The emerging system of investment law based on international treaties has attracted much attention from academics, civil society, policymakers, and practitioners alike. The system’s basic features are simple to highlight: (a) the system is based on a network of more than 3,000 international treaties (concluded mostly at the bilateral level); (b) investment treaties embody a few, open-ended norms as the relevant legal disciplines imposed on States for the benefit of foreign investors; and (c) ad hoc international arbitration, modelled along the lines of commercial arbitration, is the chosen dispute settlement mechanism.

The starting point of this article is the realization that it is crucial to properly understand the core nature of the investment treaty system. As nicely mapped out by Anthea Roberts, there are several ways according to which one can understand the investment treaty system, including under public or private international law paradigms, or under public law, international trade law or international human rights paradigms. At a more fundamental level, it seems that the debate about the nature of the system revolves around the following two key values: granting maximum protection to foreign investors and safeguarding host States’ ability to regulate in the public interest. Characterizing an award, a treaty provision, an arbitrator, a new policy, or an academic article as “pro-investor” or “pro-State” is a common, almost instinctive, exercise in the investment community. In their recent joint Statement on Shared Principles for International Investment, the European Union (“EU”) and the United States have expressly acknowledged the challenge facing the investment treaty system (albeit without giving any solution). They recognized that “governments should provide the highest possible level of legal certainty and protection against discriminatory, arbitrary, and otherwise unfair or harmful treatment to all investors and investments in their territories,” accompanied by the conviction that “governments can fully implement these principles while still preserving the authority to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies.”

In order to move away from the simplistic, binary “pro-investor v. pro-State” dichotomy and put forward instead a methodology (or mindset) capable of properly balancing investment protection and the sovereign right to regulate, the
article suggests conceptualizing the investment treaty system through the lens of judicial review. The paper’s central argument is that the nature of the investment treaty system is (and should be) at its core, the establishment of a transnational framework for the control of public decision-making at the domestic level for the immediate benefit of foreign investors. Such a framework is comprised principally of certain rules and standards of good governance imposed on each contracting party as well as an enforcement mechanism that is centered on international arbitral tribunals. Part I develops the central argument in descriptive and normative terms focusing in particular on an analysis of the object and purpose of investment treaties.

The article then proceeds to apply the “judicial review” conceptualization to two specific issues dealing with the “scope” and “standards” of review carried out by investment tribunals on the basis of investment treaties. The aim is to show the usefulness as well as the appropriateness of conceptualizing the investment treaty system as judicial review. The methodology is broadly comparative in the sense that it will draw from a variety of sources such as English judicial review, French administrative law, United States constitutional law, and the law of the World Trade Organization (“WTO”). Accordingly, with regard to the scope of review, the article addresses the issue of amenability to review under investment treaties of situations involving “contracts” between the host State and the foreign investor. I argue that relying in this context on the dichotomy between contractual and governmental conduct as several investment tribunals have done is problematic, as the dichotomy lacks clarity and fundamentally does not conform to the nature of the investment treaty system. On the contrary, I suggest that, in line with the judicial review approach, the scope of review under investment treaties should be a function of the institutional character of the actor and the nature of the function being performed (Part II).

With regard to the standards of review, the article focuses in particular on the issue of the intensity of the review carried out by investment tribunals. Once again, applying the judicial review approach to this issue, the article argues as follows: first, the nature of the underlying treaty norm should influence the intensity of the review carried out by investment tribunals and second, there should be no automatic distinction, in terms of the intensity of review, between questions of law and questions of fact (Part III).

I. THE OBJECT (AND PURPOSE) OF INTERNATIONAL INVESTMENT TREATIES

Everyone recognizes the importance of identifying the “object and purpose” of an investment treaty. This is indeed expressly required as part of applying the customary general rule of treaty interpretation (codified in Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”)). More fundamentally, the open-ended nature of the various standards provided in an investment treaty makes the identification of the “object and purpose” a crucial element in imparting
meaning to those standards. However, different views have emerged with regard to the question of what is the “object and purpose” of an investment treaty. Focusing on the title of the 1991 Treaty Between the United States and Argentina Concerning the Reciprocal Encouragement and Protection of Investments, the Azurix tribunal stated simply that the purpose of the treaty is “to encourage and protect investment.” On the other hand, the LG&E tribunal focused on the apparently broader language found in the preamble of the same U.S.-Argentina BIT and noted that “in entering the BIT as a whole, the parties desired to ‘promote greater economic cooperation’ and ‘stimulate the flow of private capital and the economic development of the parties.’” So what is the object and purpose of an investment treaty? Is it the promotion of investments or the protection of investments? Or is it both? Or is it more broadly to intensify economic cooperation between the two States and to increase the prosperity of both States?

A. Three Points on Methodology

Before answering these questions, three preliminary (methodological) points should be made. First, looking at almost 3,000 investment treaties, it is difficult to generalize. Investment treaties differ with regard to formal titles, the objectives expressly identified in the preamble and substantive and procedural provisions. However, for the purposes of this discussion, I will assume that, on the whole, modern BITs sit somewhere between the very first modern BIT (the 1959 Treaty Concluded between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments) and the updated treaty signed 50 years later by the same parties (the 2009 Agreement between the Federal Republic of Germany and the Islamic Republic of Pakistan on the Encouragement and Reciprocal Protection of Investments). Although there are some critical differences in terms of the extent of guarantees offered to the foreign investor, particularly the inclusion in the latter of a fair and equitable treatment clause as well as an investor-State dispute settlement mechanism, the assumption is that on the whole the two treaties are rather similar in terms of overall objective, structure and content.

Second, it is also important to emphasize the distinction between the reasons why a State has signed an investment treaty (or similarly, why several other stakeholders have argued in favor of investment treaties) and the “object and
purpose” of an investment treaty. The former may differ depending on the particular contracting State as well as the year in which the treaty was signed. Accordingly, Germany’s reason(s) for signing the 1959 BIT with Pakistan may have been different from Pakistan’s reason(s). Equally, those reasons may have changed, even partially, over the span of 50 years. More fundamentally, at least in the context of interpreting an investment treaty, what matters is the intention of the contracting parties as reflected in the treaty, rather than the intentions of each State involved. For example, focusing on the 1987 United States Model BIT may be useful in determining the reasons why the U.S. wished to conclude a BIT in the immediate post-cold war period,8 but it cannot certainly be a decisive element in establishing the object and purpose of the United States-Argentina BIT signed in 1991.

Third, for purposes of this discussion, I find it useful to distinguish between the “object” and “purpose” of an investment treaty, as suggested by Buffard and Zemanek. Accordingly, while the “object” of a treaty is the substantial content of the treaty, that is the provisions, rights and obligations created by the treaty, the “purpose” is the reason for establishing the substantial content of the treaty. In the words of Buffard and Zemanek, “The object of a treaty is the instrument for the achievement of the treaty’s purpose.”9 Analytically, it is thus useful to distinguish between “what the treaty is about” and “what the treaty is for” so as not to confuse one with the other. Crucially, however, the relevance of distinguishing between “object” and “purpose” is to provide a guarantee against an excessively teleological interpretation, whatever the telos may be. Again in the words of Buffard and Zemanek:

If “purpose” were the only guiding principle for interpretation, unfettered teleology would be possible and the treaty provisions actually agreed upon might become more or less irrelevant as long as the conduct of the parties achieved the aim of the treaty. By joining “object” to the guiding principle, the provisions of the treaty are linked to its aim and the conduct of the parties for achieving the aim is confined to the rights and obligations established by the treaty provisions. Interpreting a treaty in the light of its object and purpose is thus a more restricted variant of teleological interpretation.10

B. Investment Protection and Prosperity

Applying this methodology, it may be argued that the object and purpose of a standard bilateral investment treaty (such as either of the Germany-Pakistan BITs) is to ensure the protection of foreign investments (object of the BIT) in order to intensify economic cooperation, encourage/promote international capital flows

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10 Id. at 332.
and increase the prosperity of both contracting parties (purpose of the BIT).\textsuperscript{11} In other words, the investment protection guarantees provided for in the body of the treaty are the instruments with which to encourage capital flows between the two countries and in turn contribute to the prosperity (or development) of both contracting parties.\textsuperscript{12} Accordingly, the object and purpose of a BIT cannot merely be the protection of foreign investments, as some tribunals have assumed.\textsuperscript{13} This is particularly true of the earlier north-south BITs. As noted by Professor Salacuse, “[a]n investment agreement between a developed and a developing country is founded on a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future.”\textsuperscript{14} Such a grand bargain would in turn lead to economic cooperation, economic development, and mutual prosperity. In one of the key statements of the preamble to the 1991 Argentina-United States BIT, the contracting parties recognize that “agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties.”\textsuperscript{15}

