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Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?

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ABSTRACT

Globalization has changed the way sovereign states regulate their societies. The effect of globalization has been the creation of several international agreements that transfer decision-making from the national to the international level. An important subset of these agreements is international investment treaties; an estimated 2,500 of these treaties have been entered into worldwide by a number of states, especially in the last ten to twelve years. As these agreements almost always contain arbitration clauses, the number and scope of arbitrations handling disputes under these investment agreements have grown exponentially. Arbitrators governing these disputes are now regularly reviewing domestic public interest issues due to their expanded role. In fact, in some cases arbitrators are effectively striking down national regulations. The breadth of the regulatory powers of arbitrators in their review of national state decisions, regulations, and legislation has even caused some scholars to characterize investment arbitration as part of the evolving concept of global administrative law. Concerns also arise with investment arbitration's curtailment of democratic expression through its ability to counter a state's sovereign decision-making authority.

This Article seeks to address these issues, initially by positing that the efficacy of investment arbitration decisions on public interest issues is limited by the lack of public participation. The Article identifies in greater detail the

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features of investment arbitration, the elements of democracy and the democratic deficit, and the process and outcomes of investment arbitration that have implicated public interest issues. It then explores suggested solutions to increase public participation in and accountability for the investment arbitration process, and to infuse non-investment related concerns into the outcomes of the traditionally private domain of investment arbitration.

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I. INTRODUCTION

The sovereignty of a state signifies its independence.[1] Independence in regard to a portion of the globe, in turn, signifies the right to exercise therein the functions of a state, to the exclusion of any other state.[2] Thus, a state's sovereignty dictates that it may legislate and regulate at will issues of concern to its constituents, including issues of public interest.[3] States should therefore be free to set national regulations concerning environmental safety, human rights, affirmative action, or state emergencies in exercising their independence.[4]

Globalization, however, challenges the idea of the state as the sovereign guardian of the public interest.[5] The effect of globalization has been the creation of several international agreements that transfer decision making from the national to the international level.[6] The increased use of these agreements has raised concerns regarding the transfer of a state's public power to an international institution.[7] Constraints on the ability of a state to exercise its public power are particularly apparent in the area of investment arbitration.[8] Since 1959, states have entered into international treaties that permit foreign investors to initiate direct actions against a host state for disputes arising from the state's treatment of the foreign investment.[9] Until the early 1990s, international investment treaties were used primarily by European nations and to a lesser extent by the United

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1. Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (1928).

2. *Id.* at 838.

3. THOMAS G. WEISS & DON HUBERT, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND: SUPPLEMENTARY VOLUME TO THE REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 6 (Supp. 2001) (explaining that sovereignty includes the right of a state to choose its "political, economic, social, and cultural systems and to formulate its foreign policy").

4. *Id.*

5. In this Article, globalization refers to the "denationalization of clusters of political, economic, and social activities that undermine the ability of the sovereign state to control activities on its territory. . . ." Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 586 (1999).

6. Examples include the World Trade Organization, the International Criminal Court, and the European Union, although all enforceable international agreements, to some extent, transfer decision-making from the national to the international level.

7. Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 492 (2001).

8. *See* Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 28 U.N.T.S. 1963.

9. In 1959, the Federal Republic of Germany entered into the first ever bilateral investment treaty (BIT) with Pakistan to protect German investments in Pakistan. *Id.* at 24; *see also* Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 255, 299 (1997).

States.[10] However, in the last ten to twelve years, the use of international investment treaties has exploded, and it is now estimated that almost 2,500 of these treaties have been entered into worldwide by a number of states.[11] As a result, arbitrations arising from disputes governed by these international investment treaties have expanded exponentially.[12]

The growth in investment arbitration has also extended the powers of the international bodies governing these disputes.[13] In particular, the arbitrators governing these disputes are now regularly reviewing domestic public interest issues due to their expanded role.[14] In fact, in some cases arbitrators are effectively striking down national regulations.[15] The breadth of the regulatory powers of arbitrators in their review of national state decisions, regulations, and legislation has even caused some scholars to characterize investment arbitration as part of the evolving concept of global administrative law.[16]

Concerns also arise with investment arbitration's curtailment of democratic expression through its ability to counter a state's sovereign decision-making authority.[17] State parties to investment agreements can no longer legislate at will in the public interest without concern that an arbitral panel will determine that the legislation constitutes interference with an investment.[18] Thus, investment arbitration may result in an overall loss of state

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10. RUDOLF DOLZER & MAGRETE STEVENS, BILATERAL INVESTMENT TREATIES xii (1995).

11. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2006—FDI FROM DEVELOPING AND TRANSITION ECONOMIES: IMPLICATIONS FOR DEVELOPMENT xix (2006).

12. *Id.* For a partial list of published investment treaty arbitration awards, see International Centre for Settlement of Investment Disputes, List of Concluded Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=List Concluded (last visited Apr. 3, 2008); International Centre for Settlement of Investment Disputes, Online Decisions and Awards, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward (last visited Apr. 3, 2008); NAFTA Claims, Pleadings, Orders, and Awards, http://www.naftaclaims.com/disputes.htm (last visited Apr. 3, 2008).

13. *See* LUKE ERIC PETERSON & KEVIN R. GRAY, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 13 (2003).

14. *See, e.g.*, discussion *infra* Part I.B.2.b.i; *see also* PETERSON & GRAY, *supra* note 13.

15. *See* PETERSON & GRAY, *supra* note 13 (discussing that in *Ethyl Corp. v. Canada*, the initiation of an investment arbitration claim was enough to cause the Canadian government to reverse a public interest law it had promulgated).

16. *See generally* Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006).

17. Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 230 (1998).

18. *Id.* at 231–32.

independence and sovereignty, which has implications for democratic governance.[19]

Nevertheless, it could be argued that, as a system of private international governance, investment arbitrators are not "guardians of the public interest" and therefore should not decide investment disputes that implicate broader political and economic issues.[20] At the same time, the question arises whether state exercises of public authority should be adjudicated by foreigners, largely on the basis of commercial principles, when the adjudicators are unconcerned with the wider effects of their decisions.[21]

The democratic implications of public interest issues further complicate this dichotomy of investment arbitration. If democratically elected governments enact public interest regulations in response to public concerns or to address democratic ideals, how can investment arbitrators make decisions affecting such regulations without public input? Moreover, by allowing investment arbitrators to rule on public interest regulations without input from the affected populace, does investment arbitration contribute to the ever-growing democratic deficit that has plagued many international bodies?

This Article seeks to address these issues, initially through the thesis that the efficacy of investment arbitration decisions on public interest issues is limited by the lack of public participation. The Article begins in Part I by identifying in greater detail the features of investment arbitration, the elements of democracy and the democratic deficit, and the process and outcomes of investment arbitration that have implicated public interest issues. In Part II, the Article explores suggested solutions to increase public participation in and accountability for the investment arbitration process, and to infuse non-investment related concerns into the outcomes of the traditionally private domain of investment arbitration.

A. *Investment Treaties: From Shield to Sword*

Foreign investment constitutes the single largest source of external finance for developing countries.[22] Accordingly, developing countries have sought ways to encourage this form of financing from

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19. This is particularly apt in democratic societies where the state acts as the framework through which its population exercises freedom and democracy. Marc F. Plattner, *Sovereignty and Democracy*, POL'Y REV., Dec. 2003 & Jan. 2004, at 3.

20. Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 TRANSNAT'L DISP. MGMT., Feb. 2004.

21. *See* M. Sornarajah, Professor of Law, Nat'l Univ. of Sing., The Simon Reisman Lecture in International Trade Policy at the Norman Paterson School of International Affairs: The Clash of Globalisations and the International Law on Foreign Investment, at 12–13 (Sept. 12, 2002), *available at* http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf.

22. DOLZER & STEVENS, *supra* note 10, at xi.

foreign investors.[23] At the same time, foreign investors have identified developing countries as a source of beneficial financial returns and as a means of establishing themselves in future key markets.[24] This circumstance has incited considerable interest in foreign investment.[25]

However, foreign investors have continually expressed concern over investing in states where they are subject to the state's lawmaking authority but are unable to participate in the state's political or public policy processes.[26] As a result, disputes stemming from foreign investments have warranted a unique process.[27] Traditionally, foreign investment disputes were settled by force.[28] Colonial powers would resolve an investment dispute by imposing implied or actual force on their subjected colonies in a process termed "gunboat diplomacy."[29]

Around the nineteenth century, however, states moved from gunboat diplomacy to actual diplomacy, in the form of treaties of Friendship, Commerce and Navigation (FCN treaties).[30] Originally intended only to facilitate trade and shipping, FCN treaties increasingly began to include provisions protecting foreign investments.[31] The treaties emphasized the protection needed for individual investors engaged in trade and included provisions for most-favored nation treatment[32] and the guarantee of prompt, adequate, and effective compensation for an expropriation.[33] Nevertheless, FCN treaties did not provide for direct dispute resolution, and international law generally barred foreign investors

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23. *Id.*

24. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1524 (2005).

25. *Id.*; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 2 (2d ed. 2004).

26. Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 531.

27. *Id.* at 532.

28. *Id.* at 529; Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 329 (1994).

29. *Id.*

30. SORNARAJAH, *supra* note 25, at 209 (citing KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992)).

31. Jeswald Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L L. 655, 656 (1990).

32. Most-favored nation treatment requires a state to treat investors from the most favored state no less favorably than investors from another state or a non-party state. *See infra* note 118.

33. SORNARAJAH, *supra* note 25, at 209–10; KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 19 (1992); David R. Adair, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 TUL. J. COMP. & INT'L L. 195, 196 (1999).

from initiating a direct cause of action against a state.[34] Rather, aggrieved investors were forced to rely on politicking, in hopes that their home state's government would take up the claim on their behalf.[35] Alternatively, investors were forced to litigate against the host government in its own national courts.[36] However, neither option proved very fruitful for investors because the first option did not guarantee investors any compensation, even if the host government's actions were found illegal, and investors rarely found success litigating against the host state in its own courts.[37]

In the 1960s, states began to develop bilateral investment treaties (BITs) in order to create more favorable investment climates.[38] An integral aspect of these post-FCN investment treaties was the introduction of a direct dispute-resolution forum for a foreign investor against the host state.[39] The post-FCN treaties no longer required the investor to seek aid from her home government nor, in most cases, to exhaust local remedies.[40] Today, an aggrieved investor can, after consultation and negotiation with the host state, submit her claim against the host state for resolution under the auspices of an arbitral body, such as the International Centre for the Settlement of Investment Disputes (ICSID) or the rules under the United Nations Commission on International Trade Law (UNCITRAL).[41]

Modern investment treaties also provide for general consent by a host state to future investment disputes.[42] In effect, states provide

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34. Adair, *supra* note 33, at 196–97; Franck, *supra* note 24, at 1537; van Harten & Loughlin, *supra* note 16, at 129–30.

35. Adair, *supra* note 33, at 196–97.

36. *Id.*

37. Adair, *supra* note 33, at 196–97; Sacerdoti, *supra* note 9, at 413–14.

38. Bilateral investment treaties were initially formulated only between developed and developing states, but the North American Free Trade Agreement and the Energy Charter extended the use of investment treaties to agreements between developed states. *See generally* DOLZER & STEVENS, *supra* note 10.

39. Adair, *supra* note 33, at 196–98.

40. Some investment treaties require that investors select a "fork in the road," that is either pursue their claim in the host government's national courts or initiate an arbitral action directly against the host state. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Croat., art. X(3), July 13, 1996, S. TREATY DOC. NO. 106-29; Protocol Amending the Treaty Concerning the Treatment and Protection of Investments of October 27, 1982, U.S.-Pan., art. 1, June 1, 2000, S. TREATY DOC. NO. 106-46.

41. *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

42. Jan Paulsson, *Arbitration without Privity*, 10 ICSID REV. 232, 232–33 (1995). This consent notion is in direct contrast to international commercial arbitration or other claims tribunals that have adjudged a state's treatment of foreign investors, such as the US-Iran Claims Tribunals. In either of these institutions, although states must consent to the dispute resolution forum, consent is required only for disputes arising out of a specific contract in the case of international commercial arbitration or disputes over a limited subject matter in the case of claims tribunals. *Id.*

an undated, blank check to foreign investors.[43] This limitless general consent allows investors to easily initiate claims against states for alleged breaches of the treaty.[44] In fact, in some cases investors either bypass or give insignificant attention to the consultation and negotiation phase of the dispute and proceed directly to arbitration.[45] As a result, the general consent feature of investment treaties exposes states to a broad range of claims by foreign investors related to the states' exercise of public authority.[46] Thus, investment treaties, which initially were aimed at reducing the risk of investing abroad, have now been transformed into tools with which to assail an extensive range of a host state's governmental activity.

B. *Investment Arbitration as an Instigator of the Democratic Deficit*

Since their inception, investment treaties have gradually grown in scope.[47] Although initially created as a protectionist measure against the arbitrary and capricious acts of a host state, investment treaties have gradually transformed into weapons with which investors can "attack" the acts of host states.[48] Public interest regulations promulgated by host states have been particularly vulnerable to attacks from investors.[49]

However, investment arbitration claims involving public interest regulations also raise democratic concerns. Public interest regulations are promulgated by elected officials to protect the welfare of the state's citizens and nationals.[50] Thus, interference with these regulations by unelected and unappointed arbitrators is not consistent with basic principles of democracy.

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43. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 21–22 (1999) (noting that general consent is "a blank cheque which may be cashed for an unknown amount at a future, and as yet unknown, date").

44. Arbitration is generally a consensual process; however, the general consent provided for in investment treaties allows the investor to proceed without first obtaining the state's consent.

45. For example, in the first investment dispute filed under the North American Free Trade Agreement, the investor filed its suit against the government of Canada before allowing for the full period of the negotiation and consultation phase to lapse. *See* Ethyl Corp. v. Canada, NAFTA Ch. 11 Arb. Trib. (June 24, 1998), *reprinted in* 38 I.L.M. 708 (1999), *available at* http://www.naftalaw.org/disputes_canada_ethyl.htm.

46. *See, e.g.*, discussion *infra* Part I.B.2.b.i.

47. Salacuse, *supra* note 31, at 656–59.

48. *Id.* at 659–60.

49. *See, e.g.*, discussion *infra* Part I.B.2.b.i.

50. Sandra L. Caruba, *Resolving International Investment Disputes in a Globalised World*, 13 N.Z. BUS. L.Q. 128, 137 (2007).

1. Democracy and the Democratic Deficit

Democracy, at its core, involves representation; that is, a democratic government is a government by and for the people.[51] However, democracy is also based on participation in the form of a citizen's right to have knowledge of and participate in decisions that will affect their interests.[52] Thus, democracy can be characterized both by principles of public participation and accountability.[53]

Principally, democracy involves citizens participating in the lawmaking process via public elections.[54] In this way, elected officials act as the voices of their constituents at the legislative or executive level.[55] Accordingly, the effectiveness of public law requires the availability of processes and forums through which citizens can participate in shaping the policies and structures of their regulatory regimes.[56] Thus, public participation seeks to fulfill the aims of open public debate and access for individuals and groups to all levels of public institutions.[57] Effectively, democracy requires that citizens be provided with sufficient information to make informed decisions and engage in meaningful political debate.[58]

Democracy is also characterized by accountability because elected officials are directly responsible to the citizens that elected them.[59] Accountability signifies the control that the governed exercise over their representatives.[60] It also provides a check on the majoritarian excess of elected officials and their subordinates through the rule of law.[61] The rule of law requires an independent judiciary that protects basic rights and liberties.[62] By constraining the acts of executive and legislative authorities, the rule of law also ensures that the fundamental rights of citizens are given effect through public law.[63]

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51. Nicolas N. Kittrie, *Democracy: An Institution Whose Time Has Come—From Classical Greece to the Modern Pluralistic Society*, 8 AM. U. J. INT'L L. & POL'Y 375, 379 (1993).

52. *See generally* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970).

53. *Id.*

54. Stein, *supra* note 7, at 493.

55. Craig Forcese, *Does the Sky Fall? NAFTA Chapter 11 Dispute Settlement and Democratic Accountability*, 14 MICH. ST. J. INT'L L. 315, 317 (2006).

56. ALFRED C. AMAN, JR., DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM 8 (2004).

57. Stein, *supra* note 7, at 493.

58. *Id.*

59. Forcese, *supra* note 55, at 317.

60. Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 684 (1997).

