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Panel B3 – Granting States a Margin of Appreciation: Deference in International Law

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Stephanie Forrest is an associate with Wilmer Cutler Pickering Hale and Dorr LLP, London and discussed the history and origins outside of the human rights and investment context and the question of how to define the "margin of appreciation." The concept has been widely used and applied by the European Court of Human Rights (ECHR), however, there is no general and widely accepted definition. The first reference to the principle of a margin of appreciation can be found in the British Claims in the *Spanish Zone of Morocco Claims* in 1925. Spain argued that an appreciation should be afforded for any measures taken in Morocco out of necessity on the basis that this amounted to an internal affair, falling outside the jurisdiction of the tribunal. Great Britain submitted that the arbitrator should have jurisdiction where Spain was negligent in its military operations. Judge Huber appeared to agree with Spain in part, stating that the question of whether their military operations were necessary should be left to the appreciation of domestic authorities acting in difficult situations. In this case, there is a delicate balancing of domestic authorities and the appropriate standard of review of state measures under international law.

Between 1925 and 1945, there were a number of references made to the margin of appreciation, including the Permanent Court of International Justice (PCIJ) decision in the *Lighthouses Case* and the advisory opinion on the *Acquisition of Polish Nationality*. In the early references, the margin of appreciation was only mentioned in passing, often without elaboration or explanation and does not

appear to influence the outcomes of decisions. There was a turning point in the Nuremberg trials where the international military tribunal refused to defer to the decisions of German authorities as to whether the measures taken by Germans in alleged self-defence in World War II were necessary. This is a departure from Huber's earlier approach, where he stated that the appreciation of necessity should be left to the domestic authorities.

Since the Nuremberg trials in 1947, the overwhelming majority of tribunals and courts have refused to apply a margin of appreciation. The International Court of Justice (ICJ) in *Oil Platforms* refused to apply a margin of appreciation in the context of claims regarding the lawful use of force in international law. Iran contended that by attacking and destroying Iranian oil companies and offshore oil production, the United States had violated the freedom of commerce as protected by the 1955 treaty between the parties. The ICJ considered whether the actions taken by the American navy were justified under the treaty as measures necessary to protect essential security interests. The ICJ rejected a margin of appreciation and held that the requirement stipulating that measures of self-defence must be necessary is a strict and objective test.

Most recently, in *Whaling in the Antarctic*, the ICJ again refused to grant the margin of appreciation in interpreting Article 8 of the *Convention for the Regulation of Whaling*. This Convention allows a limited exception to the ban on commercial whaling for scientific research. Japan's program of whaling for scientific purposes was challenged by Australia and Japan invoked a margin of appreciation. The ICJ refused to defer to Japan's decisions about whether their program was for the purpose of scientific research. Applying this test, the ICJ found that Japan had failed to consider the feasibility of alternative methods for achieving its scientific objectives.

These decisions firmly establish that the margin of appreciation has no basis in international law, nor can it be seen to have gained the status of a rule of customary international law. It is more appropriate to apply an objective standard of review, based on the terms of the treaty used with reference to the principles of reasonableness or proportionality. This is only part of the story and the margin of appreciation has received more favourable treatment in other contexts. It should be questioned whether the margin of appreciation is appropriate in those contexts in light of the rejection of the courts and tribunals, including the ICJ since 1948.

Andrew Legg is a barrister in the Essex Court Chambers, London and addressed the margin of appreciation in a number of different contexts, but particularly in European human rights law. *Philip Morris v. Uruguay* dealt with the plain packaging regulation of cigarettes. It concerned whether public health legislation can be used to justify restrictions on Philip Morris's business model. The court referenced the margin of appreciation briefly and without thorough explanation. It went on to say that an abstract review circumscribed by the margin of appreciation is not appropriate; rather, the analysis must assess the reasonableness of the measure. It is sufficient, in light of the applicable standard, to hold that the relevant legislation is an attempt to address a real public health concern, the measure taken is not disproportionate, and it was adopted in good faith.

The margin of appreciation is conceptually a doctrine of deference that involves a form of second order reasoning. For example, in the legal context of the European convention system, the key matter in dispute is whether the issue falls within the relevant standard, but there may also be external factors that affect an assessment of these first order considerations. The margin of appreciation is the judicial practice of assigning weight to reasoning in cases on the basis of three external factors:

1. *The level of democratic legitimacy in the circumstances.* Prisoner voting cases provide useful examples for this factor. The Grand Chamber said there are numerous ways of running electoral systems and it is for each contracting state to determine their democratic vision. Despite this finding, the court went on to assess the arguments presented and found against the state because there had been a violation of the standard. This is a good example of how the margin of appreciation is second order reasoning but not determinative.