This more analytical approach to the object and purpose of a BIT has clear consequences for the interpretation of the treaty, as recognized for example, by the Saluka tribunal:

\begin{itemize}
\item \textsuperscript{11} The preamble to the 1959 Germany-Pakistan BIT reads: DESIRING to intensify economic co-operation between the two States, INTENDING to create favorable conditions for investments by nationals and companies of either State in the territory of the other State, and RECOGNIZING that an understanding reached between the two States is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States, HAVE AGREED AS FOLLOWS.” The preamble to the 2009 Germany-Pakistan BIT reads: “Desiring to intensify economic co-operation between both States, Intending to create favourable conditions for investments by investors of either State in the territory of the other State, Recognizing that the encouragement and protection of such investments can stimulate private business initiative and increase the prosperity of both Contracting States, Have agreed as follows.”
\item \textsuperscript{12} See Gus Van Harten, Investment Treaty Arbitration and Public Law 140 (2007).
\item \textsuperscript{13} See, e.g., Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 85 (April 29, 2004) (“the object and purpose of the BIT is to provide broad protection for investors and their investments”) and Sempra Energy International Nortalis v. Argentina, ICSID Case No. ARB/02/16, Decision on Jurisdiction, ¶ 142 (May 11 2005) (“the clear intention was to provide full protection for investors”). For a more “enlightened” view, see Lemire v. Ukraine, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, ¶¶ 272-73 (Jan. 14, 2010).
\item \textsuperscript{14} Jeswald Salacuse, The Law of Investment Treaties 111 (2010).
\item \textsuperscript{15} Noteworthy is the elaboration of the longer-term objective of the treaty building upon the general goal of “reciprocal prosperity” which figured in the 1959 Germany-Pakistan BIT. The preamble to the Argentina-U.S. BIT contains an express recognition that “the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights.”
\end{itemize}
The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.16

Following the Saluka tribunal’s reasoning, one could equally argue that an interpretation that focuses exclusively on affording protection to foreign investments to the detriment of the host State’s exercise of regulatory power, may also lead to attracting less scrupulous or meritorious investments. This in turn may undermine the host State’s long-term objective of securing prosperity or economic development (at least to the same extent).17

However, the fundamental point here is that the purpose of the treaty is the contracting parties’ prosperity rather than the protection of foreign investors. This approach is in principle neutral with regard to the pro-investor or pro-State outcome of the interpretative exercise carried out by investment tribunals. Whether the interpretation of the treaty (in light of the purpose of the treaty) leads to a wider or narrower protection to investors or right to regulate of States will often depend on the (sector-, country-, time-specific) link between investment treaty protection and investment flows and between investment flows and development.

C. A System of Judicial Review as the Object of BITs

More fundamentally, this more nuanced assessment of the object and purpose of BITs enables us to better appreciate the nature of the investment treaty system. Accepting the conclusion that the ultimate purpose of a modern investment treaty is the contracting parties’ prosperity, is there anything that can be added to the other (general) conclusion that the object of a modern investment treaty is the protection of foreign investments? Building upon recent scholarship emphasizing

16 Saluka Investment v. Czech Republic, Partial Award, ¶ 300 (March 17, 2006). The Preamble of the Netherland-Czech Republic BIT reads as follows: “Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investor of one Contracting Party in the territory of the other Contracting Party, Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable.”

17 Compare the Saluka approach with the one in SGS v. Philippines, where the tribunal emphasized the promotion and protection of investments as the object and purpose of the Switzerland-Philippines BIT and thus found it “legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments.” SGS v. the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004).
the relevance of comparative public law as an analytical tool to better comprehend international investment law; the article argues that the main object of an investment treaty is the establishment of a system of judicial review reserved for foreign investors. In other words, in order to increase the flow of capital and the prosperity of both contracting parties, an investment treaty sets up a system of judicial review, that is a framework for the control of public decision-making at the domestic level comprised of certain rules and standards imposed on the contracting parties and an enforcement mechanism that is centered on international arbitral tribunals.

Generally, judicial review can be linked to the principle of the rule of law providing a normative justification for investment treaties. In this sense, as noted by Professor Crawford, the role of international investment law is to reinforce the rule of law internally: “in an investment protection dispute[,] . . . if the applicable law is international law, the criterion of liability is a set of standards more or less indistinguishable from the standards of the rule of law – absence of arbitrary conduct, judicial independence, non-retrospectivity.” Certainly, the relevance of the link between the investment treaty system and the rule of law is emphasized by the breadth of the coverage of investment treaties. In accordance with the customary rules on State responsibility, the range of conduct that is attributable to a State is quite broad, covering inter alia the conduct of any State organ “whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”

More narrowly, the investment treaty system principally focuses on identifying certain principles of good public governance that feature in many public law systems, such as legality, fairness and reasonableness. The textual and conceptual emphasis of investment treaties is (and should be) on setting out duties for (host) States to abide by, rather than rights for investors to receive.
Accordingly, the focus is on making sure that the host State behaves (principally vis-à-vis foreign investors) in a non-discriminatory, non-arbitrary, fair and equitable manner. In this sense, investment treaties differ from international human rights treaties or constitutional bills of rights. Fundamentally, the latter by their very nature, are premised on a (complete) set of fundamental values and rights. The former, on the other hand, focus on certain obligations imposed on public authorities for the immediate benefit of a limited set of stakeholders. This may simply be a matter of emphasis (investment treaties often do expressly grant investors the right to an international arbitral tribunal to adjudicate claims of alleged violation of the treaties’ standards) and subject to future development (the international legal system may someday be comprised of equally developed and more integrated subsystems). However, characterizing the object of investment treaties as the establishment of a framework for the control of the lawfulness of public decision-making is in line with the recognition that the ultimate purpose of investment treaties is the prosperity of the contracting parties rather than the mere protection of foreign investment.

The contracting parties’ choice of international arbitration (whether state-state or investor-state) as the preferred mode of dispute settlement or enforcement mechanism does not modify the object of an investment treaty. While theories of arbitration emphasize the multifaceted nature of arbitration (with both “contractual” and “jurisdictional” features), modern international arbitration (and in particular investment treaty arbitration) involves, akin to judicial dispute settlement, “a tribunal reaching by an essentially judicial process a reasoned in accordance with customary international law”) and Article 1.1 of the Protocol to the European Convention on Human Rights (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”).

24 It should be emphasized that investment treaties “may serve to commit host countries to principles that have intrinsic worth and that will strengthen liberal democracy within those countries, apart from any immediate contribution to increasing foreign investment flows.” Kenneth Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 119 (2010). See De Smith’s Judicial Review, supra note 22, at 5: “principles developed through judicial review have become central to all of public administration insofar as those principles seek to enhance both the way decisions are reached and the quality of the decisions made.”

25 Despite the different emphasis, it may be argued that international investment treaties provide for a stronger protection for foreign investors’ rights compared to the protection guaranteed by human rights treaties.


decision clearly based on law." 28 In this sense, it is not a contradiction to argue that an investment arbitral tribunal performs judicial review. Equally, the choice of arbitration in investment treaties does not in principle modify the essential object of an investment treaty. It is, in fact, the exact opposite: the object (and purpose) of investment treaties as described above, should influence the way in which investment tribunals discharge their adjudicative functions vis-à-vis a claim brought under an international investment treaty. 29

D. Three Broad Implications

Characterizing the investment treaty system as judicial review (in the sense explained above) has three broad implications. First, the relation between the exercise of public authority and the protection of foreign investment is a more balanced one. The perspective is one that is not based on granting foreign investors “absolute rights” or affording them “full protection.” Rather, the premise of the investment treaty system is that the exercise of public authority (including over foreign investors) is accepted, but is subject to a set of general principles in order to avoid discriminatory, arbitrary, and unreasonable conduct by public authorities (including unlawful expropriation). 30 Normatively, this is a more desirable conceptualization of a mono-thematic (and thus incomplete) treaty system. In other words, it provides the right context (or frame of mind) in which to balance the need to protect foreign investors with the need to preserve the host State’s right to regulate in the public interest.

Second, conceptualizing the investment treaty system as judicial review does not automatically reduce the flexibility of the treaty standards. Like most good public governance principles (used domestically for the control of the constitutionality of legislation and the legality of administrative acts), investment treaty standards are of a general, open-ended nature, and their application allows unavoidably (and in fact consciously) for flexibility and evolution. In light of the breadth of the coverage of the investment treaty system, the identification of what is arbitrary or unreasonable, for example, may differ depending on the nature of the conduct under review (whether the relevant measure is a general act of the legislator or an administrative decision of the local water regulator vis-à-vis a concessionaire). Equally, a finding of arbitrariness or lack of reasonableness may depend on the specific socio-economic context, which is found at the time of applying the treaty standard. For example, applying principles of good public governance at the height of the neoliberal policies in the 1980s and 1990s may have led to a result different from an application of the same principles twenty years later in the midst of a global financial crisis. This is not a violation of the customary rules of treaty interpretation.

30 See Roberts, supra note 1, at 66.
or a betrayal of the common intentions of the contracting parties; rather it is simply the natural result of applying a set of general, open-ended standards.