61. *Id.*

62. *Id.*

63. *Id.*; *see also* CAMBRIDGE DICTIONARY OF PHILOSOPHY 699 (Robert Audi gen. ed. 1995) (providing a definition of the rule of law by Philip Soper, which notes that the

The presence of core democratic principles, such as public participation and accountability, in a decision-making process also confers legitimacy upon a system of governance.[64] The legitimacy stems from the public's ability to participate in and evaluate the outcomes of the governance process.[65] Thus, a governance system that curtails public participation, including the public's ability to hold decision makers accountable, will always be vulnerable to attacks based on its legitimacy.[66] Moreover, a system that curtails democratic principles—by, for example, removing issues that directly affect citizens to a system that is inaccessible and structurally isolated from public input—creates a democratic deficit.[67]

Globalization has become an instigator of the democratic deficit and a threat to democratic accountability.[68] The effect of globalization has been to disperse political authority throughout the world and to allow state public policy to be shaped by the international system.[69] In addition, the international system tends to operate in a more insular fashion than parallel domestic systems.[70] International policy decisions are thus made without the scrutiny of legislatures and courts, making citizen participation even more remote.[71] Accordingly, international decision-making systems are often bereft of such core democratic principles as public participation and accountability.[72] Ultimately, those who are affected by an international body's norms and decisions do not feel as if they had a meaningful say in the creation and application of those norms, thereby propelling the democratic deficit.[73]

2. The Impact of Investment Arbitration on the Democratic Deficit

Investment arbitration is vulnerable to the many critiques associated with globalization and the democratic deficit because it, in

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rule of law includes "the largely formal or procedural properties of a well-ordered legal system . . . ; a prohibition of arbitrary power . . .; and tribunals (courts) that are reasonably accessible and fairly structured to hear and determine legal claims").

64. Stein, *supra* note 7, at 493–94.

65. *See* Catherine A. Rogers, *Transparency in International Arbitration*, 54 U. KAN. L. REV. 1301, 1312 (2006).

66. *See id.* at 1309.

67. AMAN, *supra* note 56, at 3; Jeffrey Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 454–55 (2001); Richard Falk & Andrew Strauss, *Toward Global Parliament*, FOREIGN AFF., Jan.–Feb. 2001, at 213.

68. Falk & Strauss, *supra* note 67, at 213.

69. *Id.*; *see also* discussion *infra* Part I.B.2.b.i.

70. Falk & Strauss, *supra* note 67, at 213.

71. Stein, *supra* note 7, at 490.

72. Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 648 (1994).

73. Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 674 (2006).

effect, operates as an international system devoid of core democratic principles.[74] In both its process and its outcomes, investment arbitration appears to contribute to the democratic deficit.[75]

a. The Investment Arbitration Process

The investment arbitration process begins with the investor's initiation of a claim.[76] Notice of the claim is sent to the host government, after which negotiations and consultations between the parties often follow.[77] After initiation of the claim, the parties proceed to selection of the arbitrators.[78] The arbitral tribunal typically comprises three arbitrators, one chosen by each of the two parties and one chair arbiter selected by either the two chosen arbitrators or the arbitral institution.[79] Once the arbitral tribunal is selected, the parties begin the exchange of pleadings.[80] The exchange of pleadings may be followed by meetings or conferences to marshal the evidence, but they generally lead up to a short oral hearing.[81] Issues raised at the oral hearing may then be addressed in post-hearing briefs.[82] Finally, the tribunal issues an award.[83]

Although the investment arbitration process parallels the domestic adjudicative process in many ways, there are a number of important differences.[84] First, public participation is severely limited

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74. *See* NATHALIE BERNASCONI-OSTERWALDER, DEMOCRATIZING INTERNATIONAL DISPUTE SETTLEMENT: THE CASE OF TRADE AND INVESTMENT DISPUTES 4 (2006), *available at* http://www.ciel.org/Publications/ICNRD6_300ct06.pdf.

75. Atik notes that democracy refers both to process and political outcomes. Atik, *supra* note 67, at 453.

76. ICSID Convention, *supra* note 41, art. 36; International Court of Arbitration, Rules of Arbitration art. 4, Jan. 1, 1998 [hereinafter ICC Rules]; United Nations Commission on International Trade Law Arbitration Rules, G.A. Res. 31/98, art. 3, Dec. 15, 1976 [hereinafter UNCITRAL Rules].

77. ICSID Convention, *supra note* 41, art. 36; ICC Rules, *supra* note 76, art. 4; UNCITRAL Rules, *supra* note 76, art. 3.

78. ICSID Convention, *supra note* 41, art. 37; ICC Rules, *supra* note 76, art. 4; UNCITRAL Rules, *supra* note 76, art. 3–6.

79. ICSID Convention, *supra* note 41, art. 37; ICC Rules, *supra* note 76, arts. 8–9; UNCITRAL Rules, *supra* note 76, arts. 5–8.

80. Franck, *supra* note 24, at 1543–44.

81. International Centre for Settlement of Investment Disputes Convention, Rules of Procedure for Arbitration Proceedings rule 33 (Apr. 2006), http://www.worldbank.org/icsid/basicdoc/partF.htm.

82. Post-hearing briefs may be submitted at the discretion of the tribunal. *See* Post-Hearing Brief, Malaysian Historical Salvors Sdn Bhd v. Malaysia , ICSID Case No. ARB/05/10, at 2 (noting that the post-hearing brief was filed in accordance with the directions of the tribunal).

83. ICSID Convention, *supra* note 41, arts. 48–49; ICC Rules, *supra* note 76, art. 25; UNCITRAL Rules, *supra* note 76, § IV.

84. *See* Franck, *supra* note 24, at 1544–45.

in investment arbitration.[85] Unlike many other adjudicative processes, investment arbitration is marked by its confidentiality.[86] The genesis of the investment arbitration process is the international commercial arbitration process, which is designed to mediate disputes of a commercial nature between private consenting parties.[87] Accordingly, international commercial arbitration emphasizes confidentiality and secrecy.[88] Moreover, given the orientation of the international commercial arbitration process toward commercial needs, the process discourages transparency and democratic participation.[89]

Investment arbitration embodies the confidential and secretive nature of the international commercial arbitration process.[90] Neither the pleadings nor the oral hearings are typically made available or accessible to the public, and the final decisions of the tribunal are released only with the consent of the parties.[91] As a result, the public is often unaware of pending or ongoing arbitrations.[92] Although public participation in the form of amicus involvement or open public hearings has been invited in limited cases,[93] critics still cite the lack

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85. Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 370 (2003).

86. See, for example, discussion *infra* note 90.

87. States may be parties to international commercial arbitration disputes; however, in these circumstances states are treated as private parties because the issues generally concern contractual or other commercial issues as opposed to exercises of public authority. Franck, *supra* note 24, at 1538–45.

88. This is due, in part, to parties' wishes not to publicize some or all of the following: certain allegations, such as bad faith and incompetence; a "loss," if they lose the arbitration; adverse positions; and confidential or sensitive information. Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 123 (2003).

89. BERNASCONI-OSTERWALDER, *supra* note 74, at 4.

90. Alvarez & Park, *supra* note 85, at 383–86.

91. Forcese, *supra* note 55, at 318; PETERSON & GRAY, *supra* note 13, at 26.

92. For example, with *Sun Belt Water v. Canada*, even knowledgeable scholars are unaware of the current status of the arbitration. *See* H. Hamner Hill, *NAFTA and Environmental Protection: The First 10 Years*, 2006 J. INST. JUST. INT'L STUD. 157, 162–63; Scott Sinclair, *NAFTA Chapter 11 Investor-State Disputes*, *in* TRADE AND INVESTMENT RESEARCH PROJECT, CANADIAN CENTRE FOR POLICY ALTERNATIVES (2005), *available at* http://www.policyalternatives.ca/documents/National_Office_Pubs/2005/chapter11_january2005.pdf.

93. For example, portions of the oral hearings were simultaneously broadcast and opened to the public in both the *Methanex* and *UPS* cases. *See* United Parcel Serv. of Am., Inc. v. Canada (U.S. v. Can.), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (NAFTA Ch. 11 Arb.) (2001), *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf [hereinafter *UPS* Petitions for Amici Curiae]; Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons To Intervene as "Amici Curiae," 17 WORLD TRADE & ARB. MATERIALS 61 (NAFTA Ch. 11 Arb.) (2005), *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf [hereinafter *Methanex* Petitions for Amici Curiae]; *see also* discussion *infra* Part II.A.1.b.

of transparency in the arbitration process.[94] Public involvement in the arbitration process is more often the exception than the norm.[95] Modeling the investment arbitration process on international commercial arbitration, therefore, raises serious concerns about lack of democratic input.

A second difference is the lack of independence of the adjudicative body.[96] Whereas in many judicial systems, the hallmarks of an independent judiciary are tenure and financial security,[97] investment arbitration has neither.[98] Although arbitrators are generally highly respected individuals who are well-versed in the area of international law,[99] the market for appointments as an arbitrator is highly competitive and arbitral fees are very lucrative, heightening the need for arbitrators to be concerned about their reputations in order to ensure reappointment.[100] Moreover, because arbitrators lack judicial tenure, many continue parallel careers as practicing attorneys.[101] Accordingly, it is not uncommon for an arbitrator to preside over one dispute while acting as counsel in another.[102] Because of this, arbitrators may seek to define investment terms expansively as a means of ensuring the continued viability of investment arbitration.[103]

A final difference that raises democratic concerns is that, despite parallels between the functions of investment arbitral tribunals and administrative agencies, certain democratic restraints on administrative agencies do not apply to investment arbitral tribunals.[104] Like administrative agencies, investment arbitral

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94. *See* BERNASCONI-OSTERWALDER, *supra* note 74, at 1; ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT [OECD], TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES (2005), *available at* http://www.oecd.org/dataoecd/25/3/34786913.pdf [hereinafter OECD REPORT]; HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT 3 (1999), *available at* http://www.iisd.org/pdf/naftasummary.pdf; Alvarez & Park, *supra* note 85, at 383–86; Buys, *supra* note 90; Julia Ferguson, Note, *California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 499, 505, 515 (2000).

95. OECD REPORT, *supra* note 94.

96. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 521–22 (1997).

97. *See* U.S. CONST. art III; Constitution Act, 1867, 30 & 31 Vict. Ch. 3, §§ 96–100 (U.K).

98. Rau, *supra* note 96, at 521–22.

99. Paulsson, *supra* note 42, at 232–33.

100. Rau, *supra* note 96, at 521–22.

101. *Id.* at 517.

102. AARON COSBEY ET AL., INT'L INST. FOR SUSTAINABLE DEV., INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 6 (2004).

103. van Harten & Loughlin, *supra* note 16, at 148; *see also infra* note 167.

104. Atik, *supra* note 67, at 454–56.

panels operate below the formal legislative level but serve an adjudicatory and standard-setting function that affects the economic and social values of ordinary citizens.[105]

Administrative law generally requires that an elected legislature both delegate the implementation of a specific statute to an administrative body and provide for independent judicial review of the administrative body's decisions to ensure that the administrative body is acting within the purview of its delegated statutory authority.[106] However, although investment arbitral tribunals exercise the adjudicatory and rule-making functions of domestic administrative bodies, for the most part their decisions lack a review mechanism to ensure they are acting within their delegated authority.[107] In some cases limited review is provided for by the arbitral institutions or by the courts at the situs of the arbitration, but the judiciary of the affected state often is unable to constrain the actions of the investment arbitral tribunal.[108]

Without domestic court review of its decisions, investment arbitration is permitted to operate negatively—effectively it can strike down a state's national regulation if the regulation is inconsistent with provisions in the relevant investment treaty.[109] At the same time, investment arbitral tribunals are reluctant to consider the public policies supporting a state's regulations.[110] As a result, the outcomes of investment disputes are often heavily weighted against state interests.

Overall, adjudicative bodies are thought to be less democratically sound than elected bodies.[111] Nevertheless, this "counter-

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105. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 1–4, 7 (2006); van Harten & Loughlin, *supra* note 16, at 121.

106. Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63, 17 (2005).

107. Atik, *supra* note 67, at 455.

108. Article 52(1) of the ICSID Convention provides for the limited review of investment arbitral awards rendered under its jurisdiction. ICSID Convention, *supra* note 41, art. 52(1). However, under the UNCITRAL and ICSID Additional Facility Rules, if the situs of the arbitration is outside of State X, the courts of State X will not be able to review the award. *Id.* § 6; UNCITRAL Rules; *supra* note 76. Thus, when Mexico wanted to review the award against it in *Metalclad*, the courts of Canada reviewed the award because Vancouver was chosen as the situs of the arbitration. United Mexican States v. Metalclad Corp. (Mex. v. B.C.), 2001 B.C.S.C. 664 (2001), *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladJudgement.pdf [hereinafter *Metaclad*].

109. Atik, *supra* note 67, at 467.

110. For example, in *Metalclad*, the tribunal refused to look behind the reason for the governor's ecological decree. Metalclad Corp. v. United Mexican States, Award of the Tribunal, ICSID Case No. ARB(AF)/97/1, ¶¶ 109–11 (2000) [hereinafter *Metaclad* Award].

111. *See* Atik, *supra* note 67, at 457.

majoritarian" aspect of adjudicative bodies, particularly courts, can be checked by a legislative override.[112] In contrast, decisions rendered by investment arbitral tribunals cannot be overridden.[113] A state faced with an adverse decision by an investment arbitral tribunal can choose to disregard the decision and retain the offending regulation; however, it must still compensate the investor who brought the action, and it faces possible lawsuits from other similarly situated investors.[114] As a result, investment arbitration may be a form of judicial lawmaking, as its decisions can effectively lead to repeals of state regulations or result in exorbitant compensatory awards that make maintenance of the offending regulation highly problematic.[115] In this sense, the international arbitration system enjoys a form of undemocratic supremacy as its decisions are not subject to a legislative check.

b. The Outcomes of Investment Arbitration

The procedural shortcomings of investment arbitration represent only one source of the system's democratic deficiency. Investment arbitration may also impinge upon democracy when tribunal

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112. Thus, a congressional enactment in the U.S. can alter a court decision outside the constitutional sphere, and the Canadian Parliament can invoke the "notwithstanding clause" to override certain court decisions. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962); DAVID JOHANSEN & PHILIP ROSEN, THE NOTWITHSTANDING CLAUSE OF THE CHARTER (2005), *available at* http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm; Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963, 1967 (2004).

113. The lack of a legislative override has caused some commentators to note that arbitrators are effectively preventing domestic governments from being able to govern at will. *See* Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 MINN. J. GLOBAL TRADE 209, 273 (2001); Jones, *supra* note 26, at 545; *see also* Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 198 (2001) ("[P]rivate corporate interests . . . 'undermine' legitimate governmental regulations in a 'supranational' forum insulated from the usual domestic political and legal processes.").

114. Generally, the scope of a final investment arbitral award is limited to monetary damages. Thus, an award against a state generally will not include an order to remove the domestic regulation found to have interfered with the investment. *See Metaclad* Award, *supra* note 110, ¶ 131; Cia del Desarollo de Santa Elena SA v. Costa Rica, ICSID Case no. ARB/96/1, ¶ 111 (2000). In both awards, although the tribunal found the environmental regulations to be contrary to the states' investment treaty obligations, the awards only ordered the states to compensate the investors with monetary damages.

115. Atik, *supra* note 67, at 455; Jeffrey Atik, *Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 135, 141 (Todd Weiler ed., 2004).

decisions address issues whose scope extends beyond investment disputes.[116]

At its core, investment arbitration involves issues related to investments.[117] Claims generally center on allegations of expropriation, a state's failure to accord national treatment,[118] a state's failure to grant most-favored nation treatment,[119] or a state's failure to accord an investor "fair and equitable" treatment.[120] All investment-related disputes are considered arbitrable under the treaty, and most treaties define investment broadly.[121] However, given that a state's laws and regulations generally attend to the public interest, arbitral decisions that effectively invalidate state

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116. *See* Atik, *supra* note 67, at 455.

117. See, for example, *infra* notes 121–24.

118. For example, Article II(1) of the Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investments states:

> With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than it accords, in like situations, to investments in its territory of its own nationals or companies (national treatment) or to investments in its territory of nationals or companies of a third country (most-favored-nation treatment), whichever is most favorable (national and most-favored-nation treatment). Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national treatment and most-favored-nation treatment to covered investments.

Treaty Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Hond., July 1, 1995, S. TREATY DOC. NO. 106-27.

119. *Id.*

120. *See generally* Barnali Choudhury, *Evolution or Devolution?—Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD TRADE & INVESTMENT 297 (2005).

121. For example, the Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment defines "'investment' of a national or company" as comprising

> every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of: (i) a company; (ii) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company; (iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue sharing contracts, concessions, or other similar contracts; (iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges; (v) intellectual property, including: copyrights and related rights, patents, rights in plant varieties, industrial designs, rights in semiconductor layout designs, trade secrets, including know how and confidential business information, trade and service marks, and trade names; and (vi) rights conferred pursuant to law, such as licenses and permits; (The list of items . . . above is illustrative and not exhaustive.)

Bolivia Bilateral Investment Treaty, U.S.-Bol., Apr. 17, 1998, S. TREATY DOC. NO. 106-25.

measures often have implications beyond purely investment-related issues; as a result, the scope of an investment arbitration may reach public interest issues that directly impact citizens' rights.[122]

i. Public Interest Issues

The concept of public interest issues can be formulated in two ways. First, the public interest can be thought of in terms of the interest of the state and its constituents.[123] For example, under takings jurisprudence, state takings may be exempt from liability if effectuated for a public purpose.[124] For the most part, the state has broad discretion to self-define its public purpose so long as it is rational or reasonable.[125] The discretion given to states to act for a public purpose is premised on the idea that the state will act in its own best interests and in those of its citizens.

