FROM INTERNATIONALISM TO COSMOPOLITANISM: USING DOMESTIC PUBLIC LAW DEFERENCE MECHANISMS TO LEGITIMIZE THE FULL REVIEW OF SOVEREIGN MACROECONOMIC POLICIES IN INVESTMENT ARBITRATION

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Abstract

The present article relies on the vicinity of investment arbitration with public law, and seeks to explore whether the transposition of domestic public law mechanisms, related to the exclusion of political and policy issues from judicial review, into the sphere of international investment arbitration could advance the academic discourse on the desired level of scrutiny to be undertaken by arbitral tribunals vis-à-vis questions of sovereign macroeconomic policy. Analysis of these mechanisms' structure and application leads to two conclusions. First, that measures of macroeconomic policy are justiciable; and second, that their review should presumptively be based on a full standard. It is submitted that both of these conclusions serve the investment system's goals, promote its function as a cosmopolitan policy maker, and fit with public international law's vibrantly politicized nature.

I. Introduction

How does the notion of '*forum conveniens*' relate to investment arbitration? Are there any limits to the issues which an arbitral tribunal may tackle? How easily can we strike a fair balance between the sovereign's right to implement its own macroeconomic policy and the investor's right to protection? What is the interplay between investment arbitration, international law and politics? The present article attempts to shed light onto the aforementioned questions by examining the desirable level of arbitral review with respect to measures concerning sovereign macroeconomic policies.

More specifically, the article first establishes the vicinity between investment arbitration and domestic public law. It then proceeds to discuss the domestic public law mechanisms which offer judicial immunity to acts touching upon political issues. The common rationale, structure and application of these mechanisms is reflective of an overall consensus which leads to their transposition into the international legal order. The jurisprudence of the International Centre for Settlement of Investment Disputes ["**ICSID**"] flowing from the Argentine crisis is used as a case-study to assess whether such a transposition holds any merit. Subsequently, the article establishes that the arbitral tribunals' decisions on the justiciability of such claims run parallel to the development of the 'political question' doctrine under domestic public law. This observation leads to the next issue, namely, whether the same doctrine could help shape the desired standard of review that arbitral tribunals ought to adopt when assessing measures premised on sovereign macroeconomic policies. In answering this question, the article examines the different strains of related jurisprudence and subsequently exposes the various opinions expressed in academia. It continues by arguing that the transposition of the doctrine into investment arbitration creates a presumption in favour of a full-scale arbitral review. This presumptive standard stands in between arbitral practice and academic discourse and, as such, helps reconcile the two. The last part of the article puts the discussion within the wider perspective of international law. It

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concludes by noting that international law in itself is a *de facto* politically charged area of law, and investment arbitration cannot be an exception. Therefore, and to the extent that international law and investment arbitration implicitly serve as a form of global governance, the proposed presumption in favour of a full-scale standard of review regarding measures related to macroeconomic policies is further legitimized.

II. Investment Arbitration and Public Law: Two Parallel Universes?

Recent academic literature focuses upon investment arbitration's vicinity to public and domestic administrative law.[1] The systems' similarities might be traced in three distinct directions: (i) the claimants' standing; (ii) the essence of the judicial review; and (iii) the implications flowing therefrom.

Starting from the procedural aspects, investment arbitration is perhaps the sole discipline within the international public legal order whereby individuals may bring direct claims against sovereign States in the absence of diplomatic espousal.[2] Furthermore, both systems are underpinned by a common rationale, i.e., in bringing claims against the State, plaintiffs are perceived as the weak party whose role '*ought to be enforced*' and safeguarded against the sovereign's potentially abusive actions.[3]

Turning to the essence of the arbitral review of measures related to the sovereign's macroeconomic policies, it has to be examined whether the sovereign's discretion has been exercised lawfully by reference to the international obligations assumed under investment treaty law. At first instance, investment arbitrators are being called upon to clarify the substance of standards crafted under international legal norms, which are just as abstract as those under national administrative law.[4] Subsequent to this crystallization, investment arbitrators conduct a balancing exercise between the investor's property rights on one hand and the sovereign State's public interests, as reflected within their adopted measures, on the other.[5] Based on the above, investment arbitrators are entrusted with a task similar to that of administrative judges, namely, the examination of governmental actions. In assessing the legality of these actions, investment arbitrators take recourse to the same methodology and tools as administrative law adjudicators. In fact, these findings have led many commentators to argue that investment arbitrators constitute a *sui generis* form of public authority.[6]

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1 *See generally* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., 2010); INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Gus Van Harten ed., 2007).

2 Outside the scope of the investment regime, individuals enjoy standing to bring direct claims against sovereigns only within the framework of intergovernmental organizations such as the European Union and the Council of Europe.

3 *See generally* CHARLES DEBBASCH & FREDERIC COLIN, DROIT ADMINISTRATIF 127 (11th ed. 2002).

4 Examples of abstract legal notions in domestic public law include the doctrine of good faith and the protection of the citizen; examples of abstract legal notions in international investment arbitration include the standards of fair and equitable treatment and the principle of equal treatment/ non-discrimination.

5 *See generally* Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights With State Regulatory Actions in the Public Interest – the Concept Of Proportionality*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 77 (Stephan W. Schill ed., 2010), *available at* http://iilj.org/wp-content/uploads/2016/08/Kingsbury-Schill_Public_Law_Concepts_to_Balance_Investors_Rights_with_State_Regulatory_Actions_in_the_Public_Interestthe_Concept_of_Proportionality.pdf.