2. *The level of international consensus*. If the respondent state is an outlier or a rogue state, then there may be fewer grounds to give deference to the state.

3. *The level of expertise the state has on the particular matter.* On matters of national security, child protection issues, healthcare, education or the organisation of public services, respondent states ask for a wider margin of appreciation because they are closer to the relevant issues.

If the margin of appreciation is construed as a general concept of judicial deference to state authorities in certain circumstances, then perhaps there is room for a margin of appreciation being allowed in some areas. Conversely, if it is understood that the margin of appreciation is a specific doctrinal analysis in a human rights context, namely a ECHR doctrine, then the idea of applying it in other areas is more difficult. Additionally, a margin of appreciation is not a justification for avoiding scrutiny in accordance with the relevant international legal standard. Even where a margin of appreciation is afforded, a tribunal should go on to assess the underlying reasons.

Danielle Morris works at Wilmer Cutler Pickering Hale and Dorr LLP, Washington D.C and focused on two investment tribunal awards where there was a margin of appreciation afforded late last year.

Continental Casualty Company v. The Argentine Republic ICSID Case No. ARB/03/9

Continental Casualty was a United States insurance company with a wholly owned subsidiary in Argentina that challenged a number of measures by Argentina in response to their economic crisis in the early 2000s. Continental Casualty alleged the measures amounted to a violation of multiple provisions in the United States/Argentina bid. Argentina relied on Article 11 of the treaty that says the treaty would not preclude the application by either party for measures necessary for public order or protection of their security interests. Argentina argued for a broad interpretation of this provision, citing jurisprudence from the European Court of Human Rights (ECHR). The tribunal applied the Vienna Convention on the Law of Treaties (VCLT) and ultimately concluded that Article 11 was broad enough to apply to an economic crisis. Thus it agreed with Argentina and found that the crisis reached a sufficient level of severity. The tribunal states that the objective assessment of severity must contain a significant margin of appreciation for the state applying the particular measure. This statement came at the end of a textual analysis under the VCLT, and seems to have played a supporting role in the tribunal's decision.

The tribunal warned that caution must be exercised in allowing a state to escape their treaty obligations in the absence of clear indications and where the parties have agreed that disputes will be settled by arbitration. This resulted in the tribunal completing its own objective analysis of whether the measures were decisive in reacting positively to the crisis, whether there were less restrictive means available and whether Argentina could have avoided the crisis in the first place by adopting different policies. The tribunal concluded that Argentina met the requirements of Article 11 and that deference was granted to Argentina in how they defined their own essential security interests under Article 11. The tribunal refused to pass judgement on their policy choices. This is because the tribunal recognised that states have the freedom to adopt the policies of their choice and, in the circumstances, even experts disagreed about the cause of the crisis and what measures should have been taken to avoid it. The tribunal rejected Argentina's defence because Argentina's economy was evolving towards normality and Argentina sought to place a condition on Continental Casualty that they waive any other rights, including under any applicable bilateral investment treaties.

Deutsche Telekom v. India, ICSID

Deutsche Telekom owned a minority interest in a media company which entered into a contract with an Indian state-owned company for the use of an electromagnetic spectrum called the 'S Band.' India later annulled the lease agreement and Deutsche Telekom brought a claim under the Germany/India bid. Deutsche Telekom alleged India breached the treaty by annulling the lease agreement for political and commercial reasons. India argued it had annulled the lease agreement based on a policy decision to reserve the 'S Band' for non-commercial use for military and security agencies. India invoked the essential security interest clause in Article 12 of the treaty and argued that the tribunal must accord substantial deference to India's national security determinations. The tribunal began its analysis with the VCLT and based on the text of Article 12 the tribunal found it was not self-judging. The tribunal accepted there was a degree of deference owed to a state's assessment of their essential security interests, but this cannot be stretched beyond the natural meaning and required more than an ordinary public interest. The tribunal went on to determine whether the measure was principally targeted to protect security interests and objectively required to achieve that protection. The tribunal determined India failed to make a case under Article 12 for an essential security interest because it did not reserve the 'S Band' for internal use. Having

determined Article 12 did not apply, the tribunal considered Deutsche Telekom's claim and found a violation.

The tribunals in these cases do not appear to have applied the margin of appreciation doctrine as it has been developed in the ECHR. The tribunals both refer more generally to deference or discretion extended to states in identifying their public policy and their essential security interests, however, when determining whether a measure was necessary to meet the goals, they engaged in a fact-intensive and objective enquiry. It is unclear whether the margin of appreciation, as a distinct doctrine or approach, played a role in the analysis of either case. Their approach seems typical of a non-self-judging clause in which a tribunal does not second guess a state's policy decisions but will not defer to its view whether their conduct is internationally lawful. The tribunals went on to analyse whether the respondent state had met the requirements of the relevant security interest provision.