The public interest can also implicate issues that encapsulate the common interest of mankind.[126] Examples of this include issues raised by environmental concerns or human rights.[127] In this context, public interest issues may implicate the economic notion of public goods. Economists define a public good as being non-rival and non-excludable.[128] Thus, the environment, drinking water, and many public services are all considered public goods.[129]

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122. Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECEUIL DES COURS 259, 277 (1982). As Higgins asks, in the taking of property by the state, who is to pay for the economic cost of attending to the public interest involved in the measure in question?

123. *See* BLACK'S LAW DICTIONARY 1266 (8th ed. 2004) (defining "public interest" as either "[t]he general welfare of the public that warrants recognition and protection" or "[s]omething in which the public as a whole has a stake; esp., an interest that justifies governmental regulation").

124. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of . . . property . . . ; nor shall private property be taken for public use, without just compensation."); Kelo v. City of New London, 545 U.S. 469, 470 (2005); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

125. The Restatement points out in its commentary that "public purpose is broad and not subject to effective reexamination by other states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. E (1987). The European Court of Human Rights, considering the issue of takings in violation of the right to property under the first protocol of the European Convention on Human Rights, has held that it will "respect a national legislature's judgment as to what is in the public interest . . . unless that judgment is manifestly without reasonable foundation." James v. United Kingdom, 8 Eur. Ct. H.R. 123, 123 (1986).

126. *See generally* KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW 40–41 (1998).

127. *See, e.g.*, The United Nations Convention on the Law of the Sea, Oct. 7, 1982, 21 I.L.M. 1261.

128. "Non-rival" means that consumption of the good by one individual does not reduce the amount of the good available for consumption by others, and "non-excludable" means that the individuals cannot be excluded from the good's consumption. JAMES M. BUCHANAN, THE DEMAND AND SUPPLY OF PUBLIC GOODS 48 (1968); RICHARD A. MUSGRAVE, A PURE THEORY OF PUBLIC FINANCE 9–12 (1959).

129. BUCHANAN, *supra* note 128, at 3; MUSGRAVE, *supra* note 128, at 9–12.

Accordingly, investment arbitrations engage the public interest when they implicate issues concerning the common interest, such as a non-rival and non-excludable good, or the best interest of the state and its constituents. Already, this clash between investment and public interest issues has occurred in several investment arbitrations. Public interest issues have been implicated in previous arbitrations concerning regulatory expropriations (primarily in the environmental context), public services, and several idiosyncratic issues.

(1) Regulatory Expropriations through the Lens of Environmental Issues

Expropriations can take on one of two forms of property deprivation: direct or indirect.[130] A direct expropriation involves the nationalization or expropriation of an investment though formal transfer of title or outright physical seizure.[131] However, when state interference in the use or enjoyment of an investment deprives the investor of all benefits of the property, the interference is termed an indirect expropriation (although legal title to the property remains with the investor).[132]

Under customary international law, expropriations—whether direct or indirect—are compensable.[133] Nevertheless, a state regulation, though it affects foreign interests considerably, does not amount to an expropriation as it is prima facie a lawful exercise of governmental powers.[134] Most investment treaties incorporate this "police-powers" exception to allow states to expropriate a foreign investment if the expropriation is done on a nondiscriminatory basis for a public purpose and the investor is compensated.[135]

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130. *See* North American Free Trade Agreement art. 1110(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA] ("No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment."); *see also* Jennifer P. Morgan, *Carbon Trading Under The Kyoto Protocol: Risks And Opportunities For Investors*, 18 FORDHAM ENVTL. L. REV. 151, 170 (2006).

131. Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 220 (1987); OECD, *"Indirect Expropriation" and the "Right To Regulate" In International Investment* Law 3 (OECD Working Papers on Int'l Investment, Working Paper No. 2004/4, 2004) [hereinafter OECD Working Paper].

132. COSBEY ET AL., *supra* note 102, at 13; OECD REPORT, *supra* note 94; Rudolph Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID (World Bank) 41 (1988).

133. COSBEY ET AL., *supra* note 102, at 2.

134. IAN BROWNLIE, PUBLIC INTERNATIONAL LAW 509 (6th ed. 2003); *see also* Sedco Inc. v. Nat'l Iranian Oil Co., 9 Iran-U.S. Cl. Trib. Rep. 248, 275 (1985) (holding that it is an accepted principle of international law that a state is not liable for economic injury which is a consequence of bona fide regulation within the accepted police power of states).

135. For example, Article 1110 of NAFTA, reads as follows:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to

However, in the trade and investment treaty context, the police-powers exception applies only to expropriations.[136] Consequently, if an investor is denied fair and equitable treatment, national treatment, or most-favored nation treatment, the state cannot justify its actions through the police-powers exception.[137] Nevertheless, because the police-powers exception effectively distinguishes between legitimate and confiscatory regulation, defining the exception's scope is integral to determining whether states can legislate in the public interest when doing so conflicts with investor rights.

At present, three lines of reasoning, all taken from jurisprudence on regulatory expropriations in the environmental context, define the police-powers exception.[138] The first line of reasoning holds that a bona fide regulation does not exempt the government from its obligations under the expropriation provisions of an investment treaty.[139] Thus, in *Santa Elena*, the government of Costa Rica took property owned by a U.S. company for inclusion in a national park designed to protect the surrounding environment.[140] The investor argued that Costa Rica's actions constituted expropriation, and the tribunal adjudicating the dispute agreed.[141] The tribunal held that the environmental purpose for the taking of property did not "alter the legal character of the taking for which adequate compensation

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> nationalization or expropriation of such an investment ('expropriation'), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation. . . .

NAFTA, *supra* note 130, art.1110.

136. As Howard Mann and Konrad von Moltke note:

> Under the traditional international law concept of the exercise of police powers, when a state acted in a non-discriminatory manner to protect public goods such as its environment, the health of its people or other public welfare interests, such actions were understood to fall outside the scope of what was meant by expropriation. In trade law terms, this was 'a carve out' from the applicable rules. Such acts were simply not covered by the concept of expropriation, were not a taking of property, and no compensation was payable as a matter of international law.

HOWARD MANN & KONRAD VON MOLTKE, PROTECTING INVESTOR RIGHTS AND THE PUBLIC GOOD: ASSESSING NAFTA'S CHAPTER 11, at 16 (2003), *available at* http://www.iisd.org/trade/ILSDWorkshop/pdf/background_en.pdf.

137. *Id.*

138. Examining regulatory expropriations through the lens of environmental concerns is particularly apt given that several investment arbitrations of claims for expropriation have implicated environmental concerns either directly or indirectly. This repeated clash between governmental regulations and investor rights has begun to provide guidance on the precise extent of the police powers exception.

139. Cia del Desarollo de Santa Elena SA v. Costa Rica, 1 ICSID (World Bank) 96 (2000).

140. *Id.*

141. *Id.*

must be paid" and that environmental measures, "no matter how laudable and beneficial to society as a whole," were similar to other expropriatory measures, and therefore compensable.[142]

For the most part, tribunals have been reluctant to examine the motivations behind environmental regulations that interfere with investor rights.[143] Thus, when the Mexican government addressed the adverse environmental effects of a landfill by instituting an ecological decree to protect land used as a hazardous waste site, the tribunal held that the decree constituted an expropriation and that it "need not decide or consider the motivation or intent of the adoption" of the decree.[144] Similarly, in *Tecmed* the tribunal declined to examine the motivation or intent behind state legislation when the Mexican government had failed to renew the permit for a landfill site operated by a Spanish investor due to environmental and health concerns.[145]

Effectively, this line of reasoning ignores the police-powers exception and severely limits the state's ability to regulate in the public interest. In fact, when confronted with an investment arbitration, at least one government sufficiently doubted the applicability of the police-powers exception that it repealed the contested regulation even though it had been enacted for health and environmental reasons.[146]

A second line of reasoning, however, acknowledges the indisputable nature of a state's right to exercise its sovereign powers and notes that legitimate state regulations neither constitute an expropriation nor are compensable.[147] This line of reasoning demands a proportionality analysis to show that a state regulation is

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142. *Id.* ¶¶ 71–72.

143. *See, e.g.*, *Metaclad*, supra note 108.

144. *Metaclad* Award, *supra* note 110, ¶¶ 109–11.

145. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID (World Bank) Case No. ARB(AF)/00/2, ¶ 120 (2003) [hereinafter *Tecmed*]. But see S.D. Myers, Inc. v. Canada, Partial Award, ¶¶ 152, 161–62 (2000) [hereinafter *S.D. Myers* Partial Award], in which Canada had enacted regulations prohibiting the transboundary export of PCBs, supposedly for the purpose of guaranteeing the disposal of PCB waste in an environmentally sound manner. In that case, the tribunal examined the motivation or intent behind the regulation and concluded that its main purpose was the protection of domestic companies and therefore found the regulation to be in violation of obligations owed to the investor. *Id.*

146. Ethyl Corp. v. Canada, Notice of Arbitration, UNCITRAL (1997) [hereinafter *Ethyl*]. In response to Ethyl's investment arbitration and without proceeding to the merits, Canada settled the action for US $13 million and repealed the law. PETERSON & GRAY, *supra* note 13, at 13.

147. *S.D. Myers* Partial Award, *supra* note 145, ¶ 281. The *Tecmed* tribunal acknowledged the indisputable nature of a state's right to exercise its sovereign powers within the framework of its police power, which could result in non-compensable economic damage to those subject to its powers. *Tecmed*, *supra* note 145, ¶ 119.

expropriatory.[148] In *Tecmed*, the tribunal determined that a state's regulatory actions or measures could only be characterized as expropriatory after examining whether the state actions or measures were

> proportional to the public interest presumably protected and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.[149]

In adopting the proportionality analysis of *Tecmed*, the *Azurix* tribunal held that a regulation depriving an investor of his property must pursue a "legitimate aim in the public interest" and the means employed must be proportional to the "aim sought to be realized."[150] Both the *Tecmed* and *Azurix* tribunals also noted that, because foreign investors cannot participate in the democratic processes that produce the challenged measures, it may be reasonable for nationals to bear a greater burden in the public interest than non-nationals.[151]

Thus, under this second line of reasoning, the police-powers exception can only be invoked when the investor's ownership rights have not been completely deprived or where the state's regulations are proportional to the interest being protected. Moreover, proportionality should be assessed by considering the significance of the regulation's impact on the investment and the foreign investor's ability to participate in the creation of the state regulation.[152] Similarly, the police-powers exception is available only when the state can prove "some genuine interest of the public"; mere assertion of an interest is insufficient.[153] In effect, this line of reasoning emphasizes the regulations' impact on the investment and the investor's inability to participate in the process that created the contested regulation, to the detriment of any public interest being served.

A third line of reasoning suggests, however, that disputes involving conflicts between investor rights and environmental

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148. Azurix v. Argentine Republic, ICSID (World Bank) Case No. ARB/01/12, ¶ 310 (2006) [hereinafter *Azurix*]; *Tecmed*, *supra* note 145, ¶ 122.

149. *Tecmed*, *supra* note 145, ¶ 122. In *Tecmed*, the tribunal found that the state regulation was created in response to sociopolitical pressure rather than for environmental protection reasons, but also found that the political pressure did not amount to a state of emergency. Accordingly, the tribunal found the regulation, which significantly interfered with the investor's investment, was not proportional and thereby constituted an expropriation. *Id.* ¶¶ 129–37.

150. *Azurix*, *supra* note 148, ¶ 310 (citing *In the Case of James and Others*, ¶¶ 50, 63 (1986)).

151. *Id.*; *Tecmed*, *supra* note 145, ¶¶ 121–22.

152. *Tecmed*, *supra* note 145, ¶ 122.

153. ADC Affiliate, Ltd., v. Hungary, 3 ICSID (World Bank) 16 (2006).

concerns should be decided in favor of the environmental concerns.[154] In *Methanex*, a Canadian investor argued that California's ban on MTBE[155] was expropriatory as it affected the investor's production of methanol, a key component of MTBE.[156] California countered that the ban was necessary because MTBE was contaminating water supplies, posing both an environmental and a health risk to California residents.[157] In determining whether the ban was an expropriation for which the state was liable, the *Methanex* investment arbitral tribunal drew a clear distinction between expropriatory measures and public purpose regulations, holding that

> [a] non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments have been given by the regulating government to the then putative foreign investors contemplating investment that the government would refrain from such regulation.[158]

The *Methanex* tribunal therefore concluded that public purpose regulations, when enacted with due process and not discriminatory, are neither expropriations—even if they affect foreign investments—nor compensable.[159] Interestingly, the general police-powers exception found in many investment treaties allows public purpose regulations to affect investments, but only if adequate compensation is paid.[160] Thus, the *Methanex* line of reasoning broadens the scope of the police-powers exception beyond the texts of most investment treaties.

Following *Methanex*, the *Saluka* tribunal also adopted the ruling that economic injuries resulting from bona fide regulations within the police powers of a state are not compensable.[161] The tribunal observed that the adjudicator should determine whether particular state conduct constitutes valid regulatory activity.[162] *Saluka* thus requires tribunals to evaluate the public purpose of the state

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154. Methanex Corp. v. United States, Final Award, ICSID (World Bank) (2005), *available at* http://www.state.gov/documents/organization/51052.pdf [hereinafter *Methanex* Final Award].

155. MTBE is an abbreviation of methyl tertiary-butyl ether, a gasoline additive that is added in relatively low concentrations to increase octane ratings in premium grade fuels. Envtl. Protection Agency, Overview: Methyl Tertiary Butyl Ether (MTBE), http://www.epa.gov/mtbe/faq.htm (last visited Mar. 30, 2008).

156. *Methanex* Final Award, *supra* note 154, at Part IV, Ch. D.

157. *Id.*

158. *Id.* at Part IV, Ch. F, ¶ 6.

159. *Id.* at Part IV, Ch. D.

160. NAFTA, *supra* note 130, art. 1110.

161. Saluka Investments BV v. Czech Republic, UNCITRAL Partial Award, ¶ 262 (2006) [hereinafter *Saluka* Partial Award].

162. *Id.* at ¶¶ 263–64.

regulation rather than to defer to a state's assessment as to whether a particular regulation serves the public interest.[163]

However, because investment arbitration is devoid of a precedent system,[164] future tribunals are free to adopt any of the three lines of reasoning adopted in *Santa Elena*, *Tecmed*, and *Methanex*. Therefore, future tribunals considering expropriation claims involving environmental concerns may hold that the expropriation is unaffected by the purpose of the regulation, is subject to a proportionality analysis, or does not amount to a compensable interference. As a result, the requirements for and compensability of expropriations based on environmental regulations remain at issue.

(2) Non-Expropriatory Regulatory Interferences with Investments

Even when a state's actions in regulating for the public interest are covered by the police-powers exception, the state regulation may amount to a violation of other investment protections. Regulatory interferences with investments may still violate national treatment,[165] most-favored nation treatment,[166] or fair and equitable treatment provisions.[167]

In *S.D. Myers v. Canada*, a challenge to the Canadian government's ban on the transboundary export of PCB waste (instituted, at least in part, to ensure that the waste was disposed of in an environmentally sound manner), the tribunal found that the measure did not constitute an expropriation due to the temporary nature of the ban.[168] However, the tribunal found that the ban constituted a violation of national treatment and fair and equitable

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163. *Id.*

164. *See generally* FIONA MARSHALL & HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., REVISION OF THE UNCITRAL ARBITRATION RULES (2006), *available at* http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf.

165. National treatment requires states to treat foreign investors and investments no less favorably than domestic investors. NAFTA, *supra* note 130, art. 1102; *see also* Treaty Between The United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Jam., art II(1), Feb. 4, 1994.

166. Most-favored nation treatment requires states to treat investors from the most-favored nation no less favorably than investors from a third party state or a non-party state. NAFTA, *supra* note 130, art. 1103; *see also* Agreement Between the Swedish Government and the Macedonian Government on the Promotion and Reciprocal Protection of Investments, Swed.-Maced., art. 3(1), 1998.

167. Fair and equitable treatment requires states to accord foreign investments and investors treatment in accordance with international law. NAFTA, *supra* note 130, art. 1105; *see also* Treaty Between the United States Of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Turk., art. II(3), 1985.

