511.

199. *Id.*

200. *AES Summit Generation Ltd. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, ¶ 9.1 (Sept. 23, 2010), 50 I.L.M. 186 (2011). A request for annulment was registered on January 28, 2011, and decided on June 29, 2012. *List of Concluded Cases*, *supra* note 2. That decision is not available on ICSID's website, reflecting that both parties did not consent to its publication. *See* ICSID Convention art. 48(5). It has nonetheless been made publicly available, illustrating that neither the ICSID Convention nor the ICSID Rules prohibit the unilateral disclosure of unpublished awards. In a fifty-four page decision, the ad hoc Committee unanimously dismissed all of AES Summit's claims for annulment. *AES Summit Generation Ltd. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the Ad Hoc Committee on the Application for Annulment (June 29, 2012), <http://italaw.com/sites/default/files/case-documents/ita1072.pdf>.

pricing, which it had previously abolished in 2004.²⁰¹ AES Summit and AES Tisza (collectively AES Summit), energy generators and U.K. companies, had entered into power purchase agreements (PPAs) with Hungarian-owned entities before Hungary issued the Decrees. Based on the Decrees, AES Summit commenced investment arbitration proceedings and alleged that Hungary had violated various Energy Charter Treaty provisions, including the obligations to afford “fair and equitable treatment” and to refrain from “unreasonable or discriminatory measures.”²⁰²

AES Summit argued that Hungary violated the former obligation by 1) interfering with its rights under the PPAs and a settlement agreement executed in 2001, 2) failing to act in good faith and in accordance with AES Summit’s legitimate expectations, 3) failing to provide an agreed-upon level of financial and legal stability to its investment, and 4) reintroducing the administrative prices in an arbitrary and discriminatory manner and without due process.²⁰³ It argued that Hungary violated the latter obligation because the Decrees were not reasonably related to a rational state policy and did not apply to all similarly situated generators.²⁰⁴ Like many investment arbitrations, the proceedings consisted of briefing by the parties and a four-day hearing, during which witnesses and experts presented testimony and counsel presented oral argument.²⁰⁵

The tribunal did not set forth any governing standard of review in its award. At the outset, it determined that it lacked jurisdiction over contract-based claims and thus could not consider AES Summit’s argument that Hungary failed to provide fair and equitable treatment by breaching the PPAs.²⁰⁶ Then, it turned to AES Summit’s fair and equitable treatment claim under the Energy Charter Treaty and rejected the arguments that Hungary acted contrary to the claimant’s legitimate expectations and failed to provide a requisite level of financial and legal stability. The tribunal reasoned that Hungary did not make any representations or give any assurances that it would not reintroduce administrative prices.²⁰⁷ Specifically with respect to AES Summit’s legitimate-expectations argument, the tribunal found that in 2001, there was a “great probability” that administrative prices would not be reintroduced, but not an “absolute certainty, giving rise to internationally protected legitimate expectations.”²⁰⁸ With respect to AES Summit’s complaint of inadequate financial and legal stability, the tribunal explained that the Energy Charter Treaty’s requirement that the parties encourage and create stable conditions is “not a stability clause. A legal framework is by

201. *AES Summit Generation Ltd.*, 50 I.L.M. ¶¶ 4.1–.25.

202. ECT, *supra* note 119, art. 10(1); *AES Summit Generation Ltd.*, 50 I.L.M. ¶¶ 4.3–.4.

203. *AES Summit Generation Ltd.*, 50 I.L.M. ¶ 9.1.

204. *Id.* ¶¶ 10.1.1–.1.3.

205. *Id.* ¶ 3.28.

206. *Id.* ¶ 9.3.1.

207. *Id.* ¶¶ 9.3.1–.5, 9.3.35–.36.

208. *Id.* ¶ 9.3.25.

definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.”²⁰⁹

The tribunal considered the procedural question to be the “heart of the case” and explained that it had

approached th[e] question on the basis that it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state’s acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety)—to use the words of the *Tecmed* tribunal—that the standard can be said to have been infringed.²¹⁰

Based primarily on uncontroverted testimony by the head of the Hungarian Electricity Office Preparation Department at the relevant time,²¹¹ the tribunal found that the process had a number of flaws, the most significant being extremely short comment periods for the draft Decrees.²¹² Overall, however, the tribunal found that the process “did not fall outside the acceptable range of legislative and regulatory behavior” and thus “could not be defined as unfair and inequitable.”²¹³ It observed that AES Summit submitted comments and met with Hungary before the final Decrees issued, and that Hungary made changes to the Decrees that reflected the investors’ concerns.²¹⁴

Turning to AES Summit’s unreasonable or discriminatory measures claim, the tribunal applied a two-part test requiring 1) the existence of a rational policy, defined as a “policy taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter”; and 2) reasonableness of the state act in relation to the policy, defined as “an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it.”²¹⁵

Hungary claimed that it reintroduced administrative pricing for three main reasons. First, it asserted that it was concerned about the viability of a

209. *Id.* ¶ 9.3.29; see ECT, *supra* note 119, art. 10(1) (expressly requiring the encouragement and creation of stable conditions for foreign investors).

210. *AES Summit Generation Ltd.*, 50 I.L.M. ¶ 9.3.40 (quoting *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003), 10 ICSID Rep. 130 (2004)). The tribunal limited its consideration of AES Summit’s last fair and equitable treatment argument to the procedure by which Hungary adopted the Price Decrees, choosing to address the arguments related to the Decrees’ substance under the unreasonable or discriminatory measures standard. *Id.* ¶ 9.3.37.

211. *Id.* ¶ 9.3.42.

212. *Id.* ¶ 9.3.66.

213. *Id.* ¶¶ 9.3.66, 9.3.73.

214. *Id.* ¶¶ 9.3.50–51.

215. *Id.* ¶¶ 10.3.7–9.

negotiated solution because generators had refused to agree for several years to any reductions in PPA capacity for the purpose of freeing up capacity for the parallel free market.²¹⁶ Second, it stated that the action was a response to investigation pressure by the Commission of the European Communities and a foreseeable obligation to return some state aid.²¹⁷ Finally, Hungary asserted that it took the action because the profits enjoyed by the PPA generators, in the absence of regulation or competition, exceeded reasonable rates of return for utility sales.²¹⁸

The tribunal rejected the first reason on the ground that a state cannot reasonably take an action for the sole purpose of forcing private parties to change or relinquish their contractual rights.²¹⁹ Then, a majority of the arbitrators found that the second reason was not supported by the evidence because the relevant Hungarian agency had not yet been consulted by the Commission when administrative pricing was first reintroduced and the specific mechanism Hungary used had no bearing on state-aid eligibility.²²⁰ The tribunal then found, based primarily on debates inside and outside the Hungarian Parliament at the relevant time, that the Price Decrees were “motivated principally” by Hungary’s third stated reason, namely, concerns that generators were earning excessive profits and burdening consumers.²²¹ The tribunal characterized that motivation as “the politics surrounding so-called luxury profits” but found luxury profits to be “a perfectly valid and rational objective for a government to address.”²²² Noting that Hungary had tried and failed to renegotiate the PPAs with the generators before it reintroduced administrative pricing, the tribunal further found that the action was reasonably correlated to the rational policy, for purposes of the second prong of the test, and ultimately that the Price Decrees were “reasonable, proportionate and consistent with the public policy expressed by the parliament.”²²³ It then further examined “if, as stated by Hungary, the generators were still going to receive a reasonable return.”²²⁴ The tribunal found that they would because the rates under the Price Decrees were comparable to the rates at the time of the original investment.²²⁵ The tribunal found no evi-

216. *Id.* ¶ 10.3.11.

217. *Id.* ¶ 10.3.15.

218. *Id.* ¶ 10.3.20.

219. *Id.* ¶¶ 10.3.12–14.

220. *Id.* ¶¶ 10.3.16–18. To one of the three arbitrators, however, the evidence demonstrated that it had been made clear to Hungary that there were concerns about the high prices at the European level. *Id.* ¶ 10.3.19.

221. *Id.* ¶¶ 10.3.30–31.

222. *Id.* ¶ 10.3.34. The tribunal further noted that, “while such price regimes may not be seen as desirable in certain quarters,” that fact did not make them irrational. *Id.*

223. *Id.* ¶¶ 10.3.35–36.

