The Post-*Chevron* Law of Deference for Investor-State Arbitration

Won L. Kidane*

* Professor of Law, Villanova Law.

INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*,[1] the United States Supreme Court clarified the "law of deference" built "on the foundation laid in Chevron."[2] The American conception of the law of deference, long solidified as the *Chevron*[3] doctrine,[4] has had extraordinary resonance, having been cited in at least 18,000 cases and 22,000 publications over a period of forty years.[5]

The Court's overruling of the two-step *Chevron* analysis for the resolution of statutory ambiguity[6] is the most obvious outcome and is likely to attract the most attention. There is, however, an obscure aspect of the Court's overruling of *Chevron*: the clarification of the concept of deference as a rule of decision, a legal imperative, rather than as a mere standard of review.[7]

---

1 603 U.S. 369 (2024).

2 *See Loper Bright*, 603 U.S. at 398 (citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring)). For clarification, *see infra* Section II.

3 Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

4 Black's Law Dictionary defines "doctrine" as "[a] rule, principle, theory, or tenet of the law; as, the doctrine of merger, the doctrine of relation, etc. Doctrinal interpretation." *Doctrine*, BLACK'S LAW DICTIONARY (2d ed. 2010). Although the Supreme Court in *Loper Bright* makes it clear that there is a "law of deference," it also uses the term "doctrine" to signify the same notion of binding norms. This article likewise uses these terms interchangeably with some caution.

5 *See* Brittany Pemberton & Daniel Pope, *After 'Chevron' Deference, "Respect": 'Loper Bright' and Agency Policymaking*, REUTERS (July 8, 2024), https://www.reuters.com/legal/legalindustry/after-chevron-deference-respect-loper-bright-agency-policymaking-2024-07-08/ [https://perma.cc/2YG8-PQFL] ("First articulated in the Supreme Court's 1984 decision in *Chevron v. Natural Resources Defense Council*, the deference doctrine has been cited in more than 18,000 decisions and analyzed in more than 22,000 academic publications and legal treatises").

6 In *Loper Bright*, the Supreme Court offered a brief and useful summary of the *Chevron* two-step analysis in the following terms:

> Our *Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." If, and only if, congressional intent is "clear," that is the end of the inquiry. But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute."

Loper Bright, 603 U.S. at 379-80 (internal citations omitted).

7 A rule of decision tells whether to defer, while a standard of review determines to what extent. Considering standard of review as "a methodological devise," Lukasz Gruszczynski and Wouter Werner note:

> In the international context, standard of review can be defined as "the nature and intensity of review by [an international] court or tribunal of decisions [or other actions that involve some form of prior determination] taken by governmental authority." Standard of review therefore determines the extent of discretionary powers enjoyed by national authorities in making certain decisions, and affects the allocation of power between national and international levels.

LUKASZ GRUSZCZYNSKI & WOUTER WERNER, DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS 3 (2014) (citing Jan Bohanes & Nicolas Lockhart, *Standard of Review in WTO Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 379 (Daniel Bethlehem et al. eds., 2009)).

This article argues that conceiving of the doctrine of deference as a standard of review[8], rather than a legal command, will help reduce the worrying levels of inconsistency and incoherence in investor-state dispute settlement (ISDS).[9] The article seeks to identify the source of the problem in the application and/or omission of the law of deference in ISDS jurisprudence and clarify the concept by comparative reference to the most contemporary American law of deference.

Reasoning by interdisciplinary analogy is both common[10] and respectable in ISDS jurisprudence.[11] As such, this article does not endeavor to justify the use of interdisciplinary analogical reasoning so much as it seeks to contribute to the conceptual clarity of the ISDS law of deference by reference to the evolution and contemporary expression of the American law of deference.

ISDS tribunals regularly decide matters of public importance under a variety of international treaties and domestic laws and often exercise normative judgment of legislative, executive, and judicial choices of sovereign states.[12] They frequently employ the law of deference; however, its source, meaning and application remain despairingly unexplained and unharmonized.[13]

---

8 *See, e.g*., Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review Through Comparative Public Law* 26 (Soc'y of Int'l Econ. L., Working Paper No. 2012/33, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095334 [https://perma.cc/4UUM-A7F7] ("[A]rbitral tribunals should draw on a broader comparative public law analysis to further concretize the standard as determined under public international law and analyze in a comparative fashion the standard of review other domestic and international courts use under similar circumstances and similar standards of review").

9 For a brief appraisal of the structure of ISDS and concerns of jurisprudential inconsistency and incoherence, *see infra* Section IV.

10 *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 51 (2013) ("As the Vienna Convention rules often provide little help in resolving interpretive difficulties, investment tribunals routinely draw analogies with and from other legal disciplines."). Roberts cites examples including *S.D. Myers, Inc. v. Canada*, First Partial Award, ¶¶ 243-51 (UNCITRAL Nov. 13, 2000); *Methanex Corp. v. United States*, Final Award on Jurisdiction and Merits, pt. IV, ch. B, ¶¶ 29-35 (UNCITRAL Aug. 3, 2005) and *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 144 (Oct. 11, 2002), 42 ILM 85 (2003).

11 *See* Roberts, *supra* note 10, at 53 ("[T]he use of analogies in the field's early cases, as well as in contemporary cases involving novel issues, plays an important role in shaping the nature of the field and its emerging case law."). Among the writings that she relies on for theoretical clarity of reasoning by analogy are Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993), and Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 933 (1996).

12 *See* Schill, *supra* note 8, at 2 ("Investment treaties not only empower foreign investors by granting them protection against host state conduct independent of domestic law and domestic courts; they also grant considerable powers to arbitral tribunals to review government conduct, including central public policy decisions, under broadly formulated standards of treatment."). Schill cites several cases including *CMS Gas Transmission Co v, Argentine Republic*, ICSID Case No. ARB/01/8, Award, (May 12, 2005); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) [hereinafter *LG&E*]; and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2004).

13 Schill accurately characterizes the arbitral tribunals' use of the doctrine of deference as a "mantra." He writes:

For example, applying the doctrine of deference in *Lemire v. Ukraine*[14], the ISDS tribunal administered by the International Center for the Settlement of Investment Disputes (ICSID)[15] offered what could be considered a classic expression of deference:

The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal's sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. *It must be proven that the State organ acted in an arbitrary or capricious way.*[16]

Another high-profile tribunal composed of V.V. ("Johnny") Veeder (presiding), Gabrielle Koffman-Kohlor and Brigitte Stern has unanimously concluded that "[a] State can thus be mistaken without being unreasonable."[17]

Other tribunals have, however, failed to appreciate the doctrine of deference even when the governing law that they must apply clearly called for it—creating a significant gap in their legal analysis and sometimes leading to empirically indefensible results such as the finding of arbitrariness in the aggregation of otherwise individually valid state measures that the doctrine of deference could have cured.[18]

> Investment treaty tribunals do not ignore that the standard of review in relation to host state conduct is an important concern for understanding their role vis-à-vis states. In fact, a review of arbitral jurisprudence suggests that the concept they use to fashion the standard of review is deference. Yet, the term itself is not used in a uniform fashion and often repeated in a mantra-like fashion (A.). Furthermore, arbitral tribunals do not always agree on what degree of deference is appropriate under which circumstances (B.). This suggests that there is continued uncertainty as to conceptual foundations of deference as the standard of review in investment treaty arbitrations.

Schill, *supra* note 8, at 5. Although Schill's identification of the problem is accurate and useful, this article conceptualizes the issues differently and does not follow "deference" as a standard of review analytical framework. *See infra* Sections III-V.

14 Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010).

15 The International Center for the Settlement of Investment Disputes (ICSID) was established by the Convention for the Settlement of Investment Disputes. It is the principal world bank-affiliated body that administers ISDS cases. Comprehensive information about ICSID and the published cases are available at https://icsid.worldbank.org/.

16 *Lemire*, *supra* note 14, ¶ 283 (emphasis added). The tribunal adds:

> A regulatory organ charged with the attribution of licences on a competitive basis plainly violates essential notions of fairness if it refuses to consider the information provided by a qualified applicant, or if it engages in favouritism. And the State itself breaches its obligations under the treaty if it exercises undue influence over the decision making of regulatory bodies.

17 Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Award, ¶ 180 (Nov. 25, 2015) (emphasis added).

18 Proving the absence of something requires more explanation than a simple quote or a cite. This proposition is explained in Section IV by reference to *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), and *Metalclad Corp v. The United Mexican States*, ICSID Case No. ARB/(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 209.

As discussed in Section IV, to decide whether there has been a treaty violation,[19] tribunals must not only examine whether the concerned state action is materially wrong as a matter of the state's own law but also determine whether the said action was arbitrary and capricious. As further explained in Section IV, the tribunal's decision on the state's interpretation of its treaty obligation is analogous to the *Chevron* deference question of deciding statutory ambiguity. However, the question of whether the state's interpretation and application of its own laws is materially wrong and whether that wrongfulness rises to the level of a treaty violation is analogous to *Loper Bright*'s decision on whether the agency's action is arbitrary or capricious.[20]

In overruling the *Chevron* doctrine of deference, the Supreme Court held that "*Chevron* turns the statutory scheme for judicial review of agency action upside down"[21] and reasoned that "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[22]

Resolving ambiguities in legal rules constitutes a considerable portion of the duties of courts of law and arbitral tribunals across the world. In interpreting treaties, ISDS arbitral tribunals often borrow legal doctrines and canons of statutory interpretation from domestic as well as international court jurisprudence.[23] Reputable ISDS scholarship has highlighted

---

19 The discussion of the substantive rule in Section IV is limited to the most frequently invoked treaty principles of fair and equitable treatment (FET) and expropriation.

20 This analogy is explained further in Section IV.

21 *Loper Bright*, 603 U.S. at 399.

22 *Id.* at 400-01. The Court further stated:

> The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute"…*Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day— is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.

Id. (quoting *Chevron*, 467 U.S. at 843, n. 9).

23 This practice has grounding in the sources of international law enshrined in Article 38 of the Statute of the International Court of Justice. One of these sources is "general principles of law recognized by civilized nations." Statute of the International Court of Justice, art. 38, Apr. 18, 1946 (hereinafter ICJ Statute). This means tribunals adjudicating controversies under international law, as ISDS tribunals often do, use these principles as sources of law. This is consistent with the treaty interpretation rule contained in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which authorizes the decisionmaker to take into account "any relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331. Anthea Roberts, however, writes:

> Article 31(3)(c) of the Vienna Convention requires interpreters to take into account the subsequent agreements and practice of the treaty parties on interpretation along with "any relevant rules of international law applicable in the relations between the parties."

domestic and global administrative law analogies suggesting, for example, that an ISDS tribunal "is an administrative review agency because, but for its establishment in the international sphere, it would be performing a role similar to that of a semi-autonomous domestic tribunal charged with resolving regulatory disputes."[24]

Since these ISDS tribunals typically resolve disputes under investment treaties or selected domestic laws of obligations and operate outside any hierarchical legal system with binding precedence, they justify their doctrinal borrowing on an *ad hoc* basis. The doctrine of deference in ISDS cases has been viewed as a standard of review or a tool of persuasion, but confusion about its source, nature, content, and application continues to ail the system.[25]

Consistent with the oft-repeated saying that jurisprudence is the United States' largest export, the Supreme Court's overruling of *Chevron* will undoubtedly be a subject of profound curiosity in the corridors of judicial, arbitral, and academic powers around the world. ISDS tribunals, statistically

---

> This last provision encourages "systemic integration" as the treaty parties are assumed to have incorporated customary international law and general principles of law for all questions that the treaty does not itself resolve (such as rules on state responsibility). But this is complicated by, among other things, vague rules governing *lex specialis* and the fact that when investment treaties and general international law overlap, it is unclear to what extent the former codifies, ousts, or exists alongside the latter. It is also problematic when general international law rules exist to govern *interstate* relationships, but it is not clear whether and, if so, how they might apply to *investor-state* relations.

Roberts, *supra* note 10, at 51 (citations omitted).

24 Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 149 (2006). Harten & Loughlin further note:

> Investment arbitration is best analogized to domestic administrative law. In domestic administrative law, the primary subject of adjudicative review is executive government. In response to an individual claim, the courts may review sovereign acts of executive government to determine whether they were lawful and, if not, to adopt an appropriate remedy. In investment arbitration, by contrast, the main subject of adjudicative review is not executive government but the state as a whole. The international principle of the unity of the state establishes state responsibility for acts of its constituent elements, regardless of how public authority is allocated under domestic public law. In effect, the state is equated to the executive branch in domestic administrative law, and is subjected to review by an international tribunal constituted as part of a bargain between states.

Id. at 146.

25 Whether ISDS is a system or merely a framework is a subject of controversy. *See, e.g*., David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513, 517 (2009) ("ICSID can be schizophrenic in this way—on the one hand, imagining ICSID as a framework calls for a concentrated focus on the particular dispute, while at the same time, imagining ICSID as a system represents an attempt to rearrange all of the free standing arbitrations as though they were part of a court system. This situation can lead to great surprise and frustration when the realization hits home that patterns sometimes present are more coincidental than planned. The question of whether there is a system present depends on whether the questions shared by the various tribunals are identical, or perhaps nearly so. Certainly, ICSID tribunals share the procedural and jurisdictional limitations of the ICSID convention, but they do not necessarily address the same identical substantive questions since usually different concessions or BITs are involved. However, in the case of NAFTA Chapter 11 arbitration, for example, the tribunals are all part of a de facto system in that they all share the substantive text.").

composed primarily of Western-educated jurists,[26] will attempt to understand why *Chevron* was overruled and how that will impact international judicial and arbitral decision making.

