

7-1-2017

## Interpreting Public Interest Provisions in International Investment Treaties

Alison Giest

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### Recommended Citation

Giest, Alison (2017) "Interpreting Public Interest Provisions in International Investment Treaties," *Chicago Journal of International Law*. Vol. 18: No. 1, Article 9.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol18/iss1/9>

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# Interpreting Public Interest Provisions in International Investment Treaties

Alison Giest\*

## Abstract

*Investor-state arbitral provisions are incorporated into various bilateral and multilateral investment agreements, providing foreign investors means to recover from host states when investment expectations change. There is debate on the merits and harms of these investment arbitral provisions, some of which surrounds the provisions' effects on public interest regulation. Vague treaty language has led to inconsistent arbitral outcomes and a chilling effect on public interest regulation. Despite attempting to improve health or environmental conditions, states may be vulnerable to large amounts of liability in international arbitration. How much regulatory liberty do the U.S. Model Bilateral Investment Treaty, North American Free Trade Agreement, and Trans-Pacific Partnership each provide to states? After arguing that the regulatory liberty is insufficient, this Comment considers various strategies for increasing state regulatory capacity, concluding that a good-faith inquiry tied to international norms would provide for a better balance between state and investor interests.*

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## I. INTRODUCTION

International investment law protects foreign investments from state action through thousands of international bilateral and multi-state treaties.<sup>1</sup> These treaties allow multinational corporations or individual investors to recover from countries when their investment expectations decrease due to domestic regulatory and legal changes, arguably enabling greater economic growth and foreign direct investment.<sup>2</sup> With aspects of both public international law and private commercial arbitration underlying the field,<sup>3</sup> the international investment regime struggles to provide a consistent body of law.<sup>4</sup> The treatment of national regulation in international investment treaty language exemplifies this tension. Regulatory language has evolved in recent years, as drafters attempt to strike a balance between foreign investors' expectations and host countries' desire to regulate without exposure to liability. This Comment analyzes treaty interpretations that reconcile these competing interests, looking specifically at various iterations of the U.S. Model Bilateral Investment Treaty and the Trans-Pacific Partnership.

Countries bind themselves to the possibility of investor-state settlement and arbitration through various multilateral free trade agreements (FTAs), such as the North American Free Trade Agreement (NAFTA),<sup>5</sup> bilateral investment treaties (BITs), and bilateral trade treaties. Disputes may arise as countries regulate to advance "essential security and the public order, human rights, sustainable economic growth, environmental protection, social and labour standards, cultural policy and the capacity to respond to situations of economic emergencies."<sup>6</sup> Where two countries are party to a treaty, an investor from Country A who invests in Country B can bring a claim against Country B when changes in Country B's regulatory environment negatively affect the investment. Over 3,000 agreements<sup>7</sup> strengthen investor rights through investor-state dispute settlement (ISDS) provisions.<sup>8</sup> As of 2014, there have been over 500 formal disputes between

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<sup>1</sup> Aikaterini Titi, *The Right to Regulate in International Investment Law*, in 10 STUDIES IN INTERNATIONAL INVESTMENT LAW 19–21 (2014).

<sup>2</sup> 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, 62 (2011); Chiara Coppotelli, *Investor-State Adjudication Mechanism Negotiations in the TTIP: An Unpopular Endeavor into the Potential Politicization of Dispute Settlement*, 39 FORDHAM INT'L L.J. 1355, 1357–58 (2016).

<sup>3</sup> Titi, *supra* note 1, at 29.

<sup>4</sup> See Schill, *supra* note 2, at 58.

<sup>5</sup> David Dayen, *The Big Problem With the Trans-Pacific Partnership's Super Court That We're Not Talking About*, HUFFINGTON POST (Aug. 29, 2016), <https://perma.cc/AZ6A-X5L7>.

<sup>6</sup> Titi, *supra* note 1, at 19.

<sup>7</sup> Dayen, *supra* note 5.

<sup>8</sup> ISDS is the umbrella term for these disputes.

investors and states, with an increase in recent years as more investment treaties are signed.<sup>9</sup>

Recently, international investment law has faced abundant public and academic criticism, much of which stems from its interference with states' right to regulate.<sup>10</sup> As tribunals provide investors greater opportunities to recover, states will naturally regulate less for fear of liability. Scholars have speculated that this phenomenon has spawned a "legitimacy crisis" where countries may exit investment treaties.<sup>11</sup> Developments in recent BITs and FTAs attempt to tackle these growing concerns with text that recognizes states' ability to regulate in the public interest domain.<sup>12</sup> The U.S. Model BIT and Trans-Pacific Partnership Agreement (TPP) texts would seem to restore regulatory sovereignty to the states, but interpretive concerns provide insight into the continuing tension between investors and states in international investment law.<sup>13</sup>

The U.S. Model BIT serves as the template for U.S. investment treaties, and is crucial to understanding any U.S. investment provision. There have been several iterations of the Model, which will be further discussed in Section IV. In 2004, officials made significant changes by limiting the types of claims that investors could bring, introducing statutes of limitations, and clarifications of the definition of investment.<sup>14</sup> Despite increased criticism of the Model BIT and BITs generally, there were few material changes between the 2004 and 2012 versions.<sup>15</sup> The 2012 version served as a model for the investment provision in the TPP.<sup>16</sup> The TPP was a draft multilateral trade treaty being negotiated among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the U.S. and Vietnam<sup>17</sup> that set rules to "regulate about one-third of global trade and investment."<sup>18</sup> The TPP's draft investment provisions were leaked last year. While

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<sup>9</sup> Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 463 (2015).

<sup>10</sup> Titi, *supra* note 1, at 32–33.

<sup>11</sup> Schill, *supra* note 2, at 29.

<sup>12</sup> Titi, *supra* note 1, at 24–26.

<sup>13</sup> *See id.* at 35–37 (describing the competing concerns as a line drawing problem where it is unclear how to distinguish "between the right to regulate and limitations on treaty's investment protections").

<sup>14</sup> Lise Johnson, *The 2012 U.S. Model BIT and What the Changes (or Lack Thereof) Suggest About Future Investment Treaties*, 8 POL. RISK INS. NEWSL., No. 2, Nov. 2012, <https://perma.cc/X2D3-4TZ5>, at 1–2.

<sup>15</sup> *See* Mark Kantor, *Little Has Changed in the New US Model Bilateral Investment Treaty*, 27 ICSID REVIEW 335, 378 (2012).

<sup>16</sup> *Id.*

<sup>17</sup> Titi, *supra*, note 1, at 61.

<sup>18</sup> Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1, 3 (2015).

there is an emphasis in the language on the right to regulate in the public interest domain,<sup>19</sup> the TPP investment language falls victim to many of the criticisms of other treaties' investment provisions. The U.S. withdrew from the treaty prior to ratification, limiting the scope of the liability that the TPP would have yielded.<sup>20</sup> However, its language would be similar to that incorporated in other investment and trade treaties.

TPP negotiations over investment provisions sparked significant criticism and debate because of the increased amount of liability for regulating that the countries would face.<sup>21</sup> Some countries ensured that they would be exempt from the TPP's ISDS provision.<sup>22</sup> And while one treaty, like the TPP, would not alter international investment law greatly because of the large number of treaties already in existence,<sup>23</sup> the criticism of the TPP reflects the negative perception of ISDS generally. Without rectifying the system, ISDS will continue to face criticism. The evolution of the U.S. Model BIT and drafting of the TPP reflect some of the most current thinking regarding investments and regulation. Both will be discussed in Sections IV and V.

This Comment proposes that clarity in future public interest provisions would provide stability for states, and produce no greater harm to investors than the treatment that domestic corporations receive or that multinational corporations face in their own states. Given recent criticism and increased transparency in international investment law, there is reason to think that arbitral tribunals would be receptive to interpretive guidance. Additionally, uniformly reading in a good-faith requirement with respect to state regulation, and putting the burden on investors to prove bad faith, would provide greater clarity for states, investors, and tribunals.

Section II proceeds by briefly describing the background of international investment agreements, highlighting the benefits and criticisms of the system and establishing the need to rectify investment law procedure, as opposed to eliminating investor-state dispute mechanisms. Section III explains how public interest exceptions for state liability have been incorporated into treaty language, and proceeds in Sections IV and V by showing how public interest exceptions

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<sup>19</sup> See Titi, *supra* note 1, at 26.

<sup>20</sup> See Kevin Granville, *What is TPP? Behind the Trade Deal That Died*, N.Y. TIMES, (Jan. 23, 2017) [https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?\\_r=1](https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?_r=1).

<sup>21</sup> See Franck, *supra* note 9, at 464.

<sup>22</sup> Andrew Stephenson & Lee Carroll, *The Investment Treaty Arbitration Review, The Trans-Pacific Partnership*, LEXOLOGY (Aug. 24, 2016), <https://perma.cc/K6FB-6VJV>.

<sup>23</sup> See Todd N. Tucker, *Creeping Multilateralism*, TODD N. TUCKER: UNDER TWO CEILINGS (Apr. 30, 2015), <https://perma.cc/A5Q7-JXS4> (“But if the past pacts continue to exist, then investors could pluck the most pro-investor provisions from a country’s entire roster of treaties. Such use of [the most-favored nation clause] sharply diminishes the utility of treaty-by-treaty reform efforts.”).

have evolved in the U.S. Model BIT, NAFTA, and the TPP. After establishing that the most current treaties provide insufficient guidance to tribunals, Section VI describes several proposed solutions. Finally, the Comment concludes by emphasizing the importance of interpretive guidance and a good-faith requirement.

