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The Social Cost of International Investment Agreements: The Case of Cigarette Packaging

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Do international investment agreements (IIAs) impinge on the domestic sovereignty of developing countries? Should we care? National governments have signed and ratified over 3,000 IIAs,[1] which stipulate the terms of protection for private foreign investment within a host country. Though the first bilateral investment treaty (BIT)—one of the most popular types of IIA—was adopted in 1959, it was not until the 1990s that a true surge began, with the number in force rising from 385 in 1990 to 1,857 in the late 1990s, to over 2,300 at present.[2] IIAs are the first agreements to give multinational firms standing to sue host governments in international arbitration tribunals. It is not until recently, however, that firms have begun to use their power to arbitrate. The first public arbitration was between a U.K.-based firm and Sri Lanka in 1987, and the second did not follow until 1993, with 41 more by the end of the 1990s. Yet 69 cases were filed in 2016 alone; and as of July 2017, more than 800 arbitrations had been notified to the United Nations Conference on Trade and Development.[3] This development has been transforming the relationship between firms and the state, and it has led to a proliferation of investment disputes against host governments. The rise in dispute settlements has prompted legal scholars and policymakers to claim that host countries may be adjusting or failing to enact domestic laws and policies in order to stave off future arbitration; and this "regulatory chill" is thought by some to be intruding on the domestic sovereignty of independent nations in unforeseen ways.

International investment agreements have led to a host of high-profile and controversial legal disputes. In one famous case, Metalclad (a U.S. company) claimed

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that the Mexican government had violated its obligations under an international investment agreement by indirectly expropriating the company's investment through the enforcement of the country's regulations. The local government of Guadalcázar—citing an environmental study and local complaints regarding pollution of the water supply—had decided not to issue a construction permit for the operation and expansion of a toxic waste facility. Following three years of litigation, the arbitral tribunal of the International Centre for Settlement of Investment Disputes—an autonomous institution under the aegis of the World Bank Group—determined that the government of Mexico had acted in a manner "tantamount to expropriation" and that Metalclad had been further denied "fair and equitable treatment," primarily because the municipal government lacked the authority to deny a construction permit on environmental grounds. The arbitral tribunal ordered the Mexican government to pay $16.7 million in damages to Metalclad for compensation and lost future earnings.[4]

This and other similar cases have led to claims that investor-state arbitration may be impeding governments in their ability to regulate and to protect their citizens' wellbeing. At the same time, supporters of IIAs claim that for governments to garner the benefits of such agreements (through greater foreign investment), they must be prepared to give up some measure of sovereignty, as they do with any other international agreement. But what if this loss of sovereignty results in substantial social costs because governments lose the ability to regulate in the best interests of their citizens? Although this dilemma manifests itself most clearly in instances when the host state loses an arbitration case, as in the Mexico example above, there are subtler, more hidden instances that occur *before* any such arbitration ever takes place—instances of regulatory chill.

To understand the normative implications of regulatory chill, I first situate IIAs in the broader context of domestic sovereignty and international treaties. Second, I look at the provisions within IIAs that make them dissimilar from other international treaties and show how these differences may lead to a loss of sovereignty in ways that are troubling and distinct from typical treaties. Finally, I provide an in-depth analysis of the regulatory chill phenomenon in investor-state arbitration over tobacco in Australia and Latin America to assess whether it may create additional social costs that states need to account for when they consider the trade-offs and implications of investor-state dispute settlement. Australia and Latin America represent valuable test cases for regulatory chill, for while the state won the arbitration settlement in both cases described below, there is still ample evidence that

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other states factored in the threat of future arbitration when they were considering new cigarette packaging legislation. Because this phenomenon finds evidence even when states win dispute settlements, the chilling effect—and its corresponding social costs—may be even higher in other industries where settlements more consistently rule against the state.