Loper Bright demonstrates the complexity of the law of deference even in an advanced domestic legal system with a clearly delineated hierarchy of laws, separation of powers, and ascertainable and directly applicable statutory framework. In ISDS cases, the tribunal's task is often not limited to interpreting a defined corpus of statutory framework under clearly allocated decisional powers with a system of precedent. Its tasks include ascertaining the applicable rule of law from a wide variety of international and domestic sources, defining their hierarchy on an ad hoc basis, identifying actions and omissions of domestic institutions, understanding their domestic statutory functions and their decision-making processes, determining facts, and finally, deciding the degree of deference that it should accord to the decisions of these domestic actors without the benefit of binding precedence.[27]

For example, an ISDS tribunal may be asked to defer to a prosecutor's decision to initiate criminal charges for tax evasion against an international investor whose entire investment collapsed due to criminal investigations and imposition of tax liens on its assets. In such situations, the question of deference arises indirectly when the investor brings a claim (against the state) under the substantive treaty protections, including the denial of fair and equitable treatment and indirect expropriation.[28]

The tribunal in the above example could face two problems. The first is jurisdictional. Certain treaties bar the investor from suing the state if the investor "implemented" the investment through illegal means.[29] The tribunal must then determine whether the investment was "implemented" through illegality, such as the commission of misrepresentation, fraud or even crimes. If the local prosecutorial authorities had already determined that a crime had been committed and initiated the criminal process, and the criminal process causes the investment to collapse before the local courts

26 In the studies that this author has conducted, of the eighty-eight arbitrators who decided all of the published ICSID administered ISDS cases involving African states over a period of sixty years, only eight arbitrators were non-Western, and even those eight were trained in the Western legal traditions. *See* WON L. KIDANE, AFRICA'S INTERNATIONAL INVESTMENT LAW REGIMES 92-93 (Oxford Univ. Press 2024).

27 For details, *see infra* Sections III–IV.

28 ISDS cases are primarily based on bilateral investment treaties which give the investor legal standing to proceed against the state for violations of investment protection principles such as non-expropriation and denial of fair and equitable treatment. These principles are the subject of extensive scholarship. *See, e.g.*, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005); JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES (2010); THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010).

29 *See, e.g.*, Agreement for the Reciprocal Promotion and Protection of Investments, Eth.-Isr., art. 1(1), Nov. 26, 2003 (providing protection to investments that are "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made including").

have had a chance to determine guilt, should the ISDS tribunal defer to the judgment of the local prosecutors on their determination of probable cause to prosecute in the first place? What about the local courts' finding of guilt or innocence? If the tribunal defers to the prosecutors' decision to prosecute, it must, under the treaty, dismiss the case for lack of jurisdiction. If the tribunal does not defer and instead wishes to examine the evidence *de novo*, it must hold an evidentiary hearing and decide for themselves whether, in its view, the investment was "implemented" through the commission of crimes.[30]

The second relates to the merits. Assuming that the tribunal exercises discretion, should it defer to the prosecutors' decision to initiate the criminal proceedings, or must it examine the evidence to see if the tribunal itself is independently satisfied that there was probable cause?[31] In the second instance, as explained in Section IV, the determination of whether there was probable cause relates to the question of whether the state's decision amounted to indirect expropriation or the denial of fair and equitable treatment, which in turn requires the determination of whether the prosecutorial decision was arbitrary and capricious.

This is just an example of the range of arbitral decision-making processes that call for the application of the doctrine of deference. This article attempts to use the profound *Chevron-Loper Bright* jurisprudence to develop an international analytical framework for consideration in ISDS cases. It seeks to bring clarity to two clusters of issues: the legal source of the doctrine, and its content and application.

In the *Chevron* context, deference is a doctrine that describes how courts must resolve ambiguities in the applicable statutory law. Yet, *Loper Bright* makes clear that this form of deference is not a tool of statutory interpretation but rather a legal command. The Court explained that statutory interpretation must reflect the court's best judgment after applying all relevant canons. In its own words, "[i]t therefore makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible."[32] The content of the doctrine has made this seismic shift after forty years of application and scrutiny. Although the new *Loper Bright* analytical framework needs to solidify in future jurisprudence, it seems to suggest a simpler resolution of the age-old question of who decides what and why.

---

30 This in turn raises two issues: whether a crime was committed and whether the word "implemented" relates to the initial means of acquiring the investment or to its implementation during the lifespan of the investment.

31 These fact patterns are based on a real ISDS case that the author has encountered in confidential arbitral proceedings that prohibit publication of the pleadings and awards.

32 *Loper Bright*, 603 U.S. at 400.

The Court's resolution rests primarily on its reading of two provisions of the Administrative Procedure Act (APA)[33] Under Section 706, which governs judicial review of questions of law, the Court disallows judicial deference. By contrast, Section 706(2)(A) limits judicial scrutiny to determining whether agency action is arbitrary or capricious, thereby allowing deference to agency's findings. This distinction is critical: when the applicable legal standard is the finding of arbitrariness, *Loper Bright* has no effect on *Chevron*.

This article argues that *Loper Bright*'s overruling of *Chevron* deference should not make any difference in the ISDS law of deference because the rule of decision in ISDS cases such as the denial of fair and equitable treatment and indirect expropriation often call for tribunals to determine whether the state's actions were arbitrary and capricious. ISDS tribunals' review is thus analogous to APA Section 706(2)(A) rather than the operative introductory paragraph of Section 706 on judicial review that *Chevron* deals with.

Section II of this article details the evolution of the American law of deference and what emerged out of *Loper Bright*'s overruling of *Chevron*. Section III introduces ISDS and the substantive rules of decision and procedures that call for the application of the doctrine of deference. Section IV profiles ISDS cases that have inconsistently applied the doctrine of deference and reviews the ISDS literature. Section V sets forth the *Loper Bright* analytical framework and shows its utility for ISDS jurisprudence. Section VI offers a summary of conclusions.

---

33 5 U.S.C. § 706.

> To the extent necessary to decision and when presented, the reviewing court ***shall decide all relevant questions of law***, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) ***hold unlawful and set aside agency action, findings, and conclusions found to be—***
>
> ***(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law***;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) ***unsupported by substantial evidence*** in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

THE AMERICAN LAW OF DEFERENCE

In their 2019 book *Deference: The Legal Concept and the Legal Practice*, leading authorities in American administrative law Gary Lawson and Guy I. Seidman characterize "deference" as "perhaps the most important concept and practice in law" and acknowledge that it is also "one of the most underanalyzed and undertheorized legal concepts and practices."[34] And that is because "[i]t lies at the core of every system of precedent, appellate review, federalism and separation of powers, all of which center on how one actor should deal with previous decisions."[35]

The same could be said about the concept of deference in ISDS because ISDS tribunals are invariably required to "deal with previous decisions" of the various organs and instrumentalities of the respondent state. As a matter of fact, all they do is "deal with" the administrative, legislative, or judicial decisions of sovereign states of one kind or the other without any mandatory rule or jurisprudential guidance on what level of deference to accord those decisions in the determination of whether the respondent state has violated its treaty obligations.[36]

This section surveys various definitions of deference, traces the development of the law in the pre-*Chevron*, *Chevron* and post-*Chevron* era, and outlines the analytical template that emerged out of this evolution.

---

34 GARY LAWSON & GUY I. SEIDMAN, DEFERENCE: THE LEGAL CONCEPT AND THE LEGAL PRACTICE (Oxford Univ. Press, 2019). The abstract of the book captures the essence of their useful work as follows:

> Deference is perhaps the most important concept and practice in law. It lies at the core of every system of precedent, appellate review, federalism, and separation of powers, all of which center on how one actor should deal with previous decisions. Oddly enough, deference is also one of the most underanalyzed and undertheorized legal concepts and practices, perhaps because its applications are so varied. This book's goal is to provide a definition of and vocabulary for deference that can be used to describe, explain, and/or criticize deference in all of its manifestations in the law, including some manifestations that are not always identified by legal actors as instances of deference, such as practices of precedent in which institutional actors consider their own prior decisions. This book undertakes a descriptive and conceptual, not normative or critical, analysis of deference. It leaves to others the question whether deference, in any particular context, is "legitimate" or "bad," and it does not seek to prescribe whether and how any legal system should apply deference in any specific circumstance or to critique any particular deference doctrines. Rather, it hopes to bring the very concept of deference to the forefront of legal discussion; to identify, catalogue, and analyze at least the chief among its many legal applications; to set forth the many and varied rationales that can be and have been offered in support of (some species of) deference in different legal contexts; and thereby to provide a vocabulary and conceptual framework that can be employed in future projects, whether those projects are descriptive or prescriptive. While this book draws its material almost entirely from American law and practice, we hope in future work, perhaps with the help of other scholars, to expand the study to include the law and practice in other countries and particularly in non-common-law legal systems.

35 *See id.*

36 For the nature of these decisions, *see infra* Section IV.

Definition

The general essence of the term "deference" often contains the idea of "yielding" or "giving some consideration" to the judgment of one who had previously decided the same matter.[37]

The Black's Law Dictionary definition of deference is brief: "1. Conduct showing respect for somebody or something; courteous or complaisant regard for another. 2. A polite and respectful attitude or approach, esp. toward an important person or venerable institution whose action, proposal, opinion, or judgement should be presumptively accepted."[38]

The Bouvier Law Dictionary definition of deference is more comprehensive.[39] Lawson and Seidman analyze these definitions in great detail and offer their own definition as "[t]he giving by a legal actor of some measure of consideration or weight to the decision of another actor in exercising the deferring actor's function."[40] They add that "[d]eference can be mandatory, because it is commanded by positive law, or discretionary, and it can be justified in particular settings for reasons of legitimacy

37 *See* LAWSON & SEIDMAN, *supra* note 34, at 73.

38 *Deference*, BLACK'S LAW DICTIONARY (12th ed. 2024).

39 *See* LAWSON & SEIDMAN, *supra* note 34, at 83-84 (quoting THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 317 (2011)).

> To yield to someone or something else, at least for a time. Deference is an act of restraint by a person or entity with the authority or power to act but who chooses not to do so in order to abide the result of another's action, or at least to await the completion of another's action to determine whether to act. Deference in law is essential to the functioning of the legal system, in which a single legal determination depends on a division of labor, so that a legal official tasked with one component of a decision must defer to other officials in their respective tasks. The allure of deference in allowing the official to evade responsibility for a decision or action committed to the office, however, endangers the legal system at least as much as the risk of failures of deference. The proper limit of deference may be the same as the proper scope of discretion, but deference, inherently, must fall within the scope of discretion: an official may only defer when the official has the power to act. As such, deference does not ultimately foreclose the possibility of action, as the deferring official retains an obligation to act if the official to which deference is given fails to act or acts unlawfully in some manner. Deference, in general, is appropriate by one official or entity toward another, when the law creating their officers' delegates a particular task or experience to one and not the other. Courts defer to one another in this way, as well as to legislatures and executives, and legislatures and executives defer to one another and to the courts. This is both the essence of separation of powers and the basis of a reasonable division of labor among the creation, execution, and interpretation of law— recognizing that such categories are never perfect. Courts in the United States defer routinely to one another, so that trial courts defer to courts of appeal and supreme courts on matters of the interpretation of law, and appellate courts defer to trial courts on matters of trial discretion, such as the admission or significance of evidence. Judges defer to juries on matters found by the jury as fact, and juries defer to judges on matters of law. In addition, federal courts defer to Congress on matters of legislative authority to the agencies, which are created by legislation, to execute and interpret the legislative matters committed to the agency. Both executives and legislatures defer to courts on constitutional matters and on matters in which the courts have a customary expertise or commitment, such as their own rules.

40 LAWSON & SEIDMAN, *supra* note 34, at 106.

(legitimation deference), accuracy (epistemological deference), cost (economic deference), or communication."[41]

Their definition captures the essence in law well, but what is even more useful is their identification of why one may or must defer to the decisions of another. When deference is commanded by the applicable rule of positive law, the second (or third, or more as the case may be) has no choice but to defer. In that sense, although they do not say this directly, this type of deference is a simple application of a rule of law, not a standard of review. More on this later in Section IV.

Confusion does, however, pervade the concept of discretionary deference. This introduces two problems. The first is the determination of whether deference is mandatory or discretionary in the first place. The answer to this question is not always obvious. In fact, in *Loper Bright*, the Supreme Court gets into this question, albeit indirectly, distinguishing between APA Sections 607 on judicial review and 607(A)(2) on the judicial setting aside of agency action that is found to be arbitrary or capricious.[42] This distinction is key and will be analyzed further in Section II(d).

Definitionally, however, the Lawson-Seidman tentative rendition suggests that when deference is not a command of positive law (such as appellate deference to the jury's verdict in criminal matters),[43] deference requires its own justification, which they classify and discuss in four categories: (1) legitimation, (2) decisional accuracy, (3) decisional economy, and (4) signaling, constituting the bulk of their book's chapter on deference.[44]

---

41 *Id*.

42 *Loper Bright*, 603 U.S. at 391-92.

> In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." §706(2)(A). The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, §706 (emphasis added)— even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

Id. (emphasis added).

43 *See* LAWSON & SEIDMAN, *supra* note 34, at 85-90.

44 *See id*. at 90-106.

Although the discussion that follows the classification does not strictly maintain the separation of categories suggested by the headings, the essence of non-mandatory or discretionary deference is pragmatism. For example, the category of legitimation often incorporates elements of accuracy and cost saving. Once discretion is ascertained (an important step in the analysis), the decision-maker finds justification in these related elements of pragmatism.

