SUBSIDIARITY AND THE PUBLIC–PRIVATE DISTINCTION IN INVESTMENT TREATY ARBITRATION

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I
INTRODUCTION

Investment treaty arbitration is a form of international dispute settlement. It allows foreign investors to bring claims against sovereign states that host their investment on the basis of an alleged breach of those sovereign states' commitments regarding foreign investment in their territory. If the state has promised, for example, to extend fair and equitable treatment to the investor, and the state does not keep this commitment, the foreign investor has standing to bring a claim against the state before an arbitration tribunal and seek financial reparation for damages.

Host states often comply with (or breach) their international obligations toward foreign investors through local decisions and regulations. For instance, states expropriate a foreign investment through local decisions. Therefore, in deciding investment disputes, arbitrators often have to scrutinize the behavior of host states and pass judgment on their local decision-making process. Investment arbitration involves two levels of decisionmaking: (1) an international level, where international investment arbitrators assess the behavior of sovereign states on the basis of international law; and (2) a local level, where sovereign states adopt decisions regarding foreign investors, which can in turn be assessed by the international investment tribunals.[1]

Because of its two-level architecture, investment arbitration requires some kind of organizing principle for allocating authority along its vertical axis; that is, it demands a criterion for choosing whether certain issues should be decided at the national or international level. The principle of subsidiarity is one such criterion. As put forward in the introduction to this issue, the principle of subsidiarity requires decisionmaking to occur at lower levels, unless good reasons exist to shift it upward.[2] Certain international legal regimes, such as the Inter-American regime of human rights or the law of the European Union

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1. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 45–69 (Vaughan Lowe ed., 2007).

2. Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1, 6–7.

(EU), expressly provide for subsidiarity as an overarching organizing principle of the interaction between the domestic and international levels. Investment arbitration, in contrast, includes subsidiarity in a much less straightforward fashion. The international investment regime (the law that creates the rights and duties of foreign investors and gives jurisdiction to courts and investment tribunals to enforce them) contains no express reference to subsidiarity, or any other such principle, as an organizing tool for the interaction between the international and domestic levels.[3] As a result, the question of subsidiarity emerges in investment arbitration in a much less stark fashion than occurs in human rights or EU law, for example. Thus, subsidiarity is seldom a formal obstacle for the exercise of jurisdiction by investment tribunals.[4] Instead, it emerges as a question of *deference*. Though the investment regime gives arbitration tribunals the jurisdiction to assess local decisions that affect foreign investments, the degree of deference (if any) that such tribunals should give to local decisionmakers remains an open question.

Against this backdrop, this article argues that the vertical allocation of authority has become a space where contrasting views of investment arbitration as a whole are projected. Subsidiarity in investment arbitration reflects the public–private distinction that permeates most contemporary readings of investment arbitration. Specifically, demand for subsidiarity is a function of the public–private distinction: a private reading of investment arbitration entails a lower demand for subsidiarity (that is, it demands with less intensity that decisionmaking occurs at a lower level), whereas a public reading of investment arbitration entails a higher demand for subsidiarity (requiring with more intensity that decisionmaking occurs a lower level).

Each mindset justifies its choice between levels of authority in terms of its own representation of the external pressures faced by the investment regime. For the public mindset, a central challenge to the investment regime is its lack of democratic legitimacy as an exercise of public power. Faced with this pressure, the public mindset features subsidiarity as an answer because scaling down the level of authority might bridge the investment regime's legitimacy gap by reconstituting the democratic credentials of the decisionmaker. In contrast, for the private mindset, the regime's challenges emerge from its failure to fulfill its function of creating legal certainty for investment; thus, scaling up decisionmaking could enhance the possibilities of a predictable, nonpolitical regulatory environment. In this context, the vertical allocation of authority, derived as it is from the public–private divide, works in investment arbitration as a pressure-relief valve. The valve allows the investment regime to react to the

3. *See* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations*, 35 YALE J. INT'L L. 283, 297 (2010) (explaining that, regarding domestic regulations, "ICSID tribunals have, as yet, failed to develop a coherent jurisprudential approach or consistent standard of review").

4. The exhaustion of local remedies is not required in contemporary investment arbitration. *See* Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 LAW & PRAC. INT'L CTS. & TRIBUNALS 1, 1 (2005).

external criticism by shifting authority down to the local level or by scaling it up to the international level, thus accounting for deep change while remaining overall stable.

This shifting vertical allocation of authority in investment arbitration can be mapped onto Jachtenfuchs and Krisch's conjectures regarding the demand and supply for subsidiarity in global governance. Their introductory article posits that demand for subsidiarity might be higher when acts of global governance institutions "are highly intrusive and concern specific cases."[5] As this article explains, this intuition proves to be right in the case of investment arbitration, but it has been permeated by wider debates of global governance, particularly the public–private divide in governance. Investment arbitration provides a rich illustration of the pathways through which demand for subsidiarity is implemented and the shifting ways a wider understanding of governance affects the demand for subsidiarity in a particular context. Ultimately, the investment arbitration case underscores the importance of the public–private distinction for the overall discussion of subsidiarity in global governance.

Moreover, on the supply side of the equation, Jachtenfuchs and Krisch suggest that subsidiarity will be more present in regimes that deal with issues without international repercussions and less so in institutions regulating actual or potential negative externalities.[6] This suggestion is partially confirmed by the investment regime: subsidiarity is likely to appear in the private mindset of arbitration, which conceives of investment protection as a transnational concern. The article's conjecture, though, is not confirmed by the public mindset of arbitration, which also considers investment protection as a transnational issue, affecting global public goods and yet calling for subsidiarity on precisely such grounds.

This article focuses on cases emerging from the Argentinean crisis in 2001 and proceeds in the following way: Part II introduces the vertical allocation of authority (that is, scaling authority up or down) in international investment arbitration and traces the role of subsidiarity therein. Part III explores the public–private division in investment arbitration. Then, part IV, which is the core of the contribution, explains how the subsidiarity and the vertical allocation of authority in investment treaty arbitration are a function of the public–private distinction. Part V concludes by suggesting that the choice of allocating authority at a specific level is not the result of the inherent characteristics of the investment regime, but is rather a device to maintain the stability of the system. The shifting of authority works as a pressure-relief valve, through which the regime is able to react to discontent. When the legitimacy of the investment system is questioned, the vertical allocation of authority operates as a mechanism of marginal adjustment, shifting authority from one level of governance to the other in order to enhance the system's legitimacy.