6 *See* Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Special Species of Global Administrative Law,* 17 EUR. J. INT'L. L. 121 (2006) (on the emergence of a global administrative law discipline); Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance,* 14 ICCA Congress Series, 5-69 (Albert Jan Van den Berg

This proposition is further supported by the wider implications an investment award might bear. A decision on the unlawfulness of an implemented measure leads to an award of damages in favour of the investor. In light of this remedy, an arbitral tribunal's findings indirectly influence the present and future implementation, design and execution of public policies. If the language of the award affixes liability on the State for arbitrary or unfair laws, then the State might consider amending its specific legislation and/or wider policy with a view to avoid future disputes.[7] Therefore, investment arbitrators assume a role parallel to that of national administrative judges in crafting standards of accepted governmental action, which naturally affect sovereign policy-making.[8]

Interestingly, this crystallization of standards is not only witnessed within the framework of a national legal order. Quite on the contrary, these standards equally bear an impact on the international legal order, to the extent that they help 'shape investors' expectations' on a global level.[9] This is so on two distinct grounds. First, arbitral awards contribute towards the multilateralization of a purely bilateral system such as that of investment arbitration. Their findings on the standards of protection afforded to investors on the occasion of a particular case, crafts the latter's general perception as to the desirable threshold of legitimate State action. Based on these general standards, other investors will advance their future legal claims against other host States.[10] Second, investment tribunal awards assume an international policy-making function akin to the domestic one exposed above. Applying, *mutatis mutandis,* the rationale sketched under the regime's domestic implications, arbitral awards influence sovereign legislative and regulatory choices at a global level.[11] This is so to the extent that an arbitral tribunal's findings on a particular case concerning a specific host State might be taken into consideration by other States, in hope of avoiding a potential claim against them.

Parallel to these structural and substantive similarities, the investment regime equally presents distinct traits that differentiate it from the public law system. First, the limitations imposed upon the sovereign are not necessarily indicative of a global consensus as to the desired standard of conduct. This is due to the fact that much unlike domestic public measures, these are not the product of a public deliberation and/or a process of wider legitimization.[12] Second, and in complete contrast to the domestic public measures adopted by governmental agencies which act upon specifically delegated powers, standards of investment protection do not necessarily derive from actors with specialized expertise. These are strictly premised on a bilateral negotiation. Therefore, the adopted standards run the risk of being purely reflective of the asymmetry in the

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ed., 2009) (on the exercise of a global governance function); INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 3-37 (Stephan W. Schill ed., 2010).

7 By way of example, the Indian Government revised its Model BIT in 2015 to specifically exclude judgments and arbitral awards from the definition of "investment" in response to the ICC tribunal's findings in White Industries Australia Limited v. The Republic of India, Final Award, (Nov. 30, 2011) (UNCITRAL).

8 *See generally* Harten & Loughlin, *supra* note 6.

9 *See* Kingsbury & Schill, *supra* note 5.

10 Jose E. Alvarez, *Is the Investment Regime a form of Global Governance?*, 15 ICCA Congress Series 159 (Albert Jan Van den Berg ed., 2011).

11 For the general discussion on arbitral tribunals' role as global policy makers, *see* Kingsbury & Schill, *supra* note 5.

12 *See* Guido Santiago Tawil, *On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine*, 15 ICCA Congress Series 325 (Albert Jan Van den Berg ed., 2011) (on the internationalization of administrative law through consensus building mechanisms such as best practices and regulations).

bargaining power between different contractual parties.[13] Based on the above, the standards introduced under the investment regime enjoy a thinner level of legitimacy when compared to those implemented under a domestic public law system. At the same time, a lower threshold of legitimacy equally conditions the arbitral fora before which investment disputes are adjudicated. This is to the extent that investment claims are subject to a private dispute resolution mechanism, instead of the public standing bodies competent to adjudicate domestic public and administrative disputes.[14]

The above analysis indicates that the investment arbitration regime draws parallel similarities with the domestic public and administrative law system. This overall commonality might be traced within the actors' standing, the nature of judicial review exercised as regards measures related to macroeconomic policies, and the awards' overall implications within the domestic and international legal order. The question then is whether this theoretical exposure bears any practical implications. It also raises questions as to the possibility to mend the investment system's lower level of legitimacy as illustrated above, by transposing specific public law doctrines into the investment arbitration framework.

III. Domestic Mechanisms on the Exclusion of Political and Policy Issues from Judicial Review

Interestingly, a vast majority of domestic public law systems have introduced deference mechanisms excluding issues from judicial review due to their deep political character. Such deference mechanisms appear under various legal forms in different jurisdictions, including the 'political question' doctrine in the United States ["**US**"][15] and the UK[16] and the doctrines of '*actes de gouvernement*'[17] and '*Regierungsakt*'[18] in France and Germany respectively. By way of example, in *Schroder* v. *Bush*, the plaintiffs sought an order requiring the President, Secretary of the Treasury, Secretary of Agriculture, and their agents to control US currency and to maintain market conditions so as to be favourable to American farmers as well as an order requiring the US Trade Representative "*to cooperate in negotiating and implementing foreign trade agreements that would benefit small farmers*".[19] The 10th circuit of the US Court of Appeals rejected the plaintiffs' action, *inter alia*, by reasoning that: "[*c*]*ourts are ill-equipped to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency*".

A comparative analysis reveals that although premised on different starting points and related to different constitutional histories, structures, and methods of organization, the aforementioned

13 *See* Kingsbury & Schill, *supra* note 5.