Martins Paparinskis is Reader in Public International Law at the University College London, Faculty of Laws. Paparinskis discussed "fair and equitable" and "a margin of appreciation" in international law. There is doubt whether there is a difference between the alleged meaning of the margin of appreciation and the content of applicable positive international law. This discussion is used as a springboard to suggest a similarly critical analysis to other elements of vernacular that have been adopted in investment arbitration practice.

International investment law is a field of public international law, not a hybrid or *suis generis* field. Care must be taken in approaching these issues because of the lack of central institutional elements that encapsulate peculiarity. In other contexts, we can be amused about the misstatements of regional or domestic courts about international law because there is a framework that informs the reasoning. International investment law does not have that; there is no way to contain the peculiarity. It is therefore important to be technically conservative but not in a methodological or substantive process sense.

Gary Born, a leading participant in international dispute settlement debate, is rightly concerned about the transposition of the margin of appreciation into general law. Born's particular concerns, however, are less persuasive. Born thinks that the ECHR has the right margin of appreciation and particular textual formulation. The articulation of rules is not necessarily inapt because it is regional. Regions routinely act as laboratories for the development of international law that then becomes general law. A margin of appreciation, however, is a negotiation between contracting parties of the proper level of review that makes political sense only in the context of the particular political structure. This may be transposable if investment law had a similar structure, however, Paparinskis does not believe that it does.

Paparinskis encourages the reading of arbitrators who turn a similarly critical gaze on such concepts as legitimate expectations and proportionality having flowed out of the same reservoir. There is growing acknowledgement that legitimate expectations probably do not exist in general international law. Proportionality is not something that finds favour everywhere, but these European technical terms that are not reflected in state practice seem to have found more favour. It is a good thing that tribunals are becoming more critical of these matters but it would be helpful to consider the extent to which this has a practical difference.

Naboth van den Broek works at Wilmer Cutler Pickering Hale and Dorr LLP, Washington D.C. and addressed the margin of appreciation in the World Trade Organization (WTO). There are two recent cases in the WTO where the term margin of appreciation appears, but in a different way than has been discussed so far. In this discussion, three overall messages will be presented. Firstly, despite the absence of references to a margin of appreciation, similar concepts have been discussed frequently in WTO law in a variety of ways, but not explicitly. Secondly, in the WTO context, this has been a controversial issue for a number of years. Thirdly, the views of those who see this as a controversial issue are not consistent, either due to pragmatism or direct case interest.

The first area where concepts similar to a margin of appreciation arise in WTO law regards a set of public policy exceptions. For example, Article 20 of the General Agreement on Tariffs and Trade (GATT) provides a number of exceptions for governments to restrict trade for legitimate public policy objectives. In cases, an active weighing and balancing of the interests is involved, and consideration of how the respondent member dealt with the interests. In *US – COOL* the appellant argued that there is a margin of appreciation in assessing whether a proposed alternative measure achieves an equivalent degree of contribution. In an even more recent case, the panel said that in assessing whether an alternative measure achieves an equivalent degree of contribution may be informed by the nature of the risk and the gravity of the consequences.

The second area is sanitary and phytosanitary (SPS) cases. SPS measures allow governments to impose certain measures to protect human health and protect against diseases and pests, under strict conditions. WTO panels don't just review whether scientific evidence is the basis for the decision but review whether the evidence is sufficient. This is an area where there is little margin of appreciation. Trade remedies is another area where concepts similar to a margin of appreciation arise. This area is controversial and at the centre of many debates with the United States. Article 17.6 of the Antidumping Agreement provides that the panel shall interpret the relevant agreement in accordance with customary rules of public international law. Further, where the panel finds that there is more than one permissible interpretation, the panel shall uphold the measure that is in conformity with the agreement.

Other areas include the appellant body's ability to review the domestic law of a respondent member, customs related cases and essential security exceptions in the GATT Article 21.

It is interesting that in the current debate about the future of the WTO and reform, we see a lot of focus on one or two of these issues, particularly trade remedies and the role of the appellant body in reviewing domestic law, but there is very little focus on the other issues. There are inconsistencies in countries views because countries that are opposed to a margin of appreciation for one set of issues are often on a different side for another set of issues. The best example is trade remedies cases and SPS cases, where the countries who are respondents in trade remedies cases tend to be complainants in SPS cases.