5. Jachtenfuchs & Krisch, *supra* note 2, at 15.

6. *Id.* at 16.

II

SUBSIDIARITY AND THE VERTICAL ALLOCATION OF AUTHORITY IN INTERNATIONAL INVESTMENT ARBITRATION

An international investment agreement (IIA) is a treaty between two or more states establishing rules that govern investments by their respective nationals in the other's territory. These rules are enforced through exceptional mechanisms of adjudication. Investment agreements usually grant jurisdiction to arbitration tribunals over disputes between private investors and the host state, giving investors standing before such international tribunals.

As a form of dispute settlement, investment arbitration is not much different from other forms of adjudication, with the important exception that a private party, the investor, is given standing to initiate proceedings against a sovereign state that would otherwise be immune in the local courts of most foreign states. Investment arbitration, however, is much more than just a dispute-settlement mechanism. It is a technology of global governance, in which an international institution exercises power with a direct impact on individuals beyond the parties to the investment dispute. As suggested in the introduction to this issue, such intense impact on local politics triggers a high demand for subsidiarity.[7]

Investment arbitration operates as a form of global governance, affecting local decisionmaking, in at least three ways.

First, investment arbitration often reviews domestic regulation for possible violations of standards contained in the treaty. For example, a local regulation may be tantamount to expropriation of a foreign investment, and the investment tribunal may order compensation to the investor. Thus, even if the arbitral tribunal has no formal power to strike down local regulations, in effect the tribunal engages in review of the regulations (including domestic judicial decisions), assessing them against the standards mandated by the treaty. As a consequence of such review, host states may decide to strike down their own regulations or may be deterred from adopting a certain line of regulations—a phenomenon that has been referred to as a "chilling effect" of investment arbitration.

Second, investment arbitration tribunals contribute to the definition of appropriate standards of domestic governance, particularly in their influence on domestic administrative laws and procedures. Especially through the fair and equitable treatment standards (though not restricted to them), investment tribunals review domestic administrative processes and may have an influence on the framing and application of such local procedures. To assess awards, arbitration tribunals have established standards applicable to stability, predictability, and consistency of the legal framework; the protection of legitimate expectations; procedural and administrative due process; and the

7. *See id.* at 15.

requirement of reasonableness and proportionality in domestic administrative proceedings,[8] all of which have an impact in structures of domestic governance.

Finally, international investment arbitration may be subject to domestic legal review. Up to now, this article has explained that investment arbitration involves tribunals deciding whether a host state has violated the standards of an IIA. This is typically a "top-down" process in which the international authority exercises jurisdiction over the local level of decisionmaking. However, investment arbitration also involves a "bottom-up" exercise of authority that is correspondingly read through the public–private lenses. Domestic courts may also be given jurisdiction to decide whether investment arbitration awards (that is, the decisions adopted by international investment tribunals) should be subject to domestic judicial review. In this dimension, it is a matter of the domestic arbitral law of the site of the arbitration to establish the possibility of judicial review and its characteristics[9] and of the procedural rules of the arbitration. Thus, crucial considerations are whether a domestic court will have the jurisdiction to review such awards, and how strict its analysis will be.

Given these characteristics, investment arbitration is not only a dispute-settlement mechanism but also a veritable exercise of global governance, which can be compared with other global regulatory regimes.[10] Investment arbitration involves at least two levels of decisionmaking in which an international institution (an investment arbitration tribunal) is empowered to adopt decisions that affect the national or subnational level of governance. Investment arbitration is an area of governance where the demand for and supply of subsidiarity, as put forward in this issue's introduction, can be fruitfully discussed. States that shape the regime, in close conversation with private interests potentially benefited by such a move, agree to scale up the authority to adopt decisions related to foreign investment protection (in particular, adjudication of investment claims), thus effectively creating a multilevel structure of governance.

But investment arbitration is not governed by an express principle of interaction between levels of governance. Despite the multilevel structure they create, IIAs are typically silent with regard to the framing of interaction. Furthermore, despite the fact that some IIAs include certain rules concerning exhaustion of local remedies,[11] in most cases arbitration tribunals get little

8. *See generally* Benedict Kingsbury & Stephan Schill, *Investor–State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, (N.Y. Univ. Pub. Law & Legal Theory Working Papers, Paper No. 146, 2009), http://lsr.nellco.org/nyu_plltwp/146.

9. *See, e.g.*, Veijo Heiskanen, Matthias Scherer & Sam Moss, *Domestic Review of Investment Treaty Arbitrations: The Swiss Experience*, 27 ASA BULL. 256, 256–79 (2009).

10. *See, e.g.*, Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 148–50 (2006); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 701 (2005); Kingsbury & Schill, *supra* note 8, at 41.

11. *See generally* Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231–56 (2004) (explaining that the tribunals

guidance from investment protection treaties as to the relative importance of domestic decisions in the international tribunal's decisionmaking. As a result, given the formal absence of a principle of subsidiarity, this pondering of the relative authority of domestic decisions is framed as a problem of *deference*. Thus, investment tribunals might decide to be deferential to domestic decisionmakers, thus applying in practice the principle of subsidiarity (in which power is pushed to the lower level of decisionmaking), or they may decide not to be deferential at all, thus maintaining the decision-making power at the international level.

In the absence of an overarching principle of subsidiarity, the international investment regime implies a double process of vertical allocation authority. First, the legal framework of the IIA scales up decision-making authority to the investment tribunal, granting the power to an international authority to essentially review domestic decisions on the basis of the criteria set forth in the treaty. And, once exercising its jurisdiction, the investment tribunal assesses the relative persuasiveness of a domestic decision, deciding whether the decision-making power should remain at the international level—if it finds that the domestic decision is not persuasive—or whether authority can be scaled down to the national level—if it finds that the domestic decision is persuasive. Investment arbitration is, in this sense, a regime of governance with a vertical allocation of authority that is simultaneously stable and in constant flux. Although a formal allocation of authority gives the investment tribunal jurisdiction over a domestic decision, the same formal allocation of power allows for shifting authority along the vertical scale.

When do investment tribunals decide to be more deferential, thus applying in practice a stronger principle of subsidiarity? For Jachtenfuchs and Krisch's conjecture regarding the demand for subsidiarity in global governance, investment arbitration should be a case where the demand for subsidiarity is high, because it is a form of authority that directly impacts local governance.[12] The investment case, however, is a much more dynamic process of vertical allocation of authority. Authority is sometimes pushed downward to the national sphere, but it also sometimes remains at the international level. This process can be better understood in reference to the public–private divide that characterizes the contemporary understanding of investment arbitration, as is explored in the following two parts.