14 *Id.*

15 *See generally* Russell Gabriel, The political questions doctrine and the politics-law distinction, (May 8, 1987) (unpublished LL.M. Thesis, Harvard University); Mulhern J. Peter, The political question doctrine and judicial review (May 8 1987) (unpublished LL.M. thesis, Harvard University).

16 *See generally* GORDON ANTHONY, UK PUBLIC LAW & EUROPEAN LAW: THE DYNAMICS OF LEGAL INTEGRATION 30 (2002); Chris Himsworth, *Judicial Review of Political Questions, Questions of Justiciability,* INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW (2007) VII World Congress, *available at* http://www.enelsyn.gr/papers/w5/Paper%20by%20Prof.%20Chris%20Himsworth.pdf.

17 *See generally* DEBBASCH & COLIN, *supra* note 3.

18 *See generally* R. Smend, *Les Actes De Gouvernement En Allemagne*, Annuaire Institut International de Droit Public (1931); GERNOT BIEHLER, PROCEDURES IN INTERNATIONAL LAW 164 (Springer ed., 2008).

19 Schroder v. Bush, 263 F.3d 1175 (10th Cir. 2001).

doctrines do in fact present common elements. The present attempt does not intend to exhaust the doctrines' details and specificities. Quite on the contrary, it aims to prove that a wider legal notion could be transposed to investment arbitration by highlighting the doctrines' common rationale, legal structure and trends in application.

The rationale underpinning the aforementioned deference mechanisms touches upon two elements. At first instance, comes the principle of separation of powers. The acts in question relate to policy or political choices, which lie within the executive's competence. Therefore, the possibility of their review would entail the judiciary intruding into strictly executive and/or governmental powers.[20] This is because a decision on their legality would implicitly dictate to the executive a specific direction of accepted policy-making.[21]

The second ground that justifies the acts' non-justiciability relates to the absence of a concrete judicial benchmark for the review of such measures, topped up with a possible lack of technical expertise required for their substantive assessment. The very essence of the acts in question is determined by reference to an inherently discretional policy choice. The notion of a policy decision itself reveals that there is a lack of 'judicially discoverable and manageable standards' based on which this may be examined.[22] It lies within the sovereign's discretion to prioritize its different policies and to adopt measures that are reflective thereof.[23] Therefore, there is no generally accepted benchmark or threshold for conducting a review as to which policy of the sovereign ought to have prevailed.[24] Even if such a benchmark existed, however, it would entail a specialized and detailed technical policy assessment, which the judiciary might not be rightly placed or qualified to conduct due to lack of required expertise. As the United States Supreme Court noted in *Coleman* v. *Miller*:

> "*[a]n appraisal of a great variety of relevant conditions, political, social and economic … can hardly be said to be within the appropriate range of evidence receivable in a court of justice. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government.*".[25]

Another common element which relates to the deference mechanisms' similar structure is that they have been framed under an abstract legal doctrine, the essence of which is subsequently substantiated and interpreted by the judiciary.[26] Therefore, it is the judiciary itself which decides whether a given measure might be immune from judicial review based on whether their exemption satisfies and serves the fundamental rationales exposed above. Today, there is overall consensus affirming that acts related to the sovereign's international relations and its internal

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20 DEBBASCH & COLIN, *supra* note 3.
21 Tom Zwart, *Overseeing the Executive: Is the Legislative Reclaiming Lost Territory From the Courts?, in* COMPARATIVE ADMINISTRATIVE LAW, 150-151, (Susan-Rose Ackerman & Peter Lindser eds., 2010).
22 Baker v. Carr, 369 U.S. 186, 217 (1962).
23 Jesse H. Choper, *The Political Question Doctrine: Selected Criteria*, 54 DUKE L. J., 1457-1523 (2005).
24 Goldwater v. Carter, 444 U.S. 996, 999 (1979).
25 Coleman v. Miller, 307 U.S. 433, 453-454 (1939).
26 For the substantiation of abstract legal norms in investment arbitration, *see* Part II.

public policy by and large qualify as non-justiciable.[27]

The application of the doctrines has actually run under a common thread within different jurisdictions. The initial broader judicial approach as to which acts qualify as non-justiciable, has given way to a stricter interpretation.[28] In addition, various legal orders have introduced an enhanced system of exceptions regarding the prima facie application of the doctrine. For example, under the French doctrine of '*actes detachables*', separate acts in implementation of the general sovereign policy are not exempt from judicial review.[29] This is due to the fact that the causal link between the adoption of individual administrative decisions and the implementation of the general policy is weak. Hence, the rationale that justifies the non-justiciability of the acts is equally weakened in such instances, to the extent that such measures do not raise, but incidentally, questions of high and sensitive decision-making.[30] The second line of exceptions relates to the doctrine of 'subsequent judicial review'. Although the adoption of measures relating to public policy might not be challenged directly, their application can lead to the award of damages in favour of the individual whose legal position and rights have been adversely affected as a result thereof.[31] Therefore, by deeming the government liable for the damages individuals sustain as a consequence of the measures endorsed, the judiciary might be found to be indirectly expressing its approval or disapproval of the overall policies upon which the latter are premised.

All the above leads to the conclusion that various jurisdictions have introduced deference mechanisms which allow for issues of political and/or policy oriented nature to escape judicial review. Although the exact details of each domestic mechanism might present differences, the doctrines applied are premised on common rationales. They are structured around similar legal frames, and their application follows parallel trends. This finding leads to the question as to whether a similar doctrine might be transposed to investment arbitration.