## II. INTERNATIONAL INVESTMENT AGREEMENTS

### A. Background of International Investment Agreements

Prior to the growth of BITs, investor disputes were resolved either by domestic courts or by the investor's home country, which would negotiate the matter on behalf of the investor with the host state. Conversely, BITs and FTAs govern modern investment disputes where the investor is a party to the dispute against the host state.<sup>24</sup> BITs developed after World War II by countries to protect the investments of their nationals in other countries. The number of BITs grew exponentially during the 1990s, following recommendations by the U.N. and the proliferation of neoliberalism as part of a global strategy to increase investment in developing countries.<sup>25</sup> Arbitration offered protection for investors who were skeptical about the reliability of property rights in developing countries.<sup>26</sup> Countries signed many BITs before the growth of the robust investor-state industry that exists today, and may not have been aware of the liability risk they had opened themselves up to for some time.<sup>27</sup> Today, international investment treaties and arbitration occur all over the globe, with investment flowing to developing and developed countries. Over 90 percent of BITs include investor-state arbitration as the means for resolving investor-state disputes.<sup>28</sup> The transition from state-state negotiation to state-investor arbitration shifted power away from states and toward investors and arbitrators.<sup>29</sup>

The components of each BIT are key to understanding the scope of potential liability. Each BIT includes definitions, delineation of substantive rights, and a preamble that may guide interpretation of the substantive rights.<sup>30</sup> Substantive rights include: (1) fair and equitable treatment that “sets a minimum standard of

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<sup>24</sup> Schill, *supra* note 2, at 73–74.

<sup>25</sup> See Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 315 (2014).

<sup>26</sup> Schill, *supra* note 2, at 63.

<sup>27</sup> Katselas, *supra* note 2525, at 326–29.

<sup>28</sup> *Id.* at 324.

<sup>29</sup> See Schill *supra* note 2, at 74.

<sup>30</sup> Coppotelli, *supra* note 2, at 1364.

treatment of all foreign investors,<sup>31</sup> including things like legitimate expectations and due process;<sup>32</sup> (2) “most favored nation” clauses that prevent a host country from favoring one country over another;<sup>33</sup> (3) a national treatment standard providing that foreign investments cannot be treated worse than domestic ones;<sup>34</sup> (4) umbrella clauses providing investors a cause of action in contractual claims against governments, in addition to instances where an investor is able to make a claim against the state because of its regulation;<sup>35</sup> and (5) “full protection and security,” which protects investors from expropriation.<sup>36</sup> An investor can claim violations of multiple substantive rights, depending on the particular facts of the case, in hopes of recovering under at least one. Additionally, there are a number of arbitral bodies with various rules, and each treaty designates which body considers its claims.<sup>37</sup> Some treaties may be more favorable to a specific claim than others.<sup>38</sup> Since countries are oftentimes parties to multiple treaties, an investor can choose under which treaty they want to bring a claim.<sup>39</sup>

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<sup>31</sup> Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENVTL. L. REP. 10683, 10685 (2015).

<sup>32</sup> Coppotelli, *supra* note 2, at 1369–70.

<sup>33</sup> See Wilensky, *supra* note 31, at 10685. Even if a country adopts a more “state-friendly” international investment provision, an investor can insist on more investor-friendly treatment if the state gives such treatment to another country’s investors in other treaties. Todd Tucker, *The TPP Has a Provision Many Will Love to Hate: ISDS. What is it, and Why Does it Matter?*, WASH. POST (Oct. 6, 2015) <https://perma.cc/5UQG-YHWS>. Often the most-favored nation provision implies an “in like circumstances” test where the tribunal is to decide if the measure is legitimate based on how a different investor would be treated under the same circumstances. See Titi, *supra* note 1, at 143.

<sup>34</sup> See Wilensky, *supra* note 31, at 10685.

<sup>35</sup> Titi, *supra* note 1, at 48.

<sup>36</sup> Coppotelli, *supra* note 2, at 1364, 1375 (Explaining that a breach of contract may only be expropriation if the state was acting in a sovereign, not a commercial, capacity.).

<sup>37</sup> Arbitration bodies include: the International Centre for Settlement of Investment Disputes of the World Bank (ICSID), the London Court of International Arbitration, the International Chamber of Commerce, the Hong Kong International Arbitration Centre, and ad hoc panels set up under the U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules. Claire Provost & Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, THE GUARDIAN (June 10, 2015), <https://perma.cc/DUC6-KCWT>.

<sup>38</sup> Odysseas Repousis, *Multiple Investment Treaties Between the Same States?: The Case of the ECT*, KLUWER ARBITRATION BLOG (Apr. 7, 2014), <https://perma.cc/RKU7-DUWQ>. For example, an energy investor might have the option of bringing a claim under a relevant BIT or the Energy Charter Treaty (ECT), both of which have investor-state arbitration clauses. Unless the drafters have accounted for which treaty takes precedence, an investor can choose to bring a claim under either treaty, likely one of the BITs in this instance that is more favorable to its claim.

<sup>39</sup> Concerns over treaty-shopping are exacerbated by the low bar to being considered an investor in a particular country. Qualifying as an investor in a country may require “registration” in a country or, in some cases, “substantial business presence” in one’s designated home country. WILLIAM STRENG & JESWALD SALACUSE, *INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION VOL. 2* § 10.06 (2015). Where an investor from Country A wants to invest in Country B, but no treaty exists to

Despite having generated over 500 disputes, decisions of arbitral tribunals are non-binding on future cases. This leads to legal ambiguity. Further, there are inconsistencies between case outcomes even within the same fora.<sup>40</sup> That being said, panels often reference earlier arbitral decisions, creating something of persuasive precedent. Panels often publish awards, but publish the full opinions less often.<sup>41</sup> Empirical evidence suggests that arbitral bodies rely more on their prior decisions than on the language of the particular treaty at hand, further obfuscating the legal standards.<sup>42</sup> This could suggest that the language of the treaty may not be particularly meaningful—whether or not there is explicit denunciation of public interest regulation. But it could also suggest that, even if some treaties have not incorporated public interest exceptions, arbitral tribunals may be able to consider public interest ramifications where relevant.

The International Centre for Settlement of Investment Disputes of the World Bank (ICSID) is one of the most common arbitral fora included in BIT treaties, arbitrating claims over matters such as pollution regulation, expropriation of property and oil reserves, and minimum wage increases.<sup>43</sup> ICSID is also a convention that 150 states have signed.<sup>44</sup> With so many countries, it is a credible institution and source of authority in international law.<sup>45</sup> However, there is no centralized body that governs investment disputes, ICSID or otherwise, aside from limited appellate review.<sup>46</sup> Thus, arbitrators have leeway to consider (or ignore) public interest goals, free from formal oversight.

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protect its investment, the investor might structure its investment through Country C where Countries B and C have a favorable BIT. Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225, 247 (2015).

<sup>40</sup> See CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY 3 (2015).

<sup>41</sup> Schill *supra* note 2, at 80.

<sup>42</sup> See Schill *supra* note 2, at 82.

<sup>43</sup> See Gary Hufbauer, *Investor-State Dispute Settlement*, in ASSESSING THE TRANS-PACIFIC PARTNERSHIP, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS 109, 115 (2016).

<sup>44</sup> Katselas, *supra* note 25, at 331.

<sup>45</sup> See *id.* at 330–31.

<sup>46</sup> *Id.* at 322 (noting that, in fact, an attempt to do so in the 1990's called the Multilateral Agreement on Investment (MAI) failed.); Gary Clyde Hufbauer, *Investor-State Dispute Settlement*, in TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT, 209 (Cathleen Cimino-Isaacs & Jeffrey J. Schott eds., 2015) (explaining that the ICSID Convention limits appellate review to egregious departures from procedure and corruption.).

## B. Benefits of International Investment Agreements

International arbitral tribunals provide neutrality and efficiency that supporters of the current system claim states would be incapable of providing on their own.<sup>47</sup> Without tribunals, there is concern that investors would be stuck vindicating their claims in biased local courts that do not resolve claims with sufficient speed. While treaties vary slightly, the tribunals largely offer a uniform system of rules for investors to navigate, no matter which country they invest in.<sup>48</sup> With this stability, investors secure investments in the event of material changes like the nationalization of resources.<sup>49</sup> Developing countries may be able to attract more investment when foreign investors are ensured that they will not be treated less favorably than local companies.<sup>50</sup> In some instances, developing countries might not otherwise be able to attract necessary financing.<sup>51</sup> Some empirical research suggests that BITs, and specifically those that do not require domestic resolution first,<sup>52</sup> attract more investment.<sup>53</sup> Prior to international investment agreements, investors were left with limited recourse for harm to their investments. As an alternative, investments were priced differently, investors requested support from their home state, or they simply accepted the loss.<sup>54</sup>

## C. Criticism of International Investment Agreements

Tension within the current international investment law system is apparent as countries denounce the ICSID convention, exit BITs, amend BITs, and issue interpretive statements.<sup>55</sup> There has been widespread criticism from a variety of perspectives—criticism of the tribunals' interpretations, the lack of transparency/accountability, pro-investor bias, and lost state sovereignty—

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<sup>47</sup> *Id.* at 324.