Sovereignty and Compliance in International Treaties

The field of international affairs increasingly sees sovereignty as moving beyond the narrow view of state autonomy and independent authority to a responsibility to assist and protect its citizens.[5] On this view, to which this essay largely subscribes, entering into a complex international treaty has the potential to curtail sovereignty if the agreement hinders the state from providing for the wellbeing of its people. Yet, even if we take the more narrow view of sovereignty as autonomy, there is still no question that entering into—and complying with—international treaties impinges on the sovereignty of any government. After all, the need to give up some sovereignty in order to gain potential benefits is at the heart of any international treaty. A mounting body of work seeks to explain why governments—which should want to preserve their rights to decision-making in their own national interest—are often willing to transfer some authority to international institutions through treaties. Rationalist arguments assert that states enter into and comply with international treaties if it furthers their interests, such as for reputational benefits, fear of sanctions, or economic gain.[6] Normative arguments assert that states comply because they accept the legal (and social) norms inherent in the treaties—not because a violation would result in some penalty.[7] Both schools imply that states comply as long as it is in their interest to do so, though that interest may equally be instrumental or normative. Beth Simmons takes these arguments a step further and argues that the treaties themselves can alter governments' interests to make them more likely to comply, because they would now have a reputational cost from violation.[8]

Regardless of why states enter into and decide to comply (or not) with their obligations under treaties, most treaties (and here IIAs are quite different) do not contain much enforcement capacity. At the extreme end of the spectrum, human rights treaties are relatively costless to sign as they contain few penalties for noncompliance. In fact, Oona Hathaway finds that countries with poor human rights ratings are more likely to enter into human rights treaties than

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countries with better ratings.[9] And while other types of treaties do tend to include some punishments for noncompliance, these punishments tend to be primarily reputational or have costs that are much lower than the benefits of noncompliance.[10]

IIAs are functionally different from other types of international treaties in such areas as the environment, human rights, or even trade, as they grant investors in contracting states a number of substantive safeguards to protect their property from government intervention.[11] These safeguards, such as protection from expropriation and access to a neutral dispute settlement mechanism, give investors standing to seek compensation when new regulations or laws infringe on a firm's potential profits.

Perhaps the most important safeguard offered by IIAs is protection from expropriation by the host government. IIAs generally maintain that capital-importing countries may expropriate foreign investments if the expropriation is done for a public purpose and in accordance with the law, and the investor is compensated for the expropriation.[12] Bilateral investment treaties (BITs), a specific type of IIA, further protect investors from "indirect"—or "tantamount"—expropriation, which includes regulations and other government actions that significantly decrease the value of foreign investments. In essence, any new legislation or regulation can be thought of as tantamount expropriation, and brought to investor-state dispute settlement (ISDS), if it affects the profits of a foreign investor.

In many cases, governments cannot predict what might be seen as indirect expropriation in the future. Publicly available decisions on tantamount expropriation claims are quite diverse. At one end of the spectrum, arbitrators have followed the "sole-effect" doctrine, which asserts that only the effect of the governmental measure on the property owner (foreign investor) should be taken into account when determining harm—the purpose of the governmental measure is irrelevant.[13] Other arbitrators have followed the "police-powers" doctrine, which allows them to take governmental interest into account when making a determination.[14] This uncertainty over whether new regulations constitute indirect expropriation creates a permissive condition for regulatory chill.

ISDS, the investor-state dispute resolution mechanism included in the great majority of IIAs, allows investors to bypass the country's domestic legal systems to bring claims before a variety of international institutions when they believe their investment rights have been violated.[15] Over the last fifteen years foreign investors have used IIAs to bring more than 800 claims against countries, usually

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in the developing world.[16] These claims involve challenges to key areas of public regulation, including measures taken for public safety, the provision of key utilities, and environmental protection.[17]

A variety of structural characteristics make ISDS quite different than recourse to domestic courts. First, the investor plays a role in the selection of the arbitration panel.[18] Second, disputes and their resolutions may remain confidential, making it difficult to understand the reasoning behind many decisions and thus contributing to the uncertainty surrounding future regulation. Third, as in all international law, there is no precedent in ISDS. This means that while each tribunal may look at past decisions in determining an outcome, they are not required to do so. As a result, there are a number of diametrically opposed decisions to nearly identical cases.[19] A former deputy director of the most widely used ISDS facility, the International Centre for Settlement of Investment Disputes, noted that "the scope for inconsistent decisions in regard to essentially the same issues is obvious."[20] Taken together, these characteristics highlight the uncertainty and unpredictability at the heart of IIA enforcement.