IV. The Transposition of the 'Political Question' Doctrine into International Investment Arbitration: a Case for the Claims' Non-Justiciability?

The transposition of the political question doctrine into international investment arbitration might play out on two distinct grounds. More specifically, this may concern a *per se* adoption of the concept seeking to deem investors' claims concerning host States' macroeconomic policies non-justiciable. This may also refer to the concept being used as a guiding line in delineating the desirable standard of review of measures touching upon macroeconomic policies. In assessing whether any of these grounds can stand, the ICSID litigation following Argentina's economic crisis will serve as a case-study.

Starting with the former ground, and according to Article 25(1) of the ICSID Convention, "*[t]he*

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27 *See* Ildiko Marosi, *Political Questions in the United States and in France, available at* http://www.kre.hu/portal/doc/sic/2009/sic4_10_marosi-csink.pdf.

28 *See generally id.*

29 *See generally,* DEBBASCH & COLIN, *supra* note 3.

30 *See generally id.*

31 *See generally id.*

jurisdiction of the Centre extends to any legal dispute arising directly out of an investment."[32] Based on this jurisdictional requirement, Argentina argued, in the series of cases concerning decisions introduced during its financial recess, that measures of general economic policy are immune from the judicial review of ICSID on two distinct premises.

The first objection raised by Argentina referred to whether review of a sovereign State's macroeconomic policy qualifies as a legal dispute, in the first place. To substantiate this claim, Argentina argued that the disputed measures had been adopted as a reaction to a social economic crisis. As such, they were not intended to influence by any means the specific claimants' rights and obligations; any influence upon them would not constitute but a political choice's 'undesirable consequence'. Therefore, the claimants' assertions would not qualify as related to a legal dispute, to the extent that at the measure's heart lay political considerations with general and attenuated implications.[33]

In responding to this objection, arbitral tribunals seemed to define the notion of a legal dispute broadly, namely, by reference to the means by which investors support their claims. In particular, the tribunals found that in order for their disputes to qualify as legal, respondents ought to present legal claims premised on specific provisions and acts. Therefore, a legal dispute would merely concern: "…*the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation*.".[34]

The second objection raised by Argentina related to the issue of whether the disputes in question flowed 'directly out of an investment'. So long as the dispute in question did not arise out of measures specifically and individually targeted against a given investment, and rather arose from the sovereign's right to design and implement general public policies, the dispute fell outside the jurisdiction of ICSID.[35] This argument reflected the idea that a State's commitments towards a given investor are constrained within the four squares of the investment's specific contractual framework. The opposite would in theory allow for an investor to block any general public policy functions the State enjoys, thus imposing disproportionate restrictions upon national sovereignty.

Arbitral tribunals seemed to accept the fundamental difference between measures of general economic nature and those specifically driven towards the investor's operations and deemed the former non-justiciable. However, they adopted a broad definition as to what constitutes an investor-targeted measure. The criterion would not lie as to the measure's general legal character, rather, it would relate to the distinct and individual implications this might directly bear on an investor:

> "…*The arbitral tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on*

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32 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25(1), August 6, 1964, 17 U.S.T. 1270.

33 National Grid PLC. v. Argentine Republic, Decision on Jurisdiction, (June 20, 2006) (UNCITRAL), ¶¶ 142-147 [*hereinafter* "National Grid PLC v. Argentine Republic"].

34 *Id.* ¶ 160.

35 CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction (July 17, 2003), ¶¶ 24-30 [*hereinafter* "CMS Gas Transmission Co."].

> *whether they are right or wrong. The tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts*.".[36]

Based on the above findings regarding the non-justiciability of the related claims, we conclude that the application of the doctrine of 'political question' in the framework of investment arbitration runs parallel to that under domestic public law. Namely, both systems recognize the theoretical possibility that some questions cannot be subject to judicial review due to their deeply political character. However, the arbitral tribunals, like domestic courts, adopt an overall narrow and restricted approach as to what constitutes a political, instead of a legal and hence justiciable matter.[37] Moreover, the arbitral tribunals' delineation between general measures of economic policy on one hand, and acts in implementation thereof on the other, seems to echo the domestic doctrine of 'detachable acts'.

This analysis reveals that the transposition of the 'political question' doctrine from the domestic legal order into the investment arbitration framework may serve two functions. At first instance, it helps explain the arbitral tribunals' findings concerning the actual justiciability of the investors' claims. Moreover, it may be perceived as a source that offers extra legitimization in favour of the arbitral tribunals' conclusions regarding the respondents' objections on jurisdiction. That being said, the question then turns to whether the very same doctrine could offer an indication as to the desired standard of review which arbitral tribunals ought to adopt when assessing questions of general economic policy.

V. The Transposition of the 'Political Question' Doctrine into International Investment Arbitration: a Guiding Line Towards the Desirable Standard for Arbitral Review?

As explained above, the transposition of the 'political question' doctrine into international investment arbitration might play out on two distinct grounds. The second ground relates as to whether it could actually serve as a guiding line in delineating the desirable standard of review, as regards the measures touching upon macroeconomic policies. In order to assess this question, a three-fold approach will be followed. At first instance, the standards of review applied by ICSID's arbitral tribunals on the case-study of the Argentinian crisis will be sketched. Next, the various academic opinions on the matter will be equally illustrated. Finally, it will be examined whether an argument premised on the 'political question' doctrine could reconcile academia with practice.