The core of their legitimation consideration rests on "structural allocation of power" and "informational advantages."[45] The structural allocation of power obviously goes into the domain of mandatory deference, but their discussion is tied to the informational advantage, which is a critical pragmatic consideration. The example is highly relevant to this article and illuminating.

It concerns a federal court's review of the executive branch's treaty interpretation. Although the court, in the tripartite structure of government, has the final say on what the law means, the executive's determinations on treaty matters deserve a degree of deference because the structure gives the executive informational advantage.[46] In that sense, the structural half of the "legitimation deference" is akin to mandatory deference and the informational advantage half is akin to decisional accuracy and economy.

As such, "legitimation deference" as a category does not contribute to analytical clarity. It may even inject a layer of uncertainty. The same may be said for the fourth category, "signaling,"[47] because in addition to lacking clarity itself, according to the way they formulate it, its purpose is exogenous to deciding the particular controversy that the deferring decision-maker is seized of at the moment. This is evident from the core of their signaling analysis, stated as follows:

A court might defer in order to signal to other actors the court's view of those actors' proper roles. It might signal to a legislature the court's view of its own role, either to encourage or discourage certain kinds of legislation affecting the court. It might signal to other legal actors the court's commitment to a particular approach to decision-making.[48]

As Lawson and Seidman also acknowledge, there is no practical reason why signaling cannot be folded into the "economic deference" genre.[49]

That leaves categories two and three: decisional accuracy and decisional economy. It is important to remember that mandatory deference requires no

45 *See id*. at 91-94.
46 *See id*. at 91-93.
47 *See id*. at 105-106.
48 *Id*. at 106.
49 *Id*.

additional justification once its source is ascertained. Discretionary deference as a function of pragmatism requires justification, and accuracy and economy are the most sensible justifications not only in domestic court proceedings but also in ISDS cases, as will be described in more detail in Section IV.

Lawson and Seidman helpfully fold accuracy into "epistemological deference" and cost-related considerations into "economic deference."[50] The other two categories are either redundant, overlapping, or even confusing. As such, this article will use these two non-mandatory categories of deference with the recognition that they may at times merge in the analysis.

Epistemological deference is broader than economic deference because it concerns the proximity of the initial decision-maker to the matters to be decided as in a trial court hearing the evidence firsthand. It not only looks at the better opportunity to observe but also the process of doing so. Lawson and Seidman put it as:

> *Maybe the other actor is in a better position than is the deferring actor to get the right answer. This could result from the other actor having more knowledge, more expertise or experience, a better perspective from which to glean answers, all of the above, and/ or any other consideration that puts one in a position to make good decisions*.[51]

This conclusion is obvious as far as the determination of facts is concerned, but they raise an interesting question about how federal courts treat state courts' determinations of state law. Applying the same notion of "the other actor having more knowledge, more expertise or experience, a better perspective" to the federal court's review of a state court's determination of its own state laws, it appears that they argue that epistemologically, even in what is considered de novo review of questions

---

50 *See id*. at 107.

51 *See id*. at 95 (emphasis added). They exemplify this point using the Supreme Court's rationale in *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991):

> Those circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district- court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts. In deference to the unchallenged superiority of the district court's factfinding ability, Rule 52(a) commands that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In addition, it is "especially common" for issues involving supervision of litigation to be reviewed for abuse of discretion. Finally, we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."

of law, a measure of deference to the state court's decision may be the route to accuracy.[52]

This is a good analogy to ISDS tribunals' review of state courts' interpretation and application of their own laws in matters involving the foreign investor. One of the key questions that this article addresses is what level of deference tribunals owe the state organs' interpretation of their own laws.

This question is not without difficulty because when the treaty is the only applicable rule of law, the status of state law is uncertain. For jurists who come from legal traditions that consider questions of foreign law as questions of fact that need to be determined as such under specific evidentiary standards (such as expert witnesses), the state courts or administrative tribunals' determinations may be irrelevant as a source of proof. If, however, the question of state law is considered a matter of law or a rule of decision, then it becomes a part of the tribunal's ascertainment of the rule of law and the question of whether it should be deferred to the decisions of state law raises the same underlying questions that this article grapples within the following sections.

The efforts of the field's most learned scholars to define deference often result in circular reasoning, highlighting the inherent complexity of the concept itself. Lawson and Seidman's final definition is "*the giving by a legal actor of some measure of consideration or weight to the decision of another actor in exercising the deferring actor's function.*"[53]

---

52 *See* LAWSON & SEIDMAN, *supra* note 34, at 96-100. They add a useful commentary to this in the following terms:

> A judge's primary obligation is to decide cases in accordance with governing law. The obligation to apply governing law carries with it an obligation to use one's best efforts to determine the governing law that one must apply. Judges thus have an interpretative responsibility to try to get the right answer unless they are told by the Constitution that that responsibility belongs to someone else. Suppose, however, that a judge conscientiously determines that some other actor is better suited than is the judge—by skill, knowledge, temperament, or institutional position— to determine the right answer to a problem. In that circumstance, the judge might well have a legal obligation to defer to the other actor's interpretation, at least to the extent of accepting the other actor's interpretation, unless it is very clearly wrong. Thus, seemingly pragmatic arguments about individual or institutional competence to reach correct constitutional interpretations can translate into legal arguments because of judges' primary legal obligation to determine correctly the applicable law.

Id. at 98-99 (quoting Gary S. Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1278-79 (1996)).

53 *See* LAWSON & SEIDMAN, *supra* note 34, at 106 (emphasis in original). Immediately following this indeterminate and permissive definition that does not on its face acknowledge mandatory deference (folding all deference into "some measure of consideration"), they attempt to rehabilitate the deficiency in the definition with the following post-script:

> We use the term "mandatory deference" to describe giving some measure of con sideration or weight to the decision of another actor when such consideration or weight is commanded by positive law that satisfies an adequate rule of recognition regarded by the deferring actor as authoritative, and we use the term "discretionary deference" to describe consideration or weight given to another's decision by choice. The courts

Deference mandated by law cannot fall under the rubric of "some consideration" because it is outcome determinative. Their definition is complete as far as "discretionary deference" is concerned. Although the classifications are analytically useful, they do not address the most contentious question of the extent of deference that each calls for. "Some consideration" is not useful guidance because the contention usually is how much consideration and why as a matter of law. As such, mandatory deference cannot be merged into discretionary deference in one definition.

The *Chevron* line of jurisprudence that culminated in *Loper Bright* offers authoritative guidance on the law of deference in the United States and may also provide persuasive guidance to ISDS tribunals that struggle with the same types of problems in interpreting and applying investment treaties and investment contracts. The following section profiles the state of the law of deference in historical context.

Pre-Chevron Law of Deference

In *Loper Bright*, building its reasoning to overrule the *Chevron* doctrine from the outset, the Supreme Court reached back to *Marbury v. Madison* and said, "[t]his Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[54] For those who were waiting to hear *Chevron*'s fate, they did not need to read further to know the outcome, although the Court recognized that "exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes."[55]

The Court quickly turned around and said that "[r]espect, though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."[56] Fast forward to the New Deal era,

---

> do not formally distinguish discretionary deference from mandatory deference, and the same rationales that support discretionary deference in any given case might also induce a legal designer to construct a scheme of mandatory deference in such a case, so we do not claim that there is any kind of legal or metaphysical difference between discretionary and mandatory deference. We use two distinct terms simply because of our intuition that a "choice" to follow binding positive law is different in some important way from a choice to yield to another's decision in the absence of legal command.

Id.

54 *Loper Bright*, 603 U.S. at 385 (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)).

55 *Id*. at 385-86 (quoting Edwards' Lessee v. Darby, 25 U.S. 206 (1827)) ("[I]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

56 *Loper Bright*, 603 U.S. at 370 (quoting United States v. Dickson, 40 U.S. 141, 162 (1841)) ("As Justice Story put it, 'in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries,' the court was 'not at liberty to surrender, or to waive it.'").

the Court made what remains the most essential and enduring distinction between deference relating to questions of fact and to questions of law.

[A]s new agencies with new powers proliferated, the Court continued *to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment*. During this period, the Court often treated agency determinations of fact as binding on the courts, provided that there was "evidence to support the findings."[57]

Perhaps the most notable guidance in the pre-*Chevron* and pre-APA period came from *Skidmore v. Swift & Co*,[58] in which the Court endorsed a measure of deference and respect to agency interpretations of law as long as they are "made in pursuance of official duty" and "based upon . . . specialized experience."[59] In one of the most frequently cited passages of the opinion, the Court also said that the measure of deference that the agency's interpretation gets depends on "*the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*"[60]

Another remarkable decision in the pre-*Chevron* era that the Court highlights in its *Loper Bright* decision is *Gray v. Powell*, [61] in which the Court deferred to the agency's determination of the meaning of an important term in a statute because the Court found that Congress had delegated that task to the agency.[62] The key determination in *Gray v. Powell* was that the court may defer to the agency's determination of law if it finds that the agency's determination is "a sensible exercise of judgment."[63] *Loper Bright*

57 *Id.* at 387 (citing St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936) ("When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive."). The *Loper Bright* court further noted:

> Congress could therefore "appoint[] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily."
>
> But the Court did not extend similar deference to agency resolutions of questions of *law*. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function."

Id. (quoting *St. Joseph Stock Yards*, 298 U.S. at 51; United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 544 (1940)).

58 323 U.S. 134 (1944).

59 *Id*. at 139-40.

60 *Id*. at 140 (emphasis added).

61 314 U.S. 402 (1941); *see Loper Bright*, 603 U.S. at 387-90.

62 *See* Gray v. Powell, 314 U.S. at 411.

63 *Id.* at 412-13.

concluded, however, that *Gray v. Powell* had never been consistently followed.[64]

Even more remarkably, in summarizing the state of the law of deference in the pre-APA and pre-*Chevron* era, the *Loper Bright* Court said:

Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule: the traditional understanding that *courts* must "decide all relevant questions of law."[65]

The Role of the Administrative Procedure Act (APA)

Loper Bright sought instruction from and elevated the APA to outcome determinative status on the question of deference. Most notably, it drew a distinction between deference on interpretation of law and deference on the determination of whether the agency's action is arbitrary and capricious. This distinction is key and will be discussed further, but it suffices to note here what exactly the Supreme Court said on this point:

The APA thus codifies for agency cases; an unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it.[66]

What the Court says next is more instructive:

And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, **because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential**. See §706(2)(A) (agency action to be set aside

64 *See Loper Bright*, 603 U.S. at 389-90 (quoting K. DAVIS, ADMINISTRATIVE LAW § 248 (1951) ("The one statement that can be made with confidence about applicability of the doctrine of Gray v. Powell is that sometimes the Supreme Court applies it and sometimes it does not."); *id.* (quoting also Bernard Schwartz, *Gray vs. Powell and the Scope of Review,* 54 MICH. L. REV. 1, 68 (1955)) (an "embarrassingly large number of Supreme Court decisions that do not adhere to the doctrine of *Gray v. Powell*").

65 *Id.* at 390 (citing 5 U.S.C. § 706) ("In a statute designed to 'serve as the fundamental charter of the administrative state,' Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was 'exclusively a judicial function.' But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to 'interpret constitutional and statutory provisions' without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus 'remains the responsibility of the court to decide whether the law means what the agency says.'" (citations omitted)).

66 *Id.* at 391-92.

if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").[67]

For purposes of deference, the Court made a distinction between "*all relevant questions of law*" under Section 706 and "*judicial review of agency policymaking and factfinding*" under Section 706(2)(A), concluding that the latter calls for deference as opposed to the former. In other words, in determining whether the agency's findings of fact and policy decisions are arbitrary, capricious, or otherwise not supported by substantial evidence, the reviewing court must defer to the agency's findings of fact and policy choices. This is a sensible and essential distinction and will be addressed in connection with ISDS cases in Section IV.

The Chevron Doctrine (Post-APA)

Under the *Chevron* two-step analysis, the reviewing court must first determine "whether Congress ha[d] directly spoken to the precise question at issue."[68] If it finds that "the intent of Congress is clear, that is the end of the matter."[69]

If the court finds ambiguity, it must defer to the agency's interpretation as long as it is "a permissible construction of the statute."[70] *Loper Bright* further indicated that the *Chevron* decision "rested on 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows,'"[71] and concludes, "[n]either *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The 'law of deference'

67 *Id.* at 392 (emphasis added).

68 *Id.* at 372 (quoting *Chevron*, 467 U.S. at 842).

69 *Id.* (quoting *Chevron*, 467 U.S. at 842). To determine congressional intent,

> [A] reviewing court was to "employ[] traditional tools of statutory construction." Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme.

Id. at 397 (citations omitted).

70 *Id.* (citing *Chevron*, 467 U.S. at 842).

71 *Id.* at 398 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996)).

that this Court has built on the foundation laid in *Chevron* has instead been '[h]eedless of the original design' of the APA."[72]

This doctrine of deference stood unstable in the jurisprudence for forty years,[73] entertaining relentless challenges[74] and attracting extraordinary levels of judicial citation and scholarly commentary.[75]

The Post-Chevron Law of Deference

What does *Loper Bright* do to *Chevron* deference? *Loper Bright* relies heavily on the APA. It states that:

> The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA.[76]

The Court, then, emphasizes that "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[77] It also concludes that Chevron is inconsistent with this principle because it "defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret [. . .] statutory provisions.'"[78]

First, it acknowledges that "although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'"[79] The key here

---

72 *Id.* (citing *Perez*, 575 U.S. at 109 (Scalia, J., concurring)).

73 *Id.* at 406.

74 *Id.* at 405-06.

75 *See* Pemberton & Pope, *supra* note 5.