III

THE PUBLIC–PRIVATE DIVISION IN INVESTMENT ARBITRATION

Investment arbitration tribunals embody a form of hybrid dispute settlement with important implications in terms of global governance. This hybrid characteristic has created debate among investment law scholars,

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are guided by certain parameters defined by BITs).

12. Jachtenfuchs & Krisch, *supra* note 2, at 15.

concerning the "private" or "public" nature of the investment regime. Such characterization will have, in turn, an impact on the overarching vertical allocation of authority, particularly the demand for a principle of subsidiarity. This part introduces the public–private divide in investment arbitration, while the next connects the divide with subsidiarity.

The public–private division in investment arbitration can be defined in reference to four variables: (1) the legal regime applicable in investment arbitration; (2) the actors involved in the dispute; (3) the function that investment arbitration fulfills; and, finally, (4) the issues dealt with by the decision of the investment award and their overall impact.

Legal Regime. Investment arbitration is established on the basis of a public-law instrument (a treaty) concluded between sovereign states. Its basic legal architecture is that states limit their sovereignty and instead accept the jurisdiction of an arbitral tribunal to adjudicate possible violations of such limits. The arbitral tribunal's sources are mostly public-law sources,[13] not private-law instruments.[14] In its basic legal structure, then, investment arbitration resembles the international human rights regime. However, the procedure of investment arbitration has a private origin, which is reflected in the overall idea that there should be an equivalence of means between the state and the investor as disputing parties. The rules of arbitration that are followed were, for the most part, originally designed for resolving disputes between private parties and are still characterized by the overall need for confidentiality and the role of the disputing parties as "masters of the arbitration."[15]

Investment arbitration is a procedural regime created with private disputes in mind that is now used for adjudicating on the basis of public-law instruments. This dual nature derives from the early origins of the overall investment regime, in which developing countries in dire need for foreign capital sought to assure capital exporting countries that their investments would be safe. This assurance required, on the one hand, a credible legal embodiment that would effectively bind the capital importing country. This legal obligation could derive only from public-law obligations adopted by the capital importing state, which would effectively limit the state's sovereign power in its treatment of investors present in its territory. But traditional public international law had no adjudicative procedure to enforce these kinds of legal obligations when the beneficiaries were private parties. Thus, the procedures of arbitration between private actors and their rule of party equality were used as a template for investment arbitration. As a result, sovereign nations ended up in the position of being

13. ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 39–133 (2009).

14. *See* Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835–51 (2005).

15. Rolf Trittmann, *When Should Arbitrators Issue Interim or Partial Awards and or Procedural Orders?*, 20 J. INT'L ARB. 255, 262 (2003).

treated as equals to private parties, even when the former adopted decisions for the general interest of their own communities.[16]

Actors. Actors involved in arbitration procedures also play a role in the construction of the public–private distinction. For analytical purposes, the disputing parties can be discussed separately from the arbitrators. Investment arbitration involves a private actor, the investor, and it also involves a sovereign state, the quintessential public entity. Arbitrators comprise the second group of actors involved in investment arbitration. In this regard, the distinction of public–private also emerges. Arbitrators are normally appointed by the disputing parties and emerge from two different "epistemic communities."[17] On the one hand, there are international public law scholars and practitioners with experience in litigating and solving inter-state disputes, and on the other hand, there are arbitrators who emerge from the community of international commercial arbitration. These two epistemic communities are likely to clash because they have different audiences and perspectives of the role of law, the state, and the function of arbitration.[18]

Function. Investment arbitration has an ambivalent function in global governance. On the one hand, it ostensibly seeks to solve a dispute between a private party and a host state. In that sense, it is not that different from international commercial arbitration, with the (possibly marginal) difference of having as defendant a sovereign state. However, in order to solve such a dispute, investment tribunals often fulfill a function that comes close to judicial review. When exercising their jurisdiction and determining possible responsibility of a host state, investment tribunals regularly assess domestic regulations against international standards of treatment. This process of review can be characterized as public in the sense that it implies a review of domestic regulation that is itself public. Investment arbitration is, therefore, hybrid in its function: although it is a dispute-settlement mechanism involving a foreign investor, it also acts as a judicial institution of review of domestic acts.

Issues. Finally, the public–private division of investment arbitration is also built in reference to the issues that are involved in the arbitration and the overall impact of the decisions. Investment arbitration is not solely a dispute-settlement mechanism; it has wider impacts on the domestic context of the investment subject to the dispute and on the overall global regulatory

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16. On the origins of the investment regimes, see generally KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (2013). Miles's account differs from the one presented here by focusing on the substantive obligations of the regime (rather than on the specific form of arbitration), and, following Tony Anghie's work, links such obligations to the colonial heritage of international law. For an example of Tony Anghie's work, see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

17. *See* Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

18. Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 888 (2011); *see also* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 54–55 (2013).

landscape. These wider impacts have been interpreted along a public–private dichotomy.[19] From this perspective, investment arbitration not only acts as a private dispute resolution mechanism, but it also implies an exercise of public authority by impacting local governance in at least the three ways referred to earlier. The issues that are dealt with in investment arbitration also contribute to its hybrid character. Arbitration is typically triggered by a claim on the basis of a foreign investment, which defines a private framework for the controversy. However, investment controversies often involve the exercise of public power by the host state, which enter into conflict with the solely private nature of the investment controversy. Moreover, investment arbitration awards can have a wider impact on the protection of public values, such as human rights[20] or the environment[21]: a domestic decision protecting those values could be hindered or encouraged by signals from investment arbitration tribunals. Despite the apparently private nature of the dispute, investment arbitration easily shifts toward the public domain of governance.

The hybrid nature of the investment regime opens the space for two competing mindsets of investment arbitration: a public mindset, emphasizing the public aspects of each characterizing trait of investment arbitration, and a private mindset, emphasizing the private aspects of the system. The contrast between these views is at the heart of the public–private divide in contemporary readings of investment arbitration, and their contrasting views, in turn, define the demand for subsidiarity in this structure of governance.