A. The Standard of Review for Measures Related to Macroeconomic Policies: the Case-Study of Argentina's Litigation before ICSID

Having decided that claims related to macroeconomic policy choices are justiciable, the arbitral tribunals on the case-study of the Argentinian crisis went on to analyse the substance of the disputes in question. In so doing, however, they themselves acknowledged the inherent difficulty in conducting such an assessment: "…*[w]hile the legal meaning of the governing legal framework and the*

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36 *Id.* ¶ 33.

37 For the discussion on the current narrow approach under the domestic doctrine, *see* Part III.

license is quite straightforward… the reality of the Argentinian economy is more difficult to assess.".[38]

The aforementioned difficulty may be traced on two distinct grounds. The first ground concerns the nature of the assessment in question. Economic policy relates to extremely intricate technical issues which require additional expertise and specialized knowledge, which arbitrators do not necessarily possess. The questions posed under the *Continental Casualty* v. *Argentine Republic* ["**Continental Casualty**"] litigation are reflective thereof, wherein the restructuring of the defaulted debt related to 152 different governmental securities and referred to a variety of jurisdictions and currencies.[39] Questions of macroeconomic policy in particular bear an additional challenge. Their unique characteristic is that it is hard to build consensus as to the most appropriate measure even among those with technical expertise. This is so due to the fact that macroeconomic issues are premised on the projection of current figures to future economic environments. Therefore, such findings are inherently speculative and thus, unstable. The expert-witness statements help illustrate the various debates and discussions led within the executive prior to the implementation of a given macroeconomic decision.[40] Following this projection, the decision makers are called upon to balance various alternatives against a series of public policy priorities. Consequently, the end result of this balancing exercise remains to a great extent, subjective.

The second source of difficulty relates to the methodology to be followed when examining such measures. The challenge lies as to the fact that the assessment of macroeconomic policies is in essence a '*retrospective examination*'.[41] It is submitted that this is so especially when taking into account the fact that an arbitral tribunal has at its disposal financial and economic data which was non-existent at the time of the original decision-making. Therefore, this informational asymmetry conditioning the two crucial points in time raises jurisprudential questions about the right benchmark to be adopted when assessing such measures. On the one hand, is it legitimate to condemn public policies under the light of evidence and data unavailable at the time of decision making? If not, then is it feasible that the new information does not even subconsciously influence the adjudicator when assessing the measure's legality? Wouldn't the new data more often than not lead to the conclusion that a less restrictive measure could have been implemented, making the act in question disproportionate and consequently illegal? Despite the fact that the arbitral tribunals admitted to the related difficulties exposed above, they nonetheless adopted different approaches as to how the related disputes ought to be resolved.

Under one strain of case-law, the arbitral tribunals started off by accepting that the parties and experts appeared divided on the most appropriate measure required in order to tackle the given crisis. The tribunal went on to clarify that any assessment as to which measure was most suitable fell outside the scope of their jurisdiction. The measure in question, however, would be reviewed

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38 CMS Gas Transmission Co., ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 152 .

39 Continental Casualty Corporation v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), Footnote 228.

40 Enron Corporation Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007), ¶ 141 [*hereinafter* "Enron Corporation Ponderosa Assets, LLP"]; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (September 28, 2007), ¶ 250.

41 Continental Casualty Corporation v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), Footnote 228 .

on the basis of whether this constituted the sovereign's sole alternative. Should this be the case, the State would possibly escape liability. To the extent that other alternatives existed, though, the State would be deemed to be liable for the adverse effects flowing from the policy the sovereign ultimately chose to adhere to.[42]

Burke-White and von Staden summarize the second strain of case-law under *LG&E Energy Corp.* v. *Argentine Republic*,[43] and *Continental Casualty*,[44] as follows:

> "*(The tribunals)… gave considerable deference to Argentina's determination that its actions were necessary to protect essential security interests and maintain public order. (They) recognized the public law nature of the disputes and the fact that, along with the rights of investors, considerable national and global policy concerns were at stake.*".[45]

Consequently, and despite the difficulties associated with the assessment of measures related to macroeconomic policies, the arbitral tribunals went on to examine them. This, however, led to the creation of two different strains of related case-law.

B. Towards a Desirable Standard of Review: the Academic Voices

This divergence in case-law led a series of academic commentators to discuss what the desirable standard should be when reviewing sovereign macroeconomic policies. The current analysis presents the main proposals expressed in academia, it summarizes the arguments behind them and attempts to trace possible weakness in their practical application by investment tribunals.

The very notion of a 'standard of review' reflects the "*degree of intensity or thoroughness of review during the judicial process*"[46] and is premised upon the perception that there is an "*inevitable distribution of power between the judiciary and the national bodies under its control.*".[47] A deferential standard of review, in its turn, stands for the exercise of judicial restraint on issues conditioned by uncertainty as to the right conclusion and/or the absence of a universally accepted benchmark regarding their assessment.[48] The expressed opinions on the desirable deferential standard of review may be classified under three categories.

The first category highlights the textual and/or factual circumstances of the given case. In particular, Rahim Moloo supports that the guiding line as to the deference an arbitral tribunal ought to show, is to be found by reference to the textual interpretation of the Bilateral

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42 Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (September 28, 2007), ¶¶ 350-351; Enron Corporation Ponderosa Assets, LLP, ICSID Case No. ARB/01/3, Award (May 22, 2007), ¶¶ 308-309; CMS Gas Transmission Co., ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 323.

43 LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006).

44 Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).