<sup>48</sup> Schill, *supra* note 2, at 63.

<sup>49</sup> Provost & Kennard, *supra* note 37.

<sup>50</sup> Hufbauer, *supra* note 43, at 109.

<sup>51</sup> Jane E. Cross, *Foreign Investment Laws in Developing Countries: Effective Industrial Policy?*, 6 MICH. Y.B. INT'L LEGAL STUD. 155, 171 (1984).

<sup>52</sup> Some treaties require the dispute be litigated in domestic courts prior to moving to international arbitrators. This approach would be less favored by investors, as it would be more time consuming and costly, with a lower likelihood of recovery early on. Thus, there is a trend that removes this requirement in ISDS provisions.

<sup>53</sup> The Hon. Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 708 (2013).

<sup>54</sup> *See* Franck & Wylie, *supra* note 9, at 471.

<sup>55</sup> *See* Katselas, *supra* note 25, at 318.

leading to what some scholars have called the “public law challenge.”<sup>56</sup> Recently, Bolivia, Ecuador, and Venezuela denounced ICSID completely; Ecuador has terminated some of its BITs; last year, India either renegotiated their BITs or insisted on joint interpretative statements in an attempt to rein in the interpretive power of tribunals.<sup>57</sup> In countries that have rejected the ICSID convention, there seems to have been a decrease in foreign investment,<sup>58</sup> but this could also be due to a host of other factors (including the fact that there has been a change to the system, leaving a wake of legal uncertainty). This Comment assumes that the benefits of international investment treaties outweigh the costs of total rejection of the system, and thus focuses on potential reforms.

Many states have expressed dissatisfaction with the wide “interpretative powers” of investment tribunals that stem from the ambiguous protections provided for in the treaties.<sup>59</sup> The U.N. Conference on Trade and Development’s (UNCTAD) World Investment Report criticized inconsistent readings of key provisions in international investment agreements and poor treaty interpretation.<sup>60</sup> In addition to the fact that there is no binding precedent to provide clarity in international investment law, the tribunals “continue to generate inconsistent interpretations of the same standards of investment protection and differing conclusions as to state liability in relation to cases with identical or similar fact situations.”<sup>61</sup> Incoherent decisions make it difficult for both states and investors to conform their behavior to international law.<sup>62</sup> This has been thought to also reduce the amount of public welfare regulation overall.<sup>63</sup> Interpretive concerns will be elaborated in Section III.

The system lacks transparency leading to both a lack of precedent for parties to follow and a lack of accountability.<sup>64</sup> Nongovernmental organizations have focused much of their criticism here.<sup>65</sup> Proceedings are largely confidential,

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<sup>56</sup> Stephan W. Schill, *The Public Law Challenge: Killing or Rethinking International Investment Law?*, COLUM. FDI PERSP. No. 58, Jan. 30, 2012.

<sup>57</sup> Titi, *supra* note 1, at 23; Kavaljit Singh & Burghard Ilge, *India Overhauls its Investment Treaty Regime*, FINANCIAL TIMES (Jul. 15, 2016), LEXIS ACADEMIC; See Bureau of Economic and Business Affairs, *Ecuador: 2016 Investment Climate Statements*, U.S. DEPT. OF STATE (July 5, 2016), <https://perma.cc/QCY6-RNVB>.

<sup>58</sup> Brower & Blanchard, *supra* note 53, at 764–65.

<sup>59</sup> Schill *supra* note 2, at 66.

<sup>60</sup> U.N. Conference on Trade and Development (UNCTAD), *World Investment Report: Reforming International Investment Governance* 145, U.N. Doc. UNCTAD/WIR/2015 (June 24, 2015).

<sup>61</sup> HENCKELS, *supra* note 40, at 3.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Provost & Kennard, *supra* note 37.

<sup>65</sup> See Schill, *supra* note 2, at 66.

making it difficult to establish a line of precedent to guide behavior.<sup>66</sup> And unlike most national courts, there is no legislative balance of power.<sup>67</sup>

There is criticism of inherent pro-investor bias<sup>68</sup> stemming from the historical lack of regard for public welfare in the language of investment treaties.<sup>69</sup> The appearance (and quite possibly the reality) of this bias, compounded by the structural/procedural issues like uncapped awards and the finality of arbitration decisions with only a limited system for appeal or review, increases the pro-investor bias sentiment.<sup>70</sup> Nonparties cannot participate in these confidential proceedings, even if they are to be affected by the outcome of the tribunal decision.<sup>71</sup>

Given the uncertainty and potential bias, states regulate less—diminishing their sovereignty. When a country is forced to make policy changes in the interest of its citizens, they may be vulnerable to claims if foreign investments are affected, even if local investments would not be protected. The standards for bringing a successful investor-state dispute claim are lower than they are in most domestic contexts.<sup>72</sup>

#### D. The “Public Law Challenge”

Because of the historical lack of regard for nonparties and the public in arbitral decisions, the criticism of investor-state dispute settlement has been termed the “public law challenge.”<sup>73</sup> International investment arbitration is neither wholly private arbitration nor public law, but some combination of both.<sup>74</sup> In commercial, contract-based arbitration the parties are viewed by arbiters as equals; if one party breaches the contract, that party is liable.<sup>75</sup> This intuition is often mapped onto international investment arbitration between states and parties, even though the consent to arbitrate based on treaty rules is more attenuated than it would be in a commercial dispute because “the investor acts upon an opportunity

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<sup>66</sup> Schill, *supra* note 2, at 67.

<sup>67</sup> Katselas, *supra* note 25, at 331.

<sup>68</sup> Brower & Blanchard, *supra* note 53, at 711.

<sup>69</sup> Schill, *supra* note 2, at 67.

<sup>70</sup> Provost & Kennard, *supra* note 37.

<sup>71</sup> Schill, *supra* note 2, at 64.

<sup>72</sup> See Katselas, *supra* note 25, at 331.

<sup>73</sup> Schill, *supra* note 2, at 67.

<sup>74</sup> Schill, *supra* note 2, at 59.

<sup>75</sup> See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 124 (2007).

provided by an earlier inter-state bargain.”<sup>76</sup> This has been called “arbitration without privity.”<sup>77</sup>

A public law perspective requires horizontal equality between the two states, not the investor and a state.<sup>78</sup> The state should be able to exercise authority over its own affairs,<sup>79</sup> in pursuit of “democracy, equal treatment, separation of powers, legal certainty and predictability, or in other words, the rule of law.”<sup>80</sup> The issues that these investor disputes involve (that is, regulation) are areas typically handled by public law (i.e., the government).<sup>81</sup> And certainly, the decisions that arbitrators come to, despite criticism that they can be incoherent, are an exercise of public authority, as they shape behavior in ways atypical of traditional commercial arbitration.<sup>82</sup> Professor Stephan Schill argues that instead of blending the features of private and public law in a way that is inherently conflicting, we should adopt an international public law framework that protects other constituencies, in addition to the state itself and foreign investors.<sup>83</sup> Schill suggests strengthening the international arbitration system by incorporating best practices from domestic contexts as a way to increase the legitimacy of investor-state dispute resolution. Domestic courts are already suited to deal with questions such as due process and expropriation.<sup>84</sup> Schill’s solution will be discussed later in this Comment, but for now, it serves as a helpful framework for understanding the complexity of international investment law.

## E. Exiting International Investment Treaties

The investor-state dispute resolution system requires procedural and substantive changes to address the growing criticism. For example, procedurally, there have been attempts to increase transparency. ICSID now publishes at least some excerpts of legal reasoning in its decisions, increasing accountability and transparency.<sup>85</sup> UNCITRAL’s recent Transparency Rules require all decisions to be published.<sup>86</sup> These are merely several examples of changes that address

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<sup>76</sup> *Id.* at 126.

<sup>77</sup> Schill, *supra* note 2, at 77.

<sup>78</sup> VAN HARTEN, *supra* note 75, at 131.

<sup>79</sup> *See id.*

<sup>80</sup> Schill, *supra* note 2, at 67.

<sup>81</sup> *Id.* at 76.

<sup>82</sup> *See id.* at 79.

<sup>83</sup> *Id.* at 59.

<sup>84</sup> *See id.* at 60.

<sup>85</sup> Brower, *supra* note 53, at 717.

<sup>86</sup> *Id.*

procedural flaws. Further improvements would likely increase the legitimacy of the tribunals themselves, but are beyond the scope of this Comment.<sup>87</sup>

Before discussing these changes, it is important to note that it is difficult to exit investment treaties. When it is possible, countries lose the benefits of participation in the investor-state resolution system. It takes six months to exit the ICSID Convention, but a state still remains a party to each BIT that it has signed.<sup>88</sup> There is typically a waiting period in each BIT whereby a country must wait a specified number of years before exiting the treaty.<sup>89</sup> And even where this does occur, most BITs include “survival clauses” where matters can continue to be arbitrated for ten to twenty years if they occurred while the treaty was effective.<sup>90</sup> Thus, a country must exit all BIT agreements and wait until the end of all “survival clauses” to no longer be vulnerable to claims. Further, given the benefits, this Comment assumes that countries should stay in their agreements and improve them, as opposed to exiting the investor-state dispute resolution system altogether.