IV
SUBSIDIARITY AS A FUNCTION OF THE PUBLIC–PRIVATE DISTINCTION IN INVESTMENT ARBITRATION: THE STANDARD OF REVIEW

The public–private divide is an important aspect in defining the demand for and supply of subsidiarity in investment arbitration. This connection emerges indirectly because the question of subsidiarity is not expressly present in the investment regime. However, as discussed above, it does emerge in the form of deference. Should international investment tribunals defer to domestic decisionmakers? Should domestic courts defer to international investment tribunals? This discussion is framed by specialists in investment arbitration as a problem of the standard of review.[22] This part briefly introduces the concept of standard of review, and then shows how its use in investment arbitration closely mirrors the public–private divide explored earlier.

19. *See* VAN HARTEN, *supra* note 1, at 45–71; Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 71–84 (2011).

20. *See* Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L COMP. L.Q. 573–96 (2011).

21. *See* MILES, *supra* note 16, at 154–209.

22. *See, e.g.*, Burke-White & von Staden, *supra* note 3, at 283–345.

A standard of review refers to the level of scrutiny that an adjudicator applies when reviewing the decision—for example, an investment arbitration award—of a lower court or of another institution. The notion comes from domestic judicial review and is inspired by the appropriate balance of powers between high courts, lower courts, and institutions in other branches of power.[23] Put simply, a standard of review sets the questions that will be asked of the primary decision. Thus, in domestic law, standards of review are often pictured along a continuum, with completely new review of the primary decision on one end and complete deference to that decision on the other.[24] Thus, when engaging in judicial review, a court has the option of applying a very strict level of scrutiny, considering and deciding the legal question anew—in effect substituting the primary decisionmaker via judicial review. Alternatively, in the other extreme, the reviewing court has the option of adopting a highly deferential standard, under which it will give more weight to the primary decisionmaker.

In domestic systems, deciding the applicable standard of review gravitates around the specific reason for the review. A certain argument against the primary decision will entail a particular standard of review. For example, a legal decision of the primary decisionmaker will most likely be reviewed de novo; that is, the reviewing court will decide the legal issue without affording the lower court deference.[25] In contrast, other arguments against the primary decision will warrant a more deferential standard of review. For example, challenges on the basis of factual errors will most likely trigger a standard of review in which the presiding court will only look for ostensibly erroneous interpretation of fact by the primary decisionmaker.[26] Short of that, the court will show deference to the primary decisionmaker.

In international law, the question of standards of review has taken on specific characteristics of its own. International courts are often reviewing not a decision by a lower court, but rather the decision of one of the parties to the litigation—often, a state. Consequently, the issue of standard of review involves pondering the legitimate policy space of states, which risks being unduly restricted. Should international courts be deferential to the decisions of domestic institutions or, on the contrary, should they engage in de novo review of primary decisions? Exceptionally, in certain specialized regimes, the language contained in the relevant treaty answers this question. Such is the case of dumping litigation at the World Trade Organization (WTO), for which the Article 17.6 Anti-Dumping Agreement provides a specific standard of review in anti-dumping proceedings.[27] That is, however, the exception. In most

23. Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 236–41 (2009).

24. For a discussion of the standard of review in U.S. law, see generally Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231–51 (1991).

25. Peters, *supra* note 23, at 246.

26. *Id.* at 245.

27. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade

international legal regimes, the question of standard of review is left open for the relevant court to decide.

Two sources of analytical tools have been developed in international law to that effect. First, the General Agreement on Tariffs and Trade Article XX permits certain exceptional trade-restrictive measures to be adopted in order to protect public goals such as morality, security, or the environment.[28] Such exceptional measures must be necessary to achieve the stated goal. Thus, when deciding whether the measure is truly necessary, the WTO panel and Appellate Body have developed a consistent body of case law that assesses whether the state has taken the least restrictive measure reasonably available that meets its permissible objective under General Agreement on Tariffs and Trade Article XX. To meet this standard, the defendant state must make a prima facie argument that the exceptional measure was necessary in its context. In that case, the panel or Appellate Body will have a deferential attitude toward the primary decisionmaker. Then the burden of proof shifts to the complainant, who must prove that the measure is unnecessary (mainly by proving the reasonable availability of a less trade-restrictive alternative measure).[29]

The European Court of Human Rights, in turn, has developed the second important analytical tool in defining the level of scrutiny to be applied when assessing reviewing domestic measures: the "margin of appreciation" doctrine.[30] The doctrine refers to the "'breadth of deference' that the Court is willing to grant to the decisions of national legislative, executive, and judicial decisionmakers."[31] The margin of appreciation is a form of standard of review under which an international court gives weight to the reasoning of the primary decisionmaker for reasons of democratic legitimacy, common practice of the states, or expertise.[32]

Investment law has not adopted a specific standard of review. A mix of different standards applies in an uneven fashion.[33] These variable standards of review can be read as a function of the public–private division of investment arbitration. As was discussed above, international investment arbitration can be classified as public or private because its actors, legal structure, and other dimensions feature characteristics of both. How the arbitration is classified

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1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

28. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-20, 55 U.N.T.S. 194.

29. On the standard of review in the WTO, see generally Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT'L ECON. L. 635–59 (2003).

30. For an introduction to the doctrine, see ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 38–66 (Vaughan Lowe ed., 1st ed. 2012).

31. Burke-White & von Staden, *supra* note 3, at 305.

32. LEGG, *supra* note 30, at 17.

33. *See generally* Caroline Henckels, *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration*, 4 J. INT'L DISP. SETTLEMENT 197–215 (2013); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor–State Arbitration*, 15 J. INT'L ECON. L. 223–55 (2012).

affects the way the standard of review is exercised and, therefore, the demand for subsidiarity in investment arbitration.

In general terms, a public-law mindset favors allocating authority at the domestic level. Those with this mindset prefer a deferential standard when investment tribunals review domestic decisions but favor a nondeferential standard when domestic courts review investment awards. In contrast, tribunals and scholars with a private-law mindset favors allocating authority at the international level. They prefer a nondeferential standard for investment tribunals and a deferential standard for domestic courts.

On what grounds is the decision to allocate authority at a certain level adopted? The demand for subsidiarity as a function of the public–private divide creates a mechanism to maintain the stability of the system by allowing authority to be scaled up and down. Each mindset (public or private) justifies its choice between levels of authority in terms of its own representation of the external pressures faced by the investment regime. The shifting standard of review (and the implicit shifting demand for subsidiarity) works as a pressure-relief valve through which the regime can react to criticism or discontent. For the public mindset, a central challenge to the investment regime is its lack of legitimacy as an exercise of public power. Thus, the vertical allocation of authority creates a mechanism of marginal adjustment, shifting authority from one level of governance to the other, which could enhance the system's legitimacy—in this case, by moving authority to the domestic level. In contrast, for the private mindset, the regime's challenges emerge from its failure to fulfill its function of creating legal certainty for investment. In that case, the solution would be to move authority up the scale of governance by creating a centralized investment court or an appellate facility. Moving authority up and down permits this kind of adaptation without having to transform the deep structure of the system. The public–private distinction provides the appropriate rationale for shifting authority. Through that mechanism, the investment regime is able to maintain its stability while at the same time adapting to external environmental pressures.