45 William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration,* 35(2) YALE J. INT'L L. 283, at 299 (2010).

46 SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 148 (2007).

47 SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 209 (2012).

48 Julian Rivers, *Proportionality and Variable Intensity of Review,* 65(1) CAMBRIDGE L. J. 174, 199 (2006) (defining the notion of deference).

Investment Treaty ["**BIT**"] signed between the State and the investor.[49] The text of the BIT offers the sole original reflection of the parties' intention regarding the exercise of judicial restraint, the argument goes, such that that would offer legitimacy in favour of a more deferential standard of review. Caroline Henckels on the other hand, considers that the exercise of arbitral deference may be legitimized only by reference to the special circumstances and characteristics of each case.[50] The common trait of the aforementioned theories is that they focus on the occasions under which deference ought to be exercised. However, they do not go so far as to sketch the specifics of a desirable standard of review or to prescribe how such a standard should apply. Moreover, these theories refrain from introducing a universal preference to a catch-all deferential review, and rather function on an *ad hoc* basis.

Another line of academic literature uses the vicinity of investment law with public law in order to draw legitimacy to a more deferential standard of review. To the extent that the subject matter and nature of the questions under review are similar under both public law and investment arbitration, a method of review inspired by the former might be successfully transposed to the latter.[51] Based on this rationale, Schill argues that the desirable standard of review in investment arbitration is prescribed by recourse to a comparative analysis of domestic public law.[52] More specifically, Schill suggests a two-fold approach. At the first instance, public international law offers the initial framework for review. Measures in question are tested against general principles of international law such as, for example, that of good faith.[53] On a second level, a broader comparative public law analysis offers both positive standards that help sketch the desired degree of scrutiny for the issue in question, as well as a series of reasons that justify and legitimize the exercise of judicial deference, given the circumstances of the case. Katselas takes Schill's thought one step forward by suggesting a specific standard of review drawn from the American administrative legal order.[54] In particular, she considers that the 'arbitrary and capricious standard

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49 *See* Rahim Moloo, *The Source for Determining Standards of Review in International Investment Law*, INVESTMENT TREATY NEWS (July 19, 2012), *available at* https://www.iisd.org/itn/2012/07/19/the-source-for-determining-standards-of-review-in-international-investment-law/ [*hereinafter* "Rahim Maloo"]; *See also*, Rahim Moloo & Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law,* Y.B. INT'L INV. L. (2012).

50 Caroline Henckels, Balancing Investment Protection & Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration 4, (unpublished manuscript) (on file with Journal of International Dispute Settlement).

51 Anthea Roberts, *The Next Battleground: Standards of Review in Investment Treaty Arbitration,* 16 ICCA Congress Series (Albert Jan Van den Berg ed., 2012), (rejects the transposition of public law standards to investment arbitration on three distinct grounds, namely: 1) the fundamental rationale underpinning deference mechanisms under national public law, namely the question of separation of powers, is absent from the international investment framework; 2) investors run the risk of being left unprotected before the sovereign's "majoritarian wishes"; and 3) the argument on deference on the ground of the arbitrators' lack of expertise does not stand to the extent that national judges on many occasions traditionally exercise judicial review in areas outside the scope of their expertise).

52 Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review Through Comparative Public Law* (Society of International Economic Law Working Paper No. 2012/33) [*hereinafter* " Stephan W. Schill"]; *See also,* Stephan W. Schill, *Deference or no Deference, That Is the Question: Legitimacy and the standards of review in investor-state arbitration,* INVESTMENT TREATY NEWS, (July 19, 2012) *available at* https://www.iisd.org/itn/2012/07/19/deference-or-no-deference-that-is-the-question-legitimacy-and-standards-of-review-in-investor-state-arbitration/.

53 *Id.*

54 Anna T. Katselas, *Do Investment Treaties Prescribe A Deferential Standard of Review? A Comparative Analysis of the U.S. Administrative Procedure Act's Arbitrary And Capricious Standard of Review and the Fair and Equitable Treatment and Arbitrary or Discriminatory Measure Treaty Standard,* 34(1) MICH. J. INT'L L. 88, 92-121, 141-148 (2012).

of review' prescribed in the US Administrative Procedure Act can be applied to measures allegedly in breach of investment protection standards such as that of fair and equitable treatment and non-discrimination.[55] Turning to the difficulties that the aforementioned proposal might entail, Schill's proposition raises three points. From a methodological standpoint, the proposal's general character and nature does not allow for its applicability to be tested until this is concretized through a more specific public law standard, doctrine or procedure. On a more practical level, the proposed comparative exercise necessitates a substantive analysis of the various national administrative law systems. Given the complexity of national administrative organization, however, the execution of such an analysis would not only necessitate high degrees of expertise on the arbitrators' part, but also an equally substantial amount of time. From a jurisprudential basis, it is doubtful whether such a comparative approach might help cure the aforementioned inconsistency, which conditions the case-law in the domain. Quite on the contrary, the subjective nature of any comparative review could potentially lead to an increased complication of what is anyhow a fragmented segment of jurisprudence. Moving to Katselas' proposition, two comments can be made. The fact that the proposed standard of review is met within a given domestic system, but not necessarily within a depictive number of national legislations, raises jurisprudential issues as to the legitimacy of its transposition to an international framework. From a more substantive standpoint, the proposed standard of review is applicable to instances whereby the Congress confers upon administrative agencies the delegated power to fill in existing legislative lacunae. Therefore, much unlike the case of measures related to general economic policy, the arbitrary and capricious standard of review does not directly relate to questions of general policy-making, rather to ordinary administrative decisions.