168. *S.D. Myers* Partial Award, *supra* note 145, ¶¶ 258–68; *see also* EPA, Basic Information: Polychlorinated Biphenyls (PCBs), http://www.epa.gov/epaoswer/hazwaste/pcbs/pubs/about.htm (last visited Mar. 29, 2008) (providing a definition and discussion of PCBs).

treatment principles that required compensation for damages.[169] Moreover, if Canada had not already amended its regulations on the export of the hazardous waste, the government's loss in the investment arbitration action would likely have resulted in a repeal or amendment of the offending law.[170]

Similarly, in *Azurix*, which involved a water concession contract, the Argentine government enacted measures for the protection of public health when problems with water quality arose after an investor took over the provision of water services in Argentina.[171] In response, the investor brought an action against the Argentine Republic alleging expropriation and denial of fair and equitable treatment.[172] The tribunal declined to find that the regulatory actions amounted to an expropriation.[173] Nevertheless, it held that the investor had been denied fair and equitable treatment.[174] In fact, the tribunal noted that the standards of bilateral investment treaties require states to "pro-actively" encourage and protect foreign investment.[175]

Thus, a balancing of investor rights against a state's ability to regulate in the public interest requires the police-powers exception to be extended beyond expropriation claims to other investment claims. Failure to do so ensures that investment arbitration outcomes implicating both non-expropriation claims and public interest issues will continue to favor investment interests. In this context, several investment arbitrations have been launched that implicate both expropriatory and non-expropriatory claims but nevertheless affect important public interest issues, including public services and several state-defined public interest issues.

(3) Public Services

Public interest issues that implicate the state or the common interest and extend beyond issues of expropriation are also found in the realm of public services. Public services are those without which the basic welfare of society would be endangered or those that states have traditionally afforded their citizens.[176] Examples include water

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169. *S.D. Myers* Partial Award, *supra* note 145, ¶¶ 258–68.

170. For example in *Ethyl*, the Canadian government repealed the law in issue after the investor initiated a claim against the government pertaining to the law. *Ethyl*, *supra* note 146, ¶ 114.

171. *Azurix*, *supra* note 148, ¶ 144.

172. *Id.*

173. *Id.*

174. *Id.* ¶ 322.

175. *Id.* ¶ 372.

176. *See, e.g.*, GA. CODE ANN. § 45-19-1 (Supp. 1998) (defining "public employee"); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001); Nat'l League of Cities v. Usery, 426 U.S. 833, 851 (1976).

services, health care, education, public transport, and security.[177] In fact, in some states—particularly developing states—public services may be the only mechanism for providing essential services, such that the availability of these public services implicates issues of fundamental human rights.[178] Public services are also typically associated with an obligation of universal service, or the provision of the service to all state residents regardless of income or at an affordable price.[179]

(a) Water Services

The right to water illustrates the link between public services and human rights.[180] The right to water implies a corresponding obligation by the water service provider to provide sufficient, accessible, and affordable water, which might not be possible unless water is provided as a public service or on equivalent terms.[181]

However, many developing states are unable to put in place the necessary infrastructure for the provision of water services on a public basis.[182] As a result, several states have allowed foreign investors to privatize their water services.[183] These state actions have often led to arbitration.[184] In the most well-known of these disputes, U.S.-based Bechtel Corporation privatized the water

177. *See* discussion *infra* Parts I.B.2.b.i–ii.

178. *See generally* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Report of the High Commissioner: Liberalization of Trade in Services and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002); UNCTAD Secretariat, Universal Access to Services, U.N. Doc. TD/B/COM.1/EM.30/2 (Aug. 18, 2006).

179. UNCTAD Secretariat, *supra* note 178.

180. UN bodies have recognized that the right to water is implicit in several international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). General Comment No. 15, The Right to Water (Concerning Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (Nov. 26, 2002) [hereinafter General Comment No. 15]; Convention on the Rights of the Child art. 24(2)(c), Nov. 20, 1989, G.A. Res. 44/25; Convention on Elimination of Discrimination Against Women art. 14(2)(h), Dec. 18, 1979, 19 I.L.M. 33.

181. General Comment No. 15, *supra* note 180, ¶ 2.

182. See, for example, arbitrations involving water disputes listed *infra* note 186.

183. For example, privatization of water services has occurred in Argentina, Bolivia, Tanzania, and Belize. *See infra* note 186.

184. Arbitrations involving water disputes currently include: Suez v. Argentine Republic, ICSID (World Bank) Case No. ARB/03/17 (2007); *Azurix*, *supra* note 148; Suez v. Argentine Republic, ICSID (World Bank) Case No. ARB/03/19 (2005); SAUR Int'l v. Argentine Republic, ICSID (World Bank) Case No. ARB/04/4 (2004) (Proceedings currently suspended); Compañía de Aguas del Aconquija S.A v. Argentine Republic, ICSID (World Bank) Case No. ARB/97/3 (2002).

services in Cochabamba, Bolivia.[185] The privatization led to a 400% rate increase and gave rights to private wells to the investor corporation, thereby allowing it to charge users for water from their own wells.[186] Due to the price increases, the citizens of Cochabamba rebelled by organizing protests that led to military intervention, during which hundreds were injured and at least one person was killed.[187] After witnessing the violence and protests, the investor voluntarily terminated the contract with the Bolivian government, and water services returned to state control.[188]

Shortly thereafter, the investor sought $25 million in damages from the Bolivian government for alleged breaches of provisions in the investment treaty governing the dispute, which it claimed led to the rescission of the water privatization contract.[189] Although the arbitration proceeded to the constitution phase, the investor ultimately withdrew its claim against Bolivia in 2006 in return for Bolivia's absolving it of all potential liability.[190]

The public interest issues raised in Cochabamba, however, were disregarded in another investment arbitration involving the provision of water services. *Azurix v. Argentine Republic* involved a water concession contract that had been granted to U.S. investor and Enron spinoff Azurix for thirty years for the provision of water services in

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185. Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, 1766–67 (2004).

186. *Id.*

187. For details of the situation in Cochabamba, see *The Fight for Water and Democracy: An Interview with Oscar Olivera*, MULTINATIONAL MONITOR, June, 2000, http://multinationalmonitor.org/mm2000/00june/interview.html; Sanchez-Moreno & Higgins, *supra* note 185, at 1769–71.

188. Sanchez-Moreno & Higgins, *supra* note 185, at 1769–71.

189. Ucheora Onwuamaegbu, *Aguas del Tunari S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3) Introductory Note*, ICSID REV.—FOREIGN INVESTMENT L.J. 445, 447–48, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC628&caseId=C210; Sanchez-Moreno & Higgins, supra note 185, at 1771–72.

190. Damon Vis-Dunbar & Luke Eric Peterson, *Bolivian Water Dispute Settled, Bechtel Forgoes Compensation*, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable Dev., Winnipeg, Man., Can.), Jan. 20, 2006, at 1, *available at* http://www.iisd.org/pdf/2006/itn_jan20_2006.pdf. A similar dispute arose after a UK-Dutch company purchased a majority interest in a water services company in Belize. Shortly thereafter, the company decided to substantially increase water tariffs charged to consumers. Concerns about the ability of low income earners to afford water services, among other reasons, forced the Belize public utilities' commission to reject the tariff increase. Thereafter, the investor began arbitration proceedings against the state. However, arbitration proceedings were terminated when the government of Belize repurchased the investors' shares in the water services company. For a synopsis of the relevant events, see Damon Vis-Dunbar, *Belize Dodges Water Suit with UK Firm, but Arbitration Still an Option in Tanzania*, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable Dev., Winnipeg, Man., Can.), Oct. 26, 2005, at 6, *available at* http://www.iisd.org/pdf/2005/investment_investsd_oct26_2005.pdf.

the Argentine province of Buenos Aires.[191] Problems arose after onset of the takeover of the concession by Azurix, including concerns about water quality and water pressure.[192] Later, when an algae outbreak contaminated the water supply, government officials warned citizens not to drink the water, advised citizens to minimize exposure to the water, and dissuaded customers from paying their water bills.[193] In October 2001, Azurix initiated a claim under the U.S.-Argentina bilateral investment treaty seeking damages in excess of $600 million.[194]

The tribunal observed that the measures taken by the Argentine officials were exercises of its public authority for the protection of public health, but found that the measures had exacerbated rather than aided the health crisis.[195] In finding for the investor, the tribunal held that Azurix had been denied fair and equitable treatment because Argentina's actions in actively encouraging the investment were below international standards, which frustrated the investor's legitimate expectations.[196] In the end, the tribunal ordered damages in the amount of $165 million.[197]

Several other disputes related to the provision of water services are currently in progress.[198] However, if the decision in *Azurix* is indicative of future tribunal rulings, it suggests that state interferences with water service contracts that are not expropriatory in nature may lead to exorbitant compensatory awards, even if the interference is for the public's protection.

(b) Health Care and Other Subsidized Public Services

Outcomes from investment disputes that implicate health care issues or other subsidized public services may also impinge upon democratic values. In many states, public services are either fully or partially subsidized by the government in order to ensure availability of these services on a universal basis regardless of individuals' ability to pay.[199] For example, in Canada, essential health care services are subsidized in order to ensure universal access.[200] In fact, provision of

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191. *Azurix*, *supra* note 148.

192. *Id.*

193. *See id.* ¶¶ 126–44 (providing a synopsis of the circumstances at the time of the dispute, and the tribunal's own view of the circumstances).

194. *Azurix*, SEC Q. REP., Nov. 19, 2001, http://www.sec.gov/Archives/edgar/data/1080205/000095012901504206/0000950129-01-504206.txt.

195. *Azurix*, *supra* note 148, ¶ 144.

196. *Id.* ¶ 372.

197. *Id.* ¶ 442.

198. *See, e.g.*, Impregilo S.p.A. v. Argentine Republic, ICSID (World Bank) Case No. ARB/07/17 (2007).

199. See, for example, discussion of Canada's subsidization of health services *infra* note 200.

200. In Canada, medically necessary hospital services and medically required physician services fall within the ambit of insured health services that are fully funded

universal health care services is viewed by Canadian nationals as a part of their identity, such that outside interferences with health care services would likely be viewed as striking at deeply held core values.[201]

However, a recent increase in international trade of health care services has the potential to affect the provision of health care services, and correspondingly, the potential to affect the democratic values of states where the services are subsidized.[202] States that subsidize health care may be subject to claims for breaches of investment treaty obligations if they argue for access to other states' health care sectors while simultaneously denying foreign investment in their own health care sectors.[203] Similar problems may also arise, as in the water privatization disputes discussed above, if foreign investors are invited into a state's health care sector and the government is later forced to interfere when the level of health care provided by the investor is inadequate. For example, due to problems with privatization initiatives in Czech hospitals, the Czech government passed legislation that curtailed the ability of private, for-profit hospitals to receive payments from health insurance schemes.[204] Proponents heralded the legislation for "improv[ing]

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by the public authority. Canada Health Act, R.S.C., ch. C 6 (1985). However, not all medically related services are publicly funded in Canada. Prescription drugs, home care, alternative and complementary therapies, and nonsurgical dental services are not publicly funded but are provided by private companies. JON R. JOHNSON, COMMISSION ON THE FUTURE OF HEALTH CARE IN CANADA, HOW WILL INTERNATIONAL TRADE AGREEMENTS AFFECT CANADIAN HEALTH CARE? 1–3 (2002), *available at* http://dsp-psd.pwgsc.gc.ca/Collection/CP32-79-22-2002E.pdf; Tracey Epps & Colleen M. Flood, *Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of the NAFTA for Medicare*, 47 MCGILL L.J. 747, 753–55 (2002).

201. For example, in the Budget Report of 2004 the Canadian government wrote: "Canada's universal public health care system gives concrete expression to the principles of fairness and equality of opportunity that define our identity as Canadians." THE IMPORTANCE OF HEALTH, BUDGET REPORT (2004), *available at* http://www.fin.gc.ca/budget04/PDF/paheae.pdf.

202. *See generally* Epps & Flood, *supra* note 200.

203. States in which health care is subsidized face attack from foreign investors primarily on two fronts if they allow any of the health care services currently under their purview into the competitive marketplace. First, national treatment provisions of investment treaties may be violated if health care services are contracted out only to individuals or companies of the host state, because this may prevent the cross-border delivery of these services. Second, under expropriation treaty provisions, a states effort to move health care services currently provided by the private, competitive marketplace into the public domain, might give rise to claims of expropriation. *See generally* JOHNSON, *supra* note 200; STEVEN SHRYBMAN, A LEGAL OPINION CONCERNING NAFTA INVESTMENT AND SERVICES DISCIPLINES AND BILL 11: PROPOSALS BY ALBERTA TO PRIVATIZE THE DELIVERY OF CERTAIN INSURED HEALTH CARE SERVICES 2–8 (2000), *available at* http://www.healthcoalition.ca/cupe-bill11.pdf (addressing proposals by Alberta to privatize the delivery of certain insured health care services).

204. Luke Eric Peterson, *Czech Hospital Bill Passes as President Warns of Investment Treaty Lawsuits*, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable

accessibility to hospitals," while critics warned that the legislation could trigger investment arbitration claims if any of the private, for-profit hospitals were owned by foreign investors.[205]

However, the reach of investment and trade obligations into the public service sector does not end with water or health services. Any public service sector into which foreign investors are invited is subject to investment arbitration claims if the state interferes due to concerns about the quality of the service being provided. Given that many public services encompass human rights obligations,[206] investment arbitrations have the potential to create significant problems for citizens' basic and most essential rights.

(4) Idiosyncratic Public Interest Issues

Whereas many public services could be termed public interest issues, as defined by common or universal interests, investment arbitration also implicates the best interests of the state and its constituents. The idiosyncratic nature of these issues may lead a state's populace to view the handling of these issues by investment arbitral tribunals as highly antidemocratic.[207]

For example, South Africa recently enacted a Black Economic Empowerment (BEE) policy that aims to redress historical, social, and economic inequalities faced by the black community in South Africa.[208] In South Africa's mining sector, the BEE mining regime vests all mineral and petroleum rights in the government.[209] This allows the government to condition the granting of state licenses for mining rights on companies' compliance with social, labor, and development objectives set out in a mining charter.[210] Objectives include the hiring of black or historically disadvantaged South

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Dev., Winnipeg, Man., Can.), May 31, 2006, at 5, *available at* http://www.iisd.org/pdf/2006/itn_may31_2006.pdf.

205. *Id.*

206. For example, the provision of water services and health care services are embodied in "the right to life," while education services are embodied in the "the right to education." Universal Declaration of Human Rights, G.A. Res. 217A (III), arts. 3, 25 and 26, at 71, U.N. Doc. A/810 (Dec. 10, 1948).

207. *See* Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 241 (1998) (arguing that some applications of international trade discipline on national regulation are popularly viewed as more antidemocratic than others).

208. Broad-Based Black Economic Empowerment Bill 27B of 2003 (S. Afr.); *see also* SOUTH AFRICA'S ECONOMIC TRANSFORMATION: A STRATEGY FOR BROAD-BASED BLACK ECONOMIC EMPOWERMENT, *available at* http://www.dti.gov.za/bee/complete.pdf (providing an overview of BEE Policy).

209. Luke Eric Peterson, *European Mining Investors Mount Arbitration Over South African Black Empowerment*, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable Dev., Winnipeg, Man., Can.), Feb. 14, 2007, at 3, *available at* http://www.iisd.org/ pdf/2007/itn_feb14_2007.pdf.

210. *Id.* at 2.

African (HDSA) managers and the selling of 26% of shares to blacks or HDSAs.[211]

In January 2007, Italian investors and their Luxembourg-based holding company Finstone (PTY) Ltd. SA launched an action arguing that the BEE mining regime violates provisions of South Africa's investment treaties with Italy and Luxembourg.[212] The investors contend that the forced divestiture of their investment to HDSAs is a denial of fair and equitable treatment and that they are being discriminated against through treatment less favorable than that given to HDSAs.[213] Effectively, by submitting this dispute for investment arbitration, the foreign investors are asking a three-person tribunal, which may have no links at all to South Africa, to evaluate the propriety of South Africa's BEE policy vis-à-vis its interest in attracting foreign investment.

The California government faces similar scrutiny from an investment arbitral tribunal for regulations it enacted to protect Native American sacred lands from holes created by open-pit mining operations.[214] In 1987, Canadian mining company Glamis Gold began preparation for the operation of an open-pit gold mine in the Imperial Valley of California.[215] Although initially denied a permit to operate the mine due to concerns about adverse impact on both the environment and a local Native American tribe's religious sites, a change in government later reversed the denial of the permit.[216] The California government reacted by passing emergency legislation requiring the backfilling and re-contouring of new open-pit metallic mines in protected areas of the California desert near sites sacred to the local Native American tribe.[217] Glamis argued that the California backfilling regulations destroyed the value of its mining investments, and in 2003, Glamis initiated an investment arbitration arguing that

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211. *Id.* at 3.

212. *Id.* at 2. The investors argue that the BEE policy violates the expropriation and fair and equitable provisions of the relevant investment treaties. *Id.* at 3.

213. *Id.* at 3–4.

214. *See* Glamis Gold, Ltd. v. United States, Notice of Arbitration (2003), *available at* http://www.state.gov/documents/organization/27320.pdf [hereinafter *Glamis Gold* Notice of Arbitration]; *see also* NAFTA Claims, Disputes: Glamis Gold, Ltd. v. United States, http://www.naftalaw.org/disputes_us_glamis.htm (providing a chronological list of pleadings associated with this case).

215. *Glamis Gold* Notice of Arbitration, *supra* note 214, ¶ 3.