### III. PUBLIC INTEREST EXCEPTIONS

#### A. How Public Interest Exceptions Are Incorporated Into Treaties and Their Interpretation

It is generally acknowledged that states need to be given some freedom for public interest regulation. In fact, the first BIT between Germany and Pakistan in 1959 included security, public health, and morality exceptions to the most-favored-nation substantive right.<sup>91</sup> This Section will demonstrate the difficulty of defining what regulation in the public interest means, and elaborate on how the exception is captured in treaty language. Before expanding on this, it is important to consider why states should be exempt from compensating investors in certain instances.

Many scholars would suggest that ordinary regulatory activity should exempt countries from liability under the substantive standards.<sup>92</sup> And thus, public interest

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<sup>87</sup> The UNCTAD World Investment Report suggested “improving the impartiality and quality of arbitrators” and recommended “assisting developing countries in handling [investment dispute] cases.” *supra* note 60.

<sup>88</sup> Katselas, *supra* note 25, at 338.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 339.

<sup>91</sup> Titi, *supra* note 1, at 53.

<sup>92</sup> *Id.* at 33–34. Alternatively, some argue that while there is a right to regulate, it does not forgive a country of its obligation to compensate. But because a compensation requirement would deter

exceptions are incorporated into treaties to reduce taxpayer liability when the regulation is intended to benefit the public and prevent the chilling of such regulation.<sup>93</sup> For example, taxation on tobacco might decrease an investor's expectation by reducing demand for the product. But where the tax is necessary for health purposes, should taxpayers be expected to compensate the investor? This Comment and many scholars assume the answer is no. There is a justification for such an assumption in takings law. Without extensive review of U.S. takings law, the government is not expected to compensate an individual when the regulation is designed to prevent a public nuisance.<sup>94</sup> Compensation is due generally only when the entire value of property has been reduced from the regulation, which is a high bar for a plaintiff to meet.<sup>95</sup> Further, domestic investors are protected less than foreign investors covered by investor-state arbitration treaties because there is not domestic recovery for public interest or non-public interest regulation.<sup>96</sup> Scholars have considered linkages between U.S. takings law and international investment standards, and while this analysis is outside our scope, takings law and its limits on compensation embody the need for unconstrained public interest regulation.<sup>97</sup>

At a basic level, public interest regulation is “regulation with a basis other than a state of necessity, national security or the public order.”<sup>98</sup> This Comment considers how to define or interpret the public interest or ordinary regulatory

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regulation, this Comment assumes that without forgiveness of liability, the right to regulate could not exist.

<sup>93</sup> Aaron Cosbey, *NAFTA's Chapter 11 and the Environment: A Discussion Paper for the CEC's Public Workshop on NAFTA's Chapter 11*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Mar. 24, 2003), <https://perma.cc/KE5W-G6RT>.

<sup>94</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (holding that a regulatory taking has not occurred when a regulation does “no more than duplicate the result that could have been achieved in the courts.”).

<sup>95</sup> *See id.* at 1030 (“When, however, a regulation that declares “off-limits” all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”); *Lingle v. Chevron U.S.A. Inc.*, 543 U.S. 528, 528–530 (2005) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)) (rejecting a regulatory takings test that assessed the extent to which a regulation advanced legitimate state interest, in favor of the Penn Central test that inquires into the “economic impact on the claimant,” “distinct investment-backed expectations,” and “the character of the government action”).

<sup>96</sup> *See* Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 N.Y.U. L. REV. 30, 31 (2003).

<sup>97</sup> *See id.* There might be an argument that international investors need special protection given that they are not a part of the domestic political process, as a domestic tobacco producer would be. However, an international firm can garner domestic political support in the same way that a domestic firm can, and in neither case does the corporation itself have the ability to vote—it must influence the political process through alternate means.

<sup>98</sup> Titi, *supra* note 1, at 101.

activity. *Metalclad*<sup>99</sup> provides an example of the difficulties that this presents. The tribunal in that case interpreted NAFTA's fair and equitable treatment provision and determined that the public interest was not sufficient to overcome indirect expropriation by Mexico.<sup>100</sup> Initially, Mexico granted the Mexican company Coterin permission to build a hazardous waste facility. The company was sold to Metalclad, a Delaware company. The local government, with the appropriate national authority to deny such construction, later prohibited Metalclad from constructing the facility after protests. The local government designated the site as a "Natural Area for the protection of cactus."<sup>101</sup> The tribunal found against Mexico, ruling that it had denied Metalclad a "predictable framework" for planning its investment, thereby violating Article 1105(1) because Metalclad had relied on the representations made to Coterin by the Mexican government.<sup>102</sup> Metalclad successfully argued that Mexico failed to provide requisite clarity about the licensing process based on provisions in NAFTA that call for transparency.<sup>103</sup> They found that because Metalclad had invested a significant amount into construction, denying the permit constituted an indirect expropriation.<sup>104</sup> This appears to be an overly broad characterization of investment expectation because it required a level of transparency between local and national government above that which is typically required in international law.<sup>105</sup> Later interpretations have been limited as such.<sup>106</sup> And in this case, Mexico petitioned for review by the Supreme Court of British Columbia, a limited body of arbitral review. The court rejected the tribunal's ruling in part—deciding that the level of transparency must be understood in light of international law's deference to a country's right to regulate, but upholding the indirect expropriation because it was not "patently unreasonable," and Mexico had previously been satisfied with the level of environmental protection when they provided an initial permit.<sup>107</sup> This case illuminates the conflict over public interest regulation. On a textual level, it is possible to frame the municipal permit denial as either reasonable or unreasonable public interest regulation. The arbitral proceedings highlight several problems.

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<sup>99</sup> See *Metalclad Corp. v. United Mexican States*, 40 ILM 36 (2001).

<sup>100</sup> Gustavo Vega & Gilbert R. Winham, *The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican, and U.S. Trade and Investment Relations*, 28 OHIO N.U.L. REV. 651, 690 (2002).

<sup>101</sup> *Metalclad*, *supra* note 99, at 44. See also Vega, *supra* note 100, at 690.

<sup>102</sup> *Metalclad*, *supra* note 99, at 50.

<sup>103</sup> Vega, *supra* note 100, at 690.

<sup>104</sup> *Metalclad*, *supra* note 99, at 50.

<sup>105</sup> See Titi, *supra* note 1, at 238; see also Vega, *supra* note 100, at 701–704.

<sup>106</sup> See Cross, *supra* note 51, at 162–65 (reconsidering NAFTA and the U.S. Model BIT).

<sup>107</sup> *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359 (Can. B.C. Sup. Ct.), at ¶¶ 68, 70, 72, 76, 99, 100, 134.

The deferential review of arbitral decisions is concerning, as is the lack flexibility for states to adjust their laws to changing circumstances.

There is a generally accepted exception in international law for “bona fide” regulation that causes economic harm.<sup>108</sup> However, the frequency with which tribunals make such inquiries is not totally clear; nor is it clear if the inquiry is made by tribunals in a consistent way.<sup>109</sup> One might term these “bona fide” public interest regulations as those with a *legitimate* purpose. Despite increased recognition that host states should have some right to regulate,<sup>110</sup> most BITs are vague with regard to what is *legitimate*, leaving little guidance for tribunals as to how to weigh competing state and investor interests and to what extent the state’s interest should be scrutinized. For example, the E.U.’s characterization of legitimate regulation as “public health, safety, environment, public morals, and the promotion and protection of cultural diversity”<sup>111</sup> is quite vague. Various treaties create their own lists of values that are within the public interest.<sup>112</sup> But how much can a regulation protect the environment? What makes protecting cacti a valid justification for denying a hazardous waste facility? How many cacti make it a worthy interest? A list of values is of limited use without guidance on how to define the terms.

When public interest exceptions are rejected by tribunals, governments may be left paying large amounts of money in awards or settlements, and/or the public left without beneficial policies.<sup>113</sup> For example, in *Vattenfall v. Germany*,<sup>114</sup> Vattenfall, a Swedish corporation, claimed that the new water quality standards made their coal-fired power plant “uneconomical.”<sup>115</sup> The claim was for over one billion dollars, but it settled “when the government agreed to watered-down standards.”<sup>116</sup> Prospectively, governments may avoid regulating with the prospect of arbitration. For example, scholars suggest that Canada did not adopt tobacco plain packaging laws to avoid arbitration.<sup>117</sup> Having established a need to regulate,

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<sup>108</sup> HENCKELS, *supra* note 40, at 7.

<sup>109</sup> *See id.*

<sup>110</sup> Titi, *supra* note 1, at 58.

<sup>111</sup> Hufbauer, *supra* note 43, at 118.

<sup>112</sup> *See* Titi, *supra* note 1, at 101.

<sup>113</sup> Wilensky, *supra* note 31, at 10684 (“In practice, these payments may make regulatory measures cost-prohibitive, especially in an era marked by austerity.”).

<sup>114</sup> *See* Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Request for Arbitration (2009).

<sup>115</sup> Wilensky, *supra* note 31, at 10684 (citing Vattenfall, *supra* note 114, at 12).