Third, as in any system of judicial review, the role of the tribunals called upon to carry out the review is both central and complex. Investment tribunals are in fact charged with interpreting and applying general, open-ended standards to specific State measures, while striving for the right balance between the protection of foreign investors and the legitimate exercise of regulatory authority. Moreover, though functionally limited, the role of investment tribunals may be quite complex. Functionally, investment treaty tribunals perform “judicial review” rather than “merits review.”31 While judicial review may include both procedural and substantive criteria (for example, due process and proportionality, respectively), its scope is limited to reviewing whether the measure is “lawful” (on the basis of those criteria) rather than whether the measure is the “preferable” one. Nevertheless, even judicial review has its difficulties: the application of criteria such as due process or proportionality entails a level of discretion and balancing that makes the task of tribunals not without its complications.32

II. THE SCOPE OF JUDICIAL REVIEW UNDER BITS: CONTRACTUAL v. GOVERNMENTAL CONDUCT

The usefulness of conceptualizing the investment treaty system as judicial review may be tested in relation to the crucial issue of the scope of the review carried out by tribunals pursuant to investment treaties. Particularly controversial is, in fact, the issue of amenability to review under investment treaties of situations involving “contracts” between the host state and the foreign investor (so called “state contracts” or “foreign investment contracts”). State contracts assume a special importance in the field of foreign investment as they often represent a common mode of entry for foreign investors, especially in developing countries.33 State contracts take different forms but may be categorized principally as “public procurement contracts” and “concession contracts.” The former are contracts for the supply of goods (like energy products or vehicles), the carrying out of works (like construction of highways, airports, or dams) or the provision of services (like

31 Peter Cane, Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals, in COMPARATIVE ADMINISTRATIVE LAW 426, 429 (Susan Rose-Ackerman & Peter Lindseth eds., 2010) (“The concept of merits review can be said to have three elements, which might loosely be called the substantive, the procedural and the remedial. Substantively, the role of the merits reviewer is to ensure that the ‘correct or preferable’ decision is made. The review process is colloquially captured in the idea that the merits reviewer ‘stands in the shoes of the primary decision-maker.’ The remedial element concerns the powers of the merits reviewer when it reviews a decision.”)

32 The dividing line between “judicial review” and “merits review” is difficult to draw, particularly when one considers the use of substantive criteria of proportionality and reasonableness as grounds of judicial review. See PAUL CRAIG, ADMINISTRATIVE LAW 615 (6th ed. 2008).

33 UNCTAD STATE CONTRACTS 3 (2004).
financial or professional services). The latter are contracts for the operation of a public service (like water, gas, transport, or waste services).

A typical scenario of a concession contract in the context of foreign investment may be illustrated by the factual matrix of a recent dispute between Impregilo S.p.A. and the Republic of Argentina. Following the decision to privatize the provision of water and sewerage services, the Province of Buenos Aires adopted the necessary regulatory framework (Law No. 11,820), established a regulator (ORAB) and organized a bidding process for the concessions to be issued for the various parts of the Province. Following the award by provincial decree of one of the concession areas to an international consortium lead by Impregilo, (1) the consortium incorporated and funded AGBA, an Argentine company and (2) a Concession Contract was executed between the Province and AGBA. Following numerous disputes (over the span of five to six years) involving AGBA, on the one hand, and principally the Governor, the Ministry of Public Works and Services, and the water services regulator of the Province of Buenos Aires, on the other hand, the Province terminated the concession contract due to AGBA’s alleged fault. In its treaty claim against the Republic of Argentina, Impregilo claimed, inter alia, that the Province of Buenos Aires had, from the very beginning of the concession, repudiated its commitments and obligations under the concession contract and regulatory framework.

One of the questions presented to the Impregilo v. Argentina tribunal was whether the contractual relationship (stemming from the concession contract) underlying the dispute between the foreign investor and the province had any impact on determining whether Argentina had violated its obligations under the Argentina-Italy BIT (i) to accord at all times “fair and equitable treatment” to Italian investments and (ii) not to expropriate, directly or indirectly, Italian investments without payment of prompt, adequate and effective compensation. This is not a novel issue and several investment tribunals have dealt with it, whether at the jurisdictional (is the claim one that concerns an obligation of the host State under the investment treaty?) or merits phase (has the host State actually violated the treaty obligation?).

There appears to be a growing number of investment tribunals that have answered this question on the basis of a dichotomy between “contractual conduct” and “governmental conduct.” Even before addressing whether the treaty standards have been violated, these tribunals appear to require that the host State conduct at issue be governmental in nature, as “only the State as a sovereign can be in violation of its international obligations.” In one of the clearest articulations of this line of cases, the Hamester v. Ghana tribunal noted:

34 Impregilo v. Argentina, ICSID Case No. ARB/07/17, Award (June 21, 2011).
36 Hamester v. Ghana, Award, ICSID Case No. ARB/07/24, ¶ 328 (June 18, 2010).
Almost all of the allegations which make up Hamster’s claim of breach of the BIT, whether relating to allegations of arbitrary or discriminatory treatment; unfair and inequitable treatment; or expropriation, concern the conduct of Cocobod, in relation to Article 7 of the JVA [joint venture agreement]. The conduct was contractual and not sovereign in nature . . . . To use the language of the award in the Vivendi Annulment case, “the essential basis” of Hamster’s claims is purely contractual . . . . It may be that there were violations of the JVA committed by the Claimant, and it may be that Cocobod violated the JVA in failing or refusing to deliver the requested amount of cocoa beans, but these are contractual matters and not treaty matters. As a result, the commercial acts of Cocobod, even if they had been attributable to the Respondent, could still not have constituted a breach of the BIT engaging the international responsibility of the [respondent].

Accordingly, even if attributed to the host State on the basis of customary rules on state responsibility, a specific conduct allegedly in violation of a contract is per se not in breach of an investment treaty if it does not involve an exercise of sovereign authority or puissance publique. The Impregilo v. Argentina tribunal appears to have followed this arbitral practice and rejected the investor’s claims under the Argentina-Italy BIT with regard to the acts performed by the Province of Buenos Aires as a party to the concession contract.

This line of cases is problematic mainly for two reasons. First, the dichotomy between contractual and governmental conduct lacks clarity at least in the way that it has been developed by investment tribunals so far. Second, conditioning reviewability under an investment treaty on the basis of the nature of the conduct under review does not conform with the object of such treaties as identified above. On the contrary, in line with the judicial review conceptualization, the scope of review under investment treaties should be a function of the institutional character of the actor and the nature of the function being performed. The following sections elaborate further on these statements.

A. Lack of Clarity

First of all, there is a lack of clarity with regard to the relevant criteria for determining the “very nature of” the conduct under review (i.e., whether the conduct at issue is contractual or governmental in nature). Those tribunals that have adopted the dichotomy in order to limit the review of host State conduct under investment treaties, have at most referred to whether the host State conduct is “going beyond that which an ordinary contracting party could adopt.”

37 Id. at ¶¶ 330-331 and 337.
38 Impregilo v. Argentina, ICSID Case No. ARB/07/17, Award, ¶ 272 (June 21, 2011) (with regard to the provision on expropriation) and ¶ 310 (with regard to the FET standard).
39 Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Award, ¶ 51, at 34 (Dec. 22, 2003) (‘Pour que la violation alléguée du contrat constitue un traitement injuste ou inéquitable au sens de l’Accord bilatéral, il faut qu’elle résulte d’un
whether the host State conduct “entails the use of governmental powers.” While admittedly it is difficult to determine whether a certain conduct constitutes ordinary contractual conduct or entails the use of governmental power, there has been so far very little elaboration of the difference. Some decisions raise more questions than provide answers. For example, is conduct “contractual” if it is (at least arguably) permitted under the contract? Is conduct “governmental” if it is taken pursuant to a law or regulation or judicial decision? What if the contract is signed in the pursuit of a governmental function but the actual conduct at issue is taken on the basis of that contract? This lack of clarity is somewhat problematic, particularly in light of the general consensus (following the Vivendi annulment decision), that a breach of contract may give rise to a breach of an investment treaty. In other words, the behavior of the host State at the basis of a claim for breach of contract can overlap partially or fully with the behavior underlying a claim for a breach of the treaty.

Secondly, and more fundamentally, clarity is lacking with regard to the relevance given by investment tribunals to the above-mentioned contractual/governmental dichotomy. Some tribunals seem to perceive the governmental nature of the host State conduct at issue as an independent requirement that must be complied with before that conduct may be subject to treaty review. The Hamester tribunal is the clearest example of this approach, excluding the reviewability of the host State conduct at issue on the mere basis that that conduct was not “sovereign” in nature, independent of an assessment of whether that conduct was in breach of the treaty’s substantive standards.

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40 Impregilo v. Pakistan, ICSID No. ARB/03/3, Decision on Jurisdiction, ¶ 260 (April 22, 2005); Siemens v. Argentina, ICSID Case No. ARB/02/08, Award, ¶¶ 248-60 (Jan. 17, 2007).

41 Siemens v. Argentina, ¶ 260 (“The Tribunal concludes that, in the actions listed above, Argentina acted in use of its police powers rather than as a contracting party even if it attempted at times to base its actions on the Contract. As to the other allegations made by Siemens, they relate to delays, non-budgetary allocations, or continuation of the manual system to issue DNIs and are actions that, in the context, could be construed as acts of a contractual party or of the sovereign acting as such. They are not essential to a finding of expropriation and the Tribunal will not consider them.”).