The last criterion refers as to the standards of review adopted by other international adjudicative fora that bear functions similar to investment arbitration tribunals. In particular, Burke-White and von Staden argue for the application of a standard of review premised on the doctrine of the 'margin of appreciation' ["**MOA**"].[56] According to the authors, the test under MOA is two-fold. First, the arbitrators identify whether the measure in question relates to a policy that would justify a deferential review. Once this criterion has been met, then, the measure is reviewed under a 'residual proportionality' screening. The 'residual proportionality' standard of review omits the standard balancing exercise on the wider implications of the implemented policy, as per the traditional proportionality review, and rather focuses on the first tier of the test regarding the suitability of the measure. The skipping of this last part is justified on two grounds. First, the consequences flowing from the policy in question are already examined under the first tier of the test, on the premise of which a more deferential standard is being applied. Second, it is exactly

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55 *Id.*

56 *See* Burke-White & Staden, *supra* note 45, at 333-344 (discussing the application of the margin of appreciation and proportionality analysis in arbitral theory and practice); *See also,* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation And Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties,* 48 VA. J. INT'L L. 307, 368-386 (2007); The MOA doctrine refers to the space for maneuver that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention) and has been defined as "(…) the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties", *see generally* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF THE PROPORTIONALITY IN THE JURISPRUDENCE OF ECHR (2002).

the arbitrators' lack of expertise to assess the macroeconomic costs and benefits that might flow from the measure in question that justify the adoption of a deferential standard in the first place. Therefore, such a balancing exercise would in essence lead to the exact situation that the deferential standard would seek to avoid. Against this background, Katselas raises three concerns regarding Burke-White's and von Staden's proposal.[57] First, the rights examined under investment arbitration are not necessarily similar in nature to those protected under the European Court of Human Rights ["**ECHR**"]. Therefore, the transposition of the MOA test might not always be able to address the different range of rights raised before investment arbitral tribunals. Moreover, the exercise of deference is justified within the framework of the ECHR by reference to the Convention's unilateral character. In particular, the international text is premised on a wider consensus and as such is not necessarily reflective of each member State's specific and detailed policy intentions. Quite on the contrary, the investment regime is premised on a bilateral system of agreements, hence the guarantees offered have a higher normative effect. Last but not least, the ECHR is structured around a solid system of endorsed and promoted policies and priorities. However, it is extremely difficult to identify a list of possible policies and priorities deemed legitimate under the investment framework. In fact, this is the exact function that investment arbitrators are called upon to exercise.[58]

Based on the above, the diverse jurisprudence of the investment arbitral tribunals has sparked an interesting academic discourse as to the desired level of judicial scrutiny arbitrators ought to exercise come a measure related to macroeconomic policy choices. The major academic voices, however, are equally diverse. Although they all advocate in favour of a more deferential treatment of the related questions, their starting points and overall implications are different. Therefore, the question then turns as to whether the 'political question' doctrine could help reconcile the current state of the academic opinions expressed on the matter.

C. The 'Political Question' Doctrine as a Guiding Line Towards the Desirable Standard of Review for Questions of Maroeconomic Policy

Based on the 'political question' doctrine analysed above, domestic public law deems a series of issues related to governmental policy-making, to be immune from judicial review. Although the doctrine itself relates to the notion of justiciability, the fundamental elements of its rationale coincide with those prescribed under the definition of a deferential standard of review. They are both premised upon the notion of distribution of powers and refer to the lack of a universally accepted benchmark for the judicial review of the measures. This commonality would allow us to further explore how its transposition in investment arbitration could influence the current academic discourse on the desirable standard of review of measures related to sovereign macroeconomic policy making.

From a methodological point of view, the use of the 'political question' doctrine bears a number of advantages. It epitomizes the academic discussion on the vicinity between public law and investment arbitration by offering a practical field whereby this similarity might be applied and tested. The introduction of a standard of review by reference to the 'political question' doctrine

57 Katselas, *supra* note 54, at 133-141.
58 *Id.*

brings two distinct elements when compared to the other proposals that are equally based on the public law-investment arbitration commonality rationale. First, the current proposal is based on a concrete doctrine, instead of a wider and more abstractive comparative approach, and as such, is expected to be more practical and easily applicable. Second, its application would enjoy higher legitimacy to the extent that the doctrine in question is found in a series of domestic legal orders, as exposed above.

Where would the theory behind the 'political question' doctrine lead us then, as far as the standard of review in investment arbitration goes? The doctrine itself does not prescribe a grey zone of deferential review for measures that are not *per se* non-justiciable. Therefore, the doctrine does not accommodate the cluster of those measures whose content closely relates to sovereign choices yet is not strong enough to establish non-justiciability on the basis that their review would potentially raise similar issues to those justifying the doctrine's creation in the first place. The transposition of this scheme into the investment arbitration framework leads us to the conclusion that once the measures in question are deemed justiciable by the arbitral tribunal, they will presumptively be subject to the same standard of review, as any other measure would be.