<sup>116</sup> *Id.* at 10685.

<sup>117</sup> *See id.*

the next three subsections explore how public interest exceptions are incorporated into treaties.

### 1. Public interest exceptions can take the form of obligations.

Positive regulatory language can be either obligatory or declaratory in nature. Neither create a “legally enforceable right” to regulate per se, but signals to tribunals the intentions of the party states.<sup>118</sup> The Belgium-Luxembourg Economic Union (BLEU)-Mauritius BIT (2005), for example, provides for explicit environmental obligations: “each Contracting Party shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation.”<sup>119</sup> This type of language does not, however, force a tribunal to weigh the public interest against that of the investor, whose rights are still the main focus of the treaty. Likewise, some BITs have expressed positive obligations for companies to abide by, like corporate social responsibility norms that require corporations to behave in ways that account for the public and/or the environment. But there is no direct cause of action against either the investor or the state for not complying, and the obligations of the state to work toward better public interest protections can only indirectly be considered in a tribunal when looking at an investor-state dispute. Arguably, these norms would be better exemplified in legislation (as opposed to investment treaties).<sup>120</sup>

### 2. Public interest exceptions can be declaratory in nature.

The second type of positive language, declaratory rights to regulate, may provide some signaling to tribunals, but is also substantively toothless. Norway’s Draft Model BIT for example states that “[n]othing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Agreement* that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.”<sup>121</sup> While signaling some receptiveness to public interest concerns, effectively, if a regulation is inconsistent with the treaty goals (for example, investment protection), then it is not within the state’s authority to regulate at the expense of investment.<sup>122</sup> A drafting approach with more teeth can be found in Article VIII of the UK-Colombian BIT: “Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining, or enforcing any

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<sup>118</sup> Titi, *supra* note 1, at 10–15.

<sup>119</sup> *Id.* at 106; Bilateral Investment Treaty, BLEU-Mauritius, art. 5(1), Nov. 30, 2005, <https://perma.cc/5GWF-T3D9>.

<sup>120</sup> See Titi, *supra* note 1, at 109–10.

<sup>121</sup> Draft Model BIT, Norway, art. 12, 2007, <https://perma.cc/U9D4-PBVD> (emphasis added).

<sup>122</sup> See Titi, *supra* note 1, at 112–13.

measure that it considers appropriate . . . provided such that measures are non-discriminatory and proportionate to the objectives sought.”<sup>123</sup> Here, the consideration for the public interest is unqualified, as it does not include “otherwise consistent with this Agreement” language. But treaties with such language are certainly in the minority.<sup>124</sup>

3. Public interest exceptions can be incorporated into the preamble of a treaty.

While the language does not directly provide a right, incorporating the language in a preamble serves an interpretative purpose stemming from the Vienna Convention on the Law of Treaties (VCLT).<sup>125</sup> Some models state that “investment protection is to be realised without compromising public policy objectives.”<sup>126</sup> Where there is language on regulation in the preamble, the tribunals may be more likely to weigh the public interest more carefully. Despite the VCLT, tribunals have often given more interpretive power to preambles than other regulatory provisions in investment treaties.<sup>127</sup>

#### IV. EVOLUTION OF THE U.S. MODEL BILATERAL TREATY

This Section and the next demonstrate the evolution of public interest language in the U.S. Model Bilateral Trade Agreement (U.S. Model BIT) and the Trans-Pacific Partnership. Both treaties incorporate public interest concerns using all three methods described above. The chosen language theoretically guides states as they regulate, companies as they invest, and tribunals as they assess whether a given regulation is in conformity with the treaty.

Change in the U.S. Model BIT reflects increased concern for regulation.<sup>128</sup> The U.S. Model BIT is a template for investment treaties between the U.S. and other countries. The Office of the U.S. Trade Representative has the freedom to adjust the model, but any negotiated BIT needs two-thirds Senate approval.<sup>129</sup> The 1984 Model BIT and treaties based on it were more investor-friendly because of inclusion of things like the umbrella clause that give investors the opportunity to

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<sup>123</sup> *Id.* at 114.

<sup>124</sup> *See id.* (“A more daring exception . . .”)

<sup>125</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>126</sup> *See Titi, supra* note 1, at 116.

<sup>127</sup> *See id.* at 122.

<sup>128</sup> *See id.* at 69. Investors brought claims against the U.S. several times in the 1990s, sparking interest in treaty language adjustments.

<sup>129</sup> *Fact Sheet: Model Bilateral Investment Treaty*, Office of the United States Trade Representative (Apr. 2012), <https://perma.cc/56WY-WMFK>.

recover for contract disputes with states, in addition to instances where they can recover for regulatory change.<sup>130</sup> The preamble of the 1984 version included no public interest recognition, nor did any specific provisions provide for protection of the environment, labor, or any other public interest.<sup>131</sup>

The 2004 iteration provided preamble language recognizing for the first time that investment goals should be met “in a manner consistent with the protection of health, safety, and the environment, and the promotion of *internationally* recognized labor rights.”<sup>132</sup> Interestingly, labor rights are tied to international standards, but other interests are not tied to any particular international or domestic standard.<sup>133</sup> Without tying the right to a particular protocol or standard, the tribunal may be left in the dark with regard to how far a country can go in its public interest regulation. The 2004 model also included the Investment and Environment Article for the first time, recognizing that states should not lower their *domestic* environmental standards as a means to acquire investment.<sup>134</sup> This prevents a state from weakening its environmental regulation, but does not explicitly provide that the state should have an ability to heighten regulation. A country that initially has low environmental standards may be vulnerable to claims as it attempts to regulate in line with international environmental standards. Reference to such standards would provide more freedom to regulate.<sup>135</sup> Like the Norway Draft mentioned in Section III, the new Article included a right to regulate on behalf of the environment “otherwise consistent with this agreement,”<sup>136</sup> reducing virtually any right to regulate if it would negatively impact a foreign investment. While this is recognized as a step forward, in that it theoretically provides protection for environmental regulation, the language remains vague and ineffective.<sup>137</sup> Article 13 introduces a higher protection for labor, but it is still vague.<sup>138</sup> Countries cannot reduce their labor standards “in a manner that weakens or reduces adherence to the internationally recognized labor

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<sup>130</sup> Titi, *supra* note 1, at 49.

<sup>131</sup> *See Text of the U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment of February 24, 1984*, 4 INT’L TAX & BUS. L. 136, 136 (1986).

<sup>132</sup> *Treaty Between the Government of the United States of America and the Government of [country] Concerning the Encouragement and Reciprocal Protection of Investment*, U.S. DEPARTMENT OF STATE (2004), <https://perma.cc/W3K4-WDCB> [hereinafter Model BIT (2004)] (emphasis added).

<sup>133</sup> *See id.*

<sup>134</sup> *See id.* at art. 12; ANDREAS KULICK, GLOBAL PUBLIC INTEREST AND INTERNATIONAL INVESTMENT LAW 70 (2012).

<sup>135</sup> *See* KULICK, *supra* note 134 at 71.

<sup>136</sup> 2004 Model BIT, *supra* note 132, at art. 12.

<sup>137</sup> *See* KULICK, *supra* note 134, at 71.

<sup>138</sup> *See id.*

rights.”<sup>139</sup> Like the environmental provision, there is no explicit freedom to heighten labor regulation in order to come into compliance with referenced international norms. However, the second clause on “otherwise consistent” regulation that exists in Article 12 on the environment is absent from Article 13 on labor. The clause circumscribes freedom to regulate environmental harms where it is contrary to economic objectives, but labor regulation is not limited in the same way. There was also language added in Annex B that did not appear in the 1984 Model that attempts to clarify how public interest regulation relates to expropriations: “Except in *rare circumstances*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.”<sup>140</sup> Theoretically, this removes the possibility that a legitimate welfare-enhancing regulation will be classified as an expropriation.<sup>141</sup> However, it is unclear what the “rare circumstances” are that would constrict a state’s freedom to regulate.

The 2012 Model contains a greater amount of positive language regarding a right to regulate. However, it has been criticized as equally ambiguous as the 2004 Model.<sup>142</sup> The preambular language from the 2004 Model remains, providing some level of limited interpretive guidance. The language in Article 12 on the environment is largely the same, but the 2012 Model adds positive language recognizing the right<sup>143</sup> that each state has to enact legislation “where a course of action or inaction reflects a *reasonable exercise* of such discretion, or results from a bona fide decision regarding the allocation of resources.”<sup>144</sup> While a more formal right to regulate appears, it is qualified by ambiguous language like “reasonable exercise.” And even with this apparent right, it is unclear if a right to regulate forgives all ISDS liability or only mitigates it. There was also increased specificity as to what “environment” means in the context of the treaty.<sup>145</sup> However, the

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<sup>139</sup> 2004 Model BIT, *supra* note 132, at art. 13.

<sup>140</sup> *Id.* at Annex B (emphasis added).

<sup>141</sup> See Titi, *supra* note 1, at 38.

<sup>142</sup> See *id.* at 300; 2004 Model BIT, *supra* note 132.

<sup>143</sup> See *Treaty Between the Government of the United States of America and the Government of [country] Concerning the Encouragement and Reciprocal Protection of Investment*, U.S. DEPARTMENT OF STATE (2012), <https://perma.cc/9LWZ-LTBR> [hereinafter Model BIT (2012)] (“the right to exercise discretion with regard to regulatory, compliance, and investigatory matters”).