42 RFCC v. Morocco, ¶ 66, at 40 (“Or, les critères pour déterminer si l’État agit comme puissance publique sont donnés par le premier paragraphe de l’article 5 de l’Accord bilatéral italo-marocain qui doit être lu comme faisant référence à la nature de la mesure, laquelle doit donc être prise en vertu des ‘lois et règlements en vigueur’ ou par application d’ une disposition judiciaire.’ Le premier paragraphe impose en quelque sorte une condition de forme de la mesure incriminée afin que la réclamation alléguant une expropriation ou une nationalisation se situe dans le cadre de cette disposition.”).

43 Hamester v. Ghana, ¶¶ 325-331; see also RFCC v. Morocco, ¶ 51, at 34 (“L’État, ou son émanation, peuvent s’être comportés comme des cocontractants ordinaires ayant une divergence d’approche, en fait ou en droit, avec l’investisseur. Pour que la violation alléguée du contrat constitue un traitement injuste ou inéquitable au sens de l’Accord bilatéral, il faut qu’elle résulte d’un comportement exorbitant de celui qu’un contractant..."
On the other hand, other tribunals appear to refer to the governmental nature of the host State conduct as part of assessing the merits of a treaty claim. For example, in *SGS v. Philippines* the tribunal needed to determine for purposes of establishing its jurisdiction, whether the claimant had made a prima facie case under the BIT, independent of the underlying investment contract. In its analysis the tribunal does appear to rely on the (contractual/governmental) nature of the conduct at issue but only within the broader context of determining whether (at least in principle) the claimant had stated a claim for breach of the (i) expropriation provision or (ii) FET standard.

More specifically, the tribunal first rejected the prima facie claim of expropriation principally because there was no deprivation or total loss of the claimant’s contractual right, where deprivation or total loss represented the relevant requirement in order to establish expropriation. The *SGS v. Philippines* tribunal found as follows:

> Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. A fortiori a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.44

Secondly, in accepting the possibility (at least in principle) of a violation of the fair and equitable treatment standard, the *SGS v. Philippines* tribunal appears to focus on whether the conduct of the host State met the treaty standard, rather than on the nature of the host State conduct per se. The tribunal noted that “Whatever the scope of the Article IV [FET] standard may turn out to be – and that is a matter for the merits – an unjustified refusal to pay sums admittedly

44 *SGS v. Philippines*, ¶ 161; see also Waste Management v. Mexico (II), ICSID Case No. ARB(AF)/00/3, Award, ¶¶ 175-76 (April 30, 2004) (“The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply 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 . . . 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. In the present case, in the Tribunal’s view, this has not been shown. The question here is not one of final refusal to pay (combined with effective obstruction and denial of legal remedies); it is one of neglect and failure at the contractual level in the context of a marginal enterprise. That does not pass the test for an expropriatory taking of contractual rights . . . “).
payable under an award or a contract at least raises arguable issues under Article IV.” The Tribunal did not examine whether the conduct at issue was contractual or governmental in nature, but it focused instead on whether that conduct (i.e., the refusal to pay) was unjustified or arbitrary.

Other decisions remain ambivalent on the relevance of the contractual/governmental nature of the measure at issue. For example, in its decision on jurisdiction the tribunal in Impregilo v. Pakistan emphasized, on the one hand, the requirement that the host State conduct at issue be “beyond that which an ordinary contracting party could adopt,” and on the other hand, the fact that an investment treaty protects against “behavior of the host State acting in breach of the obligations it had assumed under the treaty.”

The relevance of the contractual/governmental nature of the host State conduct at issue is even more ambivalent in the recent decision in Impregilo v. Argentina. First of all, in the context of determining whether it had jurisdiction over contractual matters, the Impregilo v. Argentina tribunal made reference to the Hamester v. Ghana decision and the principle that “only the State as a sovereign can be in violation of its international obligations.” However, the Impregilo v. Argentina tribunal recognized that the distinction between contractual claims and treaty claims “is not always clear” and that “some acts may involve questions of the implementation of the Concession contract as well as the observance of Argentina’s obligations under the BIT.” The tribunal eventually rejected

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45 SGS v. Philippines, ¶ 162.
46 See also Waste Management v. Mexico (II), ¶ 115, (“In the Tribunal’s view the evidence before it does not support the conclusion that the City acted 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. It sought alternative solutions to the problems both parties faced, without finding them. The most important default was its failure to pay; . . . For present purposes it is sufficient to say that even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem. In the present case the failure to pay can be explained, albeit not excused, by the financial crisis which meant that at key points the City could hardly pay its own payroll. There is no evidence that it was motivated by sectoral or local prejudice.”).
47 Impregilo v. Pakistan, ¶ 260 (“In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (‘puissance publique’), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.”)
48 Impregilo v. Argentina, ¶ 175.
Argentina’s jurisdictional objection to the extent that Impregilo’s claims based on expropriation and unfair treatment are “clearly issues under the BIT and not exclusively contractual claims.”

Moving to the merits, the *Impregilo v. Argentina* tribunal appears to rely on the contractual nature of the measure in its determination of whether an expropriation had actually occurred. However, it is not clear whether the tribunal applied the test as an independent enquiry or as part of assessing the merits of the investor’s treaty claim. While it (implicitly) admitted that the termination of the concession by the Province of Buenos Aires could amount to a loss of the investment for purposes of a finding of expropriation, the *Impregilo v. Argentina* tribunal found that in the specific case such termination did not amount to an expropriation. In the tribunal’s view, the termination was “an act performed by the public authorities in their capacity as a party to the contract.” As long as the concession contract provided for termination in various defined circumstances and if the contract is terminated in conformity with these provisions, then such termination is not an act of expropriation by the State.

With regard to the claim based on the fair and equitable treatment standard, ambivalence with regard to the relevance of the contractual/governmental nature of the conduct at issue may be found both in the general approach adopted by the *Impregilo v. Argentina* tribunal and in the application of such approach to the various acts complained of by the investor. With regard to the former, the tribunal recognized, in line with the approach adopted in *Hamester*, that the relevant criterion distinguishing contractual rights (and obligations) from treaty rights is “whether the State or its entities act as holder of sovereign power or as parties to a contract.” However, following more the *SGS v. Philippines* approach, the *Impregilo v. Argentina* tribunal also recognized that it is the “inappropriate” use of public powers that is key in establishing a violation of an investment treaty. According to the tribunal, “there may be cases where a state entity which has concluded a contract with an investor performs acts which do not only constitute a breach of the contract but are at the same time a misuse of its status as part of the State organization… and thereby involve the State’s responsibility as party to a BIT.”

The *Impregilo v. Argentina* tribunal then moved on to examine whether the many acts complained of by the investor concerning the contractual relationship between Impregilo’s investment (AGBA) and the Province of Buenos Aires, could

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49 Id. at ¶ 188.
50 Id. at ¶ 272. Interestingly, the tribunal stated that “it is not decisive whether or not the Province had a correct understanding of AGBA’s obligations under the Concession Contract. What is relevant is rather that the Province, with some justification, considered that AGBA had grossly failed in fulfilling its contractual obligations and terminated the Concession Contract on this basis. This is sufficient, in the Arbitral Tribunal’s opinion, to exclude that the termination could be regarded as an act of – direct or indirect – expropriation or other appropriation of AGBA’s property or Impregilo’s investment.” Id. at ¶ 283.
51 Id. at ¶ 296.
52 Id. at ¶ 297.
affect Argentina’s responsibility under the fair and equitable treatment provision. \textsuperscript{53} The tribunal rejected all of the investor’s claims regarding the State acts performed by the Province as a party to the concession contract, apparently focusing on whether those acts complied with the good governance standards embodied in the fair and equitable treatment provision. The tribunal found that the investor had not demonstrated that any of those acts were “a misuse of public power,” \textsuperscript{54} “unreasonable” \textsuperscript{55} or “unjustified.” \textsuperscript{56} In a few instances, however, the tribunal excluded Argentina’s responsibility under the treaty on the basis of the “contractual” nature of the dispute, \textsuperscript{57} leaving at least open the question of the relevance of the nature of the conduct (or dispute?) at issue.

B. The Proper Role of the Nature of the Conduct

While the nature of the host State conduct may play a role in establishing a breach of the investment treaty, it is argued that the nature of the specific conduct at issue should not be (employed as) a \textit{per se} limit on the reviewability of such conduct under investment treaties. In other words, I favor the approach adopted in \textit{SGS v. Philippines} rather than the one followed in \textit{Hamester v. Ghana}. It is believed that the former is more in line with the object of an investment treaty (i.e., the establishment of a system of judicial review) and with the principles of State responsibility under international law.

The rationale and justification for domestic systems of judicial review have evolved during the last two centuries in line with the evolution of the role of government over time. Nevertheless, two of the key elements that are central in

\textsuperscript{53} \textit{Id.} at ¶ 299.

The acts complained of by Impregilo, concerning the contractual relationship between AGBA and the Province, were the following:

Such acts are, for instance, those which relate to AGBA’s entitlement to work charges and connection fees and to an increased sewage coefficient as well as other matters relating to specific clauses in the contractual provisions agreed between AGBA and the Province. Other contractual problems have concerned the application of tax stabilization provisions, the suspension of the right to interrupt services to non-paying customers and the installation of meters at customers’ requests. Other measures that should be mentioned in this context are the Province’s failure to deliver the UNIREC plants in time and the fact that a large number of users of water and sewage services with particularly low payment capacity were added to AGBA’s circle of customers which made it more difficult for AGBA to comply with its contractual obligations and reach the envisaged expansion goals.