224. *Id.* ¶ 10.3.37.

225. *Id.* ¶¶ 10.3.37–44.

dence of discrimination because the price for each generator was calculated using the same methodology.²²⁶

Having disposed of AES Summit's fair and equitable treatment and unreasonable or discriminatory measures claims, the tribunal devoted relatively little discussion to the remaining claims, which included national treatment, constant protection and security, and expropriation. It found the national treatment claim to be without merit because it was based on the same conduct as AES Summit's discriminatory measures claim²²⁷ and rejected the constant protection and security claim because, while that standard

can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view toward achieving objectively rational public policy goals.²²⁸

Finally, the tribunal found that the expropriation claim lacked merit because AES Summit was not deprived of ownership or control over its investment and continued to receive substantial revenues.²²⁹

C. Comparative Analysis: INGAA II and AES Summit

INGAA II and *AES Summit* involve remarkably similar subject matter and claims. The arbitrary and capricious, fair and equitable treatment, and unreasonable or discriminatory measures standards are all comparably imprecise and supply the basis for very similar legal arguments. As *INGAA II* illustrates, the arbitrary and capricious standard is the overarching principle of APA review and governs the analysis from beginning to end. By setting forth the standard before it addressed INGAA's specific claims, the court framed the analysis, highlighted the public law character of the dispute, and clarified its role vis-à-vis the executive branch, whose action it was reviewing. As it explained, the standard affords "broad discretion" to an agency's judgments regarding the balancing of competing interests, the drawing of administrative lines, and complex scientific or technical questions.²³⁰

The court's application of the standard to INGAA's specific claims illustrates how it operates in practice. INGAA's first claim, like many APA claims, complained that the agency's action was inconsistent with a statute the agency is charged with administering.²³¹ The court's analysis of that

226. *Id.* ¶ 10.3.47.

227. *Id.* ¶ 12.3.2.

228. *Id.* ¶ 13.3.2.

229. *Id.* ¶¶ 14.3.2–3.

230. *INGAA II*, 617 F.3d 504, 508 (D.C. Cir. 2010).

231. *Id.* at 509.

claim was necessarily informed by the relevant statute, the NGA, but in the absence of specific direction from Congress, the court deferred to FERC's judgment as to how the statute's purpose should be accomplished.²³² INGAA's second claim and its claim that FERC should have addressed a particular affidavit relate to the requirement that an agency " 'examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.' "²³³ That requirement was established in a Supreme Court case and, as the court's discussion illustrates, does not demand perfection. Agency decisions of "less than ideal clarity" are to be upheld if the agency's path "may reasonably be discerned."²³⁴ INGAA's claim that FERC had failed to adequately consider alternatives it proposed is probably a NEPA claim,²³⁵ although the court did not mention NEPA by name.²³⁶ Such claims are informed by NEPA and a substantial body of case law interpreting its requirements.²³⁷ Overall, the arbitrary and capricious standard, in combination with case law interpreting it and other relevant statutes, informed and guided the court's analysis of all of INGAA's legal arguments.

Although the *AES Summit* tribunal did not expressly identify or apply a public law standard of review, the fair and equitable treatment and unreasonable or discriminatory measures standards arguably operate as such a standard in the tribunal's analysis. Similar to the arbitrary and capricious standard in *INGAA II*, those two treaty standards occupy a central role and are interpreted in the award to contain important limitations of a public law nature. For instance, the tribunal found that the regulatory-stability element of the fair and equitable treatment standard does not limit a state's sovereign right to adapt its laws to new circumstances unless the state promises in absolute terms not to do so, which reflects a recognition of the state's sovereignty and the tribunal's role vis-à-vis the state.²³⁸ The two-part test that the tribunal applied to AES Summit's unreasonable or discriminatory

232. *Id.*

233. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

234. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009).

235. *See supra* note 70 and accompanying text.

236. *INGAA II*, 617 F.3d at 511.

237. *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989) (stating that NEPA does not mandate particular results but instead imposes procedural requirements on agencies designed to ensure that they analyze the environmental impact of their proposals and actions); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("The only role for a court [in applying the APA's arbitrary and capricious standard in the NEPA context] is to insure that the agency has taken a 'hard look' at environmental consequences."); *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 670 (7th Cir. 1997) (explaining that courts require a sufficiently broad statement of a project's purpose to prevent agencies from avoiding their NEPA obligation to consider all reasonable alternatives by defining such purpose narrowly).

238. *AES Summit Generation Ltd. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, ¶ 9.3.29 (Sept. 23, 2010), 50 I.L.M. 186 (2011).

measures claim is strikingly similar to the test that the *INGAA II* court applied to *INGAA*'s first and fourth claims.²³⁹ While the court did not expressly break its analysis into two parts, both it and the *AES Summit* tribunal effectively first considered whether the government had pursued a permissible objective and then whether the government's means were permissible.²⁴⁰ Further, both analyses are highly deferential. FERC was permitted to differentiate among categories of market participants as long as it did so "based on relevant, significant facts which [it had] explained," and the court deferred to its judgment as to where the administrative lines should be drawn.²⁴¹ For its part, the tribunal required of Hungary only a "rational" policy objective and "reasonableness" of the state act in relation to that policy.²⁴² Under that deferential standard, Hungary's decision to reintroduce administrative pricing to address luxury profits, after it had tried and failed to renegotiate the relevant contracts, easily passed muster.²⁴³

The analyses of the procedural claims are also parallel in the two cases. In both, the outcome rests on evidence that the complainants had an opportunity to present their concerns and that the government adequately considered them. Although the procedural errors alleged in the two cases are not of a comparable severity and the *AES Summit* tribunal found the procedures to be deficient in certain respects while the *INGAA II* court did not find any technical violations, the tribunal's approach is similar to what a U.S. court would likely do in similar circumstances.²⁴⁴ When technical procedural violations are found in APA cases, the reviewing court often applies the "harmless error" rule and upholds the decision if the error did not cause prejudice.²⁴⁵ The *AES Summit* tribunal effectively applied such a rule in its analysis.²⁴⁶

Finally, it is notable that the fair and equitable treatment and unreasonable or discriminatory measures standards informed, to some extent, the tribunal's analysis of *AES Summit*'s national treatment and constant protection and security claims. The tribunal relied, among other things, on its determination that Hungary had utilized "reasonable" means to pursue a "rational" policy in rejecting *AES Summit*'s constant protection and security claim.²⁴⁷ In part, the overlap is probably attributable to *AES Summit*'s

239. *INGAA II*, 617 F.3d at 509–11; *AES Summit Generation Ltd.*, 50 I.L.M. ¶¶ 10.3.7–9.

240. *INGAA II*, 617 F.3d at 509–11; *AES Summit Generation Ltd.*, 50 I.L.M. ¶ 10.3.15.

241. *INGAA II*, 617 F.3d at 509.

242. *AES Summit Generation Ltd.*, 50 I.L.M. ¶¶ 10.3.7–9.

243. *Id.* ¶¶ 10.3.30–36.

244. *INGAA II*, 617 F.3d at 511; *AES Summit Generation Ltd.*, 50 I.L.M. ¶¶ 9.3.40–51.

245. *See, e.g.*, *Nevada v. Dep't of Energy*, 457 F.3d 78, 89–91 (D.C. Cir. 2006).

246. *AES Summit Generation Ltd.*, 50 I.L.M. ¶¶ 9.3.50–51 (explaining that *AES Summit* both submitted comments and met with Hungarian officials before the government made a decision and that Hungary made some changes responsive to *AES Summit*'s concerns).