<sup>144</sup> Titi, *supra* note 1, at 107; 2012 Model BIT, *supra* note 143, at art. 12(3) (emphasis added).

<sup>145</sup> 2012 Model BIT, *supra* note 143, at art. 12(4). The 2012 Model BIT provided:

the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:

(a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

“otherwise consistent with this Treaty” language still qualifies the right to regulate.<sup>146</sup> Finally, there were some procedural additions providing for public participation and consultations to resolve disputes in this Article.<sup>147</sup> Article 7 requires “as appropriate . . . public participation.” It is ambiguous in not defining “appropriate,” and in not clarifying how failing to follow the procedural requirements would bear on liability and recovery. Presumably, the language is included to give the public an opportunity to voice concerns about the regulation or the investment, but this is not explicit. Regarding Annex B on expropriation, the language is identical to that which was included in the 2004 Model meaning that “non-discriminatory” public welfare regulation does not constitute expropriation except in “rare circumstances.”<sup>148</sup> Article 13 on labor remained largely the same, but provides for the same procedural protections as Article 12.

There are additional provisions in the 2012 model that tilt the balance away from a strong pro-investor bias. The new Model limits the scope of “investor.” For example, Article 17 removes treaty protection for investments owned or controlled by an investor from a country that is not a party to the treaty.<sup>149</sup> Formerly, an investor aiming to recover could set up a subsidiary in a state party to a favorable BIT.<sup>150</sup> The 2012 Model removes the umbrella clause that extends protection to investors in contract disputes.<sup>151</sup> Some of the substantive rights have been limited, which should theoretically make it more difficult to bring a claim against a state that has made a legitimate regulation in the public interest. The fair and equitable treatment provision and the full protection and security provision

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(b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or

(c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas. *Id.*

<sup>146</sup> *Id.* at art. 12(5) (“Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”).

<sup>147</sup> *Id.* at art. 12(6)–(7) (“6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution. [ ] 7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.”).

<sup>148</sup> *Id.* at Annex B.

<sup>149</sup> *See id.* at art. 17(1)–(2) (“A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.”).

<sup>150</sup> Titi, *supra* note 1, at 49.

<sup>151</sup> *Id.*

have been linked to the customary international law minimum standard of treatment of aliens, meaning that a country does not owe an investor treatment beyond that which is guaranteed by international law.<sup>152</sup>

## V. FROM THE NORTH AMERICAN FREE TRADE AGREEMENT TO THE TRANS-PACIFIC PARTNERSHIP

This Section will start by comparing NAFTA and the TPP, two free trade agreements that bring in more parties than a bilateral trade agreement and thus increase potential arbitration. While the U.S. pulled out of the TPP after the 2016 General Election, the language in the TPP reflects current thinking about the investment treaties and mirrors that of the U.S. Model BIT. Public interest regulatory language was strengthened in the TPP draft compared to that in NAFTA.

NAFTA, enacted in 1994, includes only three countries (the U.S., Mexico, and Canada), whereas the TPP would have included Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the U.S. and Vietnam.<sup>153</sup> NAFTA led to a nearly 500 percent increase in foreign investment among the member states.<sup>154</sup>

NAFTA includes reference to the public interest in its preamble, similar to that of the 2004 and 2012 U.S. Model BITs, but it is even more specific.<sup>155</sup> Theoretically, a tribunal might attribute greater weight to the public interest when considering an investor's claim because of the more specific language, a stronger signal of intent. The TPP considers the promotion of labor, public welfare, and the environment.<sup>156</sup> And, interestingly, the treaty language provides for an explicit "right to regulate" for environmental protection, public welfare, public morals,

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<sup>152</sup> See 2012 Model BIT, *supra* note 143, at art. 5.

<sup>153</sup> Titi, *supra* note 1, at 61.

<sup>154</sup> William L. Owen, *Investment Arbitration Under NAFTA Chapter 11: A Threat to Sovereignty of Member States?*, 39 CAN.-U. S. L. J. 55, 56 (2014).

<sup>155</sup> See North American Free Trade Agreement Preamble, Dec. 17, 1992, 32 I.L.M. 298 (1993), Pub. L. No. 103-182, 107 Stat. 2057 (1993) [hereinafter NAFTA] ("CREATE new employment opportunities and improve working conditions and living standards in their respective territories; UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation; PRESERVE their flexibility to safeguard the public welfare; PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental law and regulations; and PROTECT, enhance and enforce basic workers' rights.").

<sup>156</sup> See Trans-Pacific Partnership Preamble, Feb. 4, 2016, <https://perma.cc/YQK8-BA6S> [hereinafter TPP] ("PROMOTE high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices; PROTECT and enforce labour rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labour issues.").

and the adoption of healthcare systems.<sup>157</sup> Neither the U.S. Model BITs nor NAFTA included such specificity in their preambles. But despite robust language in the preamble, it is difficult to imagine the tribunals would consider the preambulatory language sufficient in and of itself to increase regard for the public interest in arbitration, given their lack of general regard for treaty language.

While the language in NAFTA might lead one to think that there are multiple carve-out provisions for the public interest, tribunals often interpret provisions in such a way as to limit their application.<sup>158</sup> NAFTA included vague language, similar to that of the U.S. Model BITs, related to environmental protection, stating that in order to benefit from these provisions' protection, the measures must be "otherwise consistent with this Chapter [11]."<sup>159</sup> As a result, "Articles 1101 and 1114 have not effectively shielded many public interest measures, nor deterred investors from bringing claims."<sup>160</sup> Commercial rights take precedence in the wording of the carve-out.<sup>161</sup> The TPP employs similarly preclusive language with regard to the environment, public health, and regulation.<sup>162</sup>

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<sup>157</sup> See *id.* at Preamble ("RECOGNISE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals; RECOGNISE further their inherent right to adopt, maintain or modify health care systems.").

<sup>158</sup> Cf. NAFTA, *supra* note 155, at art. 1101 ("4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is *not inconsistent with this Chapter.*") (emphasis added).

<sup>159</sup> NAFTA, *supra* note 155, at art. 1114 ("1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. 2. The Parties recognize that it is *inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.* Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.") (emphasis added).

<sup>160</sup> Kathleen Cooper et al., *Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code*, 7 GOLDEN GATE U. ENV'TL. L.J. 5, 29 (2013).

<sup>161</sup> See *id.*

<sup>162</sup> TPP, *supra* note 156, at art. 9.16 ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.") (emphasis added).

Cases suggest that tribunals inquire into the legitimacy of a regulation to determine if it is in the public interest domain. The tribunal might look to statements by the government to an investor or its own subjective determinations on what an investor should expect in terms of regulation.<sup>163</sup> However, in NAFTA, this legitimacy determination weighs in favor of investor interest because “tribunal members are required to interpret the rights granted to investors within Chapter 11 in the context of NAFTA’s objectives, which are purely commercial, set forth in Article 102.”<sup>164</sup> The Vienna Convention on the Law of Treaties requires giving greater weight to the purpose and objective of the treaty.<sup>165</sup>

The TPP language includes greater specificity than NAFTA with regard to what is legitimate in its expropriation provision.<sup>166</sup> If deemed an expropriation, the state is required to compensate the investor, similar to takings law.<sup>167</sup> Article 9.8(1) of the TPP authorizes expropriation where there is a “public purpose,” with the caveat that the taking be compensated.<sup>168</sup> Takings and expropriation generally require compensation if for a public purpose. But the focus here is on regulation and indirect expropriation, where some, but not all of the investment expectation may have decreased. The TPP incorporates language from the U.S. Model BIT that states that indirect expropriation (that is, regulation) is not a taking when “applied to protect legitimate public welfare objectives, such as public health, safety and the environment . . . except in rare circumstances.”<sup>169</sup> While this improved upon NAFTA by theoretically limiting the instances where regulation

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<sup>163</sup> Cooper et al., *supra* note 160, at 31.

<sup>164</sup> *Id.* at 24; NAFTA, *supra* note 155, at art. 102 (“The objectives of this Agreement . . . are to: a) eliminate barriers to trade in, facilitate the cross-border movement of goods and services between territories of the Parties; b) promote conditions of fair competition in the free trade area; c) increase substantially investment opportunities in the territories of the Parties; d) provide adequate and effective protection and enforcement of intellectual property rights in each Party’s territory; e) create effective procedures for the implementation and application of this Agreement, for its joint administration and the resolution of disputes; and f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.”).

<sup>165</sup> Vienna Convention, *supra* note 125; Cooper et al., *supra* note 160, at 28. NAFTA includes adherence to international law, presumably Vienna Convention interpretation, among its objectives. NAFTA, *supra* note 155 at art. 102 (“The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.”).

<sup>166</sup> See Wilensky, *supra* note 31, at 10686.

<sup>167</sup> See *id.*

<sup>168</sup> TPP, *supra* note 156, at art. 9.8(1) (“No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation, except: (a) for a public purpose [footnote omitted]; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and (d) in accordance with due process of law.”).