\textit{Id.} at ¶ 298.

\textsuperscript{54} \textit{Id.} at ¶¶ 301, 304, 306, 307.

\textsuperscript{55} \textit{Id.} at ¶ 302.

\textsuperscript{56} \textit{Id.} at ¶ 304.

\textsuperscript{57} \textit{Id.} at ¶ 303 (“This appears as a typical contractual dispute which cannot involve responsibility under the BIT”) \textit{See also} ¶¶ 305 and 308.
order to understand and justify judicial review as a special system of legal control are the “institutional character of the actor” and the “nature of the function being performed.” As convincingly argued by Mark Elliott with regard to the common law, judicial review is, first of all, necessitated by the uniqueness of government’s position (“unusually powerful” and “uniquely devoid of any legitimate self-interest”) and second, aims to secure the public interest in good governance (“the public is entitled to expect that governmental decisions will accord with standards of good administration”). Accordingly, conduct will be amenable to judicial review on the basis of indicia such as whether the conduct (a) is taken by a governmental entity and (b) engages a governmental function. In other words, while there may be powerful arguments for judicial review of decisions taken by governmental bodies, this may not be the case when such a body is engaged in activities that have little to do with a public function. Equally, while conduct by non-governmental bodies should not in principle be subject to the peculiarities of judicial review, it may on the contrary be appropriate whenever they are indeed exercising a public function.

Even without going into any detail about the notions of “governmental entity” or “governmental/public function,” an enquiry about the nature of the entity or function at issue is, strictly speaking, different from one about the nature of the conduct under review. Governmental functions may be carried out both via the use of public powers and via contracts. Accordingly, in the context of investment treaties, the key analysis should be whether the entity and function at issue are of a governmental nature, rather than whether the nature of the specific conduct under review is contractual or governmental. In Impregilo v. Argentina, for example, the relevant questions should have been (i) whether the various acts by the Governor, the Ministry of Public Works and Services and the water services regulator of the Province of Buenos Aires were acts of governmental entities and (ii) whether those acts were taken in the exercise of a governmental function. Arguably both questions should have been answered affirmatively, independently of the fact that the Province had chosen to exercise its public functions in the water services sector partly via concession contracts.

It may be further argued that, in the context of the investment treaty system, there may be no need to establish the amenability to judicial review according to the analysis based on the nature of the entity and function at issue. This is so as applicable rules on attribution of conduct under international law already operate in many respects on similar grounds. Pursuant to customary rules on State responsibility, only the conduct of “State organs” and “persons exercising

59 Id. The third indicia of amenability, according to Elliott, is whether the action is taken under legal powers. See also S.H. Bailey, Judicial Review of Contracting Decisions, 2007 PUBLIC LAW 444, 450-51. With regard to French administrative law, see JOHN BELL, SOPHIE BOYRON, & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 168 et seq. (2008).
elements of governmental authority” may be attributed to the State.\footnote{See Articles 4 and 5 of the ILC Articles on State Responsibility, G.A. Res. 56/83 (Dec. 12, 2001). Article 8 also includes conduct of persons acting on the instruction of, or under the direction or control of, a State in carrying out the conduct.} Not only would this approach have the advantage of simplifying the analysis of an investment tribunal, it would also be in line with the traditional two-prong requirement of an internationally wrongful act of a State under international law: that the conduct at issue (a) is attributable to the State under international law and (b) constitutes a breach of an international obligation of the State.\footnote{ILC Articles on State Responsibility, Art. 2.}

Nevertheless, the nature of the conduct may play a role in the investment treaty system both at the level of establishing attribution and for purposes of determining a breach of a treaty obligation. With regard to the former, while conduct by State organs is attributed to the State independently of its contractual or commercial nature,\footnote{¶ 6 of the Commentary to Art. 4, JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY at 96.} conduct of persons exercising elements of governmental authority may be attributed only if such conduct concerns governmental activity and not other private or commercial activity in which the person may engage.\footnote{¶ 5 of the Commentary to Art. 5. Id. at 101.}

For purposes of determining whether a conduct attributed to the State has breached an investment treaty obligation, it is important again to emphasize the autonomy of a cause of action under an investment treaty. While the same State conduct may be in breach of a contract and of a treaty, the actual determination of breach will depend on the contract and on the treaty, respectively. This is why a breach by a State of a contract may not as such entail a breach of a treaty, unless something further is established. It follows then that in order to understand whether the nature of the conduct plays any role in a tribunal’s review under an investment treaty, it is essential to focus on the various treaty provisions at issue. For example, investment treaties often require States to grant foreign investors fair and equitable treatment. In a situation involving contracts, what matters is whether the investor is able to demonstrate that a specific conduct attributed to the host State is unfair or inequitable. The fact that such conduct is of a contractual nature (whatever that means), is taken pursuant to a contract, or is in breach of a contract should not be dispositive of the treaty claim. While it is clear that the fact that the conduct is, for example, taken pursuant to a contract may contribute to establish its fairness and equity for purposes of the treaty, this may not be in itself sufficient. Equally, the fact that the conduct is in breach of the contract may not be sufficient to establish that the conduct is in breach of the fair and equitable standard.

A similar approach may be taken with regard to the expropriation provision in investment treaties, usually prohibiting direct and indirect expropriations of foreign investments except for a public purpose, in a non-discriminatory manner, according to due process and upon payment of compensation. Investment
tribunals seem to agree that a breach by a State of a contract may, at least in principle, constitute an expropriation for purposes of investment treaties, particularly since treaties expressly include “contractual rights” under the definition of protected investments. However, the debate in this area of investment law centers on the definition of expropriation: when may conduct (allegedly in breach of a contract) be defined as expropriatory? Once again, an exclusive focus on the nature of the conduct may not constitute the most appropriate approach. Taking what appears to be the majoritarian approach of focusing on the adverse effect of the State conduct on the foreign investment, a tribunal would need to assess whether the State has directly or indirectly deprived the investor of its investment or at least substantially interfered with the protected investment. In the case of a contract, deprivation or substantial interference may entail conduct by the host State that annuls or repudiates the contractual right (possibly in combination with effective obstruction and denial of legal remedies),64 is designed illegitimately to end the contract or to force its renegotiation,65 or is a conscious refusal to honor contractual obligations motivated by political reasons.66 Reference to the contractual/governmental nature of the host State conduct under review may be used to determine whether an expropriation has actually occurred. However, it is important to emphasize that the core of the analysis should not be centered on the nature of the conduct under review. Whether or not the conduct under review is contractual in nature (or in breach of the contract) cannot be dispositive of whether or not an expropriation has taken place.

To sum up, reviewability under an investment treaty should be based on an examination of the institutional character of the actor involved and the nature of the function being performed, rather than on the basis of the nature of the conduct under review. This view conforms to my conceptualization of the investment treaty system as judicial review, that is a transnational legal framework for the control of public decision-making at the domestic level for the immediate benefit of foreign investors.

III. THE STANDARDS OF JUDICIAL REVIEW UNDER BITS:
THE NATURE AND INTENSITY OF REVIEW

A crucial aspect of the investment treaty system deals with the parameters to be employed by investment tribunals in reviewing host States’ conduct. What is the nature or content of the review? Should a tribunal second-guess any decision of a host State? To what extent should a tribunal review legal and factual issues (that may have already been examined by a first decision-maker)? How intense should the tribunal’s review of host-State conduct be? In a very broad sense, one can describe this set of questions as revolving around the issue of the standards of

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64 SGS v. Philippines, ¶ 161 and Waste Management v. Mexico II, ¶¶ 175-76.
65 Vivendi v. Argentina II, ICSID Case No. ARB/97/3, Award, ¶ 7.5.22 (Aug. 20, 2007).
judicial review under investment treaties. Once again, this section attempts to sketch answers to these questions on the basis of a judicial review conceptualization of the investment treaty system. First, I identify two distinct meanings of the term “standard of review” and explain their interrelation (Section A). Second, I focus on the intensity of review and argue that (i) the nature of the underlying treaty norm should influence the intensity of the review carried out by investment tribunals and (ii) there should be no automatic distinction, in terms of intensity of review, between questions of law and questions of fact (Section B).