A. Standards of Review in a Private Mindset of Investment Arbitration

Reading investment arbitration as a private issue reinforces the allocation of authority at the international level. This allocation may occur in two ways. First, the relevance of the standard of review can be denied as a whole. Although investment awards do not make this argument openly, the idea of judicial review (and, hence, of a standard of review) is completely foreign to international commercial arbitration.[34] Adopting an extreme reading of investment arbitration as nothing different than international commercial arbitration would lead to denial of the relevance of standard of review in investment arbitration. As a result, under certain circumstances, the very

34. Anthea Roberts, *The Next Battleground: Standards of Review in Investment Treaty Arbitration*, 16 INT'L COUNCIL COM. ARB. CONGRESS SERIES 170, 173 (2011).

possibility of giving weight to the reasoning of a domestic decisionmaker, and scaling down authority, is completely foreign. Under a purely commercial arbitration mindset, the standard-of-review question does not emerge. And the authority to decide remains at the international level, not because it is more appropriate in terms of review, but because the arbitral tribunal understands itself as a mere mechanism of dispute settlement.

In practice, though, investment tribunals must often ponder domestic decisions and are thus presented with the need for a standard of review. In that case, the private mindset of investment arbitration entails giving very little deference to domestic decisionmakers. Although a standard of review is indeed applied, it is quite demanding, with little deference given to the principal decisionmaker. Contrary to what is predicted by the introduction to this issue, for a private mindset of investment arbitration the demand for subsidiarity will be low, even if the exercise of authority directly affects important concerns in local governance. This allocation of political power on a vertical axis is often explained as a function of political risk on the basis of the obsolescing bargain model (OBM).[35] According to this model, foreign investors face an increased political risk when the investment is performed. As the cost of withdrawing the investment becomes higher (for example, as sunk costs increase), the risk of the original bargain becoming obsolete for the host state increases as well. The investor is therefore required to hedge such political risk.

Political risk can be hedged through independent adjudication of claims against the host state. Local courts, however, may be perceived as unreliable for adjudicating these claims because they may lack independence from the authorities of the host state involved in the dispute. From the OBM perspective, it becomes necessary to scale up decisionmaking and empower an international institution (an international arbitration tribunal, for example) to adjudicate such claims.

By scaling up, this model suggests, investment disputes become depoliticized. Local decisionmaking on contentions involving a host state and important investments is bound to be subject to political pressures. In contrast, in the early years of the bilateral investment treaty boom, the goal of bilateral investment treaties was to "insulate private investment from politically driven foreign or domestic public policy—in effect, to depoliticize investment matters

35. *See generally* RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971). For its role as the underlying rationale for the investment regime, see JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 277 (2011). The OBM has since been questioned on a couple of fronts: (a) multinational corporations often do not negotiate entry conditions with the host state, but rather engage in a permanent process of updating investment environment, and (b) certain bargains fail to become obsolete because the threat of withdrawing the investment remains credible. *See* Lorraine Eden, Stefanie Lenway & Douglas A. Schuler, *From the Obsolescing Bargain to the Political Bargaining Model*, *in* INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 251–72 (Robert Grosse ed.). This critique, though, has not proved influential in foreign investment law. I thank Nicolás Perrone, whose PhD thesis explores the relevance of the OBM in foreign investment law, for pointing this literature out to me.

by placing the protection of private investment under an apolitical legal regime."[36]

The OBM model is a fundamentally private mindset. It provides a rationale for allocating authority focused on private concerns: moving the decision-making power to the international level is a way of solving the private political risk of private investors. Host states may decide to accept this bargain for multiple reasons (attracting foreign investment,[37] reducing the cost of capital,[38] or, in the case of least developed countries, securing a competitive advantage over other similarly situated countries).[39] Regardless of the reason for accepting, when the private interest of the investor is understood to be the dominant concern in a bilateral investment treaty, the idea of scaling up authority becomes a necessary part of the overall package. There is, in this sense, a connection between the private nature of the interests that are being protected and the low demand for subsidiarity in investment arbitration.

The awards in the Argentinean gas cases (*CMS*,[40] *Enron*,[41] and *Sempra*[42]) provide a good example of the connection between a private rationale of investment arbitration, a demanding standard of review, and the low demand for subsidiarity—evidencing an extremely nondeferential approach to reviewing domestic decisions.[43] The origin of these cases was the Argentinean economic emergency in 2001, when the Argentinean peso, unpegged from the U.S. dollar, was devaluated. Moreover, utilities tariffs were frozen, and several restrictions on capital were imposed (including limits to bank withdrawals and to the transfer of funds abroad). Several foreign investors had planned their revenue on the basis of a pegged currency, particularly in the public-utilities sector. Investors in the gas sector were particularly affected by the crisis. CMS, Enron, and Sempra were all American corporations invested in this sector: CMS had bought an important part of TGN, a gas transportation company that operated under a license that provided for a system of calculating tariffs in dollars (not pesos), while Enron had invested in government-issued licenses to transport natural gas and Sempra in licenses to distribute it, all with a similar financial

36. Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. L. 159, 160 (1993).

37. Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811, 822–23 (2006).

38. Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 632 (2005).

39. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 670 (1997). For a discussion opposing this view, see ALVAREZ, *supra* note 35, at 181–295.

40. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

41. Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf.

42. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), http://www.italaw.com/documents/SempraAward.pdf.

43. *See generally* Henckels, *supra* note 33, at 203 (arguing that the *CMS*, *Enron*, and *Sempra* decisions are "well known for their stringent scrutiny of Argentina's emergency measures").

structure. When the Argentinean government decided to eliminate the peso–dollar parity, all debts denominated in dollars were converted on a 1:1 ratio to pesos. The peso devaluated, however, bringing significant losses to CMS, Enron, and Sempra. In response, each corporation filed against Argentina, claiming, among other things, expropriation and violation of the fair-and-equitable-treatment standard.