<sup>169</sup> *Id.* at Annex 9-B(3)(b).

could be deemed a taking, without providing more guidance as to what is “legitimate” and what is “rare,” tribunals would have no more guidance than they did under NAFTA.<sup>170</sup> In fact, Australia refused to sign onto the investment provision of the Agreement, even in light of the seemingly more state-favoring language. Australia did not want to restrict its ability to regulate in environmental and social areas.<sup>171</sup>

The ambiguous nature of “legitimate expectations” leads to a tendency for states to settle in fear of tribunals interpreting in investors’ favor. NAFTA decisions demonstrate that tribunals have largely interpreted these provisions in ways favorable to investors. NAFTA’s text does not require dispositive scientific evidence of instances of environmental harm or a clear guiding international standard, but tribunals have required such evidence as a justification for economic harm stemming from public interest regulation.<sup>172</sup>

In *Dow AgroSciences v. Government of Canada*,<sup>173</sup> the Canadian government defended its decisions to ban pesticides by invoking the precautionary principle. Within this framework, a country may ban chemicals unless there is scientific evidence that the chemicals are not harmful—a more cautious approach to the unknown harms that could result from industrial developments.<sup>174</sup> Dow rejected this defense, calling it “political” in nature. While the case was settled, scholars predict that the tribunal would have focused on Dow’s “legitimate expectations”

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<sup>170</sup> The TPP did provide some description for what constitutes legitimate public health regulation, by ensuring that certain activities would never be considered takings. See TPP, *supra* note 156, at Annex 9-B & n. 37 (“For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.”)

<sup>171</sup> Titi, *supra* note 1, at 46–47.

<sup>172</sup> Cooper et al., *supra* note 160, at 43–44.

<sup>173</sup> See *Dow AgroSciences v. Gov’t of Can.*, NAFTA/UNCITRAL, Notice of Intent To Submit a Claim to Arbitration Under Chapter Eleven of the North American Trade Agreement (Aug. 25, 2008), <https://perma.cc/E8KS-8DPT>; Cooper et al., *supra* note 160, at 31.

<sup>174</sup> John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 13, 13 (2002). As Applegate indicates,

At its core, the precautionary principle embodies two fundamental regulatory policies: anthropogenic harm to human health and the environment should be avoided or minimized through anticipatory, preventive regulatory controls; and, to accomplish this, activities and technologies whose environmental consequences are uncertain but potentially serious should be restricted until the uncertainty is largely resolved. It reflects the implicit judgment that, in the absence of some degree of ex ante regulatory review, new technologies will create novel, severe, and irreversible-but avoidable-harms to human health and the environment. *Id.*

with reference to “scientific studies and international guidelines, not measures based on the precautionary principle.”<sup>175</sup>

In *Ethyl Corp. v. Government of Canada*, the Canadian government settled another ISDS claim related to a separate chemical ban, where there was a lack of positive evidence regarding the chemical’s harms.<sup>176</sup> Conversely, in *Chemtura v. Canada*, the tribunal deferred to Canada’s environmental regulation, rejecting a claim that the regulation violated NAFTA’s investment protection provisions because there was positive evidence of scientific harm.<sup>177</sup> The tribunal determined that the government’s assessment was in accordance with international standards and commitments, and that the chemical production at issue exceeded acceptable health risk based on these standards.<sup>178</sup> A precautionary principle approach would not have required such extensive evidence. Countries have divergent views about whether to apply a precautionary or reactionary approach to their developments.<sup>179</sup> The E.U., for example, includes reference to the principle in its general governing treaty.<sup>180</sup> However, in investment tribunals, because the text is ambiguous, tribunals made normative judgments about the how to define “legitimate.”

Without clear textual guidance, in *Methanex v. U.S.*, the tribunal rejected the expropriation claim. It stated that when states enact environmental regulation in good faith, investors should expect environmental regulation to change.<sup>181</sup> This suggests that arbitrators can be more lenient, even without guidance. On the one hand, the state wins and the regulation is enacted; on the other hand, the lack of textual guidance makes it difficult for parties to plan for the future, and may stifle regulation when states are unsure if the regulation is “legitimate.” NAFTA and later BITs allow for some public participation, like amici curiae statements, when

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<sup>175</sup> Cooper et al., *supra* note 160, at 43.

<sup>176</sup> See Christina L. Behary & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Arbitration*, 30 AM. U. INT’L L. REV. 383, 422 (2015); *Ethyl Corp. v. Gov’t of Can.*, NAFTA/UNCITRAL, Award on Jurisdiction, (Jun. 24, 1998), <https://perma.cc/78PA-6JN7>.

<sup>177</sup> See *Chemtura Corp. v. Gov’t of Canada*, NAFTA/UNCITRAL, Award, (Aug. 2, 2010), <https://perma.cc/96MG-JGA4>; FACT SHEET: INVESTOR-STATE DISPUTE SETTLEMENT (ISDS), OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Feb. 10, 2017), <https://perma.cc/7H9Y-EEP2>.

<sup>178</sup> *Chemtura Corp.*, *supra* note 177, at 37–43.

<sup>179</sup> See, for example, Consolidated Version of the Treaty on European Union art. 191(2), Jul. 6, 2016, 37 I.L.M. 67 (“Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter pay.”).

<sup>180</sup> See *id.*

<sup>181</sup> *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award, (Aug. 3, 2005), <https://perma.cc/R9MP-UPAF>; FACT SHEET: INVESTOR-STATE DISPUTE SETTLEMENT (ISDS), *supra* note 177.

the public interest is in question.<sup>182</sup> But overall, the lack of clarity and seemingly desultory decisions by tribunals demonstrate the need for a more coherent line of persuasive precedent and guidance.

## VI. REFORMING TREATY TEXT AND ARBITRAL BODIES

While there have been some drafting developments that should theoretically give arbitrators more guidance as to the intent of the signatories (that the member states want greater discretion to enact public interest regulation), the latest U.S. Model BIT and the TPP still cabin public interest regulatory space and fail to provide sufficient clarity for tribunals to follow. It would likely be difficult to capture the necessary textual precision in a treaty, as norms change and countries alter regulation accordingly. Even if this were possible, there would need to be structural changes to ensure arbitrators actually interpreted the treaty at hand. Dissemination of past decisions might fill in the gaps, but as discussed earlier, tribunals appear simply to not be following their own former decisions in a coherent way. Despite all the issues, one challenge stands out—how are arbitrators to decide when a regulation is legitimate? This Section looks at several scholars' observations and suggests that engaging in a good-faith inquiry is well within the meaning of the treaties and would provide a sufficient filter to balance the needs of investors and states.

### A. Treaty Language Suggestions

There are language alternatives that would better reflect concern for public interest regulation. The ideal treaty language that many critics favor would include absolute exemptions for public interest regulation. This would require removing the “otherwise consistent with this Charter” language that is present in Model BITs, NAFTA, and the TPP.<sup>183</sup> The following example will show that even with very pro-state language, the tribunal will still need to engage in a good-faith inquiry to ensure the regulation is legitimate.

Many critics have suggested Article XX of the General Agreement on Tariffs and Trade (GATT) as the paradigm for a public interest exception.<sup>184</sup> GATT is a multilateral treaty with rules governing international trade.<sup>185</sup> As such, it creates a range of rights and obligations.<sup>186</sup> GATT provides ten exemptions, which provide

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<sup>182</sup> Cooper et al., *supra* note 160, at 26.

<sup>183</sup> See Wilensky, *supra* note 31, at 10693.

<sup>184</sup> See, for example, KULICK, *supra* note 134.

<sup>185</sup> See General Agreement on Tariffs and Trade, art. XX, World Trade Organization, July 1986, 13.1 U.S.T.I.A. 184 [hereinafter GATT].

<sup>186</sup> See KULICK, *supra* note 134, at 67.

a higher level of guidance than most BITs. There are exemptions for public morals; human, animal, or plant life or health; products of prison labor; protection of national treasures or historic, artistic or archaeological value; conservation of exhaustible resources; or regulations needed for the acquisition or distribution of products in general or local short supply.<sup>187</sup> Unlike the agreements discussed above, it does not qualify the exemptions with “otherwise consistent” language. To balance these public interest objectives with investor interests, GATT simply prohibits “arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>188</sup> Without the qualifying language, the tribunal is forced to engage in something like a good-faith inquiry. But despite being offered as a paradigm, it is not without criticism. The exemptions are “an extremely tough hurdle [for states] to clear,”<sup>189</sup> exacerbated by the fact that the burden is on the states to prove good faith.<sup>190</sup> Norway’s legislature attempted a Draft Model BIT of its own with comparable robust public interest protection language. It laid out a list of exemptions in the preamble and provided commentary on its intentions including a desire for state autonomy with regard to regulation.<sup>191</sup> However, the draft was never ratified because of polarizing criticism from the public, some suggesting there was insufficient investor protection and others suggesting that there was insufficient room to regulate.<sup>192</sup> Norway’s failure suggests that states are not receptive to such dramatic changes in language.<sup>193</sup>

## B. Interpretive Solution

This Comment suggests that regardless of whether more precise language is adopted, the inquiry will inevitably be the following: is the regulation legitimate? Scholars have proposed several methodologies (discussed below) for answering this general question, including engaging in comparative law analysis and employing threshold inquiries into legitimate regulation. This Comment thus proposes building on these methods, and employing a good-faith inquiry will determine which regulations are legitimate and which are not.