247. *Id.* ¶ 13.3.2.

decision to pursue various claims on the basis of the same alleged conduct, but it also appears that, similar to the APA's arbitrary and capricious standard of review, the fair and equitable treatment and unreasonable or discriminatory measures standards operated as overarching decisional principles. The fact that the standards do not appear to have informed the analysis of AES Summit's expropriation claim is even consistent with the reach of the arbitrary and capricious standard because U.S. takings claims are not APA claims. Aside from being monetary claims, which the APA does not allow, regulatory takings claims in the United States are evaluated under a different, balancing test.²⁴⁸

While the decisions are similar in many respects, there are at least three significant differences. By far the most significant difference is that the claims asserted in *AES Summit* effectively challenged a legislature's reasons for passing a law, while the claims asserted in *INGAA II* challenged an agency's reasons for issuing an order. As discussed in more detail below, the former type of claim is not within the bounds of traditional "administrative review," which is limited to the review of public acts.²⁴⁹ The review of legislation, by contrast, is a hallmark of "constitutional review," which is typically governed by very different legal principles including, in the United States, the important doctrine of constitutional avoidance.²⁵⁰ Under section 706(2)(B) of the APA, a plaintiff may challenge an "agency action" on the ground that it is "contrary to constitutional right, power, privilege or immunity" but cannot argue that a law should be struck down because it is arbitrary and capricious.²⁵¹ To that end, the APA's definition of "agency action" excludes legislation and its definition of "agency" excludes Congress and the President.²⁵² Thus, the cases illustrate that investment arbitration differs from APA review in the significant respect that it permits claims of an administrative law nature to be made in a constitutional law context. That raises a substantial concern about the potential of the claims to interfere with the sovereign right of host states to legislate.

248. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–26 (1978). That balancing test considers 1) the economic impact of the action; 2) the claimant's reasonable, investment-backed expectations; and 3) the character of the government action. *Id.*; see also *Schooner Harbor Ventures v. United States*, 569 F.3d 1359, 1362 (Fed. Cir. 2009) (applying the test).

249. See Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37, 39 (2008).

250. *Id.*; see also Henry J. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT'L L. 1, 40 (2004). The constitutional avoidance doctrine precludes courts from reaching constitutional questions if a case can be decided on other grounds. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of.").

251. 5 U.S.C. § 706(2)(B) (2011).

252. *Id.*; *id.* § 551(13) (definition of "agency action"); see also *supra* notes 24–26 and accompanying text.

Second, the evidence on which the decisions are based is dissimilar. Because APA review is limited to the administrative record prepared by the agency,²⁵³ the court did not hold an evidentiary hearing in *INGAA II*. That rule is intended to limit the court's review to the record that was before the agency when it made its decision, and it highlights that APA review is essentially appellate in nature; the agency is the initial decision-making entity.²⁵⁴ The APA prescribes the procedures that federal agencies must follow when they take various actions, and a plaintiff cannot pursue an APA claim in federal court unless it adequately presented its concerns to the agency during the administrative process.²⁵⁵ In *INGAA II*, for instance, INGAA could not have pursued its claim that FERC failed to consider an adequate range of alternatives if it had not proposed an alternative to FERC at the appropriate time during the administrative process. The court, for its part, simply had to look to the administrative record to determine what INGAA proposed, whether FERC considered that proposal, and if so, how that was done.

In *AES Summit*, by contrast, the tribunal relied on various types of evidence, including factual testimony presented by a Hungarian government official, to resolve AES Summit's claims.²⁵⁶ Because investment treaty arbitration involves many nations with diverse administrative procedures, a generally applicable rule comparable to the administrative-record rule is not possible. Further, the ICSID Rules do not require anything comparable to administrative exhaustion, and tribunals probably would not decline to hear claims because a claimant failed to seek relief via an available, predecisional procedure. Accordingly, there may not be anything comparable to an administrative record in many investment disputes, necessitating the use of other types of evidence. Nonetheless, the use of a government official's testimony raises concerns of a public law nature, at least from one perspective. The U.S. Supreme Court has instructed lower courts not to "probe the mental processes" of agency decision makers in the course of reviewing agency action, and the use of such testimony also risks interference in agency functioning by monopolizing the time of agency officials.²⁵⁷ It is furthermore not the most reliable evidence because it is a post hoc explanation of

253. See *supra* note 40 and accompanying text; see also FED. R. APP. P. 16 ("The record on review of an agency order consists of: (1) the order involved; (2) the findings or report on which it is based; and (3) the . . . evidence [that was] before the agency.").

254. See *Camp v. Pitts*, 411 U.S. 138, 142 (1973); see also *supra* note 40.

255. See *Iowa State Commerce Comm'n v. Office of the Fed. Inspector of the Alaska Natural Gas Sys.*, 730 F.2d 1566, 1575 (D.C. Cir. 1984) (holding that plaintiffs must raise issues with "sufficient particularity" to put the agency on notice).

256. *AES Summit Generation Ltd. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, ¶¶ 9.3.13–.36, 9.3.42 (Sept. 23, 2010), 50 I.L.M. 186 (2011).

257. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (citation omitted); see also *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 198 (4th Cir. 2005) ("[I]nquiries into an agency's subjective intent and the necessity of its substantive decision exceed the permissible scope of judicial review in a NEPA case."). Regarding the monopolization of agency officials' time, see *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam).

the basis for a decision rather than a contemporaneous one. In APA cases, statements to the effect that “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself” are a common refrain.²⁵⁸

Finally, the *AES Summit* decision reflects more uncertainty about the meaning of the fair and equitable treatment and unreasonable or discriminatory measures standards than the *INGAA II* decision reflects about the meaning of the arbitrary and capricious standard. The tribunal’s uncertainty is reflected, for instance, in its unexplained decision to treat certain claims that AES Summit had characterized as fair and equitable treatment claims as unreasonable or discriminatory measures claims.²⁵⁹ It is not clear that a different tribunal would have made the same choice, which illustrates that the categories of action that fall within each standard, and the relationship of the standards to each other, are not yet clear to investment treaty claimants or to tribunals. Further, because AES Summit’s claims effectively challenged legislation, the tribunal’s analysis is necessarily not grounded in a substantive statute in the same way that the *INGAA II* court’s analysis is grounded in the NGA.

That *AES Summit* reflects greater uncertainty than *INGAA II* is not surprising. APA review always involves the same statutory language, has a long active history, and is governed by a rather large body of binding precedent. Investment arbitration, by contrast, involves numerous different treaties, has a much shorter active history, and has no binding precedent. Nonetheless, the uncertainty is troubling from a public law perspective because it suggests that the limits of the standards are unclear, which could contribute to overreaching, especially if the public law nature of the dispute is not taken into account.

The foregoing comparison illustrates that, in at least one investment treaty arbitration, the fair and equitable treatment and arbitrary or discriminatory measures standards served a similar, but not identical, function to that served by the arbitrary and capricious standard in APA review. On the positive side from a public law perspective, the treaty standards provided the basis for a narrow but meaningful review of whether governmental conduct adhered to fundamental rule-of-law standards but were understood to prohibit interference into the state’s policy-making authority. Further, they operated as overarching decisional principles that informed the tribunal’s analysis of other treaty-based claims.

On the negative side, however, the comparison further illustrates that investment tribunals are not subject to the significant public law limitations that constrain U.S. courts in APA review. Investment arbitration claimants may challenge a broader range of action than APA plaintiffs and are not sub-

258. *Colo. Wild, Inc. v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006).

259. *AES Summit*, 50 I.L.M. ¶¶ 9.3.36–38 (explaining that AES Summit argued both that the substance of the decrees and the procedures by which they were issued violated the fair and equitable treatment standard and that the tribunal chose to address the substance arguments under the unreasonable or discriminatory measures standard).

ject to limitations such as standing, exhaustion, finality, or ripeness. Further, the comparison provides a concrete example of the uncertain meaning of the treaty standards. Given the potential for interference in the regulatory domain of host states engendered by these circumstances, tribunals should exercise special caution to ensure that the administrative law context in which the treaty standards appear is taken into account in their interpretations. As mentioned above, U.S. courts explain the content and limitations of the arbitrary and capricious standard at the beginning of their APA analyses largely to highlight the public law nature of the dispute, clarify their role vis-à-vis the executive branch, and frame the analysis. Investment tribunals could easily adapt that model to the investment arbitration context and include similar framing, explanatory statements at the beginning of their analyses. Doing so may help them to interpret and apply the treaty standards in an appropriately narrow and deferential manner and at the same time promote the development of consistent and principled interpretations.