One of the crucial issues in the dispute was Argentina's defense of necessity. The investment treaty between Argentina and the United States provided for a nonprecluded measures (NPM) clause, which stated that "it shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[44] Argentina argued that its economic measures were necessary to maintain its national interests. Among several arguments, Argentina argued that the necessity clause was self-judging; that the clause fell upon Argentina to decide whether the measures could be undertaken under that clause. The tribunal rejected the argument, finding that the necessity clauses were not self-judging and, rather, that it had jurisdiction to decide whether the clauses could be invoked.[45] From this perspective, decision-making authority under the clause should remain at the international level. The tribunal, therefore, engaged in a substantive review of the measures, discussing in detail whether the financial situation in Argentina actually risked "total economic collapse"[46] or threatened the "very existence of the state and its independence."[47] Moreover, the tribunal discussed whether the measure was really necessary, or whether Argentina had a different alternative to deal with its massive crisis. Here again, the tribunal adopted a nondeferential standard, and without specifying the actual alternatives available to Argentina, the arbitrators decided that the measures were not the only means available to react to the crisis.[48]

This line of argument is intimately linked with the OBM rationale for investment arbitration. José Alvarez was an expert witness for the claimants in the Argentinean cases, and he defended the non-self-judging character of the NPM clause.[49] For Alvarez, there was no treaty-based argument to justify the self-judging nature of the clause, nor should there be. According to Alvarez, the treaty itself did not justify the claim for deference to the domestic

44. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.–U.S., art. XI, Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993).

45. *Sempra*, ¶ 385, 391; *Enron*, ¶ 332; *CMS*, ¶ 373.

46. *CMS*, ¶ 322.

47. *Sempra*, ¶ 348; *Enron*, ¶ 306.

48. *Sempra*, ¶ 350; *Enron*, ¶ 308; *CMS*, ¶¶ 323–324. Argentina requested that the tribunals indicate what alternative measures were available, but the *Enron* and *Sempra* tribunals stated such line of inquiry would be outside the tribunal's jurisdiction. *See Sempra*, ¶ 351; *Enron*, ¶ 309.

49. *Sempra*, Opinion of José Alvarez, ¶ 11 (Sept. 12, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0994.pdf.

decisionmaker,[50] and it should not have recognized such a defense. For him, there was no normative reason for defending a deferential standard of review because the system established by the treaty was explicitly designed for allowing investors to forego national courts.[51] In order to preserve the stability of the investment bargain and a credible investment environment, an investment arbitrator should (and indeed must) second-guess the motivations of domestic courts.[52]

B. Bottom Up: Domestic Judicial Review of Investment Awards

The private mindset is also reflected in the allocation of authority by domestic courts when reviewing investment tribunals. When a domestic court sees an investment dispute as a primarily private controversy with a party that happens to be a state, that domestic court will be more deferential to the primary decisionmaker—in this case, the arbitration tribunal. Such was the case in *BG Group PLC v. Republic of Argentina*.[53] BG, a British investment company, had entered the gas sector in Argentina and was affected by the financial crisis and the Argentinean government's emergency measures.

BG filed a claim against Argentina under the Argentina–U.K. bilateral investment treaty. The treaty required the investor to first bring the complaint before a tribunal in Argentina for at least eighteen months. BG bypassed the Argentinian courts, however, and submitted its dispute directly to an arbitral investment tribunal. BG did so because Argentina had issued a decree staying the execution of its courts' final judgments in suits resulting from the new economic measures. Moreover, Argentina had undertaken to renegotiate certain service contracts (such as gas), but it had barred firms that were litigating against Argentina from that renegotiation. The arbitral investment tribunal, based in Washington, D.C., decided that Argentina's changes to its judiciary excused the investor from exhausting the precondition to arbitration and awarded BG over $185 million in damages.[54]

Both sides filed petitions for review in the U.S. District Court for the District of Columbia: BG Group demanded recognition and enforcement of the award (it was adopted under rules of the United Nations Commission on International Trade Law), and Argentina sought to vacate the award. Argentina's argument was that the eighteen-months requirement was a condition for its consent to arbitration. Because BG had not complied with the requirement, there was no consent for arbitration, the arbitral tribunal lacked jurisdiction, and the awards had to be vacated. The District Court denied

50. Kathryn Khamsi & Jose Alvarez, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, Y.B. INT'L INV. L. & POL'Y 2008/2009 379, 440 (2009).

51. *Id.* at 426.

52. *Id.*

53. BG Grp. PLC. v. Republic of Arg., UNCITRAL, Final Award (Dec. 24, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf.

54. *Id.* ¶ 444.

Argentina's claims and confirmed the award, but the U.S. Court of Appeals for the District of Columbia reversed that ruling. The question before the U.S. Supreme Court was, then, whether a U.S. court should review the arbitrators' interpretation de novo or with the deference that courts ordinarily grant to arbitral decisions.

The Supreme Court framed the issue as a standard commercial arbitration issue. For the Court, "as a general matter, a treaty is a contract, though between nations,"[55] and, building from that mindset, it deferred to the international tribunal's decision. In this contractual approach, the eighteen-months requirement could not be read as a condition for Argentina's consent, but rather as a mere procedural requirement. As a result, the tribunal did have jurisdiction, and the Supreme Court adopted a deferential standard toward its decision, overturning the Court of Appeals decision to let the investment award stand. In this case, the private framing of the issue led to the allocation of authority at the international level.

C. Standards of Review in a Public Mindset of Investment Arbitration

Those who consider investment arbitration an issue of public governance have questioned Alvarez's interpretation. The public-law mindset of investment arbitration emerged as a reaction to the impacts that such exercise of authority was having in local politics and global governance, which remained unchecked. The public-law mindset accordingly sought to inject public-law values into investment arbitration. Some scholars considered investment arbitration a form of global governance that should be subject to global administrative law principles,[56] such as transparency, participation, and the duty to give reasons, while others saw the need to develop a global constitutionalist framework.[57] Still others saw in investment arbitration the materials to distill, in an exercise of comparative law, common public-law principles, which would form the common core of investment protection.[58] All these approaches share the view that investment arbitration was not a mere dispute-settlement mechanism, as the private mindset would have it, but rather an actual exercise of global power that had to be regulated accordingly.

The public-law mindset was not only a scholarly concern, but it also had important policy implications (involving, for example, an editorial by *The New*

55. BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198, 1208 (2014).

56. Van Harten & Loughlin, *supra* note 10, at 122; Kingsbury & Schill, *supra* note 8, at 50–53.

57. *See generally* SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009) (arguing that requirements of the fair-and-equitable-treatment standard, such as transparency and impartiality, may amount to a substantive legal framework to control arbitrariness).

58. STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009) (suggesting that common standards of investment protection can be found through a public comparative public-law exercise, through which basic principles of investment law are distilled and concretized from a wide variety of arbitral awards and other legal materials).

York Times).[59] The public dimension of investment arbitration was even accepted by arbitrators themselves,[60] most notably regarding the right of civil society to participate before investment tribunals, which has become available during the last decade.[61]

Adopting a public mindset of investment arbitration has an impact on the standard of review. The public nature of investment arbitration implies that the standard of review should be deferential to the domestic decisionmaker, thus scaling authority down. It is true, though, that the public mindset might accommodate varying degrees of deference toward the local decisionmaker.[62] However, it does feature a difference of essence, not of degree, with the private mindset. The public approach understands investment arbitration as an exercise of public authority. It therefore makes sense that such authority is exercised locally. This may not always be possible (hence the varying degrees of deference that can be accommodated in the public mindset), and sometimes authority needs to be scaled up. Such is the definition of subsidiarity, a rebuttable presumption for the local, as put forward in this issue's introduction.[63] However, the normative guideline for the public mindset is that authority should be exercised as closely as possible to the polity that is being affected. As a result, national authorities should have the first say on issues that concern investment arbitration, and only exceptionally should authority be scaled up. The private mindset, in contrast, features no such normative guideline.

Paradoxically, then, as was the case in the private mindset, politics is also the key variable that explains the demand for subsidiarity in the public mindset. While the demand for subsidiarity in the private mindset was low, because the goal was to isolate decisionmaking from local politics, in the public mindset the demand for subsidiarity is high, *precisely* because the goal is to inject decisionmaking into the legitimacy of local politics.

Perhaps the clearest contrast can be found in the Argentinean gas cases, in which William Burke-White and Anne-Marie Slaughter served as expert witnesses for the defendant, arguing among other points that the NPM clause was indeed self-judging, and that the investment tribunal should therefore review domestic decisions under a deferential standard of review, such as good faith.[64] That argument was rejected by the investment tribunals in the *CMS*,[65]

59. *See* Editorial, *The Secret Trade Courts*, N.Y. TIMES, (Sept. 27, 2004), http://www.nytimes.com/2004/09/27/opinion/the-secret-trade-courts.html?_r=0.

60. *See* Methanex Corp. v. United States, NAFTA/UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," ¶ 49 (Jan. 15 2001), http://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf.

61. *See* RENÉ URUEÑA, NO CITIZENS HERE: GLOBAL SUBJECTS AND PARTICIPATION IN INTERNATIONAL LAW 176–99 (Martti Koskenniemi ed., 2012).

62. *See* Roberts, *supra* note 34, at 175–76.

63. Jachtenfuchs & Krisch, *supra* note 2, at 6.

64. *See Sempra*, Opinion of William Burke-White and Anne-Marie Slaughter, (July 19, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0993.pdf.

Sempra,[66] and *Enron*[67] cases. One part of the reasoning was accepted, however, in other awards also related to the Argentinean situation.

In *LG&E v. Argentina*,[68] which features facts virtually identical to *CMS*, the tribunal rejected the idea that the NPM clauses were self-judging and engaged in a substantive review of the necessity of the measure. In contrast with *CMS*, though, the tribunal found that the measures *were* necessary.[69] The tribunal engaged in such a substantive review on the basis that the text of treaty did not provide for the self-judging character of the clause. *LG&E* was, however, slightly more deferential to Argentinean policy choices than the *CMS*, *Sempra*, and *Enron* cases. Although the tribunal rejected the self-judging argument, it left the door open for a deferential standard of review, specifically good faith.[70]

This line of reasoning was further developed in *Continental Casualty*,[71] yet another Argentinean case. In the case, the claimant, an American insurer who owned an important stake in the leading provider in Argentina of workers' compensation insurance, was also affected by emergency measures. Argentina argued the necessity defense, also based on an expert testimony by Anne-Marie Slaughter. In line with *CMS*, the tribunal found that the NPM was not self-judging; however, it found that if the treaty had clearly established this possibility, then authority would have to be scaled downward, in deference to the national institution.[72]

The *Continental Casualty* award uses the WTO Article XX test of necessity in order to discuss Argentina's defense. This standard proves more amenable to Argentina's claims. Unlike prior awards, which deemed Argentina's measures unnecessary if *any* alternative measure was available, the standard in *Continental Casualty* required that the alternative measure be reasonably available to Argentina in achieving its goals.[73] Under this standard, the tribunal held that Argentina's measures were necessary under the treaty. Thus, despite its rejection of the self-judging argument, by importing the WTO standard, *Continental Casualty* adopted a standard of review that was more deferential to the local policy choices by Argentina and allowed for a comparison among choices.

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65. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf .

66. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), http://www.italaw.com/documents/SempraAward.pdf.

67. Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf.

68. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

69. *Id.* ¶ 257 .

70. *Id.* ¶ 214.

71. Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, (Sept. 5, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0228.pdf.

72. *Id.* ¶ 182.

73. *Id.* ¶ 198.

The public mindset suggests that investment arbitration is not merely a system of settling private disputes and should accordingly adopt a deferential standard of review. Such is the first doctrinal expression of subsidiarity in investment arbitration. An alternative justification for scaling authority down, which has been suggested by public-minded scholars, but has not been developed by tribunals, is the margin of appreciation. Some suggest that importing this doctrine from the European Court of Human Rights would best suit the peculiar circumstances of investor–state arbitration and the limited capacities of ad hoc tribunals before the International Centre for the Settlement of Investment Disputes.[74] For them, national authorities are better positioned than an international arbitral tribunal, both in terms of expertise and domestic embeddedness, to engage in an explicit balancing between the rights and interests at stake.[75] For this reason, "the margin of appreciation allows a tribunal to set an appropriate space within which national authorities are able to take regulatory action without a tribunal second-guessing those decisions or acting in a legislative capacity."[76]

D. Domestic Judicial Review of Investment Awards

The public mindset can be glimpsed in debate around the *BG Group* decision, both in the dissenting vote of Chief Justice Roberts, joined by Justice Kennedy, and in the Solicitor General's amicus curiae. In his dissenting opinion, Chief Justice Roberts rejects the commercial arbitration framework adopted by the majority and underscores the fact that a treaty is not a contract, but rather, an agreement between two sovereign nations.[77] The dissenting opinion clearly underscores the public dimension of the dispute. For Chief Justice Roberts, "It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly."[78]

Chief Justice Roberts is emphatic that his line of reasoning does not derive solely from the fact that the instrument at hand is a treaty. The bilateral investment treaty should be read as a standing offer to arbitrate by the host state. If the investor fulfills the requirements put forward in that offer, then the arbitration agreement is concluded. For the dissenting opinion, the condition that BG failed to fulfill was not a mere procedural requirement, but a condition of consent to arbitration.[79] Consequently, whether an investor has complied with that requirement is a question a domestic court must decide de novo,

74. Burke-White & von Staden, *supra* note 3, at 323.

75. *Id.* at 337.