76 *Loper Bright*, 603 U.S. at 394 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *Am. Trucking Ass'ns*, 310 U.S. at 549).

77 *Id.* at 395 (citing Henry Paul Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983)).

78 *Id.* at 398(quoting 5 U.S.C. § 706) (emphasis added).

79 *Id.* at 394 (citing Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth., 464 U.S. 89, 98 n.8 (1983)). The second ground argued to maintain *Chevron*, which is not directly relevant here but added in the interest of completeness, was the uniform interpretation of federal law, which the Court dismissed in the following sweeping terms:

> Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a

is deference to the factual determination of the agency as long as it is within its competence. Second, it further acknowledges that the agency's expertise has persuasive power.[80] Finally, the Court bases its decision on the idea that the Courts must "construe the law with '[c]lear heads . . . and honest hearts,' not with an eye to policy preferences that had not made it into the statute."[81]

Rather forcefully, the Court continues to state that "[b]y forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging."[82] The Court states further that "[t]he better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute."[83]

The Court further observes that "*Chevron*, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach,"[84] and that "[b]ecause *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron*'s unworkability, transforming the original two-step into a dizzying breakdance."[85]

Finally, the Court emphatically holds that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under

---

> statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

Id. at 403 (citation omitted).

80 *See id.* at 402 ("Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'") (quoting *Skidmore*, 323 U.S. at 140).

81 *Id.* at 403-04 (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed. 1896)).

82 *Id.* at 404.

83 *Id.* at 403.

84 *Id.* at 396.

85 *Id.* at 409. The Supreme Court in *Loper Bright* further stated: "[T]he doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should Chevron be retained." *Id.* (citing Cargill v. Garland, 57 F.4th 447, 465–468 (5th Cir. 2023) (plurality opinion) ("May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?")). Additionally, the Court noted that "[f]our decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of 'say[ing] what the law is.' And its continuing significance remains unclear." *Id*. at 410 (citing *Marbury*, 1 Cranch at 177).

the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[86]

INVESTOR-STATE ARBITRATION

An Aberration in Public International Law

In classic international law, private parties are not supposed to sue states. States sue each other whenever there is a rule of decision that binds them, such as a treaty or custom.[87] ISDS permits private persons, be they natural or juridical, to sue a state of which they are not a citizen. Such permission

86 *Loper Bright*, 603 U.S. at 412-13.

87 For a summary of the classic sources of law in international law, *see* ICJ Statute, *supra* note 23, at art. 38.

often comes from the respondent state's own consent in an investment treaty, bilateral (BIT)[88] or regional (such as USMCA)[89] treaty, or contract.[90]

This post-World War II phenomenon is an aberration, and scholars have speculated extensively about its objective.[91] The debate about its origin and

---

88 There are 2849 bilateral investment treaties. Most of them are available at *Investment Policy Hub*, UN TRADE & DEV., https://investmentpolicy.unctad.org/international-investment-agreements [https://perma.cc/2YFA-5EU2]. An example of expression of consent could be Article 9 of the Netherlands-Ethiopia BIT. It reads:

> Article 9: Settlement of Disputes between a Contracting party and an Investor
>
> (1) Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, whenever possible, be settled amicably between the parties concerned.
>
> (2) If the dispute has not been settled within a period of six months from the date either Party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted to:
>
> a) the competent court of the Contracting Party in the territory of which the investment has been made; or
>
> b) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States entered into force on October 14th, 1966, after accession by the Contracting Parties; or
>
> c) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility of Rules), if one of the Contracting Parties is not a Contracting State of the Convention as mentioned in paragraph 2 b) of this Article; or
>
> d) an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
>
> (3) A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States for the purpose of the Convention be treated as a national of the other Contracting Party.
>
> (4) The arbitral awards shall be final and binding on both parties to the dispute and shall be executed according to national law.
>
> (5) Each Contracting Party hereby consents to submit investment disputes for resolution to the alternative disputes settlement fora mentioned in the preceding paragraphs.

Agreement on Encouragement and Reciprocal Protection of Investments, Eth.-Neth., art. 9, May 16, 2003, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1172/download [https://perma.cc/R46H-HYK2].

89 *United States-Mexico-Canada Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (July 1, 2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement [https://perma.cc/U9RY-MX8X].

90 *See, e.g.*, Nigeria v. Process & Indus. Devs. Ltd. [2023] EWHC 2638 (Comm), (Eng.)., https://www.judiciary.uk/wp-content/uploads/2023/10/Nigeria-v-PID-judgment.pdf [https://perma.cc/F5PY-8DXW].

91 *See generally* KIDANE, *supra* note 26, at 13-20. Anthea Roberts illustrates the scholarly confusion with a colorful metaphor:

> "When the skin of an Australian platypus was first taken to England in the 1700s, scientists thought it was a fake. It looked like someone had sewn a duck's bill onto a beaver's body; one scientist even took a pair of scissors to the skin looking for stitches. The animal had fur and was warm-blooded like a mammal, yet laid eggs and had webbed feet like a bird or a reptile. Scientists struggled to categorize this unusual creature. Was it a bird, a mammal, or a reptile? Or was it some strange hybrid of all three? Comprehending the investment treaty system has proven just as problematic."

Roberts, *supra* note 10, at 1.

objectives notwithstanding, investor-state arbitration is now the main mechanism for the resolution of the world's investment disputes.[92]

Sources of International Investment Law

International investment law presumes that investors committing resources in a country other than their own require protection under international law beyond the laws of the host state.[93] The evolution of the law and its doctrinal underpinnings are given a book-length treatment by this author and are beyond the scope of this article,[94] but historical efforts at codifying the substantive international investment law rule at a multilateral level have failed.[95]

Lacking a multilateral treaty that codifies the governing substantive principles of international investment law, a series of ad hoc arbitral

92 Comprehensive information and statistics, including the annual report for 2024, is found at *ICSID Caseload – Statistics*, ICSID, https://icsid.worldbank.org/ [https://perma.cc/ENW7-BDQ7].

93 For the most extreme justification, see Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517, 521-22 (1910) ("There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."). For a more modern commentary, see generally RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012). Seminal works in this field include MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (3d ed. 2010); CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L. J. 427 (2010); ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW (2d ed. 2008); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL (2013); and THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW (Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales eds., 2014).

94 *See generally* KIDANE, *supra* note 26.

95 *See* Elihu Lauterpacht, *Preface* to THE ICSID CONVENTION: A COMMENTARY ix (Christoph H. Schreuer ed., 2001); *see also* Salacuse, *supra* note 93, at 464. Instead, as this author previously observed:

> The efforts to create a multilateral investment regime faced significant obstacles from the very inception. Opinions on why such efforts failed differ on the emphasis they place on the commonly identified factors. For example, while Salacuse puts emphasis on the advantages that developed economies saw in bilateral negotiations with weaker economies, Sornarajah emphasizes the developing economies' belief that a multilateral treaty would essentially codify neo-liberal prescriptions. Whatever the real reasons might have been, the gap left by the absence of a WTO type global investment regime is now unsatisfactorily filled by a combination of a fairly robust procedural treaty, ICSID, and a multitude of regional and thousands of bilateral investment treaties that refer matters to ICSID arbitration and supply fragmented substantive rules of decision. Forty-five African states have ratified the ICSID Convention.

KIDANE, *supra* note 26, at 24 (citing Salacuse, *supra* note 93, at 464; SORNARAJAH, *supra* note 93, at 305-06; *Database of ICSID Member States*, INT'L CTR. SETTLEMENT INV. DISPS., https://icsid.worldbank.org/about/member-states/database-of-member-states [https://perma.cc/ZY6K-CC9Y]).

tribunals routinely struggle to ascertain and apply sporadic bilateral and regional investment treaties.[96]

Substantive Treaty Principles

The United Nations Commission on Trade and Development (UNCTAD) documents 2,853 Bilateral Investment Treaties (BITs), 2,226 of which are in force, and 499499 other treaties with investment chapters, 409 of which are in force.[97] These investment treaties essentially codified similar foundational principles of international investment law. The most frequently included substantive investment protection provisions are the fair and equitable treatment provision (FET) and the indirect expropriation provision. The law of deference is also relevant to these principles. A few examples of these provisions and the jurisprudence that interprets them are highlighted in the following subsections.

I. Fair and Equitable Treatment (FET)

The expression of the FET principle has varied over the decades. For example, one of the first modern BITs that the United States concluded in 1986 reads as follows:

> 2. Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws and international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party.[98]

The most recent rendition of the same principle is contained in the U.S.-Rwanda BIT of 2012. This newer model contains textual clarification of the FET principle in the following terms:

---

96 Global reform efforts are currently underway. This is beyond the scope of this article, but comprehensive information about the challenges and reform efforts are available on the official website of the United Nations. *Working Group III: Investor-State Dispute Settlement Reform*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/en/working_groups/3/investor-state [https://perma.cc/9MF4-BFFR].

97 All of these treaties are available at *Investment Policy Hub*, *supra* note 88.

98 Panama Bilateral Investment Treaty, Pan.-U.S., art. II(2), Oct. 27, 1982, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3353/download [https://perma.cc/2UM5-5R7F].

> Article 5: Minimum Standard of Treatment
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.[99]

The most contemporary rendition of the FET principle from the United States vantage point is the expression contained in the investment Chapter of the United States Mexico and Canda Agreement (USMCA). It reads in relevant part:

> Article 14.6: Minimum Standard of Treatment
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of

99 Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Rwanda-U.S., art. 5, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download [https://perma.cc/AD9D-MSRZ].

> due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
>
> 4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[100]

The lack of clarity in the previous expression of the FET principle, and particularly some tribunals' expansive interpretation of the principle to include such additional notions as "legitimate expectations," prompted these useful clarifications.[101]

Few tribunals have offered as credible and thorough an exposition of the outer limits of the FET principle as the ICSID Additional Facilities case of *Waste Management v. Mexico*.[102] The Waste Management case arose out of the Investment Protection provisions (Chapter 11) of the North American Free Trade Agreement (NAFTA).[103] The tribunal, chaired by James Crawford, who had unparalleled insight on these issues, methodically analyzed the outer limits of the FET principle with the benefit of interpretive guidance by the contracting states. Although *Waste Management*'s famous formulation of the FET rule and its decision on deference is the key takeaway, it is important to take a close look at the build-up of the jurisprudence.

The text of the treaty that the tribunal was interpreting is not unusual. It simply states: "(1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[104] The tribunal's interpretation was guided by the NAFTA Free Trade Commission's interpretive guide[105] and decisions of several arbitral tribunals that had

---

100 *United States-Mexico-Canada Agreement*, *supra* note 89, art. 14.6.

101 KIDANE, *supra* note 26, at 379-80.

102 *See* Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), https://2009-2017.state.gov/documents/organization/34643.pdf [https://perma.cc/ZS5E-B4K3] [hereinafter *Waste Management Award II*].

103 Comprehensive information on NAFTA and its replacement USMCA can be found within the *United States-Mexico-Canada Agreement*, *supra* note 89.

104 *Waste Management Award II*, *supra* note 102, ¶ 89.

105 The NAFTA Free Trade Commission offered an official interpretive guide on July 31, 2001, in the following terms:

decided the issue previously; most importantly, the decisions in *Mondev International Ltd. v. United States*,[106] *ADF Group Inc. v. United States*,[107] *S.D. Myers, Inc. v. Canada*,[108] and *Loewen Group, Inc. v. United States*.[109]

The essence of *Mondev*'s key decision, which the *Waste Management* tribunal adopted, is that "the terms 'fair and equitable treatment' and 'full protection and security' are references to existing elements of customary international law and are not 'additive,' that is, they do not add novel elements to that standard."[110] Substantively, *ADF Group*, relying on *Mondev*, held in part that:

> The government agency in question had not acted ultra vires, but, in any case, showing an act is ultra vires under the internal law of a state 'by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1) . . . something more than simple illegality or lack of authority under the domestic law of a State is necessary.'[111]

Waste Management also relied on *ADF Group* for the proposition that "both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development."[112] More instructively, the *S.D. Myers* tribunal framed arbitrariness as the core of the FET principle when it held that:

> B. Minimum Standard of Treatment in Accordance with International Law 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Id. ¶ 90. The Tribunal's interpretation took this into account.

106 ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ICSID Reports 192.

107 ICSID Case No. ARB(AF)/00/16, Award (Jan. 9, 2003), 6 ICSID Reports 470.

108 *S.D. Myers*, *supra* note 10.

109 ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).

110 *Waste Management Award II*, *supra* note 102, ¶ 91 (citing *Mondev*, *supra* note 106, ¶ 122). The *Mondev* tribunal added:

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.

Id. ¶ 95.

111 *Id.* ¶ 96 (citing *Mondev*, *supra* note 106, ¶ 180, 183-4).

112 *Id.* ¶ 92 (citing *ADF Group*, *supra* note 107, ¶ 179).

> Only when it is shown that an investor has been treated in such an *unjust or arbitrary* manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of *deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*. The determination must also take into account any specific rules of international law that are applicable to the case."[113]

Loewen v. United States added more useful context in holding:

> where the minimum standards of international law in question in a particular case are raised in respect of a claim of judicial action—that is, a denial of justice—what matters is the system of justice and not any individual decision in the course of proceedings. The system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim."[114]

Having surveyed credible jurisprudence this way, the *Waste Management* tribunal summarized the essence of the FET rule as follows:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[115]

In the end, the core of FET review is thus a review of the state's actions for arbitrariness and denial of due process. This formulation cannot credibly be disputed.[116] Indeed, the tribunal's disposal of the FET claim is telling of

---

113 *Id.* (citing *S.D. Myers*, *supra* note 10, ¶ 263) (emphasis added).