III. THE MARGIN OF APPRECIATION DOCTRINE AS AN INVESTMENT TREATY ARBITRATION STANDARD OF REVIEW

Before examining further whether APA review is an appropriate source of guidance for investment arbitration tribunals, this Part considers an alternative source of guidance recently advocated by Burke-White and von Staden: the ECtHR's *margin of appreciation doctrine*.²⁶⁰ Based on a comparative analysis of several standards of review applied in various areas of public international law, Burke-White and von Staden concluded that the margin of appreciation doctrine is the international public law standard of review best suited to investment treaty claims. Having now identified a number of public law concerns raised by investment arbitration in Parts I.C and II.C, this Article now considers whether the margin of appreciation doctrine might better address those concerns and thus provide a better foundation for an investment arbitration standard of review than the fair and equitable treatment and arbitrary or discriminatory measures treaty standards themselves.

A. Overview of the Margin of Appreciation Doctrine

The margin of appreciation doctrine is associated primarily with the ECtHR and is used consistently by that court, although other international courts have borrowed it on occasion.²⁶¹ For its part, the ECtHR decides, as a last resort, human rights complaints brought against the forty-seven states parties to the Convention for the Protection of Human Rights and

260. Burke-White & von Staden, *supra* note 11, at 701–05 (listing the European Court of Justice, the WTO Dispute Settlement Body, the Inter-American Court of Human Rights, and NAFTA arbitration tribunals among the entities that have borrowed the doctrine).

261. *Id.* at 705.

Fundamental Freedoms²⁶² and has a “subsidiary” relationship to the parties’ national courts.²⁶³ Because human rights are generally interpreted to have a broad application but are rarely absolute, the ECtHR’s task is most often to determine whether a particular interference with a protected human right is permissible.²⁶⁴ In doing so, it accounts for sovereign interests in part by granting states a “margin of appreciation” to “do things their own way.”²⁶⁵

The margin of appreciation doctrine does not appear in the Convention or its *travaux préparatoires*. It was developed by the ECtHR based on the Convention’s limitation clauses, which prescribe the circumstances under which the parties may restrict the Convention rights,²⁶⁶ although it may also have roots in the parties’ systems of administrative law.²⁶⁷ With respect to the Convention, the idea first appeared in connection with Article 15, which permits derogations from Convention obligations in times of emergency “to the extent strictly required by the exigencies of the situation.”²⁶⁸ In the (*First*) *Cyprus Case*, the European Human Rights Commission afforded the relevant state “a certain measure of discretion” in determining the extent of derogation the particular exigencies demanded.²⁶⁹ Shortly thereafter, it used the phrase “margin of appreciation” for the first time in its first individual application, *Lawless v. Ireland*, and used the doctrine to analyze the antecedent question of whether an emergency existed.²⁷⁰ In *Handyside v. United Kingdom*, the ECtHR explained the doctrine’s underlying rationale:

262. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 005 [hereinafter ECHR].

263. KAREN REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS 31 (1998); *see also, e.g.*, *Eckle v. Federal Republic of Germany*, 51 Eur. Ct. H.R. (ser. A) ¶ 61 (1982), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57476>; *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 48 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>. Subsidiarity is an important concept in European human rights law and has been described by one observer as “the principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself.” Paolo G. Carozza, *Subsidiarity As a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 38 n.1 (2003) (distinguishing the concept from U.S. federalism).

264. *See* MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 56–61 (2003).

265. James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT’L & COMP. L.Q. 459, 462 (2005).

266. As a rule, the parties are permitted to determine whether and to what extent to restrict human rights, provided they do so in accordance with the Convention’s limitation clauses. NOWAK, *supra* note 264, at 59.

267. *See* 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, 626 (2001).

268. ECHR, *supra* note 262, art. 15(1).

269. *See* Gross & Ní Aoláin, *supra* note 267, at 631 (citing *Greece v. United Kingdom*, App. No. 176/56, 1958–1959 Y.B. Eur. Conv. on H.R. 174 (Eur. Comm’n on H.R.)).

270. *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. B) at 82, 90 (1960–1961); *see* Gross & Ní Aoláin, *supra* note 267, at 631.

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of [the requirements of a limitation clause] as well as on the necessity of a restriction or limitation intended to meet them.²⁷¹

The doctrine has since developed and is now understood to vary in its application according to a number of factors.²⁷² The ECtHR commonly states that the scope of the margin varies “according to [the] circumstances, subject matter and background,”²⁷³ although it typically focuses on the following three more specific factors: 1) the nature of the right at issue, 2) whether there is a consensus among the Convention parties on a particular issue, and 3) the goal of the governmental measure involved.²⁷⁴ With respect to the right at issue, the parties are said to have no margin of appreciation with respect to sex-based discrimination,²⁷⁵ for instance, and to have a wider margin with respect to restrictions on property rights than they do with respect to restrictions on the freedom of expression.²⁷⁶ The existence of a consensus narrows the margin because it illustrates that there is agreement on the normative content of a protected right.²⁷⁷ Finally, the goal of the measure is important. If the aim of a measure is to safeguard national security, for example, a wide margin of appreciation is likely to be afforded.²⁷⁸

Application of the margin of appreciation doctrine is the first part of a two-part analysis. Once the ECtHR calculates the margin in a particular case, it factors that margin into its “proportionality” analysis, under which it

271. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 48 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>. At issue in *Handyside* was Convention Article 10(2), *id.*, which permits restrictions on the right to freedom of expression for various reasons, including to protect health or morals, provided the restrictions are “prescribed by law and are necessary in a democratic society.” ECHR, *supra* note 262, art. 10(2); see also Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT’L & COMP. L.Q. 638, 640 (1999) (discussing the case).

272. See Hutchinson, *supra* note 271, at 640.

273. *Andrle v. Czech Republic*, App. No. 6268/08, ¶ 49 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103548>.

274. See Hutchinson, *supra* note 271, at 640.

275. CLAIRE OVEY & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 427 (4th ed. 2006) (citing *Schmidt v. Germany*, App. No. 13580/88, 18 Eur. H.R. Rep. 513 (1994)).

276. Hutchinson, *supra* note 271, at 640.

277. *Id.*; see, e.g., *A, B & C v. Ireland*, App. No. 25579/05, ¶ 234 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332> (explaining that the consensus factor has long played a significant role in the ECtHR’s jurisprudence and that it is used to justify a “dynamic” interpretation of the Convention, a “living instrument” that is “interpreted in light of present-day conditions”).

278. Hutchinson, *supra* note 271, at 640 (citing *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A) ¶ 43 (1987)).

evaluates whether there is a “reasonable relationship of proportionality between the aim pursued and the means employed.”²⁷⁹

B. Application of the Margin of Appreciation Doctrine to International Investment Treaty Claims

1. Burke-White and von Staden’s Argument

Burke-White and von Staden argue that the margin of appreciation doctrine should be applied as a standard of review in some investment disputes based primarily on two factors: the public law nature of those disputes and the institutional capacity of investment arbitration tribunals vis-à-vis the other actors involved in investment disputes.²⁸⁰ First and foremost, the authors assert that there is a strong case for applying the doctrine to “regulatory or administrative” disputes involving, for instance, “traditional issues of expropriation or national treatment,” and an even stronger case for applying it to “quasi-constitutional” disputes.²⁸¹ On the latter point, Burke-White and von Staden clarify that they do not mean “constitutional” “in the sense of implicating changes to the state’s written constitution,” but instead “in the sense [of implicating] changes to a state’s economic and social constitution.”²⁸² As examples, they cite the many investment arbitrations that arose out of Argentina’s response to its economic crisis.²⁸³

The institutional-capacity factor comes into play in Burke-White and von Staden’s comparative analysis of the margin of appreciation doctrine and two alternative possibilities, the World Trade Organization Dispute Settlement Body’s “least restrictive means” test and “good faith review.”²⁸⁴ The authors argue that the relative institutional capacity of a court or tribunal

279. Kiyutin v. Russia, App. No. 2700/10, ¶ 66 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103904>.

280. Burke-White & von Staden, *supra* note 11, at 691–95 (nature of the disputes); *id.* at 711–15 (capacity of investment tribunals).

281. *Id.* at 693.

282. *Id.* at 691–94. Burke-White and von Staden urge tribunals to identify public law disputes based on the subject matter of the dispute and the text of the relevant treaty. *Id.* Specifically, the authors contend that two kinds of disputes—those involving grievances about public policy and those implicating treaty language that preserves a degree of host-state flexibility to regulate in the particular circumstances—should be recognized as public law disputes. *Id.* As an example of such language, Burke-White and von Staden identify Article 11 of the BIT between Argentina and the United States, which provides that the treaty “shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.” *Id.* at 694 (quoting Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. 11, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993)).