Before I proceed any further, it may be useful to set the outer boundaries of the nature and intensity of review. With regard to the nature of the review, it was noted above that investment tribunals perform “judicial review” rather than “merits review.”67 While judicial review may include both procedural and substantive criteria, its scope is limited to reviewing whether the measure is “lawful” (on the basis of those criteria) rather than whether the measure is the “correct” or “preferable” one. Although the dividing line between “judicial review” and “merits review” may at times be difficult to draw, at least in principle, it is said that, contrary to the merits reviewer, the judicial reviewer does not stand in the shoes of the primary decision-maker or does not have an open-ended mandate to second-guess government decision-making.68

With regard to the intensity of the review, the well-known statements of the WTO Appellate Body in EC-Hormones may be useful to emphasize. The Appellate Body noted that the appropriate standard of review for panels with respect to both the ascertainment of facts and the legal characterization of such facts under the relevant agreement is an “objective assessment” pursuant to Article 11 of the Dispute Settlement Understanding. More specifically (and crucially), with regard to findings of facts, the applicable standard is neither de novo review nor total deference.69 Admittedly these statements do little to provide substantive guidance on the intensity of the review, whether by WTO panels or investment tribunals.70 However, one can read these statements more as the Appellate Body drawing the relevant spectrum of intensity of review by excluding certain extremes. On the one hand, de novo review is excluded as it would take the tribunal very close (if not squarely in) to the realm of merits review. On the other hand, total deference is also excluded as it would practically emasculate the tribunal’s supervisory role.71

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67 See text at note 31 supra.
68 SD Myers v. Canada, Partial Award, ¶ 261 (Nov. 13, 2000).
71 Interestingly, the disputing members in EC-Hormones (particularly the U.S. and the EC) agreed on the inappropriateness of both approaches. They did, however, disagree on the level of deference (short of total) that a panel was to grant a WTO Member. EC-Hormones, at ¶¶ 41-42. For a similar, uncontroversial position in the investment treaty context, see Chemtura Corp v. Canada, Award, Aug. 2, 2010, ¶ 134 (“The Tribunal notes
A. Standard(s) of Review: Two Meanings for One Concept?

The term “standard of review” may be used to describe two interrelated concepts. On the one hand, it includes the nature (or content) of review, in the sense of the principle or norm that forms the basis of the review carried out by a court or tribunal. In the investment treaty system, these norms may include the obligation to grant national treatment or fair and equitable treatment to foreign investors, or the prohibition against discriminatory or arbitrary conduct vis-à-vis foreign investors. In a domestic law context, one would usually refer to this concept as the “grounds for review.”

On the other hand, the standard of review may also be employed to describe the intensity (or extent) of the review carried out by a court or tribunal. Concepts like full review, de novo review, anxious scrutiny, intermediate scrutiny, light touch review, minimum review, and total deference are often used to describe the different levels of the intensity of review carried out by an investment tribunal as well as a constitutional or administrative court.

The interrelation between these two concepts occurs on at least two levels. First, as the source of one or both of these standards is often jurisprudential, the two concepts are not always distinguished or even distinguishable in practice. Take for example, “Wednesbury unreasonableness,” one of the grounds of judicial review of administrative acts in English law. In Associated Provincial Picture Houses Ltd v. Wednesbury Corporation, Lord Greene explained that, in order to be unlawful, the exercise of a discretionary power by a public authority must be “so unreasonable that no reasonable authority could ever have come to it” and “to prove a case of that kind would require something overwhelming.” Although it was enunciated as a unitary principle, Wednesbury unreasonableness could analytically be broken down distinguishing between the nature of review (“reasonableness”) and the intensity of review (“overwhelmingly” or “so” unreasonable).

at the outset that it is not its task to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context, as the Claimant acknowledged at the hearing for closing arguments: “As Canada has noted, the rule of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies. We agree with this proposition.”

See also Yuval Shany, Towards a General Margin of Appreciation Doctrine in International Law?, 16 J. INT’L ECON. L. 907, 910 (2005) (emphasizing that at a minimum States must exercise their discretion in good faith according to Article 26 of the Vienna Convention on the Law of Treaties). See Continental v. Argentina, ICSID Case No. ARB/03/9, Award, ¶ 181, n. 266 (Sept. 5, 2008) (arguing that the expression “its own security interests” in Article XI of the United States-Argentina BIT “implies that a margin of appreciation must be afforded to the Party that claims in good faith that the interests addressed by the measure are essential security interests”).

72 See Woolf, Jowell, Le Sueur, supra note 22; Alex Tuerk, Judicial Review in EU Law (2009).

The same can be said with regard to (one of the key authorities on) the minimum standard of treatment of aliens under customary international law. In the *Neer* case, the Mexico-U.S. General Claims Commission noted that, in order to constitute an international delinquency, the treatment of an alien should amount, *inter alia*, to “an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” Again, at least in theory, one can distinguish two aspects of the *Neer* statement: while the governmental conduct’s “insufficiency … short of international standards” may be characterized as the underlying norm (i.e., the nature of review), the level of insufficiency required to trigger a breach of international law (i.e., the intensity of review) is one that falls “so far” short of international standards and is recognized “by every reasonable and impartial man.”

In the investment treaty context, a difference in the intensity of review seems to represent the key element underlying NAFTA tribunals’ inconsistent views of the minimum standard of treatment under customary international law as reflected in Article 1105 of NAFTA. To prove this point, it is enough to compare the relevant statements by the investment tribunals in *Glamis v. United States* and *Merrill & Ring v. Canada*. In *Glamis*, the tribunal noted that there was no indication that customary international law had moved beyond the minimum standard of treatment of aliens as defined in *Neer* in 1926. Emphasizing the same high level of scrutiny, the tribunal explained:

> [A]lthough situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1).

On the other hand, the *Merrill & Ring* tribunal concluded that, at least with regard to the treatment of aliens in relation to business, trade and investment, the customary minimum standard is broader than that defined in the *Neer* case and its progeny. According to the *Merrill & Ring* tribunal, “[T]he standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.” Accordingly, while the underlying norms referred to by both tribunals appear to be largely the same (fairness, reasonableness, due process,

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75 Glamis Gold Ltd. v. United States, Award, ¶ 616 (June 8, 2009).

76 Merrill & Ring v. Canada, Award, ¶¶ 210-23 (March 31, 2010). Interestingly, the *Merrill & Ring* tribunal considers whether Canada’s conduct at issue breached the protections provided by Article 1105 of NAFTA under two scenarios, depending on the “low” or “high” threshold to be applied to establish breach. See id. at ¶¶ 219-46.
etc.), the level of scrutiny is strikingly different. Only the *Glamis* tribunal emphasized the need for the lack of fairness, equity or reasonableness to be blatant, gross, and manifest.\(^\text{77}\)

The second level of interrelation between the nature and intensity of review occurs with regard to the concept of “deference.” The standard of review, particularly the intensity of review, is often linked with the concept of deference. As aptly noted by Schill, deference “is a parameter of the relationship between international and domestic law and protects a state’s domestic policy space against control by international law and international tribunals.”\(^\text{78}\) There are obviously several arguments both in favor and against granting (a level of) deference to host States, such as democratic accountability, expertise, inter-institutional comity, uniform development of the law, and national bias.\(^\text{79}\)

What is worthwhile emphasizing here is that one can adopt a deference perspective with regard to both the nature and intensity of review. With regard to the former, for example, an interpretation of the fair and equitable treatment standard that requires bad faith in order to establish a breach of the investment treaty\(^\text{80}\) may be seen as more deferential than one that requires, *inter alia*, the host State to maintain “a stable legal and business environment.”\(^\text{81}\) Equally, an interpretation of the national treatment standard that requires discriminatory intent as a necessary prerequisite for a finding of discrimination\(^\text{82}\) is more deferential vis-

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\(^{77}\) According to the *Glamis* tribunal, the lack of evolution since Neer “is evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard. *International Thunderbird* used the terms ‘gross denial of justice’ and ‘manifest arbitrariness’ to describe the acts that it viewed would breach the minimum standard of treatment. *S.D. Myers* would find a breach of Article 1105 when an investor was treated ‘in such an unjust or arbitrary manner.’ The *Mondev* tribunal held: ‘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 . . . .’ In the present case, the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard. The idea of deference is found in the modifiers ‘manifest’ and ‘gross’ that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.” *Glamis*, ¶¶ 614 and 617. Cf. Rahim Moloo & Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, 4 Y.B. INT’L INV. L. & POL’Y 539 (2012).


\(^{79}\) Shany, * supra* note 71, at 918-25; See also Schill, * supra* note 78 (highlighting how some of those policies may justify either stance).

\(^{80}\) Some read *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001), as an example of such interpretation.

\(^{81}\) CMS v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005).

à-vis the host State than one that more simply requires no disparate treatment between a domestic and foreign investor.83

With regard to the intensity of review, even within the boundaries noted above (excluding both “full review” and “no review”), there may be a spectrum of levels of scrutiny according to which an investment tribunal may carry out the review of a host State conduct under an investment treaty. As seen above, for example, a reasonableness review may be more or less deferential vis-à-vis the domestic decision-maker depending on the intensity of review chosen by the investment tribunal (unreasonable conduct versus manifestly unreasonable conduct). With regard to English judicial review, for example, Woolf, Jowell & Le Sueur identify three different approaches under a so-called “variable intensity unreasonableness review”: anxious scrutiny, standard Wednesbury and light touch.84

It may thus be argued that in terms of deference, an investment tribunal’s standard of review, in its dual meaning, should be seen as a two-axis relationship. In other words, the extent of the deference accorded to the host State is a combination of both the nature and intensity of review that an investment tribunal chooses to adopt.85 This is the second layer of interrelation between the two notions of the standard of review described above.

B. Is There a Difference in Intensity of Review Depending on the Nature of the Underlying Treaty Norm or the Question Before the Tribunal?