How does this proposition fit into the three strains of academic literature exposed above regarding the proposed standards of review? Starting from the first category, one could support that the two standards run in parallel and in fact complement each other.[59] In particular, to the extent that the parties' intention that the sovereign's choices be subject to a deferential standard of review is not expressly reflected in their related agreement, the presumption under both theories lies as to the fact that the arbitral tribunal will apply the standard level of judicial scrutiny. Namely, so long as parties repeatedly adhere to the same system – in the current case, the same contractual system, which might for example take the form of a standard BIT model – without drafting or adding different contractual elements that correlate to a more deferential review, they implicitly legitimize a higher level of arbitral scrutiny.[60]

The relation between the proposed standard of review and others that equally touch upon a public law criterion has been extensively exposed at the beginning of this section.[61] For current purposes, it suffices to mention that they are all based on the same rationale, but their application leads to the opposite conclusions regarding the desirable standard of review that the transposition of an abstractive public law doctrine would dictate.

The most interesting comparison is between the currently suggested standard and the one premised upon the 'MOA/residual proportionality' test.[62] At first sight, the two standards seem to be in complete contrast to each other. However, the truth lies as to the fact that both proposals are more nuanced in practice than what they would initially appear to be. The currently

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59 *See* Rahim Moloo, *supra* note 49.

60 *See* Petros C. Mavroidis, *Judicial Supremacy, Judicial Restraint, and the Issue of Consistency of Preferential Trade Agreements with the WTO: The Apple in the Picture, in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOUR OF ROBERT E. HUDEC, 583, 595 (Daniel M. Kennedy & James D. Southwick eds., 2002), (Mavroidis argues that by adhering to the WTO system and by not amending its respective provisions Member States legitimize the panel's full review of their discretional powers).

61 *See* Stephan W. Schill, *supra* note 52.

62 *See* Burke-White & Staden, *supra* note 45.

proposed standard advocates that the 'political question' doctrine creates a presumption in favour of a complete review. Yet, this presumption might be rebutted either by the parties' expressly stipulated intention to the contrary or by special factual circumstances that might lead the arbitral tribunal to engage into a *de facto* deferential treatment of the measures under review. Under the 'MOA/residual proportionality' test, on the other hand, the suggested standard of review is conditioned by a high degree of *prima facie* deference. On a closer look at the steps, such a test reveals that it nonetheless entails an examination of the suitability of the measure. In order for the arbitral tribunal to reach such a finding, it needs to investigate whether there is a less restrictive alternative to the measure actually adopted. In so doing, however, the arbitral tribunal is in essence being called upon to assess the implications that different policy choices could have borne, and subsequently deem whether the one finally endorsed was less restrictive on the basis of both its short and long term results. However, engagement into a balancing exercise of such a subjective nature is exactly what a deferential standard would seek to avoid in the first place. Based on the above, one could argue that the two standards might depart from utterly different starting points, yet could in practice be closer to each other than they would originally appear to be. The current proposal is premised on a presumption of a standard of review, which might be overturned on the basis of the particular elements and circumstances of the case. The 'residual proportionality' test is founded upon the presumption of a more deferential review, which is, however, *de facto* nuanced to the extent that less restrictive alternatives are actually being examined.

Based on the above, the 'political question' doctrine bears elements similar with the notion of deference, such that that allow for its adoption within the investment arbitration framework. From a methodological point of view, this transposition reflects the academic discussion on the commonality between public law and investment arbitration. The practical conclusion following the doctrine's adoption is the creation of a presumption in favour of a full-scale review. However, and to the extent that the full-fledged standard of review is purely presumptive, the current proposal stands in the middle between arbitral practice and academic discourse, and hence helps reconcile the two.

VI. Standards of Review, Investment Law and International Law: Putting Things into Perspective

How does a standard of arbitral review crafted around the 'domestic political question' doctrine fit within the wider framework of investment arbitration and general international law?

If we were to adopt the argument that each system is underpinned by a certain structural bias which prefers certain outcomes and choices over others,[63] then international investment law is clearly architectured around the fundamental principle of investment protection. This goal is served by the current proposal on two grounds. At the first instance, the proposal creates a presumption in favour of a full standard of review, thus, allowing for a detailed examination of the sovereign's discretion in the implementation of macroeconomic measures. Moreover, its nuanced character could help reconcile the conflicting case-law on the subject-matter and hence,

[63] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties,* 15 LEIDEN J. INT'L L. 553, 578 (2002).

offer enhanced legal stability and predictability. In addition to promoting the system's goals, the proposed standard equally supports its function as a global and cosmopolitan policy-maker.

Putting the proposed standard within a wider perspective, one concludes that the assessment of macroeconomic and or political issues is not foreign to general international law. In fact, Koskonniemi argues that international law is a highly politicized area of law in the first place.[64] Almost every aspect of public international law touches upon a State exercising its sovereign right to engage in and implement a particular foreign policy against another. Therefore, international fora are traditionally charged with the task of assessing policies whereby objective benchmarks are less evident, just as much as they are difficult to draw in questions of macroeconomic policy.

Based on the above, the current proposal is in line with not only the goals that investment law seeks to serve, but equally with the fundamental perception upon which general international law is premised in the first place.

VII. Conclusion

Following the vicinity of public law with investment arbitration, this paper suggests that the aforementioned question regarding the desired level of scrutiny undertaken by investment arbitral tribunals might be answered through the transposition of domestic public law mechanisms related to the exclusion of political and policy issues from judicial review, into an international investment regime. Analysis of the structure and application of these mechanisms leads to two conclusions. First, that measures of macroeconomic policy are justiciable; and second, that their review should presumptively be based on a full standard. These conclusions serve the investment system's goals, promote its function as a cosmopolitan policy maker, and fit with public international law's vibrantly politicized nature.

64 Martti Koskenniemi, *The Politics of International Law,* 1 EUR. J. INT'L L. 4-32 (1990).