283. *Id.* at 692 (explaining that Argentina’s response comprised a number of measures including a substantial devaluation of the peso, the “pesification” of all financial obligations, and the effective freezing of all bank accounts).

284. *Id.* at 711–19.

vis-à-vis other actors in a given context should be given significant weight in determining whether a stricter or more lenient standard of review is warranted and that investment tribunals typically lack public law expertise.²⁸⁵ Consequently, Burke-White and von Staden assert that the tribunals are ill equipped to apply the strict least restrictive means test or, for that matter, to weigh directly the individual and government interests at stake, which requires legislative-type capabilities.²⁸⁶ On the other hand, the authors reject good faith review on the ground that it is too deferential and may not always offer sufficient protection to investor rights.²⁸⁷ The margin of appreciation doctrine is presented as a middle-ground option, which purportedly requires tribunals to conduct only limited, “residual” balancing of the individual and government interests at stake.²⁸⁸ In Burke-White and von Staden’s view, the residual balancing analysis would be heavily informed by the previously calculated margin of appreciation and would be more likely to properly account for the sovereign interests involved in investment arbitrations than “a free standing proportionality analysis.”²⁸⁹

2. Application to Fair and Equitable Treatment & Arbitrary or Discriminatory Measures Claims

Burke-White and von Staden’s analysis does not appear to be limited to any particular investment treaty standard. At least with respect to the fair and equitable treatment and arbitrary or discriminatory measures standards, however, it does not appear that incorporating the margin of appreciation doctrine into the analysis would improve matters. The authors do not explain in detail how they expect tribunals to determine whether a narrow or wide margin should be afforded in particular investment disputes; however, it is evident that Burke-White and von Staden envision that tribunals would make such determinations.²⁹⁰ If the authors mean to propose a case-by-case analysis based on factors similar to those considered by the ECtHR, then the proposal is problematic, at least with respect to the fair and equitable treatment and arbitrary or discriminatory measures claims considered here.

Transplanting the three factors commonly considered by the ECtHR and discussed in Part III.A into the investment arbitration context illustrates the

285. *Id.* at 712.

286. *Id.* at 718 (“Just as ICSID tribunals lack the legislative-type capacities to engage in direct balancing, so too do they lack the knowledge, expertise and resources to engage in the kind of second-guessing of policy choices required by a least restrictive means analysis.”).

287. *Id.* at 719.

288. *Id.* at 718–19.

289. *Id.* at 718.

290. *See id.* (“Ad hoc tribunals will be better positioned to undertake balancing in such circumstances where they can ground the residual proportionality analysis in the preliminary determination of the breadth of the margin than they would be in a free-standing proportionality analysis.”).

difficulty.²⁹¹ According to Burke-White and von Staden, the ECtHR cases most analogous to investment arbitrations are those involving restrictions on property rights under Article 1 of Protocol 1 to the Convention.²⁹² Because the ECtHR often grants wide margins of appreciation in those cases based on the right at issue, they are presumably of the opinion that the “right” factor will often weigh in favor of a wide margin in investment arbitration.²⁹³ But they do not argue that investment tribunals should always grant wide margins to host states, and that argument would render a margin of appreciation calculation unnecessary. Further, not all protections granted to investors in BITs, including the rights to be treated fairly, equitably, and free from arbitrariness and discrimination, are analogous to the peaceful enjoyment of one’s possessions secured by Article 1 of Protocol 1 to the Convention.

The consensus factor is also problematic in the investment arbitration context. It serves an important purpose in the ECtHR as it often accounts for significant cultural and religious differences among the Convention parties. Recently, for example, the ECtHR decided a case brought against Ireland by women forced to either leave the state to obtain abortions or risk criminal penalties.²⁹⁴ In explaining its decision to grant Ireland a wide margin of appreciation under those circumstances, the ECtHR cited the “acute sensitivity of the moral and ethical issues raised” and the lack of consensus on the issue of when life begins.²⁹⁵ Issues of comparable sensitivity are not usually raised in investment arbitrations, and, further, most investment treaties are bilateral. Thus, neither the need nor the basis for considering the consensus factor appears to be present in investment arbitration.

Finally, it is not clear how the “goal of the measure” factor would operate in the analysis of treaty-based fair and equitable treatment and arbitrary or discriminatory measures claims. While tribunals should exercise extra caution to avoid infringing decisions within certain governmental policy-making areas, such as national security, it is not clear what basis they would have to require a “compelling justification,” as the ECtHR often phrases it, for governmental action of any lesser importance that is alleged to have violated the fair and equitable treatment or arbitrary or discriminatory measures standards.²⁹⁶

291. See *supra* text accompanying notes 272–278 (discussing the common factors considered by the ECtHR).

292. Burke-White & von Staden, *supra* note 11, at 703.

293. See *id.* (“The situations most analogous to investment arbitration in the ECtHR’s jurisprudence on the margin of appreciation are the cases relating to the protection of property under Article 1 of Protocol 1 to the ECHR. The margin of appreciation accorded to states by the Court in the regulation of property issues is generally a wide one.”).

294. A, B & C v. Ireland, App. No. 25579/05, ¶¶ 11, 13–26 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332>.

295. *Id.* ¶¶ 233, 237.

296. See discussion of *Kiyutin v. Russia* *infra* note 303.

That the factors considered by the ECtHR in its margin of appreciation analyses do not translate well to the investment arbitration context sheds light on a more fundamental problem. The variable levels of scrutiny that the ECtHR applies pursuant to the doctrine are not well suited to fair and equitable treatment and arbitrary or discriminatory measures claims because the ECtHR's task is not analogous to the task properly performed by investment tribunals when they decide those claims. In a given case, the ECtHR usually determines whether a particular limitation of a fundamental human right is permissible in light of other considerations, such as the protection of morals. Investment tribunals, by contrast, are tasked with deciding whether a particular governmental action is fair, equitable, arbitrary, or discriminatory under the particular circumstances. While the goal of a measure, for example, national security, may be relevant in determining what is fair and equitable in a specific case, that question is quite different from whether a particular objective justifies the infringement of a human right or, conversely, whether the need to protect a human right justifies the infringement of a state's right to legislate in a particular instance.

To make yet another comparison, the ECtHR's task is similar to the task performed by U.S. courts when they review constitutional claims. In doing so, they too utilize tiers of scrutiny. Based largely on the constitutional right at issue, a U.S. court will apply rational basis review, intermediate scrutiny, or strict scrutiny to allegedly unconstitutional legislative acts.²⁹⁷ The tiers of scrutiny are appropriate in that context, as they are in the ECtHR, because the court's task is to balance the government's objective and the individual's rights to determine which must give way. U.S. courts do not utilize a tiered analytical framework for APA claims, however, because the court's task in adjudicating those claims is very different. It is a more basic, but nonetheless important, review of whether agency action adheres to existing law. In general, *constitutional review* examines whether legislative acts are consistent with the supreme law of the land, while *administrative review* examines whether the actions of public actors are consistent with applicable law.²⁹⁸ The former necessarily involves scrutiny of the legislature's

297. The U.S. Supreme Court introduced the three levels of judicial scrutiny in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

298. See Alter, *supra* note 249, at 39; see also Perritt, *supra* note 250, at 40. In an expanded version of their piece, Burke-White and von Staden briefly consider U.S. constitutional and administrative judicial review and conclude that both apply standards of review parallel to standards applied in international public law adjudication. William 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, 314–19 (2010). With respect to U.S. administrative judicial review, the authors suggest that *Chevron* deference is the operative standard and conclude that it “operates similarly to the margin of appreciation used by the ECtHR.” *Id.* at 317–18. As explained above, U.S. courts apply *Chevron* deference to agency interpretations of ambiguous statutory provisions the agency is charged with administering—it is not afforded when a statute is clear, as no deference is necessary. See *supra* text accompanying notes 56–66. It is a “highly deferential” standard under which an agency's interpretation need only be “permissible.” *Chevron U.S.A., Inc. v. Natural Res. Def.*

justification for a law because the question presented is whether the law must be nullified, but the latter does not because the law itself is not under review.²⁹⁹ When an administrative act is found to be unlawful, the act is usually set aside and the matter is remanded to the agency, which gives it an opportunity to correct its action.³⁰⁰