114 *Id.* ¶ 97 (citing *Loewen*, *supra* note 109, ¶ 168) (emphasis added).

115 *Id.* ¶ 98 (emphasis added).

116 The *Waste Management* tribunal further emphasized that "investment treaties are not insurance policies for bad business judgments." *Id.* ¶ 114 (citing Maffezini v. Spain, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000), 5 ICSID Rep. 419; CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 29 (July 17, 2003), 42

the core principle that it applied in the end. Applying the facts (which are not relevant here) to the law, it concluded that:

> In the Tribunal's view the evidence before it does not support the conclusion that the City a*cted in a wholly arbitrary way or in a way that was grossly unfair.* It performed part of its contractual obligations, but it was in a situation of genuine difficulty, for the reasons explained above.[117]

The *Waste Management* tribunal also credibly linked the most central concept of the FET principle (i.e., the denial of justice) to the concept of arbitrariness. In dismissing the claimant FET claim in this case, it concluded that:

> The Mexican court decisions were not*, either ex facie or on closer examination, evidently arbitrary, unjust or idiosyncratic*. There is no trace of discrimination on account of the foreign ownership of Acaverde, and no evident failure of due process. The decisions were reasoned and were promptly arrived at. Acaverde won on key procedural points, and the dismissal in the second proceedings, in particular, was without prejudice to Acaverde's rights in the appropriate forum.[118]

The focus is on the arbitrariness of the state's actions, which essentially looks at due process rather than the substantive quality of the decisions. In other words, in deciding an FET claim, the tribunal must not conduct a qualitative review of the substance of the decision and must only concern itself with the examination of the quality of the due process. This distinction parallels that articulated by the Court in *Loper Bright* when overruling *Chevron:* it separates the *de novo* examination of the meaning of the law without deference from the determination of arbitrariness with deference, as described in Section II.

II. Expropriation

In the famous words of Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*, "[t]here are few if any issues in international law today, on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[119] The specific rules on expropriation have developed since Justice Harlan's 1964 statement, and likewise, FET gravitated towards considerations of arbitrariness in state behavior. Again, the *Waste Management* formulation is useful to note.

ILM 788 (2003)). S*ee also* Eudoro A. Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, ¶ 72-75 (July 26, 2001), 6 ICSID Rep. 164.

117 *Waste Management Award II*, *supra* note 102, ¶ 115.

118 *Id.* ¶ 130 (citations omitted) (emphasis added).

119 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

Article 1110 of the substantive NAFTA investment rules, which the tribunal applied, reads in relevant part:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.[120]

Having noted the textual distinction between direct expropriation and indirect expropriation on the one side and "measures tantamount to expropriation" on the other,[121] it identified the essence and nature of government conduct that expropriation prohibits in the following practicable and useful formulation: "It is not the function of Article 1110 to compensate for failed business ventures, *absent arbitrary intervention* by the State amounting to a virtual taking or sterilizing of the enterprise."[122]

The tribunal further links the expropriation inquiry to the denial of procedural due process in the following terms: "It is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent."[123]

---

120 *Waste Management Award II*, *supra* note 102, ¶ 142 (quoting NAFTA art. 1110).

121 *Id.* ¶¶ 143-44. The term *indirect expropriation* is used more broadly here, notwithstanding the distinction some tribunals sometimes draw between indirect expropriation and conduct tantamount to expropriation. *See, e.g.*, *Metalclad Corp*, *supra* note 18, ¶ 103 (explaining that indirect expropriation involves a taking of property, whereas a measure tantamount to expropriation may not involve a formal transfer but instead has effects that render "formal distinctions ownership irrelevant," thereby broadening Article 1110's scope beyond indirect takings.); *see also Waste Management Award II*, *supra* note 102, ¶ 143.

122 *Waste Management Award II*, *supra* note 102, ¶ 160 (emphasis added). The rest of the paragraph reads:

> In the Tribunal's view, an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached. There was no outright repudiation of the transaction in the present case, and if the City entered into the Concession Agreement on the basis of an over-optimistic assessment of the possibilities, so did Acaverde.

Id. In arriving at this conclusion, the tribunal surveyed notable arbitral jurisprudence on expropriation including *Metalclad Corp*, *supra* note 18; *Pope & Talbot Inc. v. The Gov't. of Canada*, Interim Award (UNCITRAL June 26, 2000), 122 ILR 293, 334-337; *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award (Mar. 31, 1986), 2 ICSID Rep. 343; and *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, Arbitral Award, (Mar. 15, 1963), 35 ILR 136 (1967) [set aside by an Iranian court: *see* 9 ILM 1118 (1970)].

123 *Waste Management Award II*, *supra* note 102, ¶¶ 174-75, which state:

> The normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to a definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play. The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply

Just like the FET rule discussed in Section III, the core of the expropriation inquiry is ultimately whether the state's conduct is arbitrary and capricious. In turn, the core of the arbitrariness inquiry is procedural due process. A qualitative review of the substantive decisions of state agencies is thus only relevant to the determination of whether the state acted in an arbitrary and capricious way or otherwise denied due process.

A review of the jurisprudence of deference, applying these substantive standards, is offered in Section IV.

Procedures of Dispute Settlement in International Investment Law

Conceptually, ISDS is credibly traced back to the quasi-colonial legal notion of extraterritoriality, which effectively exempted the nationals and capitals of colonial powers from local jurisdiction.[124] With the "gradual legalization"[125] of the relationship between former colonial powers, who protected their capital through extraterritoriality and coercion, and their former colonies came bilateral investment treaties.[126]

These bilateral investment treaties almost invariably contain dispute settlement clauses mandating investor-state arbitration. The typical ISDS clause in a BIT reads:

> with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent.

124 *See generally* SORNARAJAH, *supra* note 93. Extraterritorial jurisdiction functioned through what are often called unequal treaties of capitulation. These regimes operated in many parts of the world including Africa (Egypt, Morocco), Asia (China, Japan, Thailand), and the Middle East (Turkey). *See also* LIPSON, *supra* note 93.

125 This characterization comes from YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 64 (1996).

126 Sir Elihu Lauterpacht observes that:

> [t]he idea for the International Convention for the Settlement of Disputes . . . was first conceived in 1961 by Aron Broches, then the General Counsel of the World Bank. This initiative carried forward a more general one for the protection of international investment that had begun in the Organization for European Economic Co-operation (now the Organization for Economic Co-operation and Development) in the late 1950s and that ended in the production in 1962 of the OECD Draft Convention on the Protection of Foreign Property.

Lauterpacht, *supra* note 95, at xi. He adds that a failure of consensus on the substantive standards caused the failure of a GATT/WTO type multilateral agreement on investment, and the focus shifted to "effective procedures for the impartial settlement of disputes rather than by constantly seeking multilateral agreement on the establishment of general substantive standards." *Id.* The major sources of substantive principles are now bilateral investment treaties. Jeswald Salacuse likewise suggests, "given the asymmetric nature of bilateral negotiations between a strong, developed country, and a usually much weaker developing country, the bilateral setting allows the developed country to use its power more effectively than does a multilateral setting, where the power may be much diluted." Salacuse, *supra* note 93, at 464.

Settlement of Disputes Between A Contracting Party and An Investor

> (1) Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, whenever possible, be settled amicably between the parties concerned.
>
> (2) If the dispute has not been settled within a period of six months from the date either Party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted to: a) the competent court of the Contracting Party in the territory of which the investment has been made; or b) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States entered into force on October 14th, 1966 after accession by the Contracting Parties; or c) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility of Rules), if one of the Contracting Parties is not a Contracting State of the Convention as mentioned in paragraph 2 b) of this Article; or d) an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
>
> (3) A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States for the purpose of the Convention be treated as a national of the other Contracting Party.
>
> (4) The arbitral awards shall be final and binding on both parties to the dispute and shall be executed according to national law.
>
> (5) Each Contracting Party hereby consents to submit investment disputes for resolution to the alternative disputes settlement fora mentioned in the preceding paragraphs.[127]

Arbitral tribunals set up under this type of dispute settlement clause routinely adjudicate claims about violations of substantive investor

127 Agreement on Encouragement and Reciprocal Protection of Investments, *supra* note 88.

protection principles under these treaties.[128] The most frequently invoked substantive treaty principles include the fair and equitable treatment principle and indirect expropriation.[129] However, the interpretation and application of these principles in ISDS cases have been notably inconsistent and a source of serious and widespread concern.[130]

It is necessary to note, for the sake of completeness, that the uncertainty in the ISDS jurisprudence has led to a backlash[131] and, in July 2017, caused the 50th Session of the United Nations Commission on International Trade Law (UNCITRAL) to establish what is now known as Working Group III, entrusting it with "[a] broad mandate to work on the possible reform of investor-State dispute settlement. . . . The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission."[132]

Working Group III identified four areas of concern.[133] The most relevant set of concerns includes:

> [t]he lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals: Divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency; Lack of a framework to address multiple proceedings; Limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions.[134]

This article argues that a significant part of the problem is the misunderstanding and inconsistent application of the law of deference. The following sections offer a more detailed appraisal of deference in ISDS cases and ISDS literature.

---

128 A key reference in international investment law is RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012).

129 *See generally* PAULSSON, *supra* note 28; INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS (Tracisio Gazzini & Eric De Brabandere eds., Martinus Nijhoff Publications, 2012); Salacuse, *supra* note 93; SALACUSE, *supra* note 28.

130 *See, e.g.*, U.N. Comm'n on Int'l Trade L., Rep. of Working Grp. III on the Work of Its Thirty-Sixth Session, ¶ 22, U.N. Doc. A/CN.9/964 (Nov. 6, 2018), https://docs.un.org/en/A/CN.9/964 [https://perma.cc/UBG6-TQY5] (hereinafter Rep. of Working Grp. III) (citing "lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals …" as major concerns).

131 THE BACKLASH AGAINST INVESTMENT ARBITRATION, *supra* note 28.

132 *See* U.N. G.A.O.R., 82nd Sess., Supp. No. 17, Rep. of the U.N. Comm'n on Int'l Trade L., at 46-47, U.N. Doc. A/72/17 (July 2017), https://undocs.org/en/A/72/17 [https://perma.cc/K3EH-X8HB].

133 *See* Rep. of Working Grp. III, *supra* note 130, ¶ 16.

134 *See e.g.,* U.N. Comm'n on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement Submission from the Gov't of S. Afr., at 2, U.N. Doc. A/CN.9/WG.III/WP.176, (July 17, 2019), https://undocs.org/en/A/CN.9/WG.III/WP.176 [https://perma.cc/TZE7-Z3H9].

DEFERENCE IN ISDS CASES AND ISDS LITERATURE

Deference in ISDS Cases

The question of deference most often arises in the context of applying the principles of expropriation and fair and equitable treatment (FET). Tribunals have addressed both the extent to which the substantive protection standards converge and the relationship between these principles and deference as a standard of review or even a rule of decision.

In *El Paso Energy International Co. v. Argentina Republic*,[135] the tribunal observed that "ICSID case-law has developed in a way that generates some confusion and overlap between these different standards of protection found in most BITs."[136] The standards that this tribunal is referring to are expropriation and FET.[137] The tribunal further said that although these principles seem to have merged in the jurisprudence, it is "convinced that they should not be used indifferently one for the other,"[138] and sought to explain each substantive principle separately and successively.[139]

Taking on indirect expropriation first, and having made extensive reference to various authorities including ISDS jurisprudence,[140] such as

---

135 *El Paso Energy*, *supra* note 18.

136 *Id.* ¶ 226.

137 *Id.* ¶¶ 225-26. The taxonomy of the provisions of the BIT that the tribunal was dealing with is rather ordinary. The provisions as reproduced in paragraph 225 state:

> Article IV (1) of the BIT prescribes: "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)."
>
> Article II(2)(a) and (b): "(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory, notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party."

138 *Id.* ¶ 226.

139 *Id.* ¶ 231.

140 *See id.* ¶¶ 234-37 (citing, among others, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2), Award, ¶ 121 (May 29, 2003; *Pope & Talbot*, *supra* note 122, ¶ 99; and *Saluka Investments BV v. The Czech Republic*, Partial Award, ¶ 258 (UNCITRAL Mar. 17, 2006) [hereinafter *Saluka*]).

Methanex,[141] Restatement (Third) of Foreign Relation Law[142] and Ian Brownlie's famous characterization,[143] the tribunal ultimately narrowed the standard to that of arbitrary and capricious state behavior and denial of due process.[144] In its own words: "If general regulations are unreasonable, i.e. arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor's property rights."[145]

Despite its extensive efforts to distinguish the FET standard from indirect expropriation, the *El Paso Energy* tribunal could not avoid a conclusion on FET that is materially similar to the ultimate standard that it

---

141 *See id.* ¶ 243 (quoting *Methanex*, *supra* note 10, ¶ 7), which states:

> In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

142 *Id.* ¶ 238 (quoting Restatement (Third) of Foreign Rel. L. § 712 cmt. g (A.L.I. 1987) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.")).

143 *See id.* (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 532 (4th ed.) (Oxford, Clarendon Press, 1990)), which states:

> State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.

Incidentally, Brownlie is also famous for his separate opinion on the question of FET violation. *Id.* ¶ 401 (citing *CME Czech Republic B.V. v. The Czech Republic*, Separate Opinion on Final Award, ¶ 78 (UNCITRAL Mar. 14, 2003) ("It would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population."')). The *El Paso* tribunal supported this opinion with its opinion in *CME*:

> Isolating the foreign investor from the crisis through the ICSID is distorting the nature and purpose of the protection granted by treaties to investors only to turn them into privileged subjects that may appear before such World Bank agency seeking protection against structural crises as the one undergone by the Argentine economy. Bilateral treaties are not good business insurance or a protection against a crisis.