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<sup>187</sup> GATT, *supra* note 185.

<sup>188</sup> *Id.*

<sup>189</sup> See Cosby, *supra* note 93, at 15–16.

<sup>190</sup> Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?*, 39 AM. J. L. & MED. 332, 359 (2013).

<sup>191</sup> KULICK, *supra* note 134, at 73–74.

<sup>192</sup> Damon Vis-Dunbar, *Norway Shelves its Draft Model Bilateral Investment Treaty*, INV. TREATY NEWS (Jun. 8, 2009) <https://perma.cc/9ESW-T5CH>.

<sup>193</sup> See KULICK, *supra* note 134, at 75–76.

1. Tribunals should consider relevant procedures for dispute resolution across various countries.

Stephan Schill suggests that mapping a public law framework onto international investment arbitration will strengthen the legitimacy of the system.<sup>194</sup> He argues that engaging in comparative public law studies will provide guidance for tribunals as they develop overarching principles for international investment arbitration.<sup>195</sup> He finds studies in comparative law particularly suitable because arbitration closely parallels constitutional and administrative legal decision-making at the domestic level.<sup>196</sup> These systems also deal with vague standards, and as such, should provide useful models for the vague standards in investment treaties.<sup>197</sup> The problem with Schill's approach with regard to regulation is the varying receptivity states have to regulation. When states have diverging regulations in food labelling, for example, there is no correct answer as to what the right amount of labelling is. States' requirements vary based on people's preferences for information about genetically modified foods, hormones, and other attributes. Thus, while domestic contexts may provide procedural guidance for how to deal with competing investor rights and public interest regulation, they do not offer substantive guidance for how to weigh claims in a uniform manner.

2. Tribunals should have limited discretion to balance public interests and investor interests.

Andreas Kulick proposes applying a proportionality analysis that would balance the rights of investors and the public interest.<sup>198</sup> In his formula, more regulation would qualify as "legitimate." Arbitrator scrutiny should concern itself most with three prongs: "(1) suitability; (2) necessity; and (3) proportionality *stricto sensu*." Under the first prong, the state only need prove that the regulation "furthered the (legitimate) purpose as set by the government."<sup>199</sup> Second, the necessity prong looks to whether there are alternative, less restrictive ways to achieve said objective.<sup>200</sup> This is stricter than the first prong because it can be analyzed *ex post* and find liability when a government was wrong about the course of action that it took. Third, proportionality *stricto sensu* evaluates how important

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<sup>194</sup> See generally Schill, *supra* note 2.

<sup>195</sup> *Id.* at 61.

<sup>196</sup> *Id.* at 86.

<sup>197</sup> See *id.* at 89.

<sup>198</sup> KULICK, *supra* note 134, at 170. Kulick justifies the application of the proportionality balancing from the fact that Article 31 of the Vienna Convention provides that general principles of international law should be accounted for in BIT interpretation.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

the interest actually is and evaluates the means and ends. This type of analysis raises serious questions about the level of scrutiny that should be applied by the arbitral tribunals. Considerations might include “the gravity of the infringement” by the state; legitimate expectations; “importance of the global public interest”; whether or not the public interest assertion is a guise; and “importance of the investor right.”<sup>201</sup> Under a balancing approach, the compensation should not be viewed as all or nothing; rather, compensation to the investor should be adjusted based on these factors.<sup>202</sup> The first two prongs are useful threshold inquiries that a tribunal could engage in before considering the regulation further.

The third prong asks several questions that would be helpful in a good-faith inquiry. Legitimate expectations (like explicit government statements that regulation will stay a certain way) and whether the public interest is a guise would both expose bad-faith regulations. However, the inquiries in the third prong that require weighing the investor’s interest against the public interest are troublesome. It will inevitably lead to normative judgments by the tribunal. Further, reducing awards by the importance of the public interest might decrease legitimacy of the investment arbitration system. Surely, being able to attach seemingly arbitrary award numbers to global public interests would only exacerbate a system already under scrutiny for being occult and incoherent. Thus, limiting the tribunal’s power to balance the public interest and investor expectations should be a goal.

3. There should be some limit on the state’s ability to regulate.

Kulick recognized that there needs to be some limit on what a state can regulate. This Comment proposes interpretive guidance and a reliance on customary international norms as a means to determine whether regulation was made in good faith, but will proceed by first establishing that it is possible to read in a good-faith inquiry. The U.S. Model BIT (2012) includes an explicit good-faith provision where authorities in both the state of the investor and the state in violation would review the amount of “good faith” prior to formal arbitration, in an attempt to limit investor claims.<sup>203</sup> While this phrase is left out of other public interest regulation exceptions, it would not be farfetched for it to be read in. The Vienna Convention on the Law of Treaties suggests that a treaty should be interpreted in “good faith” (not to be confused with the good-faith inquiry that the Comment proposes). It is reasonable to assume that the member states did

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 186–203.

<sup>203</sup> Wilensky, *supra* note 31, at 10693–94.

not intend to have their regulatory powers severely infringed by BITs.<sup>204</sup> And thus an originalist interpretation may be useful, whereby greater weight is given to what parties intended, as opposed to a strict textual interpretation of the treaties. The extensive language on public interest regulation in the preambles of recent agreements is also a good indicator of the intentions of the member states. The “otherwise consistent with this treaty” language has been said to limit the regulatory power of states.<sup>205</sup> But given the broad language in the preambles of the U.S. Model BIT (2012) and the TPP reflecting the desire to promote public interest issues, it is reasonable to interpret protection of the environment, public health, etc. as *consistent* with the treaty. When interpreted in this way, it is not entirely clear what purpose the phrase serves, but it does not provide sufficient justification to read in a strong investor bias.

## VII. CONCLUSION

Tribunals cannot be compelled to interpret in a certain way, outside the text of the treaties. But there are reasons tribunals might be persuaded to interpret provisions in a way more favorable to states if interpretive guidance were provided by independent bodies. Given the amount of criticism that ISDS has received, if the system itself has an interest in survival, arbitration bodies should be more receptive to criticism of arbitrary decision-making. Additionally, arbitrators are repeat players that have an interest in continuing to arbitrate. They have an interest in interpreting treaties in a way that conforms to the public’s interpretation of public interest values. While there are numerous theories on why tribunal decisions vary, increased interpretive guidance should provide a framework for arbitrators to base their decisions on the intent of the member states, not the subjective opinions of the arbitrators.

There should additionally be a presumption of legitimate regulation where the regulation mirrors that of international norms. Given the ambiguity in treaties, perhaps it makes sense to give the benefit of the doubt to the state, who actually signed the treaty. This might include putting the burden of proof for proving the regulation was made in bad faith on the investor. For instance, while the ICSID tribunal rejected the precautionary principle in *Chemtura* and required positive evidence of environmental harm,<sup>206</sup> international custom might have led the tribunal to require more evidence from *Chemtura* that their chemicals were not harmful before rejecting the legitimacy of the regulation. The precautionary

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<sup>204</sup> See KULICK, *supra* note 134, at 170 (citing B. Kingsbury & S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, N.Y.U. SCH. OF L. PUB. L. & LEGAL THEORY RES. PAPER SERIES 23 (2009)).

<sup>205</sup> *Supra* note 122 and accompanying text.

<sup>206</sup> *Supra* note 177 and accompanying text.

principle has been an emerging custom in international law since the Rio Declaration on the Environment and Development in 1992.<sup>207</sup> If there is reason to think that a certain practice may cause harm to health, safety, or the environment, when the state invokes regulation, the investor would have the burden of proof in showing there is no danger. Despite the reference to domestic laws in various BITs, including the U.S. Model BIT, it would be more than reasonable for countries to exert their right to regulate when it is in line with international law norms. Protections are already in place to avoid discriminatory and arbitrary action. Thus, the investor's burden would be a tougher hurdle when the state's regulation, or precaution, was not in line with international norms. Further, it has been suggested that the precautionary principle would provide guidance stabilizing tribunal decisions.<sup>208</sup>

It is possible that giving greater deference to the state will lead to less foreign investment in the short term.<sup>209</sup> However, as it stands, the current investment arbitration system creates an inherent contradiction in international law—creating treaties that aim to reduce greenhouse gases for example, yet simultaneously burdening countries that try to make progress. Linking legitimate regulation to international norms should provide the needed stability for both states and investors that the system currently lacks. Regulation that dramatically shifted overnight would seem less legitimate than a more gradual approach that mirrored regulations in other countries. While it is likely that disputes over what international norms are would arise, it would provide a much stronger baseline than the current framework.

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<sup>207</sup> Rio Declaration on Environment and Development, art. 15, Jun. 24, 1992, UN Doc A/CONF48/14, 11 ILM 1416 [hereinafter Rio Declaration] (“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

<sup>208</sup> See Caroline E. Foster, *Adjudication, Arbitration and the Turn of Public Law ‘Standards of Review’: Putting the Precautionary Principle in the Crucible*, 3 J INT. DISP. SETTLEMENT 525 (2012).

<sup>209</sup> Although even this critique is debatable. A country may be deterred from drastic regulatory change because of the reputational impact such change would have on its ability to attract foreign investment, and the most volatile changes would likely receive domestic relief. Finally, insurance against political change can be purchased by investors ex ante. Been, *supra* note 96, at 37–38.