216. *Id.* ¶ 15. The Department of the Interior under the Clinton administration initially denied Glamis the permit. That same year, the new Secretary of the Interior under the recently elected Bush administration reversed the denial of the permit. *Id.* ¶ 16. For a synopsis of the case, see OXFAM AM., GLAMIS GOLD: A CASE STUDY OF INVESTING IN DESTRUCTION (2003), *available at* http://www.oxfamamerica.org/newsandpublications/publications/research_reports/art6471.html/OA-Glamis_Gold_English.pdf.

217. *See* Glamis Gold, Ltd. v. United States, Counter Memorial of the United States, 37–48 (2006), *available at* http://www.state.gov/documents/organization/73686.pdf.

the regulations are contrary to investment treaty provisions.[218] The arbitration is still in progress.[219]

To date, one of the most profound examples of a public interest regulation adversely affecting whole classes of foreign investors has been Argentina's Public Emergency and Foreign Exchange System Reform Law.[220] Faced with an economic crisis involving high unemployment, school closings, and the resignation of five presidential administrations in one month, Argentina enacted the Emergency Law to eliminate the conversion of tariffs from dollars to pesos at a rate of one-to-one and to abolish the indexation of tariffs to U.S. dollar indices.[221] Most of Argentina's public utilities had been privatized and purchased by foreign investors during the 1990s.[222] Accordingly, the Emergency Law resulted in the devaluation of many Argentine assets held by foreign investors.[223] Many of the affected investors began investment arbitrations against the Argentine government, leading to approximately forty arbitrations against the government worth almost $20 billion.[224]

Argentina argued that it acted out of a state of necessity following the financial crisis that imperiled the essential interests of the country at that time.[225] Specifically, Argentina defended the measures as necessary to maintain public order and protect its essential security interests.[226] The first tribunal to consider this defense rejected it.[227] The *CMS* tribunal declined to accept the necessity defense, finding that the essential interests of the state were not engaged by the financial crisis in part because, although the

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218. *Glamis Gold* Notice of Arbitration, *supra* note 214. The investor is arguing that the regulations are tantamount to expropriation and a denial of fair and equitable treatment. *Id.* ¶ 25.

219. For developments in this arbitration, see NAFTA Claims, Disputes: Glamis Gold, Ltd. v. United States, http://www.naftalaw.org/disputes_us_glamis.htm (providing a chronological list of pleadings associated with Glamis Gold, Ltd. v. United States).

220. Law No. 25.561, Jan. 6, 2002, [LXII-A] A.D.L.A. 44. For an overview of this law, see LG&E Energy Corp. v. Argentine Republic, Decision on Liability, ICSID (World Bank) Case No. ARB/02/1, ¶¶ 63–66 (2006), *available at* http://icsid.worldbank.org/ICSID/Index.jsp (type "LG&E" in search box and follow hyperlink) [hereinafter *LG&E* Decision on Liability].

221. *LG&E* Decision on Liability, *supra* note 220, ¶¶ 63–67.

222. *Id.* ¶¶ 35, 52.

223. *Id.* ¶¶ 109, 134.

224. U.N. Conf. on Trade and Dev., *Latest Developments in Investor-State Dispute Settlement*, 2, IIA Monitor No. 4, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/11(2006); *International Arbitration: Bilateral Investment Treaties* (U.S./Arg.) (Freshfields Bruckhaus Deringer LLP/Disp. Resol.Practice, New York, N.Y.), July 2005, at 2, *available at* http://www.freshfields.com/publications/pdfs/practices/12397.pdf.

225. *See* CMS Gas Transmission Co. v. Argentine Republic, Arbitration Award, ICSID (World Bank) Case No. ARB/01/8, 44 I.L.M. 1205, 1216 (2005) [hereinafter *CMS Gas* Arbitration Award]; *see also LG&E* Decision on Liability, *supra* note 220.

226. *CMS Gas* Arbitration Award, *supra* note 225, at 1239.

227. *Id.* at 1238.

crisis was severe, the measures adopted by Argentina were not the only steps available.[228] It also held that Argentina was not the sole arbiter in determining whether it was acting in a state of necessity.[229] Rather, the tribunal stated that measures enacted out of a state's own determination that it was in a state of necessity are subject to judicial review.[230] In contrast, on facts comparable to those in *CMS*, the *LG&E* tribunal found that Argentina was subject to extreme, "severe crises in the economic, political and social sectors," placing it in a state of necessity for approximately eighteen months.[231] The tribunal observed that the economic crisis resulted in unemployment, poverty, and indigency rates of "intolerable levels," the virtual collapse of the entire health care system, and the inability of one-quarter of the population to afford the minimum amount of food needed for subsistence.[232]

In a recent development, Argentina challenged the *CMS* award in an attempt to have it nullified.[233] Although the Annulment Committee annulled a portion of the award, it was powerless to lessen the overall damages owed by Argentina to CMS, despite the Committee's recognition that the *CMS* tribunal erred in failing to assess whether Argentina could have invoked a separate, treaty-based defense of necessity.[234] The narrow grounds for review in an annulment proceeding precluded the Committee from reconsidering the issue, although the Committee observed that, had it been acting as a court of appeal, it would have revisited the issue as to whether Argentina enjoyed a defense of necessity under the BIT between the United States and Argentina.[235] Interestingly, three days later, the *Sempra* tribunal, which included two of the same members as the *CMS* tribunal, held that Argentina had no defense of necessity under the BIT or under customary international law between the United States and Argentina.[236] On much the same facts as *CMS* and LG&E, the tribunal found Argentina liable to a U.S. investor for over $128 million.[237]

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228. *Id.* at 1239–41.

229. *Id.* at 1245.

230. *Id.* at 1246.

231. *LG&E* Decision on Liability, *supra* note 220, ¶ 231.

232. *Id.* ¶ 234.

233. *See* CMS Gas Transmission Co. v. Argentine Republic, Annulment Proceeding Decision, ICSID (World Bank) Case No. ARB/01/8 (2007), *available at* http://icsid.worldbank.org/ICSID/Index.jsp (enter "CMS Gas" in search box and follow hyperlink).

234. The Annulment Committee annulled the portion of the award that determined Argentina had violated Article II(2)(c) of the U.S.-Argentina BIT. *Id.* ¶¶ 158, 163.

235. *Id.* ¶ 135.

236. *See* Sempra Energy Int'l v. Argentine Republic, ISCID (World Bank) Case No. ARB/02/16, ¶ 376 (2007).

237. *Id.* ¶ 482.

The absence of precedent in investment arbitration leaves open the question as to whether the tribunal holdings in *CMS* and *Sempra*, or the holdings in *LG&E* and the annulment decision in *CMS*, will govern in future state necessity cases. Given the factual findings of the *LG&E* tribunal and the *CMS* Annulment Committee's interest in exploring a defense of necessity, it is unclear how much additional hardship the citizens of Argentina would have had to incur to satisfy the *CMS* and *Sempra* tribunals that Argentina had been in a state of necessity.

ii. Investment Arbitration, the Public Interest, and Democracy

Whether promulgated in the best interests of the state or in the common interest of mankind, public interest regulations embody deeply embedded democratic values held by a state's populace.[238] To give less credence to these values, or to simply ignore them—as has happened in several investment arbitrations—is to establish a hierarchy in which investment values trump non-investment values, no matter what the effect.

State sovereignty signifies the ability of states to regulate for the benefit of public welfare.[239] It also signifies a state's ability to assess for itself whether a regulation is truly necessary.[240] However, in an attempt to protect investors from states that hide behind public interest regulations as a disguise for protectionism, investment arbitration has moved too far away from the core rights that state sovereignty entails. Accordingly, a better solution is necessary to regain equilibrium between investor rights and the sovereign right of a state to regulate in the public interest.

II. SOLUTIONS FOR BALANCING PUBLIC INTEREST WITH INVESTMENT ARBITRATION

Given the public's stake in many of the issues related to investment arbitration and its inability to participate in or hold the decision makers of the process accountable, correcting the democratic deficit that investment arbitration creates requires more than involvement of a legislature or democratic body.[241] Rather, it involves concepts of legitimacy, which requires the inclusion of core

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238. *See* discussion *supra* Part I.B.2.b.ii.

239. Caruba, *supra* note 50, at s. 3.4.1.

240. *Id.*; Texaco Overseas Petroleum Co. v. Libyan Arab Republic, *reprinted in* 17 I.L.M. 1, 1 (1977).

241. *See* AMAN, *supra* note 56, at 5 (arguing that depending on the conceptualization of democracy, democracy deficits may require more than the attention of a legislative or executive body).

democratic values in the investment arbitration process.[242] Thus, public participation in the decision-making process should be encouraged on the part of stakeholders whose interests may not be adequately represented by a member state.[243] Minority and special interest groups should also be given a voice in the process.[244] Furthermore, decision makers should be held accountable in order to increase public perception of the quality of decisions resulting from the investment arbitration process.[245]

However, process changes alone are not enough. The reach of investment arbitral tribunals into core democratic values also requires altering investment arbitration outcomes. Thus, reduction in the scope of an investment arbitral body's actions or the inclusion of non-investment issues into its decision-making process is needed. However, only with the infusion of democratic principles into both the investment arbitration process and its outcomes can the democratic deficit begin to be addressed.

A. *Process Changes*

One method of reducing the democratic deficit is to enhance public debate and participation in the investment arbitration process such that the public feel as though they have a meaningful say in the arbitral tribunal outcomes.[246] The creation of a transparent process enables and ultimately encourages public involvement.[247]

Enhancing the legitimacy of the investment arbitration process also reduces the democratic deficit, because legitimate processes protect and promote democratic values.[248] Legitimacy is found in

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242. *See id.* at 147 (arguing that legitimacy requires more than electoral accountability and general public oversight of elected officials).

243. *Id.* at 5.

244. *See id.* at 6 (arguing that the quality of decisions "may suffer if perspectives of diverse interests and parties are not considered").

245. *See id.* at 5 (arguing that judicial panels using non-transparent decision-making processes, for example, should be held accountable).

246. Dunoff, *supra* note 73, at 674.

247. The link between public participation and transparency has been previously explored. *See, e.g.*, OLIVER FRITSCH & JENS NEWIG, UNDER WHICH CONDITIONS DOES PUBLIC PARTICIPATION REALLY ADVANCE SUSTAINABILITY GOALS?: FINDINGS OF A META-ANALYSIS OF STAKEHOLDER INVOLVEMENT IN ENVIRONMENTAL DECISION-MAKING 6 (2007), *available at* http://www.2007amsterdamconference.org/Downloads/AC2007_FritschNewig.pdf (noting that criteria for successful public participation include a transparent process); ROBERT WOLFE, TRANSPARENCY AND PUBLIC PARTICIPATION IN THE CANADIAN TRADE POLICY PROCESS 3 (2006), *available at* http://post.queensu.ca/~wolfer/Papers/Consultations.pdf (noting that "accurate, objective and timely information . . . promotes transparency . . . and enables citizens to participate in the public policy process").

248. *See generally* Douglas Lee Donoho, *Democratic Legitimacy In Human Rights: The Future Of International Decision-Making*, 21 WIS. INT'L L.J. 1, 19 (2003) ("[D]emocratic legitimacy" is defined as a "particular exercise of authority . . . justified

both the transparency of the process and the accountability of the decision makers.[249] Thus, transparency through public access to the investment arbitration process or involvement of amici curiae on public interest issues, along with the presence of accountable and independent decision makers, adds to the credibility of this decision-making process and helps to legitimize the process in the eyes of the public.

1. Transparency

The public nature of investment arbitration indicates the need for increased transparency in the process for a number of reasons. First, large segments of a society may be affected by decisions of investment arbitral tribunals.[250] In addition, the public outcry over the water services decisions and the pending arbitration of the challenge to South Africa's BEE policy demonstrate that investment arbitration decisions may go so far as to affect the fundamental values of a society.[251] Moreover, adverse decisions leading to monetary awards will likely be paid by out of the public's tax revenues.

Transparency enhances democracy by increasing citizens' access to information, thus enabling greater participation.[252] It also raises the accountability of and confidence in public authority and allows groups other than special interest groups to present their views to public institutions.[253] Increased transparency may even combat the narrowing of decision makers' viewpoints by ensuring that the public's point of view is heard by the decision makers as well.[254]

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in light of shared democratic ideals."); James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 441 (1996) (arguing that deliberative public discourse is key to transparency); Stein, *supra* note 7, at 494 (arguing that transparency supports democracy by promoting public access to information, by making officials accountable to public opinion, by countering special-interest group influence, by improving citizens' confidence in the process, and by enhancing officials' performance).

249. Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 56 (2003). Professor Brower argues that because the international community values the principles of accountability and transparency, the use of these shared values by international legal regimes serves to legitimize them. *Id.* at 57.

250. *See supra* Part I.B.2.b.i. (highlighting the wide scope of impact).

251. For the water services decisions, see *supra* Part I.B.2.b.i(3)(a). For a description of South Africa's BEE policy arbitration, see *supra* Part I.B.2.b.i(4).

252. Stein, *supra* note 7, at 494.

253. *Id.*; *see also* Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L STUD. Q. 109 (1998).

254. *See* Goldman, *supra* note 72, at 648 (stating that examples of transparency at work are the public's "opportunities to submit their views in the form of testimony, public comments, or *amicus* briefs").

Overall, transparency supports democracy, and "democracy confers legitimacy on a system of governance."[255]

Transparency is also an essential element in establishing an arbitral tribunal's legitimacy because it provides an opportunity for a reasoned critique of the process.[256] Maintaining a mere shroud of confidentiality in investment arbitral proceedings that involve public interest issues serves only to attract criticism and harm the process's legitimacy.[257] Whether defined narrowly as the availability of a process's rules to interested parties or more broadly as increased public access and participation in an adjudicatory process, transparency is an essential precondition to imparting greater democracy to the investment arbitral process. Increasing public access to the process and requiring standardized involvement of amici curiae in arbitrations involving public interest issues best serves this goal.

a. Public Access

Greater transparency may be imparted to the investment arbitration process through increased public access. For the most part, investment arbitrations run under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) are registered by the ICSID Secretariat, after which the names of the parties to the dispute, the date of registration, and a brief description of the dispute are posted on the ICSID website.[258] However, other arbitration institutions, such as the International Chamber of Commerce (ICC) or the Arbitration Institute of the Stockholm Chamber of Commerce, do not publicize any of the disputes they administer.[259] NAFTA arbitrations involving investment issues are also not widely publicized by the NAFTA secretariat, but much of the information pertaining to the arbitrations is maintained on a private website.[260]

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255. Stein, *supra* note 7, at 494.

256. *See* Rogers, *supra* note 65, at 1307 (observing that all new international criminal tribunals set transparency as a precondition for legitimacy to permit critique of their processes).

257. *See* Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213, 221 (2001) (noting that Canada and other NAFTA countries sought to improve transparency by making certain documents publicly available).

258. OECD Working Paper, *supra* note 131, at 3.

259. *Id.*

260. *See* NAFTA Claims, http://www.naftaclaims.com (last visited Feb. 27, 2008) (recording NAFTA investment arbitration reports, as maintained and updated by attorney Todd Grierson Weiler).

The *Sun Belt Water* dispute exemplifies the lack of public notice associated with investment arbitrations.[261] Sun Belt Water, a U.S. corporation, filed an investment arbitration claim against the government of Canada in 1998.[262] No further action appears to have been taken in connection with the arbitration.[263] In fact, the government of Canada insists that the arbitration has been dismissed, while the investor characterizes the arbitration as pending.[264] This inability to ascertain the status of an arbitration confirms that public notice remains inadequate.

Similarly, pleadings associated with investment arbitrations and the awards granted at their conclusion generally remain confidential.[265] In many cases, pleadings or decisions from an arbitration can only be made public with the parties' consent.[266] In an effort to provide greater transparency within the arbitration process, the ICSID rules were recently amended to provide for the prompt publication of "excerpts of the legal reasoning of the tribunal."[267] Nevertheless, publication of the arbitration award is still subject to the parties' consent.[268] In addition, most arbitral institutions do not require pleadings to be made available to the public.[269]

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261. Sun Belt Water, Inc. v. Canada, Notice of Claim and Demand for Arbitration, Oct. 12, 1998, *available at* http://naftaclaims.com/Disputes/Canada/Sunbelt/SunBeltNoticeClaimDemandArbitration.pdf.

262. *Id.*

263. *See id.*; *see also* Hill, *supra* note 92, at 162–63; Sinclair, *supra* note 92, at 2.

264. *See* Sun Belt Water, Inc., Transport of Bulk Fresh Water, NAFTA, http://www.sunbeltwater.com/docs.shtml (displaying all the records in this arbitration) (last visited March 5, 2008). Others have also noted the contradictory information on the status of the Sun Belt arbitration. *See, e.g.*, Hill, *supra* note 92, at 162–63 ("There has been no UNCITRAL action on the complaint, and the government of Canada insists it has been dismissed. Sun Belt, on the other hand, insists that the case is still in progress, and most observers identify the case as 'pending.'"); Sinclair, *supra* note 92, at 2.