Id. ¶ 216.

144 *See El Paso Energy*, *supra* note 18, ¶ 240 ("In sum, a general regulation is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process.").

145 *Id.* ¶ 241. The remainder of the paragraph reads:

> The need for reasonableness and proportionality of State measures interfering with private property has been stressed by the tribunal in *LG&E*:
>
> "With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed."

Id. (quoting *LG&E*, *supra* note 12, ¶ 195).

sets for indirect expropriation. According to the tribunal, a violation of FET may only be established if the measures are unreasonable and the investor is denied justice: "In other words, fair and equitable treatment is a standard entailing reasonableness and proportionality. It ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances. FET is a means to guarantee justice to foreign investors."[146] It also adds that "[t]here can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis."[147]

Significantly, however, while this line of reasoning readily and cogently lent itself to the application of the doctrine of deference, the tribunal does not even mention the word deference. Instead, it attempted to examine the wisdom of the Respondent's regulatory choices.

For example, the tribunal framed the issue as: "The question is therefore whether the measures adopted exceeded the normal regulatory powers of the State and violated the legitimate expectations of the Claimant."[148] Following an extensive discussion of every measure that the Respondent state took, the tribunal found that no measure was arbitrary or unreasonable and did not individually violate the FET standard.[149] However, it quickly turned around at the end and concluded rather implausibly that although each measure does not rise to the level of an FET violation independently, the cumulative effect of the non-offending and innocent measures amount to a violation of the FET standard. In its own words:

> Although they may be seen in isolation as reasonable measures to cope with a difficult economic situation, the measures examined can be viewed as cumulative steps which individually do not qualify as violations of FET, as pointed out earlier by the Tribunal, but which amount to a violation if their cumulative effect is considered. It is quite possible to hold that Argentina could pesify, put a cap on the Spot Price, etc., but that a

146 *Id.* ¶ 373 (quoting PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), § 239 ("Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards.")). The tribunal also relied on other notable authorities for the proposition that the denial of FET is tantamount tothe denial of justice. *See e.g., id.* ¶ 357 (quoting *Loewen*, *supra* note 109, ¶ 132):

> Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the interpretation according to its terms.

147 *Id.* ¶ 374.

148 *Id.* ¶ 401.

149 *See id.* ¶¶ 400-514.

> combination of all these measures completely altered the overall framework.[150]

The application of the doctrine of deference would have counseled against the finding of a violation here because, in judging the wisdom of the state's successive regulatory choices, the tribunal is substituting its own opinion for that of the state's as to how to effect the chosen regulatory changes, which the tribunal already deemed individually legitimate.

Another tribunal that ignored the doctrine of deference to find liability is the oft-cited *Metalclad v. Mexico*.[151] In this case, one of the key questions was whether the denial of a municipal construction and operation of a hazardous materials site permit amounted to the denial of FET when the Claimant had a federal permit and was led to believe that it could also get the municipal permit.[152]

The tribunal first observed that:

> Metalclad was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill. Metalclad argues that in all hazardous waste matters, the Municipality has no authority. However, Mexico argues that constitutionally and lawfully, the Municipality has the authority to issue construction permits.[153]

Failing to defer to the state's interpretation of its own constitution and other laws, the tribunal held that:

> Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill was improper, as was the municipality's

---

150 *Id.* ¶ 515. It added that:

> The Tribunal considers that, in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A creeping violation of the FET standard could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.

Id. ¶ 518.

151 *See Metalclad Corp*, *supra* note 18.

152 *Id.* ¶¶ 74-101.

153 *Id.* ¶ 85.

> denial of the permit for any reason other than those related to the physical construction or defects in the site.[154]

Other tribunals employed the doctrine of deference and avoided this kind of implausible outcome, at least partially. For example, in *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*,[155] the tribunal rejected the Claimant's proposition that the fair and equitable principle required the state to change its own laws to comply with its international obligations.[156] Having made this determination, however, the tribunal made an abrupt shift and made the following retraction of its deference to the state on expropriation:

> As already stated, the Tribunal agrees with the argument of the Respondent that an investor does not have a right to a modification of the laws of the host country. As argued by the Respondent, "every State has the power to amend any of its laws. The mere fact that Chile can change the PMRS does not mean, however, that Chile is obligated to do so." The issue in this case is not of expropriation but unfair treatment by the State when it approved an investment against the policy of the State

---

154 *Id.* ¶ 86. The tribunal finally found that:

> [T]he acts of the State and the Municipality - and therefore the acts of Mexico - fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment. This is so particularly in light of the governing principle that internal law (such as the Municipality's stated permit requirements) does not justify failure to perform a treaty. (Vienna Convention on the Law of Treaties, Arts. 26, 27). The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.

Id. ¶¶ 100-01. It is, however, important to note that the question was not whether the state used its own law to abrogate its international obligations but whether the existing state laws required a municipal permit, and if so, whether the investor should have known about them before beginning construction. The state's interpretation that the tribunal failed to defer to says that law required a municipal permit. The proper inquiry would have been whether the denial of the permit was arbitrary.

155 ICSID Case No. ARB/01/7, Award (May 25, 2004).

156 *Id.* ¶¶ 205-06, which states:

> The Tribunal draws a distinction between permits to be granted in accordance with the laws and regulations of the country concerned and those actions that require a change of said laws and regulations. To the extent that the application for a permit meets the requirements of the law, then, in accordance with the BIT and Article 3(2) of the Croatia BIT, the investor should be granted such permit. On the other hand, said provision does not entitle an investor to a change of the normative framework of the country where it invests. All that an investor may expect is that the law be applied. As explained by the Respondent, the carrying out of the investment would have required a change in the norms that regulate the urban sector in Chile. The PMRS forms part of this normative framework, as repeatedly stated by the Respondent. Laws and regulations may be changed by a country, but it is not an entitlement that can be based in Article 3(2) of the Croatia BIT. This clause is an assurance to the investor that the laws will be applied, and to the State a confirmation that its obligation under that article is confined to grant the permits in accordance with its own laws. The Tribunal concludes that the Respondent did not breach the BIT by not changing the PMRS as required for the Project to proceed.

> itself. The investor did not have the right to the amendment of the PMRS. It is not a permit that has been denied, but a change in a regulation. It was the policy of the Respondent and its right not to change it. For the same reason, it was unfair to admit the investment in the country in the first place.[157]

Another notable tribunal that dealt with deference is the one profiled in the introduction, *Lemire v. Ukraine*, where the tribunal offered a cogent articulation of the doctrine of deference:

The Tribunal is not thereby suggesting that a breach occurs if the National Council makes a decision which is different from the one the arbitrators would have made if they were the regulators. The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal's sole duty is to consider whether there has been a treaty violation. A claim that a regulatory decision is materially wrong will not suffice. *It must be proven that the State organ acted in an arbitrary or capricious way.*[158]

This case concerned a claim of discriminatory denial of radio licensing to a foreign investor.[159] Applying this principle of deference, the tribunal assessed at least two sets of state measures. First, the tribunal evaluated the quality of the applicable local regulations considering the treaty standards of FET. Secondly, the tribunal weighed the facts of the case against these local regulations. Presented simply, the tribunal held that the deficiencies in the law do not, by themselves, constitute a violation of the FET; rather, such deficiencies facilitated arbitrary and capricious administrative decision-making.[160] Delving deep into the facts, the tribunal found political

---

157 *Id.* ¶ 214.

158 *Lemire*, *supra* note 14, ¶ 283.

159 For a summary of the claims, see *id.* ¶¶ 210-19.

160 *Id.* ¶¶ 315-16, which states:

> The Tribunal has already stated its respect for Ukraine's sovereignty and for Ukraine's right to promulgate the laws which its Parliament deems are best suited to further the Nation's public interest. The powers of this Tribunal are limited to judging whether Respondent has acted in ways that affect Claimant and breach the FET standard enshrined in the BIT. But to value specific measures, the Tribunal must analyze the general legal framework within which specific conduct took place. That analysis has revealed that the procedure presents some shortcomings, which in essence affect: - the independence of members of the National Council; - the existence of an interregnum, during which licences were awarded without tender procedure; - the absence of formal valuation of the applications for licences against clearly established criteria; - the absence of reasoning for National Council decisions, whether collectively or for individual votes; and - the lack of transparency of ultimate owners of radio companies.
>
> While none of the above features alone stigmatizes the entire tender process as arbitrary, there is a risk that the shortcomings may end up mutually reinforcing each other. Members of the National Council, by virtue of the designation system, tend to have political affiliations and interests. Deficient disclosure and transparency requirements ease the misuse of discretionary powers by Council members to accommodate political or personal interests. In sum, the procedure for allocating frequencies by the National Council is fraught with shortcomings that facilitate arbitrary decision making.

interference and inexplicable and disproportionate denial of licenses and imputed discriminatory purpose and intent.[161] It held that the cumulative effect of these measures show arbitrary and capricious measures that violated FET. Although the tribunal articulated the doctrine of deference well, the tribunal found arbitrary and discriminatory measures as a matter of fact supported by uncontested statistics.

Perhaps the best articulation of the doctrine of deference comes from the famous *Electrabel S.A. v. Hungary* case.[162] The tribunal identifies arbitrariness as the proper standard for FET violation, stating:

> *Standard for "Arbitrariness"*: As already indicated above, this Tribunal agrees with the Saluka, AES and Micula tribunals in that a measure will not be arbitrary if it is reasonably related to a rational policy. As the AES tribunal emphasi[z]ed, this requires two elements: "the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. . . . a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it.[163]

---

161 *Id.* ¶¶ 318-56. For example, in ruling on one factual contention, the tribunal held:

> In light of the aforementioned circumstances, the Tribunal concludes that the President's "Instruction" amounted to interference with the independent and impartial decision of the National Council in favour of two of Claimant's competitors – Radio Era and Radio Kokhannya. It thus constituted a violation of applicable Ukrainian legislation, namely the LNC and LTR, which meets the Saluka test, since it "manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination" and thus amounts to an "arbitrary or discriminatory measure" within the meaning of Article II.3 (b) of the BIT. Furthermore, the apparently politically motivated preference for one competitor represents a discrimination against Claimant, who was applying in the same tender processes for the same frequencies.

Id. ¶ 356.

162 *Electrabel*, *supra* note 17.

163 *Id.* The tribunal further noted that:

> This has to do with the nature of the measure and the way it is implemented. In the Tribunal's view, this includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought. The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals and other international tribunals, including the ECtHR. The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.

Id. (citations omitted). Unlike many scholarly writings in the field, this article does not merge "deference" and "proportionality."

Having properly laid out the standard, the tribunal also addressed the scope of discretion, which is essentially the degree of deference, in the following terms:

> [O]nce a measure meets the test articulated above, a State has a wide scope of discretion to determine the exact contours of the measure. That requires a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests. Provided that there is an appropriate correlation between the policy sought by the State and the measure, the decision by a State may be reasonable under the ECT's FET standard even if others can disagree with that decision. *A State can thus be mistaken without being unreasonable*.[164]

The key conclusion is that the tribunal must defer to the state's policy choices, even if it believes the state is mistaken, unless those measures are unreasonable. As noted above, the tribunal indicates the comparative perspective that ISDS tribunals sometimes draw on domestic administrative law doctrines, such as proportionality, although such borrowings of analytical frameworks are neither systematic nor coherent. The *Electrabel* tribunal's use of the doctrine of deference is analogous to the *Loper Bright* line of reasoning described in detail in Section IV(a). The next section appraises notable ISDS scholarly commentary on deference.

Deference in ISDS Literature

Andreas Lowenfeld usefully characterizes the sources of international investment law as "a network of institutions, treaties, and decisions that together may be said to constitute the state of international law on transnational private investment…"[165] The network of investment treaties could generally be said to be the principal source of substantive international investment law. This is consistent with the rules contained in Article 38 of the Statute of the International Court of Justice (ICJ) on sources of international law in general including treaties, customs, and general principles of law and "decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[166]

---

164 *Id.* ¶ 180 (emphasis added).

165 *See* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 468 (2d ed. 2008).

166 *See* ICJ Statute, *supra* note 23, art. 38.

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;

Other sources of law include arbitral case law. For example, a leading authority in the field, Sornarajah, says: "Yet both the awards made by ad hoc tribunals as well as those made by institutional tribunals, particularly those made by tribunals constituted under ICSID Convention, provide evidence of possible norms which could be used for the construction of norms of international law."[167]

Sornarajah has also written that "[although] technically, arbitral decisions in ISDS cases are always *ad hoc* in nature. Advocates on either side selectively present arbitral case law to justify their preferred outcome. Those who hesitate, ignore prior arbitral case law at their own peril."[168]

Despite the controversy surrounding what is binding and what is merely persuasive, in real life, ISDS tribunals routinely predicate their decision on prior ISDS cases. These cases have become quasi binding for their persuasive interpretation of treaties and creative deployment of general principles of law. For instance, the doctrine of deference as shown in the previous section.

Scholarly writings commenting on the state of the law and appraising principles also impact jurisprudence. A few notable contributions on deference are appraised as follows. It is important to note at the outset that although the ISDS literature considers deference a standard of review, the commentator's classifications of deference in ISDS bear significant resemblance to the classifications made in American law of deference discussed in Section II. Specifically, with extensive reference to Lawson and Seidman.