The following Part examines the analogy between U.S. administrative law and investment arbitration in greater depth. For present purposes, however, it is sufficient to state that investment arbitration is not analogous to constitutional review. While BITs are treaties and do not generally prohibit arbitration tribunals from passing on the validity of national legislation, as *AES Summit* troublingly illustrates, they cannot be said to delegate constitutional-review authority to those tribunals. A state's intent to delegate such authority is arguably recognizable first and foremost from a grant of jurisdiction to nullify laws.³⁰¹ BITs do not expressly grant investment arbitration tribunals that authority, and such drastic power cannot be presumed from silence as to the remedies that may be granted, which is common in BITs. The potential incorporation of a constitutional law doctrine into investment arbitration is thus problematic, as it could suggest that tribunals should scrutinize host-state laws that are alleged to infringe BIT standards as if they had the power to nullify the laws, or at least to require that host states do so. That possibility is all the more troubling in light of the most significant problem identified in the comparative analysis of *INGAA II* and *AES Summit*, namely, that investment arbitration does not presently contain any

Council, Inc., 467 U.S. 837, 843 (1984) (permissible); *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011) (highly deferential); *see also Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712–13 (2011) (explaining that it does not matter under *Chevron* if an agency's interpretation has been inconsistent over time, came about long after the relevant statute was enacted, or was motivated by litigation). Whether understood as an iteration of the arbitrary and capricious standard or as a distinct standard, the deference afforded under *Chevron* is statically very broad and does not vary according to factors similar to those considered under the margin of appreciation doctrine. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 117 (1st Cir. 2009) (conceptualizing the standards as distinct); *supra* note 64 (explaining that the Supreme Court undertook its review in *Chevron* pursuant to a Clean Air Act judicial review provision that prescribes its own arbitrary and capricious standard of review). Under *Chevron*, for example, a U.S. court may not require a "compelling justification" from the government under any circumstances, while the ECtHR may require such a justification under the margin of appreciation doctrine. *See infra* note 303. Accordingly, I disagree with Burke-White and von Staden that *Chevron* deference operates similarly to the margin of appreciation doctrine applied by the ECtHR.

299. Alter, *supra* note 249, at 39.

300. *Id.* at 47.

301. *Id.* at 49. The power to nullify legislation is regarded as a *sine qua non* of constitutional review in the United States, but that view is not universally shared throughout the world. *See Sweet, supra* note 19, at 2769–71 (contrasting U.S. and European constitutional review, and stating that, "[t]echnically, the task of [a] reviewing court [undertaking European constitutional review] is to answer the constitutional question posed—for example, is a provision of the code unconstitutional?—not to try or dispose of litigation [as in U.S. constitutional review]").

mechanism to circumscribe the reviewability or the scope of review of host-state legislative acts.³⁰²

Neither the standards themselves—which are more akin to administrative law standards than to constitutional law standards—nor the use of arbitration—which is flexible, prioritizes finality over correctness, and is oriented toward monetary claims—suggests that states intended a “constitutionalization” of their BITs.³⁰³ The fact that investment arbitration is procedurally quite similar to traditional commercial arbitration, which is poles apart from constitutional judicial review, further supports that conclusion. Accordingly, constitutional doctrines must be considered with extreme caution, if at all, as a source of guidance for international investment tribunals.

IV. A CLOSER LOOK AT APA REVIEW AS A SOURCE OF GUIDANCE FOR INVESTMENT ARBITRATION TRIBUNALS

Thus far, it has been established that APA review and investment treaty arbitration are similar in a number of respects, and in particular that the APA’s arbitrary and capricious standard and the treaty-based fair and equitable treatment and arbitrary or discriminatory measures standards can serve

302. See discussion *supra* Part II.C.

303. Alter, *supra* note 249, at 50. Yet another problem with the margin of appreciation doctrine in the international investment context is that it would give tribunals considerable discretion to determine the relevance and weight of the three factors, which could exacerbate the problem of inconsistency in investment arbitration awards. Burke-White and von Staden suggest that the doctrine would significantly constrain tribunals’ discretion. Burke-White & von Staden, *supra* note 11, at 706. However, the ECtHR’s jurisprudence illustrates that the calculation of the margin in a particular case involves substantial discretion and can be outcome determinative. See Hutchinson, *supra* note 271, at 641 (criticizing the ECtHR for applying the doctrine inconsistently). Two recently decided discrimination cases illustrate both points. In *Kiyutin v. Russia*, a case involving alleged discrimination on the basis of HIV-positive status, the ECtHR found that both the right at issue and the existence of a consensus (that HIV-positive status is not a legitimate basis for denying residency to an alien) weighed in favor of a narrow margin of appreciation and consequently required Russia to demonstrate a “compelling justification” for its measure. *Kiyutin v. Russia*, App. No. 2700/10, ¶¶ 63–65 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103904>. In *Andrle v. Czech Republic*, by contrast, a case involving alleged sex-based discrimination against a male, the ECtHR found that the right at issue weighed in favor of a narrow margin but that the nature of the measure (a “general measure of economic or social strategy” that was intended to compensate women for the effects of past discrimination) weighed in favor of a wide margin and inexplicably afforded a wide margin overall. *Andrle v. Czech Republic*, App. No. 6268/08, ¶¶ 49–60 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103548>. The ECtHR did not consider all three of the factors in either case, did not consider the same factors in the two cases, and failed to explain its reasons for excluding the factors it excluded or its balancing rationale. Further, the margin afforded had a significant, if not determinative, impact on the outcome of each case. Russia was placed at a significant disadvantage once it was required to show a “compelling justification,” while the Czech Republic was placed at a significant advantage once it was granted a wide margin of appreciation. Ultimately, Russia lost and the Czech Republic won. See *Andrle*, App. No. 6268/08, ¶ 49; *Kiyutin*, App. No. 2700/10, ¶ 65.

similar functions when governmental decisions of a regulatory nature are at issue. It has further been established that investment arbitration is more akin to administrative review than to constitutional review. Accordingly, it is appropriate at this juncture to look more closely at the analogy between APA review and investment arbitration in order to determine the extent to which the former is an appropriate source of guidance for the latter. The systems are of course quite different, most obviously because APA review operates in a national context, while investment arbitration operates in an international one.

The arbitrary and capricious standard is statutory, but its now well-established interpretation has been shaped by three primary relational considerations, namely, that agencies possess expertise that courts do not, that courts should not unduly disrupt agency functioning, and that agencies have democratic legitimacy to make certain decisions that courts lack because agencies are part of the politically accountable executive branch.³⁰⁴ This Part examines whether, and if so to what extent, those relational considerations pertain to investment arbitration and support a similar approach.

A. Expertise

Administrative agencies are hubs of expertise and routinely make a number of scientific and technical judgments in the course of performing their functions.³⁰⁵ In U.S. administrative law, one context in which the expertise justification plays a significant role is the statutory and regulatory interpretation context. In *Chevron*, for instance, the Supreme Court deferred to the EPA's interpretation of the statutory term "stationary source" in part due to the agency's expertise in air-pollution matters.³⁰⁶ That justification probably does not support deference to host states' interpretations of treaty terms such as fair, equitable, arbitrary, or discriminatory because no scientific or technical expertise is needed to interpret those terms. It may well, however, justify deference to host-state regulatory interpretations of some host-state laws and to other scientific or technical judgments made by regulatory host-state entities, such as those made in the course of licensing and permitting decisions. Such judgments may be challenged in investment arbitrations via fair and equitable treatment and arbitrary or discriminatory measures claims. For example, in the pending *Pac Rim Cayman, LLC v. El Salvador* dispute, the parties' underlying disagreement concerns the requirements for a mining-exploitation concession under El Salvadoran

304. See *supra* notes 37–39 and accompanying text; see also Croley & Jackson, *supra* note 19, at 206–13 (discussing the relevance of the considerations in the very different context of WTO disputes).

305. See Croley & Jackson, *supra* note 19, at 206–07 (“[T]echnical expertise is the *raison d’être* of agencies; by focusing on a particular regulatory field, or sector of the economy, agencies can do what Congress lacks the time and other institutional resources to do.”).

306. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 839, 865 (1984); see also *supra* notes 56–66 and accompanying text.

mining law.³⁰⁷ That disagreement is the basis for Pac Rim's claims, among others, that El Salvador acted in an arbitrary, discriminatory, unfair, and inequitable manner when it failed to act on Pac Rim's applications for a mining-exploitation concession and related environmental permits.³⁰⁸

Claims like those presented in *Pac Rim* may raise a number of issues that implicate the expertise of a regulatory entity. Because investment tribunals, like U.S. courts, lack that expertise, deference to the relevant host-state entity's judgments on those matters is warranted. In APA cases, U.S. courts often include statements in their standards of review to the effect that, "when [an agency's] orders involve complex scientific or technical questions . . . we are particularly reluctant to interfere with the agency's reasoned judgments."³⁰⁹ Such statements clarify that one limit of the arbitrary and capricious standard is that the court may not substitute its judgment on scientific and technical matters for the regulatory entity's judgment. A similar statement in investment arbitration awards would serve the analogous, useful purpose of clarifying that the tribunal's role in deciding fair and equitable treatment and arbitrary or discriminatory measures claims does not extend to the second-guessing of scientific or technical judgments made by a regulatory host-state entity.

The importance of the expertise factor in U.S. administrative law underscores that the action under review in APA cases is always administrative, not legislative. It is the filling in of any gaps left by Congress that courts evaluate under the APA's arbitrary and capricious standard, not the broad policy lines drawn by Congress itself. As mentioned above, legislation is outside the realm of APA review.³¹⁰ Because investment treaty arbitration does not currently contain a similar limitation, it is important to state that the expertise factor is relevant only to investment claims involving the actions of regulatory or administrative host-state entities. U.S. courts do not consider whether Congress has expertise in a given area when they decide constitutional claims challenging federal legislation, and it is not suggested here that arbitration tribunals should consider whether host-state legislatures possess particular expertise when they decide investment treaty claims based on legislation.

B. Avoidance of Undue Interference in Agency Functioning

The limitations on administrative review imposed by the APA are also intended "to protect agencies from undue interference with their lawful discretion, and to avoid judicial entanglement in abstract policy

307. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, ¶¶ 61–64 (Aug. 2, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1652_En&caseId=C661.

308. *Id.* ¶ 8.

309. *INGAA II*, 617 F.3d 504, 508 (D.C. Cir. 2010) (citations omitted).

310. *See supra* notes 249–252 and accompanying text.

disagreements.”³¹¹ The undue-interference justification is related to, but separate from, the accountability justification discussed below and reflects the recognition that unbounded judicial review could grind agency functioning to a halt. Undue interference may occur in a particular case if a court impermissibly meddles in a decision that is within an agency’s discretion, but it may also occur as a result of multiple inconsistent judgments.³¹² Again, the *Chevron* case is illustrative. The EPA’s ability to administer the Clean Air Act Amendments of 1977 could have been severely disrupted if some courts had said that “stationary source” was a plant-wide term and others had said that it referred to individual smokestacks.³¹³ In the United States, federal district courts are bound only by the judgments of the federal appellate court for their circuit and the Supreme Court, and the federal appellate courts are bound only by their own judgments and those of the Supreme Court. Thus, inconsistent interpretations can pose considerable problems for federal agencies absent Supreme Court review, which is discretionary and very rare. Deferring to an agency’s judgment on certain matters is one way to guard against undue interference because it leaves the resolution of those matters, for example, abstract policy disagreements, to one agency rather than to a number of different courts.³¹⁴

The multiple-judgment problem does not exist in investment arbitration in the same way as it does in U.S. administrative law because investment awards are not limited to one geographic region within a host state. The potential for undue interference in particular policy decisions within a host state’s discretion is, however, a concern in investment arbitration. Because the standards are imprecise and there are few institutional limitations on the ability of investors to bring and pursue claims, such as agency action, exhaustion, standing, ripeness, or finality requirements, investment tribunals arguably run a greater risk of unduly interfering in government functioning than U.S. courts run when they conduct APA review. In *AES Summit*, for instance, it is a concern from a public law perspective that the tribunal effectively reviewed whether Hungary’s decision to pass legislation was fair to the claimant, something that is not possible under the APA.³¹⁵ Had the tribunal asked not merely whether Hungary’s means for pursuing its “rational” luxury-profit correction policy were reasonably correlated to that policy, but whether they were the best possible means, the review would have been even more problematic.³¹⁶ That question is an abstract policy one, and an

311. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62, 66 (2004).

312. See Croley & Jackson, *supra* note 19, at 207.

313. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984).

314. See *id.*

315. AES Summit Generation Ltd. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶¶ 10.3.7–9 (Sept. 23, 2010), 50 I.L.M. 186 (2011).

316. *Id.*

award in favor of AES Summit on those grounds likely would have suggested that Hungary needed to go back to the drawing board and relegislate.³¹⁷

It might be argued that there is less risk of undue interference in investment arbitration than there is in APA review because an adverse decision in the former usually requires only the payment of money, while an adverse decision in the latter often requires the agency to stop or withdraw its action and try again. While this is true, it is notable that BITs are often silent on the type of remedies that may be granted, and it has been argued that investment tribunals have the authority to award nonpecuniary relief.³¹⁸ Further, even if an award is exclusively monetary, it would be a risk for a host state to keep a law or policy in place that has been found to violate a BIT standard, especially if the particular treaty provision is contained in the state's other BITs or is subject to expansion through most favored nation clauses. Doing so could lead to future investment treaty claims and may worsen the state's climate for foreign investment. Thus, even though primary remedies are arguably more significant (and meaningful from a rule-of-law perspective) because they generally require an agency to correct an illegal action or withdraw it altogether,³¹⁹ while secondary remedies require only the payment of compensation to an injured party *ex post*, both have the potential to disrupt government functioning.³²⁰ Notably, the immediate availability of pecuniary remedies in investment arbitration has been criticized as being the opposite of the remedy rules of most systems of domestic administrative law.³²¹ It is believed that states generally do not make such remedies immediately available for administrative law violations due in part to budgetary fears and in part to concerns that doing so would create the wrong incentive, namely money, for private entities to bring lawsuits against the state.³²²

C. Political Accountability

Finally, democratic grounds are another important reason that deference is owed to various agency judgments under U.S. administrative law. Again to use *Chevron* as an example, it was important to the Supreme Court that Congress had delegated to the EPA responsibility for administering the statute at issue.³²³ The democratic justification is straightforward in that context, but it is more complicated in the international context. With respect to WTO disputes, Steven Croley and John Jackson have gone so far as to posit that the justification is irrelevant because the states parties to WTO disputes are

317. *Id.* ¶¶ 10.3.34–.36.

318. Schreuer, *supra* note 118, at 331–32.

319. *See* van Aaken, *supra* note 9, at 724.

320. *See id.* at 730.

321. Gus van Hartin & Martin Loughlin, *Investment Treaty Arbitration As a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 131–33 (2006).

322. *See* van Aaken, *supra* note 9, at 725–30.

323. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

not democratically accountable to the WTO membership as a whole.³²⁴ While there are significant differences between WTO disputes and investor-state disputes, that logic would seem to also suggest that the justification is irrelevant in investment arbitration because host states are not democratically accountable to their opponents or to the other state party to the relevant BIT.

That logic is flawed, however, because it is too narrow. National executive bodies conclude and ratify treaties, just as they pass laws, promulgate regulations, and take administrative actions. They are, at least in theory, accountable to their citizens for those actions, albeit not to foreign investors or to other states. Foreign investors, again at least in theory, have a political remedy in their home state with respect to the BIT at issue in an investment dispute because the investor's state is also a party to the BIT. That state can press for modifications to the BIT or even terminate it. Moreover, foreign investors and their states have other tools at their disposal to punish host states for actions they do not like, such as reducing or eliminating the amount of their investments in the state. Thus, while political accountability is not a factor in investment arbitration in the same way it is in domestic administrative judicial review, it is incorrect to say that accountability, at least generally speaking, is irrelevant in the former. And while some states are more accountable than others due to various factors, such as the structure and stability of their government institutions, investment tribunals cannot take it on themselves to compensate investors for perceived political deficiencies. As the *S.D. Myers* tribunal recognized, some remedies simply must be obtained either through political channels or not at all.³²⁵ The U.S. Supreme Court has echoed a similar sentiment.³²⁶

The political-accountability justification raises another significant issue, however, which is that investment tribunals do not occupy a position analogous to that occupied by U.S. courts. While U.S. courts do not possess executive authority and must be careful not to infringe it, the importance of their judicial role is difficult to overstate. Pursuant to Article III of the U.S. Constitution, they are one of the three branches of the U.S. government and are an indispensable part of the checks and balances system on which it is founded.³²⁷ Perhaps their most important and certainly their most glamorous

324. See Croley & Jackson, *supra* note 19, at 209 (arguing that the accountability justification is not present in the WTO context because the states parties to a WTO dispute are not accountable to the WTO membership at large).