265. *See, e.g.*, UNCITRAL Rules, *supra* note 76, art. 32(5); ICSID Convention, *supra* note 41, art. 48(5).

266. ICSID Convention, *supra* note 41, art. 48(5); *see also* UNCITRAL Rules, *supra* note 76, art. 32(5).

267. *See* ICSID Convention, *supra* note 41, at Arb. Rul. 48(4) ("The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.").

268. *Id.*

269. For example, neither the ICC nor the Stockholm Chamber of Commerce requires the publication of pleadings. ICC, RULES FOR ARBITRATION (2008), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf; STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES (2007), *available at* http://www.sccinstitute.com/_upload/shared_files/regler/2007_Arbitration_Rules_eng.pdf.

Investment arbitration hearings are also generally closed to the public.[270] Again, the rationale for this rule originates from international commercial arbitration, which encourages closed-door hearings in order to protect the privacy of the parties and the nature of the dispute.[271] However, in an effort to increase the transparency of the investment arbitration process, the ICSID Rules were recently revised to allow third parties to attend or observe the arbitral hearings with the consent of the parties.[272] This practice was employed in three NAFTA arbitrations, *Methanex*, *UPS*, and *Canfor*, whose hearings were both open to the public and broadcast live from the World Bank Headquarters in Washington, D.C.[273]

Requiring prompt publication of both the main pleadings and the arbitration award and opening the oral hearings to the public would contribute to the effectiveness and public acceptance of investment arbitration. Provisions requiring that the main documents related to arbitrations be made public and that hearings be open to the public have been included in the recent U.S. Free Trade Agreements (FTAs) with Australia, Chile, Morocco, Singapore, and Central America and the Dominican Republic.[274] Similarly, Canada's Foreign Investment

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270. Non-disputant private parties in NAFTA arbitrations do not have access to the proceedings without the consent of the parties. OECD REPORT, *supra* note 94, at 3; *see also* ICSID Convention, *supra* note 41, at Arb. Rul. 32(2) (noting that special arrangements must be made to allow uninvolved parties to witness the hearings). Transcripts of the proceedings are also not generally made available.

271. *See supra* note 88 and accompanying text.

272. *See* ICSID Convention, *supra* note 41, at Arb. Rul. 32(2) ("Unless either party objects, the Tribunal . . . may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings.").

273. *See* Press Release, ICSID, Methanex Corporation v. United States of America NAFTA/UNCITRAL Arbitration Rules Proceeding (June 8, 2004), *available at* http://www.worldbank.org/icsid/highlights/methanex-form.htm [hereinafter ICSID Methanex Corp. Press Release] (announcing the date and time of the hearings as well as issuing a general invitation to the public to attend); Press Release, ICSID, United Parcel Service of America, Inc. v. Government of Canada NAFTA/UNCITRAL Arbitration Rules Proceeding (Dec. 7, 2005), *available at* http://www.worldbank.org/icsid/highlights/ups-canada.htm [hereinafter ICSID UPS Press Release] (inviting the public to attend the arbitration hearings, excepting only "those parts of the hearing which involve confidential information"); *see also* OECD REPORT, *supra* note 94, at 10 (discussing Canfor v. United States).

274. Free Trade Agreement, U.S.-Austl. art. 21.9, ¶ 4, May 18, 2004, 118 Stat. 919, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file959_5166.pdf [hereinafter U.S.-Austl. FTA]; Free Trade Agreement, U.S.-Chile, art. 22.10, ¶ 1, June 6, 2003, 42 I.L.M. 1026, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file683_4016.pdf [hereinafter U.S.-Chile FTA]; Free Trade Agreement, U.S.-Morocco, art. 20.8, ¶ 1, June 15, 2004, 44 I.L.M. 544, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/asset_upload_file300_3858.pdf [hereinafter U.S.-Morocco FTA]; Central America-Dominican Republic-United States Free Trade Agreement, art. 20.10, ¶ 1, Aug. 5, 2004, 43 I.L.M.

Protection Agreement Model provides that "all documents submitted to or issued by the tribunal, including transcripts of hearings[,] will be promptly made available to the public" and that all hearings will be open to the public.[275] In addition, the main documents from NAFTA arbitrations have long been publicized unofficially on a private website, and the live broadcasting of two NAFTA arbitrations was met with considerable praise.[276]

Public access to the main documents and hearings in an arbitration appears to neither overburden the parties nor interfere with the propriety of the investment arbitration process. Nevertheless, critics of increased public access to arbitrations argue that further public input is unnecessary because public participation in democratic elections of their representatives, who ostensibly have authority over the regulatory schemes governing arbitration, gives the arbitration process its necessary legitimacy.[277] However, this argument fails to consider the fact that many national governments are somewhat removed from the regulatory issues in dispute "such that they may not properly weight the interests of those affected."[278]

Increased transparency does gives rise to concerns about the parties' need for confidentiality.[279] However, sensitive information can be protected through either redaction or withdrawal, as determined by the tribunal.[280] This ensures that confidential information will not be summarily disclosed.

514, *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file85_3940.pdf [hereinafter CAFTA].

275. *See* Canada, Model Foreign Investment Protection Agreement, arts. 20–47 (May 20, 2004), *available at* http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/2004-FIPA-model-en.pdf [hereinafter Canada Model FIPA] (providing dispute settlement mechanisms "between an Investor and the Host Party").

276. *See* ICSID Methanex Corp. Press Release, *supra* note 273; ICSID UPS Press Release, *supra* note 273.

277. *See, e.g.*, David Livshiz, *Public Participation in Disputes under Regional Trade Agreements: How Much Is Too Much—The Case for a Limited Right of Intervention*, 61 N.Y.U. ANN. SURV. AM. L. 529, 561 (2005).

278. *Id.* at 542.

279. *See supra* notes 88, 271 and accompanying text.

280. *See, e.g.*, Chile FTA, *supra* note 274, art. 10.20(4)(c)–(d)

> (c) A disputing party shall, at the same time that it submits a document containing information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and (d) The tribunal shall decide any objection regarding the designation of information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may: (i) withdraw all or part of its submission containing such information; or (ii) agree to resubmit complete

Criticisms aside, the primary effect of increased public access is greater public awareness of the disputed issues, particularly public interest issues, and increased overall credibility of investment arbitration. Public access also legitimizes the arbitration process by conferring on the public the rights to scrutinize and evaluate the process.[281] This Article suggests that infusing these simple practices into the investment arbitration process leads to benefits that far outweigh their drawbacks.

b. Amici Curiae

A democratic measure closely related to the publication of documents and the provision of open public hearings in investment arbitration is the inclusion of public input by way of formalized submissions. Submissions by amici curiae represent a promising source of public input into the arbitration process. However, amicus briefs have not traditionally been allowed in the investment arbitration process.[282]

Nevertheless, investment disputes with a public interest focus have often attracted intense public scrutiny. In at least four arbitrations concerning the provision of water services, citizens groups and non-governmental organizations (NGOs) have sought amicus standing or other input into the arbitrations.[283] Initially, investment arbitral tribunals deferred to the parties' views as to whether amicus groups should be granted standing.[284] Thus, in the Bolivian *Bechtel* dispute, the tribunal denied citizens and environmental groups standing at the arbitration due to the parties'

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and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

281. *See* Rogers, *supra* note 65, at 1312–13.

282. *See* ANDREA BJORKLUND, THE PARTICIPATION OF AMICI CURIAE IN NAFTA CHAPTER ELEVEN CASES (2002), *available at* http://www.international.gc.ca/ trade-agreements-accords-commerciaux/disp-diff/participate.aspx?lang=en; OECD Report, *supra* note 94, at 3.

283. *See* Biwater Gauff, Ltd. v. Tanzania, ICSID (World Bank) Case No. ARB/05/22 (2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListPending [hereinafter *Biwater Gauff*] (listing the procedural orders which have been decided and noting that a final decision on the arbitration is still pending); Suez v. Argentine Republic, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 21 ICSID REV.—FOREIGN INVESTMENT L.J. (World Bank) 342 (2006) [hereinafter *Suez* Amicus Curiae Order]; Aguas del Tunari S.A. v. Bolivia, 20 ICSID REV.—FOREIGN INVESTMENT L.J. (World Bank) 450 (2005).

284. *See, e.g.*, Press Release, Ctr. for Int'l Envtl. L., Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water (Feb. 12, 2003), *available at* http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html [hereinafter CIEL Press Release].

unwillingness to consent to their participation.[285] However, in *Aguas Argentinas*, local groups and NGOs were granted limited amicus curiae standing despite objections from the investor.[286] In allowing standing for the NGOs, the *Aguas Argentinas* tribunal noted that public interest warranted allowing amici because the subject matter of the dispute raised complex public and international law questions, including human rights considerations.[287] It also observed that, since the subject matter of the dispute—water distribution services— was a basic public service, any decision rendered in the case would have the potential to affect the overall operation of the water distribution system and thereby the members of the public it serves.[288]

Most recently, in a pending, high-profile arbitration initiated by a British investor against the government of Tanzania concerning a water services contract in Dar es Salaam,[289] three Tanzanian NGOs and two international NGOs sought amicus curiae standing, access to key documents, and attendance at the oral hearings.[290] Following the reasoning in *Aguas Argentinas*, the tribunal permitted a single written submission from all the amici but denied the other requests.[291] In particular, the tribunal denied the petitioners' request to attend the oral hearings due to objections from the investor.[292]

The tribunals in two NAFTA arbitrations involving public interest issues followed a similar approach. In both *Methanex* and *UPS*, the tribunals granted amicus standing to NGOs and public interest groups.[293] The *Methanex* tribunal found the subject matter of

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285. *Id.*

286. Onwuamaegbu, *supra* note 189, at 447–48. Standing for the parties was limited by the tribunal's refusal to allow them to attend the oral hearings or to access key arbitration documents. The tribunal determined first that amicus curiae standing for relevant groups was permissible and then whether specific groups should be granted standing. *Suez* Amicus Curiae Order, *supra* note 283, at 342–50; *see also* Suez v. Argentine Republic, Order in Response to a Petition by Five Non-Governmental Organizations for Permission To Make an *Amicus Curiae* Submission, ICSID (World Bank) Case No. ARB/03/19 (2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListPending.

287. *Suez* Amicus Curiae Order, *supra* note 283.

288. *Id.*

289. *Biwater Gauff*, *supra* note 283. The case is in progress. For the status of the case, see ICSID (World Bank), List of Pending Cases, http://www.worldbank.org/icsid/cases/pending.htm (last visited Apr. 3, 2008).

290. Biwater Gauff, Ltd. v. Tanzania, Petition for Amicus Curiae Status, ICSID (World Bank) Case No. ARB/05/22 (2006), *available at* http://www.iisd.org/pdf/2007/investment_procedural_order5_petition.pdf.

291. Biwater Gauff, Ltd. v. Tanzania, Procedural Order No. 5, ICSID (World Bank) Case No. ARB/05/22, ¶ 60 (2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListPending. The tribunal noted that it could allow the NGOs access to the documents if the tribunal required clarification on issues after the conclusion of the oral hearing. *Id.* ¶¶ 65–67.

292. *Id.*

293. The tribunals allowed amicus involvement under Article 15(1) of the UNCITRAL Arbitration Rules, which empowers the tribunal to "conduct the

the issues in dispute to be of "undoubted . . . public interest," which favored allowing amicus participation.[294] However, in both disputes, amici were only allowed to submit written submissions and were provided with only as much documentary disclosure as was necessary to make the submissions.[295] Amici were not permitted to attend the hearings or access the parties' documents.[296]

Although amici curiae have been allowed to participate in several investment arbitrations, for the most part their participation has not been formalized. A notable exception is found in the ICSID Rules, which have recently been amended to give tribunals discretion to accept third party written submissions even without the consent of the disputing parties.[297] The Rules provide that, in determining whether to accept third party submissions, a tribunal must consider whether the third party would bring a perspective to the dispute not represented by the parties, whether its submission would address a matter within the scope of the dispute, and whether the third party has a significant interest in the proceeding.[298] Similarly, the 2004 U.S.- and Canadian-model BITs and newer FTAs allow for the submission of amicus briefs, provided that each amicus has a significant interest in the arbitration, brings a different perspective to the dispute, and addresses a matter within the scope of the dispute.[299] Amicus briefs are also permitted only if the dispute concerns a matter of public interest.[300] However, rules of UNCITRAL, the ICC, and other arbitral institutions do not explicitly provide for amicus participation.[301]

The ICSID rule permitting amicus briefs is a substantial step towards the inclusion of public input into the investment arbitration process. The three-part test advocated by ICSID Rule 37 balances the need to include the public in investment disputes that involve public interest issues with the perceived problems of amicus involvement, including added costs and fears of expanded scope of disputes.[302] The rule also vests ultimate discretion in the tribunal, rather than the parties, to determine whether amicus involvement is

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arbitration in such manner as it considers appropriate" provided that the parties are both treated equally and given full opportunity to present their cases. *Methanex* Petitions for Amici Curiae, *supra* note 93; *UPS* Petitions for Amici Curiae, *supra* note 93.

294. *Methanex* Petitions for Amici Curiae, *supra* note 93, ¶ 49.

295. *Id.*; *UPS* Petitions for Amici Curiae, *supra* note 93, ¶¶ 60–61.

296. *Methanex* Petitions for Amici Curiae, *supra* note 93, ¶ 49; *UPS* Petitions for Amici Curiae, *supra* note 93, ¶¶ 60–61.

297. ICSID Convention, *supra* note 41, at Arb. Rul. 37(2).

298. *Id.*

299. *See, e.g.*, Canada Model FIPA, *supra* note 275, art. 39; Chile FTA, *supra* note 274, art. 10.19, ¶ 3.

300. *Id.*

301. *See* UNCITRAL Rules, *supra* note 76; ICC Rules, *supra* note 76.

302. BJORKLAND, *supra* note 282.

warranted.[303] This allows the tribunal to assess an amicus's interest and perspective in order to determine whether the added burdens of amicus involvement are justified. Similarly, the rule provides for the filing of joint briefs by numerous amici to limit the number of briefs filed, and it protects the process from manipulation by preventing amici from obtaining party status and allowing them only limited involvement.[304]

Under the ICSID rules, amici also benefit from the absence of a requirement that the subject matter of the dispute concern a matter of public interest, as is required by the model BITs.[305] In several previous arbitrations, including *Metalclad* and *S.D. Myers*, tribunals were reluctant to find that the disputes involved health or environmental issues despite arguable evidence to the contrary.[306] As a result, it is unlikely that these tribunals, if faced with an amicus application, would have found the disputes to concern matters of public interest, and they could have denied the amicus application on this basis. Requiring a tribunal to assess whether a dispute involves public interest issues as a criterion for amicus applications unnecessarily broadens the powers of the tribunal, giving it greater latitude to deny amicus applications.

The current process for amicus involvement is also limited by the tribunals' and parties' reluctance to grant amici access to key documents and an opportunity to cross-examine witnesses. Although several investment arbitral tribunals have been eager for amicus input, they have systematically denied amici any involvement beyond the submission of briefs.[307] Without knowledge of the content of key documents in the arbitration, amici can only be of limited assistance to the tribunal.[308] Critics of amicus involvement claim that allowing such submissions permits self-elected interest groups from developed

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303. ICSID Convention, *supra* note 41, at Arb. Rul. 37.

304. *See, e.g.*, United Parcel Serv. of Am., Inc. v. Canada (U.S. v. Can.), Amicus Petitions by the Canadian Union of Postal Workers and the Council of Canadians, 19 WORLD TRADE & ARB. MATERIALS 107 (NAFTA Ch. 11 Arb.) (2007), *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSAmicusPetitionCUPW.pdf (requesting party status to the *UPS* case and attempting to challenge the tribunal's jurisdiction and noting that both demands were denied by the tribunal). The tribunal later granted them amicus standing. *UPS* Petitions for Amici Curiae, *supra* note 93.

305. *See* Canada Model FIPA, *supra* note 275, art. 39; Chile FTA, *supra* note 274, art. 10.19, ¶ 3; ICSID Convention, *supra* note 41, at Arb. Rul. 37.

306. *Metaclad* Award, *supra* note 110, ¶ 98; *S.D. Myers* Partial Award, *supra* note 145, ¶¶ 152, 161–62.

307. In each of *Methanex*, *UPS*, and the water disputes in which amicus involvement was granted, the tribunals denied all requests by the amici other than the requests to submit amicus briefs. *Methanex* Petitions for Amici Curiae, *supra* note 93; *UPS* Petitions for Amici Curiae, *supra* note 93. For a contrasting approach to the issue of amici participation, see *Suez* Amicus Curiae Order, *supra* note 283, at 342–50 (granting certain affected groups limited amicus standing).