So what is (or should be) the nature and intensity of the review to be carried out by investment treaty tribunals? Given the generic nature of investment treaties, the answer is first of all a matter of treaty interpretation in the hands of investment tribunals. Treaties include at best very open-ended provisions (“fair and equitable treatment,” “no less favorable treatment,” “no arbitrary or discriminatory conduct,” etc.) and without any express reference to the required level of scrutiny. At times, treaties incorporate references to customary law, often leaving tribunals with the task of identifying the relevant custom. In this sense, the question about the nature and intensity of review is a “question of (international) law” entirely up to the international tribunal that is called upon to resolve a dispute concerning an alleged breach of a treaty obligation.86 Accordingly, a treaty tribunal should disregard

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83 Occidental v. Ecuador, ICSID Case No. ARB/6/11, Award, ¶ 173 (July 1, 2004).
84 WOOLF, JOWELL, LE SUEUR, supra note 22, at 592 et seq.
85 Shany, supra note 71, at 910.
86 This “question of law” is different from the question of (domestic) law that may be relevant in determining a host State’s liability under an investment treaty. In this latter sense, domestic law is an issue of fact. See Sergei Paushok v. Mongolia, UNCITRAL, Award on Jurisdiction and Liability (April 28, 2011) (where the tribunal rejected claimant’s argument that Mongolia had violated the FET standard as the enactment of the windfall profit tax was non-transparent (as it was allegedly adopted in a week and without any consultation with affected sectors)). The tribunal noted that “[n]o evidence ha[d] been introduced to the effect that, under the Mongolian Constitution or under the rules of the
whatever position, if any, has been taken by the host State with regard to the meaning or interpretation of the international treaty norm.\(^87\)

This does not, however, mean that investment tribunals should interpret treaties restrictively so as not to impinge on host States’ sovereignty or to interpret them in a broad manner granting complete legal protection to foreign investors. Treaty interpretation should instead follow the customary rule as codified in the VCLT, focusing principally on the text, context and object and purpose of the treaty at issue. As noted above, there is clearly a “deference” perspective in the tribunal’s interpretative exercise (a particular interpretation with regard to either the nature of the review or the intensity of the review may be seen as more or less deferential vis-à-vis host States).\(^88\) However, this perspective should not take over the interpretative exercise, rather it should be reflected in, and be part of, the holistic examination of the various components of the customary rule on treaty interpretation. The tribunal in Lemire v. Ukraine correctly noted that it is for the tribunal to define the “threshold of propriety” required by the FET standard on a case-by-case basis, bearing in mind both foreign investors’ interests\(^89\) and other legally relevant interests.\(^90\)

Great Khural, consultation with affected sectors or meaningful analysis of the implications of proposed legislation is required before its adoption.” \(\text{Id. at \(\S\) 304. On the complexity of the applicable law issue in investment treaty arbitration, see ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 39 et seq. (2009).}\)

\(^87\) In this sense, it has been argued that for purely legal questions there is \textit{de novo} review of a national authority’s legal determination, regardless of whether that authority has given a first interpretation of international law. \textit{See} Jan Bohanes & Nicolas Lockhart, \textit{Standards of Review in WTO Law, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW} 386 (Daniel Bethlehem et al. eds., 2009).


\(^89\) Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 284 (Jan. 14, 2010) (“The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following: – whether the State has failed to offer a stable and predictable legal framework; – whether the State made specific representations to the investor; – whether due process has been denied to the investor; – whether there is an absence of transparency in the legal procedure or in the actions of the State; – whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State; – whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent.”)

\(^90\) “The evaluation of the State’s action cannot be performed in the abstract and only with a view of protecting the investor’s rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred: – the State’s sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a
While it is not possible (or wise) here to go into any further detail about what is (or should be) the nature of review under investment treaties, the remainder of this section attempts to provide an answer to the second part of the aforementioned question, that is, how should a tribunal correctly identify the intensity of the review in the investment treaty context? Assuming that investment treaties do not provide any textual clues to answering the question, the following two propositions are hereby advanced: first the nature of the underlying treaty norm should influence the intensity of the review and second, in terms of the intensity of review, there should be no automatic distinction between questions of law and questions of fact.91

1. The Nature of the Underlying Treaty Norm and Intensity of Review

Shany has argued that standard-type norms in international law (such as “necessity,” “proportionality,” “good faith,” and “reasonableness”) justify the application of the margin of appreciation rule, as these norms meet the test of inherent uncertainty in both their interpretation and application.92 According to Shany, a tribunal should be deferential both in interpreting the content of an open-ended norm (does “fair and equitable treatment” entail a review of arbitrariness or lack of reasonableness?) as well as in applying that norm to the facts of the case (is the host State specific conduct under review manifestly arbitrary or unreasonable?). Taking Shany’s argument to its logical conclusion, rule-type norms, on the other hand, do not justify (or justify to a lesser extent) the application of a margin of appreciation. At least with regard to the issue of the intensity of review (the second prong of Shany’s margin of appreciation rule), a rule-type norm does not justify the same level of deference to the host State. In other words, a rule-type norm may justify a higher level of scrutiny of the host State measure under review compared to a standard-type norm.

Possible examples of rule-type norms in the investment treaty context include: (i) the prohibition of measures taken in bad faith,93 and the prohibition of coercion, threats, and harassment of an investment within the context of the fair and equitable treatment standard; (ii) the prohibition of a formally discriminatory measure vis-à-vis foreign investors within the context of the legitimate expectations of the investor, at the time he made his investment; – the investor’s duty to perform an investigation before effecting the investment; – the investor’s conduct in the host country.” Id. at ¶ 285.

91 There may be others as well. See, e.g., SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 208 (2009) (highlighting different levels of deference depending on the nature of the body under review: the more democratic it is, the more deference it deserves).

92 Shany, supra note 71, at 910 and 914. Shany argues the same for “discretionary norms” and “result-oriented norms.” See Continental v. Argentina, supra note 71, at ¶ 181, n. 270 (citing Shany with approval).

93 I argue that there is a difference between “bad faith” and “lack of good faith.” Only the former should be classified as a rule-type norm.
national treatment standard; and (iii) the prohibition of “direct expropriation without compensation.” In light of both the higher level of legal certainty of these norms and the related perceived gravity of the various conducts thereby prohibited, it makes little sense to introduce different levels of intensity in the review carried out by tribunals (i.e., only the most egregious form of duress or bad faith is prohibited but not “mere” harassment or bad faith). On the contrary, once duress, or bad faith, or de jure discrimination based on nationality or direct expropriation without compensation has been satisfactorily demonstrated by the claimant, there is really no reason for the tribunal to condition a finding of violation of the treaty on the basis of the particularly serious or manifest nature of the host State’s wrongful conduct.

Can a similar argument be made vis-à-vis result-oriented norms as compared to process-type norms, the former being subject to a margin of appreciation and, by implication, the latter being subject to a stricter level of scrutiny? Schill argues for such a distinction on the basis that courts in general (and investment treaty tribunals, more specifically) possess expertise in assessing the procedural propriety of governmental decisions. This appears sensible, particularly because process-type norms do not by definition involve a review of the merits. In other words, a review based on process-type norms entails a much smaller risk of the tribunal entering the forbidden zone of assessing the appropriateness or correctness of the host State conduct (a risk that is, on the contrary, present in a review based on result-oriented or substantive norms).

A confirmation of such distinction may be found in the apparent different level of scrutiny to which a claim of a procedural denial of justice is subject compared to the level of scrutiny of a claim of a substantive denial of justice. While the former can arise “from procedural irregularities in judicial proceedings, such as undue delays, lack of due process, failure to provide a fair hearing or the non-execution of a judgment,” the latter may stem from a “manifestly unjust judgment.” The Chevron v. Ecuador tribunal expressly recognized the difference

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94 The burden of proof may be a high one in some of these circumstances but that is analytically a different question, albeit one that may play a role in the ultimate assessment of the level of deference accorded to the host State and the review carried out by the investment tribunal.
95 For a case of physical and financial duress, see Desert Line Project v. Yemen, ICSID Case No. ARB/05/17, Award, ¶ 190-94 (Feb. 6, 2008); and for a case of bad faith, see Frontier Petroleum Services Ltd v. Czech Republic, UNCITRAL, Final Award, ¶ 297-301 (Nov. 12, 2010).
96 See, e.g., Shany, supra note 71, at 917.
97 Schill, supra note 78, at 24.
98 Denial of justice claims may be based on customary international law, general treaty provisions requiring “fair and equitable treatment” and specific treaty provisions requiring “effective means of asserting claims.” For examples of the latter see United States-Ecuador BIT, Art. II(7) and Energy Charter Treaty, Art. 10(12).
in the standard of review or level of deference between a claim for undue delay and one for a manifestly unjust judgment.\footnote{100}

2. Intensity of Review of Questions of Fact

It was noted above that “questions of law” are entirely up to the international tribunal that is called upon to resolve a dispute concerning an alleged breach of a treaty obligation. Accordingly, no deference should be given to whatever position, if any, has been taken by the host State with regard to the meaning or interpretation of the underlying international norm. But what about questions of fact? Should an investment tribunal review the factual findings underlying the host State conduct at issue? And if so, to what extent?