76. *Id.* Another alternative, suggested by Stephan Schill, is to adopt a standard of review based on the notion of separation of powers. From this perspective, the appropriate standard of review can be distilled from a "comparative public law exercise." Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 593 (2012).

77. BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198, 1215 (2014) (Roberts, J., dissenting).

78. *Id.* at 1219.

79. *Id.* at 1218.

rather than an issue for the arbitrator to decide subject only to the most deferential judicial review.[80] Moreover, since the requirement was one of local remedies, the dissenting opinion sees "no reason to think that arbitrators enjoy comparative expertise in construing the local litigation requirement."[81] As a result, the dissenting opinion would have remanded the award to the lower court for it to engage in a de novo review of the award.[82] The public framing of the issue seems to point, though in a less clear fashion than the other examples, to a less deferential standard of review of the international award and to a preference for a vertical allocation of authority at the national level.

V
CONCLUSION: THE LIMITS OF THE PUBLIC–PRIVATE DISTINCTION AND THE ROLE OF DEFERENCE IN INVESTMENT ARBITRATION

This article argues that the demand for subsidiarity is a function of the public–private divide in investment law. Tribunals and scholars with a public-law mindset favor allocating authority at the domestic level. Further, they favor a deferential standard when investment tribunals review domestic decisions and a nondeferential standard when domestic courts review investment awards. In contrast, tribunals and scholars with a private-law mindset favor allocating authority at the international level. They favor a nondeferential standard for investment tribunals and deferential standards for domestic courts. Thus the investment arbitration case underscores the importance of the public–private distinction for the overall discussion of subsidiarity in global governance. The relation can be mapped in the following way:

		Public mindset	**Private mindset**
Top-down investment tribunals review domestic decisions	Standard of review	Deferential	Nondeferential
	Vertical allocation of authority	National level	International level
	Example	*LG&E*, *Continental Casualty*	*CMS*, *Sempra*, *Enron*
Bottom-up domestic courts review investment awards	Standard of review	Nondeferential	Deferential
	Vertical allocation of authority	National level	International level
	Example	Chief Justice Roberts' dissenting opinion in *BG Group*	Majority opinion in *BG Group*

80. *Id.* at 1221.
81. *Id.* at 1223.
82. *Id.* at 1224.

Such a sharp division between the public and private nature of investment arbitration, though, seems untenable. Investment arbitration is *fully* public—an aspect of the regime acknowledged by neither the private nor the public mindsets explored here. The private rights that are recognized by the investor and the private arbitral procedure are expressions of public power: they are created, defined, guaranteed, enforced, and adjudicated by public power.[83] In that sense, investment arbitration is not public because it exceptionally involves public interests such as national security or the environment. It is public because there are, in fact, no purely private matters involved: all matters, including the rights of the investor, are expressions of public power. If understood in this way, purely private commercial arbitration is also public, in the sense that it is also created by the power of the state. The distinction, in this sense, is trivial, and it may obscure more than it enlightens. Because the whole area of purely private arbitration can be understood as public power, the distinction easily collapses.[84]

The fact that the investment regime is *fully* public implies a general assessment of its role in the distribution of entitlements. Foreign investment law, both substantive and procedural, established a set of rules that allows for a certain form of bargain between the investor and the state. It gives to the investor certain powers, and to the state other powers, thus defining the frontier of possibilities of their interaction. In this context, the crucial issue regarding the demand for subsidiarity in investment arbitration stops being the appropriate level of deference and becomes how a level of deference constitutes entitlements in the overarching bargain between investors, states, and civil society. Who was given a stronger position in the bargain table when the *CMS* tribunal decided to apply a nondeferential standard of review? Who would be given a weaker position at the table through importing the margin-of-appreciation doctrine? Thinking of investment arbitration as fully public, all the way down, implies that subsidiarity is not only a form of vertically allocating power between different levels of governance. It is also a form of horizontally distributing power between different actors engaged in the overall bargain of foreign investment: states, investors, and civil society.

But, even if the public–private distinction easily collapses, the demand for subsidiarity is still hinged on its currency. The distribution of entitlements through public power is not the focus of the public-law mindset of investment arbitration. On the contrary, this mindset builds on the notion that there are, indeed, some private interests in investment arbitration (for example, the right of the investor) that are in principle outside the discussion of public law. Only when they collide with public values do they become relevant for a public law

83. For a similar argument regarding private property, see generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470–94 (1923).

84. *See* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982).

analysis. The public-law mindset of investment arbitration reaffirms the public–private distinction—despite the fact that the whole system is fully public, it still reinforces the idea that there are private rights that are outside the public sphere that are in principle autonomous from public interests.

Much scholarly effort is invested in arguing that investment arbitration is a public system of governance, but this effort builds on the very idea that that there are, indeed, purely private areas of investment law to begin with. This premise seems questionable and indeed has been questioned through a longstanding tradition of critique of the public–private distinction.[85] Specifically, contemporary scholarly interventions that reify the inherent nature of a public or private governance, by speaking of new "hybrid" governance[86] or by trying perpetuate the distinction as a desirable "regulative" idea,[87] must be questioned because the difference obscures important dynamics of power and, specifically, hides the important role of public power in supposedly purely private bargains. Instead, the public–private division and its effects in terms of subsidiarity should be explored from the perspective of the stability of the overall system. The vertical allocation of authority, derived as it is from the public–private divide, works in investment arbitration as a pressure-relief valve; it allows the investment regime to react to the external criticism by reshifting authority down to the local level or by scaling it up to the international level, thus allowing for deep change while remaining overall stable.

85. *See, e.g.*, Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

86. *See* Lorenzo Casini, '*Down the Rabbit Hole*': *The Projection of the Public/Private Distinction Beyond the State* 5 (Jean Monnet Working Paper, Paper No. 8, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349841&download=yes.

87. Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)*, (Jan. 2015), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2260293.