308. Brower, *supra* note 249, at 72–73.

countries to dominate arbitrations to the detriment of less well-funded but valid interests in developing countries.[309]

Nevertheless, the success of amicus involvement in *Methanex* and several water disputes in bringing about well-reasoned, informed arbitral awards suggests that the amended ICSID rules on amicus participation should be adopted by UNCITRAL and other arbitral bodies. Although NAFTA tribunals have interpreted UNCITRAL rules to provide for amicus involvement, a structured process for amicus participation, akin to the amended ICSID rules, provides several benefits.[310] First, it prevents parties from having to litigate the issue of amicus involvement in every dispute. Second, it provides tribunals with the opportunity to hear perspectives and issues that are not adequately represented by the disputing parties, who may be focused only on the investment aspects of the dispute. Third, it paves the way for broadening the scope of amicus involvement in future disputes, with the eventual goal of allowing amici access to key documents and perhaps even limited cross-examination of key witnesses. Fourth, it encourages future involvement by amicus groups, even those that are not well funded. Finally, and most importantly, it infuses the arbitration process with democracy and helps dispel criticisms based upon secrecy.

2. Accountability of Arbitrators

Increasing the accountability of decision makers enhances the democratic nature of the process because accountability enables the public to hold elected officials or their appointees responsible for their actions.[311] In most domestic judicial systems, even where judges are not elected, the judiciary is accountable to the public by way of open hearings or press reports.[312] The legislature can also hold the judiciary accountable by overruling judicial decisions that are not in accord with the general public's view.[313] At the same time, however, the judiciary is not *directly* accountable to elected officials within the legislature.[314] Judicial independence is one of the hallmarks of most judicial systems, and it serves to legitimize the neutrality of the

309. *See, e.g.*, Philip M. Nichols, *Extension of Standing in WTO Disputes to Non-government Parties*, 17 U. PA. J. INT'L ECON. L. 295, 316, 327 (1996); Stein, *supra* note 7, at 491.

310. *See* BJORKLUND, *supra* note 282.

311. *See* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 288–89 (2004).

312. *Id.* at 294–95.

313. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §1981) (overruling several court decisions viewed by Congress as being unreceptive to employment discrimination claims).

314. *See* Kelly J. Varsho, *In the Global Market for Justice: Who Is Paying the Highest Price for Judicial Independence?*, 27 N. ILL. U. L. REV. 445, 454 (2007).

judiciary, particularly in the eyes of the public.[315] For this reason, senior court judges in many states are granted life tenure and financial security.[316] Judicial independence thus ensures the ability of the judiciary to produce fair and unbiased decisions while judges remain accountable to the public through open hearings and potential legislative override.

Investment arbitrators, however, are not accountable to the public and not independent and may, therefore, be viewed publicly as illegitimate. The lack of transparency in the process prevents the public from holding arbitrators directly accountable.[317] Moreover, because investment arbitrators may have no relationship to the state whose regulation is under scrutiny, the degree to which the arbitrators can be held responsible to the affected public for their actions is negligible.[318] In addition, without a legislative override mechanism, undemocratic decisions by investment arbitrators cannot be overturned by state governments.[319] Similarly, although investment arbitral tribunals parallel administrative agencies functionally, their decisions cannot be reviewed to the same extent as those from administrative agencies.[320]

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315. *See generally* Shirley S. Abrahamson, *Judicial Independence as a Campaign Platform*, 84 MICH. BUS. L.J. 40, 41 (2005) (observing the importance of public perception of judicial neutrality); Emmanuel O. Iheukwumere, *Judicial Independence and the Minority Jurist: The Shining Example of Chief Justice Robert N.C. Nix, Jr.*, 78 TEMP. L. REV. 379, 380 (2005) (explicating two kinds of judicial independence: "decisional independence," or "the ability of a judge to decide . . . without fear of external pressures"; and "institutional independence," or, "the ability of the judicial branch . . . to act freely and without fear of the legislative and executive branches"); Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 532 (2006) (discussing the difficulty of balancing judicial impartiality and public accountability).

316. U.S. CONST. art III; CONSTITUTION ACT OF 1867, art. 7, §§ 96–100 (Can.).

317. *See* discussion *supra* Part II.A.1.

318. An arbitrator may, but is not required to, be a citizen of the host state against which the investor has brought the action. Rau, *supra* note 96, at 506–07.

319. Although the state cannot override an investment arbitral award, it can choose to maintain the regulation at issue in the dispute even if the arbitrators find that the regulation offends a state's investment treaty obligations. UNCITRAL Rules, *supra* note 76, art. 32; ICSID Convention, *supra* note 41, art. 53(4); *see also* Dhooge, *supra* note 115; Jones, *supra* note 26, at 545. However, if it chooses to do so, the state faces the risk that other similarly situated foreign investors will launch further investment arbitration claims against the state. See *supra* note 114 for examples of arbitrations in which the state regulation was judged offending but not removed, leaving the state liable to potential further investors' suits.

320. Nevertheless, limited review of investment arbitral awards is possible at the situs of the arbitration. However, the situs of the arbitration is not always within the host state. Thus, an investment arbitral award which finds that State A's regulations contravene its investment obligations may be reviewed in the domestic courts of State B if the situs of the arbitration is in State B. *See* van Harten & Loughlin, *supra* note 16, at 133–37. This was the situation in *Metalclad* where the tribunal found that the Mexican government had contravened its investment

A final democratic problem for the investment arbitration process is that investment arbitrators lack judicial independence that protects and legitimizes the judiciary. Without tenure or financial security, investment arbitrators must constantly bargain for new appointments and appropriate compensation.[321] Thus—at least in the public perception—arbitrators' neutrality might be in question.[322] Concerns about neutrality and bias also arise from the arbitrator's ability to act as judge in one case and advocate in another.[323]

In an attempt to instill greater confidence in the neutrality of investment tribunals, the ICSID rules were recently amended to impose an ongoing duty for arbitrators to report any circumstance that could impair an arbitrator's independent judgment.[324] Prior to the amendments, ICSID rules only required arbitrators to disclose previous or existing relationships with the parties.[325] The new rules, however, require disclosure of any new relationships formed with either of the parties.[326] Nevertheless, the amended rules do not prohibit individuals from comingling their roles as arbitrator and advocate.[327]

One solution to the lack of arbitrator accountability is to increase the transparency of the process. In particular, opening investment arbitral hearings to the public would allow scrutiny and evaluation of the arbitrators' work.[328] Greater accountability could also be achieved by permitting a narrow legislative override mechanism, which would allow the host state to retain a regulation found to be inconsistent with the state's investment treaty obligations but favored by the host state's citizens. The override would bar the disputed regulation from forming the basis of future investment arbitration claims by other investors.[329] In this way, although the initial investor would be compensated for the state's interference in its investment, elected officials could preserve the views of the public

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obligations, but the review of the award was held in the domestic courts of Canada, which was the situs of the arbitration. *Metaclad*, *supra* note 108.

321. *See* Rau, *supra* note 102, at 521–22.

322. *See id.* at 514–16 (discussing several factors which undermine the perception of arbitrators' neutrality).

323. *See* COSBEY ET AL., *supra* note 102, at 6.

324. ICSID Convention, *supra* note 41, at Arb. Rul. 6.

325. *See* ICSID, *Amendments to the ICSID Rules*, 23 NEWS FROM ICSID 1 (2006) ("The rules now provide for . . . additional disclosure requirements for arbitrators.").

326. ICSID Convention, *supra* note 41, at Arb. Rul. 6.

327. *Id.*

328. Rogers, *supra* note 65, at 1312.

329. The high costs and risks associated with initiating an investment arbitration claim would prevent this solution from creating "a race to the courthouse." *See* Franck, *supra* note 25, at 1540 (observing that "[i]nvestors do not lightly sue governments as they are aware that Sovereigns will staunchly defend their corner; and, as a result, when initiating arbitration, investors undertake a major financial risk with the possibility of minimal recovery").

over those of the investment arbitral tribunal by maintaining the disputed regulation.

The accountability of arbitrators could also be reinforced by requiring reviews of arbitral awards that implicate public interest issues in the domestic courts of the host state rather than at the site of the arbitration. This would allow the domestic courts to constrain the arbitrators' actions if warranted by the public interest.[330]

The creation of a permanent arbitral body could also foster public perception of the arbitrators' legitimacy by improving their neutrality. The permanent body would be one in which the members are guaranteed tenure and security. The permanent body could also be affiliated with an existing arbitral institution, and members could be drawn from among eminent practitioners or scholars, with a goal of achieving balanced representation from both developed and developing countries and from persons both with trade and investment perspectives and with broader public interest perspectives.[331] Alternatively, a permanent roster of arbitrators, with the same goals as outlined above, could be drawn up to arbitrate investment disputes. In either case, so long as the process grants arbitrators greater security over tenure and salary[332] and disavows the current practice of allowing arbitrators to act as both arbitrator and advocate, the increased parallels between a more institutionalized arbitral judiciary and a national court or tribunal should instill greater public confidence in the decision makers of investment arbitral disputes.

B. *Outcome Changes*

Structural and procedural changes alone, without changes in outcomes, particularly when public interest issues are involved, will likely have only a negligible effect on the democratic deficit. The survey of public interest issues implicated in investment arbitrations[333] suggests that citizens' values, ranging from the

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330. However, in order to preserve the benefits of investment arbitration and to prevent bias in favor of the state, the review in the domestic courts would have to be very narrow. See the potential problems that have arisen when domestic courts review investment arbitral awards in Barnali Choudhury, *Determining the Appropriate Level of Deference for Domestic Court Reviews of Investor-State Arbitral Awards*, 32 QUEEN'S L.J. 602 (2007).

331. Forcese, *supra* note 55, at 329. Forcese argues that party selection of arbitrators can prejudice tribunal composition in favor of persons with trade and investment perspectives as opposed to broader public interest perspectives.

332. Arbitrator salaries would then be paid by state parties to an arbitral agreement, such as the ICSID Convention, or an arbitral institution, such as the ICC. Investors interested in using the investment arbitration process might pay user fees that could be used to offset state payments toward maintenance of this permanent body.

333. *See* discussion *supra* Part I.B.2.b.i.

protection of the environment to issues of race discrimination and economic hardship, are affected by investment arbitration decisions and can only be protected with changes in outcomes as well.

The repeated intersections between public interest issues and investment obligations have caused some states to proactively change future outcomes by limiting the scope of the investment arbitration process. Several states have drafted new language in future investment treaties, which tightens the expropriation provisions of the treaties with the aim of reducing the risk of subsequent findings of regulatory expropriations.[334] The United States' approach is evidenced in its recently concluded free trade agreements.[335] In the agreements, nondiscriminatory regulatory actions that "are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment[,]" are defined as not constituting indirect expropriations.[336] Similarly, future investment agreements to which Canada is a party couple investor rights with "specific and detailed exemptions" aimed at preserving the state's power to promote the public interest.[337] Some states have also taken more specific exceptions. For example, the Republic of Congo's investment treaty with the United States exempts investments related to drinking water supply,[338] and Morocco's treaty with the United Kingdom exempts government aid reserved for its own nationals that is used for national development programs and activities.[339]

Nevertheless, amending the text of investment treaties only addresses outcomes of disputes arising from recently concluded or future investment treaties. It does not address the more than 2,500 investment treaties and free trade agreements that do not contain these carve-outs and are still subject to outcomes in line with *Metalclad*, *Tecmed*, or *Santa Elena*.[340] Thus, public interest disputes falling under these old investment treaties require creative or sensitive rulings that balance investment obligations with the public

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334. HOWARD MANN, THE FINAL DECISION IN METHANEX V. UNITED STATES: SOME NEW WINE IN SOME NEW BOTTLES 9 (2005), *available at* http://www.iisd.org/pdf/2005/commentary_methanex.pdf.

335. *See, e.g.*, U.S.-Austrl. FTA, *supra* note 274, at Annex 11-B, para. 4(b); U.S.-Chile FTA, *supra* note 274, at Annex 10-D; CAFTA, *supra* note 274, at Annex 10-c, para. 4(b); U.S.-Morocco FTA, *supra* note 274, at Annex 10-B.

336. CAFTA, *supra* note 274, at Annex 10-C, para. 4(b).

337. James McIlroy, *Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back?*, 5 J. WORLD INVESTMENT 621, 644 (2004).

338. *See* Treaty with the People's Republic of the Congo Concerning Reciprocal Encouragement and Protection of Investment, U.S.-Congo, Annex, Feb. 12, 1990, S. TREATY DOC. NO. 102-1.

339. United Kingdom-Morocco Investment Promotion and Protection Agreement, art. 4 (c), 1990.

340. *See* U.N. CONFERENCE ON TRADE & DEV., *supra* note 11.

interest. Several suggested mechanisms for producing such creative or sensitive outcomes are explored below.

1. The Margin of Appreciation and Article 1 of the ECHR

The "margin of appreciation" doctrine has been most widely applied in the context of the European Convention on Human Rights (ECHR).[341] Essentially, the doctrine provides that state authorities enjoy a degree of latitude in balancing treaty obligations against other pressing societal concerns.[342] The doctrine also encourages international tribunals to grant state authorities deference in determining the proper method for executing their international law obligations.[343] The margin-of-appreciation doctrine therefore argues against de novo review of state decisions by international tribunals.[344] It also provides for normative flexibility by allowing states an extensive "zone of legality" within which they can freely operate.[345]

The doctrine has been frequently used in the application of Article 1 of the First Protocol of the ECHR.[346] Article 1 provides that every person is guaranteed the right not to be "deprived of his possessions except in the public interest."[347] In interpreting this provision, the ECHR has mandated the fulfillment of certain conditions before a person can be legally deprived of his possessions. First, the deprivation must be in the public interest.[348] National authorities are afforded a margin of appreciation in determining this issue in light of their superior knowledge of their society.[349] Their determinations are respected unless they manifestly lack a reasonable foundation.[350] Second, the deprivations must be in accordance with both domestic law and general principles of

341. *See, e.g.*, Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16. EUR. J. INT'L L. 907, 926 (2005).

342. *See generally id.* at 910; *see also* Simon Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18 J. ENVTL. L. 207, 213–14 (2006); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 404 (1998); Elyse M. Freeman, Note, *Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights*, 42 COLUM. J. TRANSNAT'L L. 177, 195–99 (2003).

343. Shany, *supra* note 341, at 909–10.

344. *Id.*

345. *Id.* at 910.

346. *See generally id.*; Baughen, supra note 342; *see also* Freeman, *supra* note 342, at 185.

347. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 18, 1954, 213 U.N.T.S. 262.

348. James v. United Kingdom, 8 Eur. Ct. H.R.123, 123 (1986); Baughen, *supra* note 342, at 213–14.

349. Baughen, *supra* note 342, at 213–14.

350. *Id.*

international law.[351] Third, the ECHR requires that there be a proportional relationship between the state regulations at issue and the aim sought to be realized.[352] As the ECHR has observed, there should be "a fair balance . . . struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"; a fair balance does not exist where an individual bears an unreasonably large burden.[353]

The ECHR also differentiates between deprivations of property and deprivations of the control over use of property.[354] Thus, even if the above three conditions for legal deprivation are satisfied, only deprivations of property must be accompanied by compensation.[355] The distinction between deprivations of property and control-of-use deprivations therefore becomes significant. Generally, only where a property owner has been divested of *all* uses of the property will a deprivation of property be found.[356] In contrast, where a property owner has not been completely divested of all uses of the property, the interference will be characterized as a "control-of-use" deprivation unless the individual has suffered an excessive burden.[357]

In the investment arbitration context, the margin-of-appreciation doctrine can be used to formulate the sensitive and creative rulings needed for investment arbitrations involving public interest issues. For example, Article 1 of the ECHR parallels the expropriation provisions of investment treaties.[358] Thus, in determining whether an expropriation is for a public purpose, the analysis under Article 1 is relevant.

Applying an Article 1 analysis to *Metalclad* or *Tecmed* demonstrates the degree to which non-investment obligations can play a role in assessing a state's investment treaty obligations.[359] For example, an Article 1 analysis in *Metalclad* or *Tecmed* would have given the Mexican government a margin of appreciation in determining whether their environmental protection regulations were in the public interest. This stands in sharp contrast to the approach advocated by the *Saluka* and *CMS* tribunals, which observed that the

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351. As Article 1 of the Protocol states: "No one shall be deprived of his possessions . . . subject to the conditions *provided for by law and by the general principles of international law.*" Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 347 (emphasis added).

352. Baughen, *supra* note 342, at 214; Freeman, *supra* note 342, at 185, 191.

353. Sporrong v. Sweden, 52 Eur. Ct. H.R. (ser. A) at 26 (1982).

354. Freeman, *supra* note 342, at 186–95.

355. Baughen, *supra* note 342, at 214; Freeman, *supra* note 342, at 187.

356. D.J. HARIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 527 (1995).

357. Peter Van den Broek, *The Protection of Property Under the European Convention on Human Rights*, 1 LEGAL ISSUES EUR. INTEGRATION 52, 86–87 (1986).

358. *See* NAFTA, *supra* note 130, art. 1110.