In her Cambridge book *Proportionality and Deference in Investor-State Arbitration*, Caroline Henckels writes that "[d]eference involves an adjudicator exercising restraint where the adjudicator's judgment is different from that of a primary decision-maker in circumstances where there is uncertainty as to what the right conclusion should be, or there is objectively correct answer to an issue."[169] Henckels's definition emphasizes the likely difference of opinion between the initial adjudicator and the reviewing adjudicator as to the correct outcome. That is indeed the essence

---

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

167 SORNARAJAH, *supra* note 93, at 87.

168 KIDANE, *supra* note 26, at 26.

169 CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY 34 (2015) (citing Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L. J. 174, 203 (2006); AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 170 (1st ed. 2009)).

of deference and one that the *Chevron* doctrine and its progeny dealt with in detail.

However, Henckels, like most ISDS scholars, considers deference as a standard of review that the adjudicator must ascertain in the exercise of its inherent power. She relies, among other authorities, on the jurisprudence of the Appellate Body of the World Trade Organization in the EC-Measures Affecting Livestock and Meat (Hormones) case.[170] She suggests further that: "Treaties rarely specifically stipulate or provide explicit guidance as to the standard of review. Rather, the authority of international courts and tribunals to determine the applicable standard of review derives from their inherent powers."[171]

Henckels discusses deference in two different categories: normative deference and empirical deference.[172] She notes that "[n]ormative deference relates to uncertainties that arise in relation to value judgment, whereas empirical deference relates to situations of uncertainty in relation to knowledge and factual findings."[173]

These classifications are important. They are also analogous to the classifications that Lawson and Seidman make in American law between legitimacy (legitimation deference) and accuracy (epistemological deference), which often merges with cost or economic deference.[174] The labels of the various forms of deference are less important than what they represent. The key functional distinctions are generically normative and epistemological.

Such classification does not, however, address the fundamental question of whether ISDS tribunals should defer to the decisions of state actors when their own view is deferent on (1) the law, and (2) facts and policy choices.

Classifications in ISDS scholarship address only the question of why tribunals defer as a matter discretion and standard of review. American law of deference, however, first asks whether deference is mandated by law. If so, it must be complied with as a matter of law without justification. There is no room for creativity. If non-deference is mandated by law, the reviewer must exercise their own judgment *de novo*. As elaborated in Section IV above, the concept of discretionary deference, which calls for independent judgment on a case-by-case basis, is thus deemed unworkable in American law of deference. Any analytical framework must therefore begin by

---

170 *Id.* at 33 (citing Appellate Body Report, *European Communities - Measures Affecting Livestock and Meat (Hormones)*, ¶ 114-17, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Feb. 13, 1998)).

171 *Id.* (citing Yuval Shany, *Towards a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 911 (2006)).

172 *Id.* at 36 (citing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 388-425 (1st ed. 2010)).

173 *Id.* (citing ALAN D. P. BRADY, PROPORTIONALITY AND DEFERENCE UNDER THE UK HUMAN RIGHTS ACT: AN INSTITUTIONALLY SENSITIVE APPROACH 68 (2012)).

174 *See* LAWSON & SEIDMAN, *supra* note 34, at 107.

underscoring that deference is a rule of law that adjudicators are bound to apply, not a standard of review to be invented on a case-by-case basis.

Significantly, even the finest of ISDS scholarly literature bifurcates the complex terrain into substance and procedure and analyzes deference under the latter with a focus on standard of review. Stephan Schill's dichotomy demonstrates this. He conceptualizes:

> [A]part from the question of how substantive investment law should be interpreted and concretized, a still not sufficiently studied issue is the level of scrutiny or standard of review that arbitral tribunals should apply when reviewing host government conduct. Such standards can range from complete deference under non-justiciability-doctrines resulting in an absence of arbitral review to reconsidering any factual or legal determinations made at the domestic level de novo.[175]

This framing distorts the analysis because it conclusively views deference as a standard of review to be adopted by tribunals as a matter of discretion. However, as *Loper Bright* has usefully clarified, there is no discretionary deference in law. It is either mandated by law or prohibited by it. *Chevron* is deemed wrong because it allowed courts discretion to defer to agency decisions if they considered the language of the law ambiguous. American courts can no longer do that. They must decide the question of law themselves. That mandate does not, however, extend to the review of the agency's action for arbitrariness. Under *Loper Bright*, in deciding whether the agency acted arbitrarily, courts must defer to the agency's factual decisions and policy choices as a matter of law.[176]

Stephan Schill is, therefore, correct when he says:

> Investment treaty tribunals are aware of the task they face and, to a large extent, are receptive to granting deference to host state institutions. Yet, to the extent they invoke the notion of deference, they attribute different meanings to it. Moreover, they treat it as a mantra rather than develop it as part of a theoretical framework structuring the power relations between states and tribunals.[177]

Schill conducts a good survey of the notable cases employing the concept of deference, although he concludes that their usage of the concept lacks theoretical sophistication and coherence. Among the cases he

175 Schill, *supra* note 8, at 3.
176 *See supra* Section II.
177 Schill, *supra* note 8, at 4.

discusses, *S.D. Myers v. Canada*[178] and *Chevron v. Ecuador*[179] offer the clearest articulations of this principle.

In *S.D. Myers*, the tribunal emphasized that:

> [Tribunals] do not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[180]

Similarly in *Chevron*, the tribunal noted that:

> [T]he uncertainty involved in the litigation process . . . is taken into account in determining the standard of review . . . if the alleged breach were based on a manifestly unjust judgment rendered by the Ecuadorian court, the Tribunal might apply deference to the court's decision and evaluate it in terms of what is "juridically possible" in the Ecuadorian legal system. However, in the context of other standards such as undue delay . . . no such deference is owed.[181]

Schill correctly states that:

> Thus, while denial of justice for manifestly unjust decisions mandated considerable deference vis-à-vis domestic courts, denial of justice for of undue delay merited no such deference. The difference between both situations, it seems, is that the former situation concerned the interpretation by the domestic court of its own domestic law, whereas the latter concerned a state's obligations under international law in regard of the duration of domestic court proceedings.[182]

178 *S.D. Myers*, *supra* note 10.

179 Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I), PCA Case No. 2007-02/AA277, Partial Award on the Merits, (Mar. 30, 2010).

180 *S.D. Myers*, *supra* note 10, ¶ 261 (quoted in Schill, *supra* note 8, at 582-83).

181 Chevron, *supra* note 179, ¶ 379 (quoted in Schill, *supra* note 8, at 584).

182 Schill, *supra* note 8, at 584.

He further observes that some of the tribunals that adjudicated the Argentina cases granted significant deference[183] to the state's policy choices while others declined to do so.[184] Schill then accurately concludes that:

> Above all, arbitral tribunals do not explain why deference should be paid to certain acts and determinations of host states but not to others, and how to distinguish between them. All in all, to the extent deference is mentioned as influential in the decision-making of investment treaty tribunals, it reminds more of a mantra that is repeated incessantly, than the result of well-reasoned reflection.[185]

Where he runs into a challenge is in his conceptualization of deference as a standard of review. If it is so, the inconsistency and incoherence is inevitable. He writes: "[a]part from the question of how substantive investment law should be interpreted and concretized, a still not sufficiently studied issue is the level of scrutiny or standard of review that arbitral tribunals should apply when reviewing host government conduct."[186] He states further that "[s]uch standards can range from complete deference under non-justiciability-doctrines resulting in an absence of arbitral review to reconsidering any factual or legal determinations made at the domestic level *de novo*."[187]

In his 2014 article, *The Margin of Appreciation in Investor State-Arbitration*, Junian Arato accepts the doctrine of deference (as an element of the doctrine of margin of appreciation) as a standard of review[188] and

---

183 *See id.* These cases include: *LG&E*, *supra* note 12, ¶¶ 201-66; Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 160-236 (Sep. 5, 2008); Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 135-84, 219-31 (Dec. 27, 2010).

184 *See* Schill, *supra* note 8, at 584. These cases include: CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶¶ 304-94 (May 12, 2005); BG Group Plc. v. Republic of Argentina, Final Award, ¶¶ 381-87, 407-12 (UNCITRAL Dec. 24, 2007); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶¶ 325–97 (Sept. 28, 2007); Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 288-345 (May 22, 2007).

185 Schill, *supra* note 8, at 585.

186 *Id.* at 579 (citing, among others, William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); 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 689 (Stephan Schill ed., 2010); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. INT'L ECON. L. 223 (2012); Anthea Roberts, *The Next Battleground. Standards of Review in Investment Treaty Arbitration*, *in* ARBITRATION – THE NEXT FIFTY YEARS 170 (Albert Jan van den Berg, ed.) (Kluwer L. Int'l 2012); Rahim Moloo & Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2011-2012 (Karl P. Sauvant ed., 2012)).

187 Schill, *supra* note 8, at 579 (citing Henckels, *supra* note 186, at 238).

188 *See* Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545 (2014). He notes that "[t]he margin of appreciation is a judge-made doctrine of deference — famously a product of Strasbourg, manufactured by the European Court of Human Rights (ECtHR); in

criticizes its use as a shortcut to a reasoned decision in each individual case.[189] He makes his position clear in the following strong terms: "[t]his capacious doctrine [margin of appreciation] merely papers over the problem of fragmented approaches to the standard of review, with the effect of producing more uncertainty — not less."[190] He attributes the problem to the lack of a definition of the standard of review in investment treaties, which he admits is not unusual.[191]

To support his conclusion that the doctrine of deference has added to the uncertainty in ISDS jurisprudence, he profiles five cases that appear to have used the doctrine inconsistently, demonstrating the "indeterminacy inherent" in the doctrine of margin of appreciation which he equates with deference.[192]

Adopting the notion that deference is a standard of review, other scholars have focused on the other side of the equation, i.e., the investor's conduct as an element of the deference inquiry.[193]

The ISDS literature and jurisprudence that classifies deference as a standard of review must thus be reexamined, not because *Loper Bright* is a binding authority on them, but because the analytical framework it sets forth is persuasive and accurate as a matter of technical legal analysis, as

---

broad strokes, it reflects a particular approach to 'assigning weight to the respondent state's reasoning' under certain judicially imposed conditions." *Id.* at 547 (citing, among others, ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 3, 17 (2012)). Arato further notes that: "Different arbitral panels have identified and relied on a dizzying set of standards of review in different cases, drawn from international and national orders, and both civil and common law jurisdictions." *Id.* at 556.

189 *See id*. at 552, which states:

> I do not want to suggest that any of these tribunals misapplied the doctrine. The problem is rather that the concept of the margin does not work in any of these awards. It creates only an illusion of consistency, at the heavy cost of masking serious differences in approach. In other words, the doctrine acts as an empty proxy for any real analysis of how to approach the truly sensitive issue: how to determine the appropriate level of deference due to a sovereign, if any, in a particular case.

190 *See id.*

191 *See id*. at 554 ("Investment treaties tend to say nothing about the standards of review applicable to disputes between sovereign states and foreign investors over the meaning or application of their provisions.").

192 *See id*. at 559. The profiled cases are: *Continental Casualty*, *supra* note 183; Frontier Petroleum Servs. Ltd. v. Czech Republic, Final Award (UNCITRAL Nov. 12, 2010); *Electrabel*, *supra* note 17; *Saluka*, *supra* note 140; Micula v. Romania (I), ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008). For his discussion of these cases, see Arato*, supra* note 188, at 559-65.

193 *See* Mojtaba Dani & Afshin Akhtar-Khavari, *Rethinking the Use of Deference in Investment Arbitration: New Solutions Against the Perception of Bias*, 22 UCLA J. INT'L L. & FOREIGN AFF. 37, 68 (2018). Concluding:

> Appropriate deference to states' sovereignty and their public order requires tribunals to dismiss cases of serious misconduct of investors in the pre-merit phases. The accepted unclean hands doctrine, under both international law and investment arbitral practice, establishes that these issues relate to jurisdiction or admissibility, and should be addressed at those stages. Taking an appropriately deferential approach enables the investment treaty regime to address the problem of the perception of bias, and to rebuild the ISDS legitimacy.

demonstrated below.[194] Deference is in this context is not a standard of review—it is a rule of decision, a legal command. In determining whether a state's actions are arbitrary and capricious, the tribunal must defer to the state's determination of facts and policy choices and focus on the quality of due process.

The view of deference as a standard of review is thus part of the problem that has led to inconsistency and incoherency in ISDS jurisprudence. The American law of deference discussed in the previous sections correctly considers deference as one of legal command. As most recently articulated in *Loper Bright*, one either defers or does not. The conception of deference as a standard of review skips an essential step in the analysis and asks how much. This is where the problem lies.

THE *LOPER BRIGHT* ANALYTICAL FRAMEWORK

The Post-Chevron Analytical Framework of Deference

Broken down into its basic elements, what *Loper Bright* holds is the following:

> 1. "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."
> 2. In doing so, the court must pay "[c]areful attention to the judgment of the Executive Branch."
> 3. Because that "may help inform that inquiry."
> 4. However, if "a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation."
> 5. But they must also make sure that "the agency acts within it."
> 6. In any case, "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[195]

The "need not" in number six suggests discretion when a matter is not subject to the APA (if there is any). But, if the matter is subject to the APA, the APA prohibits any deference in matters of statutory interpretation.

The Court's opinion in *Loper Bright* is replete with excessive repetition of *Marbury v. Madison*, citing it at least 12 times. The decision is essentially a combination of the *Marbury* rule and Section 706 of the APA. The distinction that the Court made between the review of questions of law under Section 706 of the APA and judicial review of agency action for

194 For detailed discussion of the *Loper Bright* framework, *see infra* Section V.

195 *Loper Bright*, 603 U.S. at 394.

arbitrariness under Section 706(2)(A) is the most important and relevant analytical distinction.