325. *S.D. Myers, Inc. v. Canada*, First Partial Award, ¶ 161 (Nov. 13, 2000), 40 I.L.M. 1408 (2001).

326. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

327. U.S. CONST. art. III. In *Federal Communications Commission v. Fox Television Stations, Inc.*, the Court discussed the legislature's responsibility to specify the boundaries it delegates: "[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances." *Fed. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009). Turning to the judiciary's responsibility, the Court explained that "Congress passed the [APA] to ensure that

task is constitutional judicial review, but they also perform the other three tasks generally performed by courts, namely, administrative judicial review, criminal enforcement, and dispute settlement.³²⁸

Investment tribunals are not a branch of government nor are they courts. The fact that they at times perform what seems very much like administrative review, and on occasion what seems even like constitutional review, is one basis for criticism that investment treaty arbitration lacks legitimacy.³²⁹ A full discussion of that issue is well beyond the scope of this Article, but for present purposes it is sufficient to state that the function performed by investment tribunals should not be regarded as equal to the administrative review function, and certainly not to the constitutional-review function, performed by national courts. Investment arbitration is an alternative to a host state's courts that foreign investors may choose in the event of a dispute with the state, but it is no substitute for judicial review. The word "review," which has been used throughout this Article, is arguably misleading insofar as it suggests that the national courts and investment tribunals perform equivalent functions. While investment arbitration resembles administrative review in a number of significant respects, most notably in its vertical structure and use of imprecise standards that reflect rule-of-law principles, it also differs from it in substantial ways. In addition to the substantial difference between the position occupied by domestic courts and investment tribunals, the use of arbitration rather than adjudication is meaningful and suggests that states may have had a dispute-settlement rather than an administrative-review function in mind when they signed onto the system.³³⁰

The differences between the positions occupied by domestic courts and investment arbitration tribunals weigh in favor of granting even more deference to the judgments of host states in investment arbitration than is afforded to the choices of U.S. agencies in APA review. Further, because the broadest policy lines are drawn at the legislative levels of government and investment arbitration currently lacks a mechanism to prevent the application of

agencies follow constraints even as they exercise their powers," and that "[t]o achieve that end, Congress confined agencies' discretion and subjected their decisions to judicial review." *Id.* at 537.

328. Alter, *supra* note 249, at 37.

329. See MONTT, *supra* note 181, at 125–45; van Hartin & Loughlin, *supra* note 321, at 145–48.

330. See Alter, *supra* note 249, at 37–39 (contrasting dispute adjudication and administrative review functions in international courts). It is well known that efforts to negotiate a multilateral investment agreement and to establish an international organization for investment, similar to the WTO for trade, failed. See Brower, *supra* note 89, at 306–07 (2008). With respect to the choice between arbitration and adjudication for the settlement of international disputes in general, Brower makes the observation that the trend for private parties is toward arbitration, while the trend for states, at least for disputes involving their exercise of sovereign powers and public international law, is toward adjudication. *Id.* at 259–91. Regarding states' reluctance to use adjudication to settle international investment disputes, Brower makes the argument that the disputes are often political in nature and that states may be unwilling to adjudicate them for that reason. *Id.* at 298–308.

administrative law standards to legislative acts, investment tribunals should be at their most deferential when host-state legislation is the subject of investment treaty claims.

Overall, the accountability factor is not present in investment arbitration in the same way that it is present in APA review, but it is relevant and it also weighs in favor of a cautious, deferential approach. Host states are accountable for the treaties they conclude and ratify, and perhaps more importantly for their national laws, regulations, and policies that are likely to be the grounds for investment treaty claims. Additionally, foreign investors have tools they can use to punish host states for actions they do not like. Investment tribunals are not politically accountable and are furthermore not charged with a responsibility comparable to that exercised by U.S. courts.

CONCLUSION

APA review and investment treaty arbitration are far from identical systems. The former is a form of traditional administrative judicial review and is characterized by a number of limitations of a public law nature. The latter is an optional arbitration procedure that many states have chosen to make available to foreign investors and is characterized by flexibility. Criticisms notwithstanding, the rise in the use of investment arbitration is directly attributable to the choices of many states to sign onto the system. As of the date of this Article, there were only forty-six fewer members of ICSID than there are members of the United Nations, and investment arbitration is not limited to ICSID states.³³¹

States' choices are also responsible for many features of the system, including the imprecise standards and lack of many public law safeguards and limitations. It is therefore incumbent on them to try to make any changes they deem necessary through amendments to their BITs or modifications to the relevant arbitration rules, difficult as bringing about those changes may be. Investment tribunals, however, also have a responsibility, which is to interpret the treaty terms "in their context and in light of [the treaty's] object and purpose."³³² While BITs grant protections to foreign investors, it is important that the protections they grant are protections *from* abuses of governmental power. Such protections are quite different from promises conveyed in contracts between two commercial entities that are the subject matter of traditional commercial arbitration. The more completely stated purpose of BITs is to protect foreign investors from abuses of host-state governmental power and to make remedies for such abuses available. At least insofar as the fair and equitable treatment and arbitrary or discrimina-

331. Compare *Member States*, *supra* note 88, with *Growth in United Nations Membership, 1945–Present*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Sept. 30, 2012).

332. VCLT, *supra* note 166, art. 31(1).

tory measures standards are concerned, the protection granted is of an administrative law character.

While investment tribunals thus operate in an administrative law context, they do not perform traditional administrative judicial review, and the two functions should not be regarded as equal. Investment arbitration is an alternative to a host state's courts, but it is not equivalent to judicial review. Nonetheless, investment tribunals are frequently called on to decide claims that resemble domestic administrative law claims. They are arguably at a disadvantage compared to U.S. courts when deciding such claims because the lack of public law constraints in investment arbitration and the uncertain meaning of the treaty standards make their task more difficult. In APA cases, however, the arbitrary and capricious standard goes a long way toward delineating the line between permissible and impermissible review. The interpretation of that standard has been shaped by three relational considerations, which are equally if not more relevant in investment arbitration, namely, that regulatory entities possess expertise that tribunals do not, that tribunals should not unduly interfere in government functioning, and that host states are accountable whereas tribunals are not. Fortunately, the arbitrary and capricious standard has counterparts in investment arbitration that, when correctly interpreted and applied, serve a similar line-drawing function. The fair and equitable treatment and arbitrary or discriminatory measures standards are similarly imprecise and oriented toward the rule of law, permit the same type of claims, and serve a function similar to the arbitrary and capricious standard, as illustrated by *INGAA II* and *AES Summit*. For all of those reasons, conceptualizing and applying the treaty standards as an investment treaty arbitration standard of review may go a long way toward preventing harmful overreaching by investment tribunals and at the same time promoting the development of consistent and better reasoned interpretations. In conclusion, the following standard of review for fair and equitable treatment and arbitrary or discriminatory measures investment treaty claims is proposed:

Our review of fair and equitable treatment and arbitrary or discriminatory measures claims is narrow. The former requires us to ensure that the host state acted in a consistent and transparent manner and that its actions were free from material ambiguity. The latter requires us to confirm that the host state based its decision on relevant factors and not on preference or prejudice. Perfection is not demanded by either standard. We afford the greatest deference to host-state legislative judgments, and substantial deference to host-state regulatory and administrative judgments, particularly when those judgments implicate specialized expertise or the allocation of limited resources. Deference is also owed to a host state's resolution of ambiguities in its own laws, regulations, and policies. We are not empowered to substitute our judgment for that of the host

state. The state is required only to articulate a rational connection between the facts found and the choice made.