359. *See Metaclad*, *supra* note 108; *Tecmed*, *supra* note 145.

arbitrators should evaluate or review the suitability of a state's public interest regulation, rather than deferring to the state.[360]

An Article 1 analysis would seek to achieve a fair balance, in this case between investor rights and protection of the public interest, requiring a determination of the extent to which the investors' rights were interfered with. Thus, the analysis calls for a finding of whether the investors were deprived of property or control of use. In *Metalclad* and *Tecmed*, the investors did not lose all uses of their property because they continued to maintain the land and facilities upon which the investments were based.[361] Accordingly, an Article 1 analysis would have likely labeled the state interference with the investment a control-of-use deprivation rather than an expropriation, thereby suggesting that a fair balance had been struck.

Nevertheless, the control-of-use analysis under Article 1 also considers whether as person deprived of property has suffered an excessive burden.[362] In *Metalclad*, federal authorities had assured the investor the right to operate its waste facility prior to establishment of its investment.[363] Moreover, it was only after the investor had substantially completed its investment that local authorities raised environmental concerns.[364] Although the Mexican government should be entitled to regulate in the public interest at any time, the combination of pre-investment guarantees and the last-minute raising of environmental concerns suggests that the investor did suffer an excessive burden. Therefore, the end result in *Metalclad* might not have been altered by an Article 1 analysis.[365] In contrast, if the Mexican authorities in *Tecmed* had substantiated their environmental concerns with a reasonable basis, an Article 1 analysis in that case would have likely lead to a contrary outcome.[366]

However, regardless of the final outcome in *Metalclad*, the margin of appreciation and Article 1 analyses highlight public interest issues currently absent from the analyses in investment arbitration decisions. For example, the *Metalclad* decision, as it presently stands, makes little reference to the environmental concerns local authorities had raised.[367] This result would not have been possible under an Article 1 analysis, as the Mexican government would have been granted a margin of appreciation in which to

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360. *Saluka* Partial Award, *supra* note 161, ¶¶ 263–64 (2006); *CMS Gas* Arbitration Award, *supra* note 225.

361. *Metaclad*, *supra* note 108; *Metaclad* Award, *supra* note 110; *Tecmed*, *supra* note 145.

362. Van den Broek, *supra* note 357.

363. *Metaclad* Award, *supra* note 110, ¶¶ 41, 80.

364. *Metaclad*, *supra* note 108, ¶ 17.

365. Another commentator's analysis of *Metalclad* under Article 1 finds a contrary conclusion. Freeman, *supra* note 342, at 200–02.

366. *Tecmed*, *supra* note 145.

367. *Metaclad* Award, *supra* note 110, ¶¶ 98, 106.

establish the environmental concerns its regulation sought to address.

An Article 1 analysis also calls for a "fair balance" or proportionality analysis. Interestingly, several investment arbitral tribunals have already adopted a proportionality analysis similar to the fair balance test.[368] However, because investment tribunals have not also adopted the margin-of-appreciation doctrine, which defers to a state's self-assessment of the public interest, the balancing of interests by tribunals has tended to favor investment rights.[369]

Aspects of the Article 1 analysis could also be used in the analysis of non-expropriation claims. For instance, in considering whether an investor's right to fair and equitable treatment, national treatment, or most-favored nation treatment has been violated, tribunals could defer to public interest regulations within a margin of appreciation. Tribunals could then meaningfully assess whether a fair balance had been struck between the means employed and the aims sought to be realized.

In the upcoming arbitration concerning South Africa's BEE policy, use of the margin-of-appreciation doctrine and the fair balance test could produce dramatically different results from a traditional investment analysis.[370] In that arbitration, the investors allege that the BEE policy results in a lack of fair and equitable treatment.[371] However, applying the margin-of-appreciation doctrine would show deference towards South Africa's own determination that the BEE policy serves the public interest. The tribunal would then be faced with determining whether a fair balance had been struck between the BEE policies requiring the hiring of or partial divestiture of shares to historically disadvantaged South Africans and the BEE's aim of redressing historical, social, and economic inequalities in South Africa. Unless an excessive burden would be placed upon the investors as a result of the BEE policies, an ECHR Article 1 analysis would likely find that a fair balance had been struck. Thus, use of the margin-of-appreciation doctrine and the fair balance test would

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368. *See, e.g.*, *Tecmed*, *supra* note 145; *Saluka* Partial Award, *supra* note 161.

369. For example, the *Tecmed* tribunal found that the state regulation was not grounded in environmental protection and therefore not proportional to the aim sought to be realized. *See Tecmed*, *supra* note 145, ¶¶ 122, 129–37; *see also Azurix*, *supra* note 148, ¶¶ 310–11 (citing *In the Case of James and Others*, Sentence of Feb. 21, 1986, ¶¶ 50, 63).

370. *See supra* text accompanying note 111 (addressing BEE policy); *see also supra* Part I.B.2.b.i(4) (discussing upcoming arbitration concerning South Africa's BEE policy).

371. Luke Eric Peterson, *European Mining Investors Mount Arbitration over South African Black Empowerment*, INVESTMENT TREATY NEWS (Int'l Inst. for Sustainable Dev., Winnipeg, Man., Can.), Feb. 14, 2007, at 2, *available at* http://www.iisd.org/pdf/2007/itn_feb14_2007.pdf.

conclude that the BEE policy does not violate the investors' fair and equitable treatment rights.

In contrast, under a traditional "fair and equitable treatment" analysis, tribunals generally do not give any consideration to whether state regulations serve the public interest. Rather, only the effects of the regulation are measured.[372] Thus, evaluating the BEE policy under the traditional analysis, the tribunal will likely conclude that a violation of the investors' rights has occurred if the facts show a significant interference with the investors' rights.

Overall, use of the margin-of-appreciation doctrine on a case-by-case basis allows for the inclusion of public interest issues into investment treaties, which, for the most part, do not provide for the consideration of non-investment issues. Without the doctrine's use, tribunals can easily dismiss public interest issues because they do not find textual support in most treaty provisions. The margin-of-appreciation doctrine also narrows the scope of an investment tribunal's review to issues concerning investment, their area of expertise, thereby leaving state-determined public interest issues to the national authorities who are better suited to make such assessments. Nevertheless, so long as the tribunals continue to review the bases supporting a state's finding of the public interest, states cannot use the margin of appreciation as a disguised mode of protectionism. The limits of the margin of appreciation are also tested by the fair balance test, which advocates the balancing of investment and non-investment issues and is a useful tool in investment arbitrations that implicate public interest issues.

2. Ascertaining Intent

International law acknowledges that state regulations that result in infringements upon alien property rights do not entail liability if they are bona fide and nondiscriminatory, because such regulations are within the police powers of a state.[373] Thus,

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372. HOWARD MANN & JULIE A. SOLOWAY, UNTANGLING THE EXPROPRIATION AND REGULATION RELATIONSHIP: IS THERE A WAY FORWARD? ESSAY PAPERS ON INVESTMENT PROTECTION (2002), *available at* http://www.international.gc.ca/tna-nac/documents/untangle-e.pdf; *see also* Pope v. Canada, Interim Award on Merits, ¶ 102 (2000); *Metaclad* Award, *supra* note 110, ¶ 111; *S.D. Myers* Partial Award, *supra* note 145, ¶¶ 152, 161–62.

373. *See, e.g.*, Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10(5), *reprinted in* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 553–54 (1961); OECD, Draft Convention on the Protection of Foreign Property, art. III and accompanying note, Oct. 12, 1967; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES (1987); George Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 AM. J. INT'L L. 585, 609 (1994); Sornarajah, *supra* note 21, at 283.

regulations enacted in the public interest were not likely intended to be limited by the obligations of investment treaties.

The problem lies in determining whether a regulation was enacted in the public interest or as a disguised means of protectionism. Although more recent investment treaties define the public interest broadly as including environmental, health, safety, and related issues, older treaties lack this broad definition and require a tribunal to ascertain the intent or purpose of the regulation in order to determine its true character.[374] However, tribunals have customarily focused exclusively on a regulation's effect on the investor rather than on the intent behind the regulation.[375] Some tribunals have even specifically noted that the intent or purpose of the regulation is irrelevant to the tribunal's analysis.[376]

Expanding the analysis to include an examination of the regulation's underlying intent allows for a more nuanced decision-making process.[377] Traditional tribunal analysis has focused almost exclusively on the degree of interference by a regulation.[378] This line of reasoning too often invalidates regulations genuinely enacted in the public interest. Expanding the analysis to include an examination of intent allows room for differentiation between legitimate regulations and discriminatory, protectionist interferences with investments. Focusing on the effects of a regulation without considering the purposes behind it also erodes the ability of states to enact public interest regulations.[379] Further, it propagates the consideration of investment obligations from the sole vantage point of the investor, rather than from the perspective of the state, thereby preventing the tribunal from taking into account any non-investment related concerns.

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374. *See* treaties cited *supra* note 286. The parties to NAFTA have also taken reservations to the national treatment provisions of the agreement, which provide a safe harbor for the state's provisions of social services that are in conflict with NAFTA. However, similar reservations have not been taken for the expropriation provisions of the NAFTA. *See* JOHNSON, *supra* note 200, at 13 (discussing this effect on Canada's health care system); Epps & Flood, *supra* note 200, at 776–80.

375. *See, e.g.*, Pope v. Canada, Interim Award on Merits, ¶ 102; *Metaclad* Award, *supra* note 110, ¶ 111; *S.D. Myers* Partial Award, *supra* note 145, ¶ 282.

376. *See Metaclad* Award, *supra* note 110, ¶ 111 (noting that it was not imperative to "consider the motivation or the intent").

377. Several methods exist for ascertaining intent. In the past, tribunals have ascertained the intent of a regulation by interpreting the actual statutory text of the regulation, including the use of interpretive principles detailed in the *Vienna Convention on the Law of Treaties* and by looking to witness testimony, internal government documents reflecting intent, and scientific studies and risk assessments justifying the regulation's purpose. *See, e.g.*, Methanex Corp. v. United States, Final Award, ICSID (W. Bank) (2005), *available at* http://www.state.gov/documents/organization/51052.pdf; *S.D. Myers* Partial Award, *supra* note 145; *see also* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

378. *See generally* MANN & SOLOWAY, *supra* note 372.

379. COSBEY ET AL., *supra* note 102, at 15.

Ascertaining the intent of a regulation in trade and investment disputes may also promote more democratic outcomes. One commentator has argued that tribunals should reject claims for state liability when the state regulation "reflects a deeply embedded value" that is supported by a majority of the population—a means of using democracy to legitimize the outcome of a trade dispute.[380] Following this line of reasoning, if the intent behind a regulation challenged by an investor evidences a society's values and is supported by the majority of the populace, the proper outcome would be to dismiss the investor's claim.[381]

Support for the exemption of public interest-based regulations from liability also comes from the text of the treaties. Most investment treaty provisions pertaining to expropriation exempt from liability those expropriations that are for a public purpose.[382] Although other investment obligations do not enjoy the explicit exemption found in expropriation provisions, the overall purposes and objectives of investment treaties suggest that investment obligations should be read in the context of public interest issues. For example, several treaties promote sustainable development or prohibit the relaxation of environmental and health standards as their principal objectives, thereby suggesting that all public interest issues that fall under these objectives are within the context of the treaty.[383] Similarly, in the investment chapter of NAFTA, Article 1114 argues in favor of environmental protection, which suggests that investment obligations under NAFTA should be read in the context of environmental protection.[384]

Ascertaining intent can thus lead to a number of different outcomes. First, for regulations enacted in the public interest, states

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380. Atik, *Legitimacy, Transparency and NGO Participation*, *supra* note 115, at 234, 261. Atik also argues that the state imposing the legislation should bear the burden of any ensuing trade distortion that the legislation causes. *Id.*

381. This approach assumes that a particular state's values are objectively beneficial. However, given the interest of most states in attracting foreign investment, the tendency is for states to create a stable, hospitable investment environment in which objectively beneficial values, such as internationally recognized human rights issues, are respected. Thus, a state interested in preserving foreign investment will likely be reluctant to argue in favor of a regulation that both interferes with foreign investment and is not objectively beneficial.

382. *See, e.g.*, provision of NAFTA discussed *supra* note 135.

383. *See, e.g.*, U.S.–Chile FTA, *supra* note 274; Treaty Between the Government of the United States and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, Jan. 11, 1995, S. Treaty Doc. No. 104-19; Agreement Between Japan And The Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment, Nov. 14, 2003.

384. Article 1114(1) provides: "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." NAFTA, *supra* note 130, art. 1114(1).

can be absolved of all liability so long as the regulations are bona fide and nondiscriminatory in nature.[385] Alternately, ascertaining the intent of contested regulations can lead to a purpose-and-effect analysis by the tribunal wherein the tribunal assesses whether the state has struck a proper balance between the means employed and the aim sought to be realized.[386] Finally, considering the purpose behind contested regulations can be instructive in determining the amount of compensation owed to an investor if a state is found to be in violation of an investment obligation.[387] Where an investment treaty specifies that the level of compensation owed is "just," "reasonable," "fair," or "appropriate"—as opposed to "full"—tribunals are given significant discretion to assess the limits of these terms.[388] Similarly, in assessing a claim for "fair and equitable treatment," the public-interest nature of the regulation could weigh towards fairness or equity. Thus, a public-interest-based regulation that led to interference with an investment could provide tribunals the necessary discretion to reduce the level of compensation owed to an investor.

Overall, the advantages of requiring a tribunal to ascertain the intent of an allegedly expropriatory regulation argue against a uniform standard for regulatory interferences with investments. Rather, these advantages illustrate the need to have regulatory interferences considered by tribunals with some discretion on a case-by-case basis. More importantly, an intent-based inquiry further allows tribunals to consider the public interest implications of their adjudicative functions.[389]

III. CONCLUSION

Contrary to the view of many citizens' groups or NGOs, investors and investments should continue to enjoy the protection afforded by investment treaties. Nevertheless, public interest issues should also

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385. This is the approach used in *Methanex* Final Award, *supra* note 154.

386. *See supra* notes 352–53 and accompanying text.

387. For example, Peterson and Gray argue that human rights obligations should be used to mitigate the level of damages owed. *See* PETERSON & GRAY, *supra* note 13, at 30.

388. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TAKING OF PROPERTY: SERIES ON INTERNATIONAL INVESTMENT AGREEMENTS 26–31 (2000), *available at* http://www.unctad.org/en/docs/psiteiitd15.en.pdf.

389. For example, the General Comment on the Right to Water notes that judges, adjudicators, and members of the legal profession should "pay greater attention to violations of the right to water in the exercise of their functions." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 58, U.N. Doc. E/C. 12/2002/11 (Jan. 20, 2003); *see also* PETERSON & GRAY, *supra* note 13, at 31.

be given protection. The question thus remains: When should private interests yield to the public interest?

Currently, the investment arbitration process tends to favor private investment interests when the two clash. As one tribunal noted, investment treaties require pro-active encouragement and protection of investments by states.[390] As another observed, the inability of foreign investors to participate in the democratic process that created the public interest regulation makes it reasonable for the public to bear a greater burden in the public interest than the investor.[391] Moreover, as several tribunals have held, even where a tribunal weighs a public interest issue against interference with an investment, the impact upon the investment, rather than the gravity of the public interest issue implicated, is the key consideration in determining whether an investment obligation has been violated.[392]

Although balancing competing public and private interests is an effective mechanism for determining the line between legitimate and protectionist regulations, interpreting investment treaties exclusively from an investment perspective does not achieve the proper balance. Rather, by eschewing non-investment concerns and focusing solely on investment issues in an opaque process, investor and investment concerns tend to dominate.

Where public interest issues are implicated in investment arbitrations, investment treaty obligations must be interpreted with due regard to the importance and value of such public interests. Many recent tribunals have attempted to balance non-investment concerns with investment obligations—but without recognition of the inherent worth of the deeply embedded values that public interest regulations often represent, a true balance will rarely be achieved.

In addition to more sensitive rulings from the tribunals, investment arbitration requires procedural changes. Increases in transparency and public access enhance democratic ideals, allowing the public to observe the process and hold their government accountable for the results.[393] Moreover, if members of the public are dissatisfied with their government's stance in the arbitration process, or even with the government's consent to participate in the arbitration, increased transparency will also allow the public to be informed so that they can demonstrate their dissatisfaction through the democratic electoral process.

At their core, the public interest issues implicated in investment arbitrations involve society's most sacred values: human rights, idiosyncratic issues, and values definitive of a nation's identity.

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390. *Azurix*, *supra* note 148, ¶ 372.

391. *Id.* ¶¶ 50, 63; *Tecmed*, *supra* note 145, ¶¶ 121–22 (2003).

392. *Tecmed*, *supra* note 145, ¶ 122; *see also Azurix*, *supra* note 148; *Saluka* Partial Award, *supra* note 161, ¶ 262.

393. Buys, *supra* note 88, at 134.

Thus, transferring these issues to an international body requires some degree of democratic control.[394] It is only through an adjudicatory sensitivity to public interest issues that investment arbitration will enjoy true legitimacy in the public eye.

394. Atik, *supra* note 67, at 472.