Given this unpredictability for the host governments, why do so many countries agree to give investors the ability to make claims of indirect expropriation in an international tribunal, particularly in such a way that may make the loss of sovereignty greater than is generally anticipated from international treaties? Why commit to a device that seemingly holds them and their citizens at a disadvantage? There are two schools of thought on this. The first and more traditional approach assumes that, as with all international treaties, IIAs allow governments to commit credibly to the protection of foreign capital. Here, the potential benefits of increased foreign direct investment outweigh the potential costs of committing to ISDS.[21] An alternate interpretation that has recently gained traction holds that the government officials who are responsible for negotiating these agreements do not always fully understand or appreciate the terms of ISDS or, perhaps more likely, purposefully ignore the risks in order to reap the promised benefits.[22]

While ISDS is a useful tool for restraining states from abusing their power over foreign investors, in some recent arbitrations investors seem to be focusing specifically on targeting the regulatory environment in countries with a strong rule of law. How should we think about ISDS when it moves beyond the original intent of signaling commitment to a strong investment environment and becomes a strategic play on the part of foreign investors? To answer this question, I turn to two

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important ISDS claims made by the tobacco company Philip Morris against the nations of Australia and Uruguay regarding their tobacco regulations.

Plain Packaging Regulations in Australia and Uruguay

Philip Morris initiated ISDS claims against the governments of Australia (in 2011) and Uruguay (in 2010) for tantamount expropriation because the governments implemented new regulations on tobacco packaging. While these are the only two tobacco cases that have been brought publicly under ISDS, and both findings have been in favor of the governments, we still have reason to be concerned about the possibility of regulatory chill. Specifically, we might worry that other countries, fearing similar ISDS proceedings, would change or slow their own tobacco regulations. Indeed, there is some evidence that this is the case. For example, New Zealand originally intended to implement a plain packaging law similar to that of Australia in 2013, but delayed the legislation until the conclusion of Philip Morris's ISDS with Australia.[23] Thus, even in cases where the state wins the arbitration, this leads other governments to weigh the costs of potential arbitration when making regulatory decisions.

Before I present case study evidence on regulatory chill in plain packaging, it is important to take a look at the claims made by Philip Morris against Australia and Uruguay. In 2011 the government of Australia passed the Tobacco Plain Packaging Act,[24] the first comprehensive legislation on standardizing the packaging of tobacco products and part of a new comprehensive preventative health strategy, as smoking was seen as one of the leading causes of preventable death in Australia.[25] While it has been updated several times over the past few years, the act was meant to discourage the use of tobacco products by reducing their appeal through attractive packaging. In addition to levying a series of additional tobacco taxes and sales restrictions, the act mandated that cigarettes could only be sold in plain packages (no advertising or promotion even of the brand), and graphic health warnings were increased to "take up at least 90% of the front and 100% of the back of the pack."[26] The act was based on a great deal of research that found that plain packaging would reduce the appeal and desirability of smoking and increase the salience of health warnings.[27]

In June 2011, before the legislation was even passed, Philip Morris International (PMI)—one of the largest tobacco companies both in Australia and in the world—gave written notice of their claim, followed by a notice of arbitration in November

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of the same year.[28] The claim was initiated under the United Nations Commission on International Trade Law arbitration rules under the Australia-Hong Kong BIT. PMI claimed that the plain packaging legislation constituted expropriation by restricting the use of their trademarks on their own packages.[29]

After much preparation on the part of the government to fight for what they believed was a necessary and proven health intervention, the case was decided on a jurisdictional technicality rather than on the basis of social costs. The tribunal dismissed the claim and eventually required PMI to pay the legal costs of the Australian government.[30] Because the decision against PMI was based solely on jurisdiction, there remains no reason for PMI not to continue with these types of claims in countries where they have clear recourse to ISDS.

Just before filing the claim against Australia, PMI had filed a similar claim against the government of Uruguay based on a series of regulations aimed at limiting smoking in that country. A 2004 recommendation of a tobacco control advisory commission created by Uruguay's Ministry of Public Health advised the government to follow the World Health Organization's recommendations on cigarette packaging. Accordingly, the Uruguayan government passed a series of ordinances and presidential decrees that limited branding on cigarette packaging, collectively referred to as the Single Presentation Requirement. Specifically, the regulations require that (a) health warnings cover 80 percent of the front and back of cigarette packages, (b) all tobacco packages include graphic images of the health consequences of smoking, and (c) companies cannot pursue marketing for more than one brand of cigarettes.[31]

In February 2010, PMI filed a request for arbitration with the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the Switzerland-Uruguay BIT (PMI is headquartered in Switzerland). As in the Australia claim, PMI argued that the changes to the packaging amounted to expropriation as they were unreasonable measures that would have a negative impact on their investment.[32] In 2016 an ICSID arbitral tribunal decided two to one in favor of Uruguay and dismissed all of PMI's claims, ordering PMI to "partially" reimburse Uruguay's legal expenses. The tribunal ruled that there was no trademark violation, as "the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power."[33] The tribunal (with dissent) also found in favor of the Uruguayan government's claim that