These questions stem partly from the view that courts performing judicial review will not normally interfere with a public authority’s assessment of the evidence or the facts, since they are concerned with the law and not the merits of a case.\footnote{101} In a way, this is the key difference between “judicial review” and “merits review,” as described above. However, even from this perspective, there are situations where review of facts by a court is indeed permitted. In English common law, for example, mistake of material fact, lack of substantial evidence, and new evidence not before the decision-maker may justify a court’s review of the facts.\footnote{102}

When it comes to the investment treaty system, it is apparent that investment tribunals spend a great deal of their time with factual questions and there appears to be a relatively intense review of the facts. This can be explained (and, in our view, justified) by focusing first on the difference between “questions of fact” and “findings of fact” and second on the relevance in this context of the application of the law to the facts.

\footnote{100} Chevron v. Ecuador, PCA/UNCITRAL, Partial Award, ¶ 379 (Mar. 30, 2010) (“[I]f 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 under Article II(7), no such deference is owed.”).

\footnote{101} See Siag and Vecchi v. Egypt, ICSID Case No. ARB/05/15, Award, ¶ 455 (June 1, 2009) (“The Tribunal further considers that the failure to provide due process [i.e., the host State’s failure for seven years to enter into negotiation to determine compensation for the loss of the investment and failure to respect the rulings of its courts] constituted an egregious denial of justice to Claimants, and a contravention of Article 2(2) of the BIT, in that Egypt failed to ensure the fair and equitable treatment of Claimants’ investment.”).

\footnote{102} Jan de Nul v. Egypt, ICSID Case No. ARB/04/13, Award, ¶¶ 196-254 (Oct. 24, 2008) (apparently not differentiating the intensity of review in its analysis of the claims of procedural and substantive denial of justice).

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\footnote{101} WOOLF, JOWELL, LE SUEUR, supra note 22, at 561.

\footnote{102} Id. at 564-69. See also L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 262-67 (1998).
First, in the investment treaty context, there are many factual questions that come before an investment tribunal: was the claimant notified of, or invited to, the hearing where its permit application was discussed and denied? Is there a competitive relationship between the claimant and other domestic operators? Was the government aware of an imminent seizure of the claimant’s investment and did the government adopt remedial measures following such seizure? If disputed, these factual questions need to be answered in order for the tribunal to determine whether there has been a violation of the FET standard, the national treatment standard, or the full protection and security standard, respectively. It is often the case that there are simply no existing findings with regard to these specific factual questions. It follows that in these situations, the tribunal cannot grant any deference whatsoever to a national authority’s factual findings (as there are none). In these situations, the tribunal will need instead to carry out an original or de novo assessment of the relevant facts.

Second, even in those situations where the national authority has already made certain findings of fact, the investment tribunal may need to consider those facts as part of the tribunal’s interpretation and application of the underlying treaty norm. The more open-ended the underlying norm, the more difficult it becomes to distinguish between questions of law and questions of fact. Take for example the question whether a specific gasoline additive is harmful to public health or the environment. A finding that the additive is indeed harmful may constitute at the same time the basis for a ban on the use of that additive by the host State and an important element in order for an investment tribunal to establish a violation of the international treaty based on the host State’s irrational behavior or discriminatory intent. While the Methanex tribunal did not carry out a de novo assessment of whether the gas additive methanol constituted a risk for the public health and the environment, it does not appear to have simply deferred to the domestic decision-maker, either. After an extensive examination of the “scientific evidence” (which included various scientific reports and expert witnesses), the tribunal concluded as follows:

Having considered all the expert evidence adduced in these proceedings by both Disputing Parties, the Tribunal accepts the UC Report as reflecting a serious, objective and scientific approach to a complex problem in California. Whilst it is

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103 Metalclad v. Mexico, ICSID Case No. ARB/(AF)/97/1, Award, ¶ 91 (Aug. 30, 2000).
104 SD Myers v. Canada, UNCITRAL Partial Award, ¶ 251 (Nov. 13, 2000).
105 Wena Hotels v. Egypt, ICSID Case No. ARB/98/4, Award, ¶¶ 80-83 (Dec. 8, 2000).
106 Bohanes & Lockhart, supra note 87, at 389. Cf. Lemire v. Ukraine, at ¶ 286 (“Once the scope and meaning of the FET standard has been defined in the abstract, the Tribunal must establish the facts and decide whether they constitute a violation of such standard”).
107 TIMOTHY ENDICOTT, ADMINISTRATIVE LAW 345-46 (2nd ed. 2011).
108 Methanex v. USA, UNCITRAL, Final Award (Aug. 3, 2005).
109 Id. Part III, Chapter A, ¶¶ 159-210.
possible for other scientists and researchers to disagree in good faith with certain of its methodologies, analyses and conclusions. The fact of such disagreement, even if correct, does not warrant this Tribunal in treating the UC Report as part of a political sham by California. In particular, the UC Report was subjected at the time to public hearings, testimony and peer-review; and its emergence as a serious scientific work from such an open and informed debate is the best evidence that it was not the product of a political sham engineered by California, leading subsequently to the two measures impugned by Methanex in these arbitration proceedings. Moreover, in all material respects, the Tribunal is not persuaded that the UC Report was scientifically incorrect: the Tribunal was much impressed by the scientific expert witnesses presented by the USA and tested under cross-examination by Methanex; and the Tribunal accepts without reservation these experts’ conclusions.110

It is submitted that the tribunal’s review of the regulatory process and scientific evidence in particular was a necessary component in determining whether the California ban was motivated by legitimate concerns or was intended to discriminate between ethanol and methanol producers.111 Only if the regulatory process had appeared biased or non-transparent and the scientific evidence weak or incorrect, the tribunal could have reached the conclusion that the ban was intended to discriminate vis-à-vis a foreign investor. In other words, such review was necessary to apply the international treaty norm to the particular facts of that case.112

To sum up, it is useful to distinguish two aspects of the standard of review, that is the nature of review and the intensity of review. Accordingly, in terms of the deference that is accorded to the host State, an investment tribunal’s standard of review should be seen as a two-axis relationship combining both the nature and intensity of review. Furthermore, investment tribunals should distinguish the intensity of review on the basis of the nature of the underlying treaty norm: rule-like norms and process-type norms should be subject to a more intensive review compared to standard-like norms and result-oriented norms. On the other hand, there should be no automatic distinction, in terms of intensity of review, between questions of law and questions of fact.

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110 Id., Part III, Chapter A, 51 at ¶ 101.
111 Cf. Marcos Orellana, The Role of Science in Investment Arbitrations Concerning Public Health and the Environment, 17 Y.B. INT’L ENV’T’L L. 48, 71-72 (2006) (emphasizing that the tribunal’s focus was on a review of the credibility of the domestic regulatory process that lead to the measure at issue in Methanex).
112 A very similar exercise was performed by the tribunal in Chemtura v. Canada, UNCITRAL, Award, ¶ 123 (Aug. 2, 2010), where the tribunal expressly noted that “the Tribunal is of the opinion that the assessment of the facts is an integral part of its review under Article 1105 NAFTA. In assessing whether the treatment afforded to the Claimant’s investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted in concrete.”
CONCLUDING REMARKS

To conclude, three brief remarks are relevant. First, there may be a fear that characterizing the investment treaty system as judicial review will weaken the guarantees offered to investors vis-à-vis host States. One of the findings of this article is that using the public law concept of judicial review does not lead per se to such weakening. On the contrary, as seen in the examination of two specific issues dealing with the scope and standards of review, such approach may lead to a strengthening of the protections vis-à-vis unlawful host State conduct. In other words, the judicial review conceptualization abandons the inadequate, binary “pro-investor v. pro-State” dichotomy and provides instead a more useful, holistic methodology to balance the protection of foreign investment and the sovereign right to regulate in the public interest.

Second, judicial review is just one instrument in the broader normative framework applicable to public authorities in the performance of their functions. In domestic public law systems, there is an array of additional instruments to control public authorities, including political responsibility vis-à-vis Parliament or the electorate, various constitutional checks and balances, internal reviews by the relevant governmental department or agency (which may be appealed before an administrative tribunal), complaints to ombudsmen, and independent audits and inspections.113 Often these additional instruments are much more effective and relevant in ensuring good public governance. These are lessons that the investment treaty system and investment treaty makers should carefully consider (additional instruments in the investment treaty field are, for example, developing the mechanisms for dispute prevention or dispute settlement beyond adjudication, expanding the ways in which contracting parties can influence or amend the text of treaties, or exploring options to institutionalize investment arbitration).

Lastly, while comparative public law will not be able to (and should not) provide specific, ready-made answers to all questions surrounding international investment law, employing the concept of judicial review certainly provides a fruitful methodology with which to address those questions. Lessons may be learned from national, regional and international systems of judicial review, as well as from judicial review systems for the control of the constitutionality of legislation or the control of the legality of administrative acts. There may not be today a consensus about the merits of characterizing the core of the investment treaty system as judicial review, but in my humble opinion this consensus is inevitable. And one day perhaps, we may even identify certain principles of judicial review applicable across several legal systems or even, dare I say, a theory of transnational judicial review.

113 CANE, supra note 20, at 11-13.