In other words, *Loper Bright*'s key contribution is the clear distinction that it creates between judicial review of questions of law and judicial review of agency decision for arbitrariness under Section 706 of the APA.

It helpfully sets this out in the following passages:

> In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that '[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action.'[196]

The Court further states that the APA "requires courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law,'"[197] and concludes that "The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to Marbury: that courts decide legal questions by applying their own judgment."[198]

Most importantly, it unmistakably makes a distinction between the question of deference in the court's interpretation of ambiguous laws and its determination of whether the agency's actions are arbitrary or capricious. It states that:

> [T]he APA specifies that courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action . . . even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes *no deferential* standard for courts to employ in answering those legal questions.[199]

It then emphatically makes the following conclusion:

> That omission is telling, because Section 706 *does mandate that judicial review of agency policymaking and factfinding be deferential. See* §706(2)(A) (agency action to be set aside if 'arbitrary, capricious, [or] an abuse of discretion'); §706(2)(E) (agency factfinding in formal proceedings to be set aside if 'unsupported by substantial evidence.'[200]

196 *Id.* at 391 (quoting 5 U.S.C. § 706).
197 *See id*. (quoting § 706(2)(A)).
198 *See id.* at 391-92.
199 *See id*. at 392.
200 *See id.*

Because this distinction is the essential basis of the analytical framework that this article proposes for ISDS cases, the distinction that the Court makes between the various types of deference is discussed in more detail in the following subsections.

I. Foundational Questions on Deference

As discussed in Section II, Lawson and Seidman identify mandatory and discretionary deference prior to the *Loper Bright* decision. *Loper Bright*'s analysis of the distinction between mandatory and discretionary deference proceeds *a contrario* because it considers *non-deference* on questions of law as mandatory and deference on questions of fact and policy as mandatory. In other words, under the law of deference developed by *Loper Bright*, there is no discretionary deference. The Supreme Court has essentially eliminated discretionary deference as a rule of decision or canon of statutory interpretation.

II. Mandatory Non-Deference on Questions of Law Under 706

The text of Section 706 the Supreme Court relies on in *Loper Bright* states in relevant part: "To the extent necessary to decision and when presented, the reviewing court *shall decide all relevant questions of law,* interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[201]

As indicated in the previous section, the Supreme Court interpreted this portion of Section 706 to permit no deference on all questions of law. To the extent *Chevron* required courts to defer to an agency's interpretation of an ambiguous law, that rule has now been overruled. The finding of an ambiguity gives rise to no presumption of congressional delegation of authority to the agency's interpretation. In that sense, the courts are now mandated to do the interpreting and judging without deference to the administrative agencies.

The international parallel to this rule relates to the question of the treaty tribunal's deference to the host state's interpretation of its own treaty obligation. This question arose in the Arbitration under Chapter Eleven of the North America Free Trade Agreement (NAFTA) between (1) Apotex Holdings Inc. (2) Apotex Inc. First and Second Claimants and (3) the United States of America.[202] In this case, Claimants argued against the designation of the legal seat of the arbitration to be in either Washington, D.C. or in New York. The reason for that is because the "Claimants asserted that the law applicable to arbitration proceedings in Washington DC or New York is not

201 *See* 5 U.S.C. § 706.

202 *See* Apotex Holdings Inc. and Apotex v. United States, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014) (hereinafter *Apotex*).

suitable because it requires US courts to defer to the views of the US Government on the interpretation of treaties, such as NAFTA" in case of a set aside proceeding.[203]

The Claimants relied on Supreme Court cases such as *Sumitomo Shoji America, Inc. v. Avagliano*[204] and *Abbott v. Abbott*,[205] and the Second Circuit Court of Appeals case of *Lozano v. Alvarez*[206] for the proposition that "US courts are to give 'great weight' to the views of the US Government in interpreting US treaties."[207] Indeed, the tribunal summarized that the Claimants, relying on these authorities, argued that "US judges are required by established US law to defer to the US Government on issues of treaty interpretation."[208]

The respondent in the *Apotex* case does not deny the relevance of the views of the U.S. government in the interpretation of its own treaty obligations, but disputes the degree of deference that it receives by claiming "recent cases like in *Abbott*[209] show that the contemporary process of treaty interpretation by US Courts begins with the text of the treaty, assigning only a secondary role to any views by the US Government amongst multiple other extra-textual elements."[210]

Having weighed the parties' arguments, the *Apotex* tribunal laid out its own reckoning in the following useful terms: "On one hand, the US Supreme Court does indeed assert that an administration's treaty interpretation 'is entitled to great weight.' However, the US Supreme Court also maintains that it should 'give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret' it."[211]

---

203 *See id*. ¶ A.27.

204 457 U.S. 176 (1982).

205 560 U.S. 1 (2010).

206 697 F.3d 41 (2d Cir. 2012).

207 *Apotex*, *supra* note 202, ¶ A.40 (Aug. 25, 2014).

208 *Id.* ¶ A.41.

209 560 U.S. 1.

210 *Apotex*, *supra* note 202, at ¶ A.43. The Respondents cite cases and literature to support the proposition that the views of the U.S. Government may be relevant but are not outcome determinative. They cite the Guantanamo Bay cases to show instances where the Supreme Court disagreed with the U.S. Government on its own treaty obligation. *Id.* ¶ A.42. These cases are: Hamdan v. Rumsfeld, 548 U.S. 557 (2006) and Gonzales v. O. Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006). Respondents also rely on a scholarly writing that suggests that the views of the U.S. government may be relevant, but it is one of many factors. *See Apotex*, *supra* note 202, ¶ A.43 (citing David J. Bederman, *Medellín's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529 (2008).

211 *Id.* ¶ A.45. The tribunal further acknowledges that "[t]his Tribunal is not a US court. It cannot decide how US courts might resolve the tensions in this uncertain and disputed area of domestic US law. However, the possibility that a deference doctrine might be invoked and upheld in future litigation to set aside an award clearly creates an element of legal uncertainty." *Id*. ¶ A.46. The Tribunal stresses that this "theoretical uncertainty" is not a bar to New York as a legal place for the arbitration. *Id.* ¶¶ A.46-47.

Despite the differences of opinion between the degree of deference that U.S. courts owe the government's interpretation of its own treaty obligations, and the uncertainty about what this deference would mean for purposes of set aside proceedings in the U.S., *Chevron* type deference is envisioned in U.S. treaty interpretation jurisprudence.

The overruling of the *Chevron* doctrine does not directly impact deference on questions of international law, but rests on the same epistemology and bears stark conceptual resemblance completing the *Loper Bright* analogy in the following manner. *Loper Bright* overrules *Chevron* in the context only of deference to the administrative agency's interpretation of an ambiguous law, which is analogous to the Court's deference to the U.S. government's interpretation of treaty obligations. If *Loper Bright* were to extend the treaty interpretation, by analogy, international tribunals, the equivalent of courts for this purpose, would not have to defer to the state's own interpretation of its treaty obligation. This is a logical conclusion. The least appreciated half of *Loper Bright*, i.e., mandatory deference on questions of fact and policy and the international analogy, is discussed next.

III. Mandatory Deference on Questions of Fact and Policy

The Supreme Court interprets the subsections that follow general rule on questions of law in Section 706 of the APA to mandate deference on questions of fact and policy. The text reads:

> The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) ***hold unlawful and set aside agency action, findings, and conclusions found to be—***
>
> **(A)** ***arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law***;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) ***unsupported by substantial evidence*** in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[212]

212 5 U.S.C. § 706.

In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.[213]

The most pertinent parts are "(2) *hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*… and "(E) *unsupported by substantial evidence."*

Answering the question about what, if any, deference courts owe in deciding whether the agency's actions are "arbitrary, capricious, an abuse of discretion" or "unsupported by substantial evidence" the Supreme Court said that the courts are mandated to defer. In its own words, "[s]ection 706 ***does mandate that judicial review of agency policymaking and factfinding be deferential.*** "[214]

Therefore, four notable conclusions could be made of the most contemporary American law of deference. *First,* the courts decide all questions of law without any deference to any prior decision maker. *Second*, in determining whether the agency's actions are arbitrary or capricious, the court must defer to the agency's policymaking and factfinding. *Third*, both types of deference are mandatory. *Fourth*, in all cases, the courts may consider the totality of the agency's deliberations as informational evidentiary input.[215]

The last point raises the question of what, if any, instructions do the Supreme Court give to courts as to what they may do with agency information that they find helpful in resolving the controversy before them. This is not a question of deference but one of evidentiary weight. In fact, the Court has clearly indicated that its power is limited to "*power to persuade, if lacking power to control*."[216]

---

213 *Id.*

214 *Loper Bright*, 603 U.S. at 392; *see also* § 706(2)(A) (agency action to be set aside if 'arbitrary, capricious, [or] an abuse of discretion'); § 706(2)(E) (agency factfinding in formal proceedings to be set aside if 'unsupported by substantial evidence'.)

215 The first three points summarize what is stated in the previous sections but the fourth is based on the Court's repeated acknowledgement in the opinion including the following passage:

> In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U. S. 89, 98, n. 8 (1983). Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U. S., at 140; see, e.g., *County of Maui v. Hawaii Wildlife Fund*, 590 U. S. 165, 180 (2020); *Moore*, 95 U. S., at 763. For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise.

Loper Bright, 603 U.S. at 402-03.

216 *Id.* at 402 (quoting *Skidmore*, 323 U.S. at 140) (emphasis added).

The framing that there is no discretionary deference under *Loper Bright* is, therefore, correct because the court's considerations of the agency's prior records and decisions are only informational with the power to persuade, not to control. In the absence of controlling authority, discretionary deference in the legal sense is no deference at all. Informational input is merely evidentiary in nature.

This contemporary American framework of deference could usefully be employed in ISDS cases primarily because, more often than not, ISDS tribunals are asked to decide cases based on investment treaties. These treaties contain provisions on indirect expropriation and the principle of fair and equitable treatment (FET) that require determination of the accuracy of the host state's substantive decisions and regularity of processes. This ultimately requires the determination of whether the decisions of the respondent state's agencies and instrumentalities were arbitrary and capricious. As elaborated in Section IV, the determination of arbitrariness of prior decisions necessarily raises the question of deference to the policy choices and findings of facts of any actors whose actions are attributable to the state.

The *Loper Bright* analytical framework thus persuasively advises, first, that the tribunals do not have to defer to the state's interpretation of its own treaty obligation. Second, in reviewing the state's actions and omission for arbitrariness under FET or indirect expropriation, international arbitral tribunals must defer to the state's determination of facts and policy choices, focusing instead on the quality of due process rather than the material accuracy of the substantive decision. Therefore, ISDS cases that hold that *"A State can thus be mistaken without being unreasonable*"[217] are not only strongly persuasive but also materially correct as a technical application of the substantive investor protection rules described in Section IV.

CONCLUSION

Gary Lawson and Guy Seidman's characterization of "deference" as "perhaps the most important concept and practice in law"[218] may invite a supremacy competition among legal concepts and practices, but it is by no means an overstatement of the importance of the concept of deference in secondary decision making.

ISDS tribunals, many steps removed from the facts, often assume the difficult task of determining complex facts with the limited evidence selectively presented to them. Such exercise may be unavoidable in instances where the said facts have never been determined. However, when the tribunal is presented with the determination of facts and conclusions of

217 *Electrabel*, *supra* note 17, ¶ 180 (emphasis added).

218 *See* LAWSON & SEIDMAN, *supra* note 34.

domestic law made in the host state by host state administrative or judicial bodies, the tribunal is confronted with the task of reviewing the accuracy and validity of such determinations and determining the consequences thereof under international law.

As the examples in Section IV indicate, many tribunals choose to review the facts and policy choices *de novo* without deference and come to their own conclusions notwithstanding their proximity disadvantages. Other tribunals have chosen to defer to the factual determination and policy choices of the local authorities, focusing instead on whether the decision-making process suffered from arbitrariness, serious due process deficiencies, or denial of justice.

This latter approach is the correct approach as a matter of international investment law because, as explained in Section IV, the determination of whether the host state violated FET or indirectly expropriated the investor's investment ultimately requires the determination of whether the state's actions were arbitrary and capricious. The finding of arbitrariness is essentially the finding of process deficiency—not substantive quality assurance. As the learned tribunal in *Electrabel* accurately observed, "*[a] State can thus be mistaken without being unreasonable.*"[219]

The *Loper Bright* conceptual distinction between deference on questions of law and deference on the determination of arbitrariness thus offers a remarkably apt interdisciplinary analogy for ISDS jurisprudence. Tribunals that have merged these different inquiries have often arrived at empirically inexplicable decisions, such as in the *El Paso* case, in which the tribunal found cumulative liability without finding a single independently arbitrary domestic decision.[220] Properly conceptualized, the law of deference should have counseled against such types of facially unpersuasive outcomes.

Exercising deference in the determination of arbitrariness is thus essential for all the reasons why the concept of deference exists in every system of law. This includes the lack of proximity to the facts and the rationale for the policy choices that the reviewer cannot fully appreciate.

---

219 *Electrabel*, *supra* note 17, ¶ 180 (emphasis added).

220 *See El Paso Energy*, *supra* note 18, ¶ 515, which states:

> Although they may be seen in isolation as reasonable measures to cope with a difficult economic situation, the measures examined can be viewed as cumulative steps which individually do not qualify as violations of FET, as pointed out earlier by the Tribunal, but which amount to a violation if their cumulative effect is considered. It is quite possible to hold that Argentina could pesify, put a cap on the Spot Price, etc., but that a combination of all these measures completely altered the overall framework.