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the Single Presentation Requirement, while perhaps limiting PMI's investments, was necessary for reasons of public health.[34]

In the end, both Australia and Uruguay were able to implement their tobacco packaging laws. Were there any costs to this arbitration? The answer is yes. First, there are costs to the state involved in fighting the legislation. Second, a number of other countries in addition to New Zealand were slower to implement similar regulations as a consequence of the trial. Third, the threat of arbitration may have kept some countries from implementing new regulations at all. Finally, regulatory delays or the failure to regulate could result in more smokers—and smoking-related deaths—than what could be expected with the new regulations.

Plain Packaging Regulations in Latin America

To understand whether the delay of or failure of countries to enact specific tobacco prevention regulations was related to IIAs, we need to analyze the underlying causal mechanism. That is, rather than being concerned only with a delay in the implementation of regulations—as in New Zealand—we want to understand *whether* and *why* legislators delay or change the regulations.[35]

During the initial legislative debates over tobacco packaging regulations in Uruguay, I found no mention of the possibility of ISDS and its potential costs. However, shortly after the PMI arbitration had begun, in August of 2010 a special session of the Uruguayan Congress was called to discuss the "international repercussions" of Uruguay's anti-tobacco legislation. In the discussion, the congressional subcommittee on public health met with a number of ministers and high-level bureaucrats to discuss the "latest events regarding anti-smoking policies."[36] While this is the only discussion I was able to find, its contents are quite revealing. Participants discussed the financial toll that other countries in Latin America faced from ISDS and worried about the financial implications if PMI were to win. They further pointed out that there were other forums under which PMI could make claims even if Uruguay were to win the BIT claim. Perhaps most important, a number of Congress members discussed options for modifying existing regulations to allow more brands and to lower the percentage of the package covered by pictograms so as to minimize the impact on PMI.

In the end, the government was quite worried that they would lose the claim to PMI and be required to regulate tobacco to a much lower extent than they would like. Rather than preemptively make those changes, however, they decided to

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maintain the law as first proposed. Their reasoning was twofold: first, they believed that they were in the right. They believed that Uruguayan tobacco regulations were precisely in line with WHO guidelines and that theirs were the ideal regulations for getting current smokers to quit and to limit new smokers. Moreover, they felt that the general public in Uruguay supported these regulations. Second, they believed that the world was watching. A number of lawmakers expressed the opinion that if they were to give in and reduce the regulations on tobacco, other countries would likely follow suit.[37]

What is revealing about these discussions is that regardless of the eventual outcome of the arbitration, the government contemplated reducing a policy beneficial to the health of its citizens in order to avoid the financial penalties of arbitration. And while Uruguay merely contemplated such action, Mexico actually followed through. In 2013 the Congress of Mexico attempted to drastically change its tobacco laws. Part of the proposed law included plain packaging similar to that mandated by the Australian law, where the entire back and sides and half the front were to be devoted to health warnings, with no distinguishing features on the remaining front half. A number of congressional committees were against the packaging restrictions, the main argument being that the new law would violate the free commerce and intellectual property protections of the Mexican Constitution, likely resulting in domestic and international arbitration. To strengthen their case, they referred to the arbitration against Australia. In the end, Congress rejected the law and instead required only 30 percent of the front and all of the back to carry the health warnings.[38]

Guatemala presents another interesting case in this regard. Though a signatory of the WHO Framework Convention on Tobacco Control, it requires health warnings on only 25 percent of the packet cover (while the WHO Framework calls for a minimum of 30 percent, with 50 percent or more recommended). In 2010 and again in 2016 the government attempted, but failed, to pass a Tobacco Control Law, which called for 80 percent (2010) and 60 percent (2016) of the packaging to be covered with health warnings. While legislative debates on the passage of the law are not available, two position papers written by the Congressional Commission on Economics and External Trade (2010) and the Congressional Commission on Health (2016) argue that passage of these strict tobacco regulations would violate freedom of enterprise and intellectual property rights guaranteed by the Constitution, making Guatemala vulnerable to domestic and international claims. The 2010 Commission stated that "extending the pictograms

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to 80% of the package would be tantamount to expropriation of private property, and violate constitutional and international commitments."[39] The 2016 position paper cited similar concerns and specifically stated that the free trade agreement among Central America, the Dominican Republic, and the United States creates "enforceable commitments that need to be balanced with the Law's objective." The paper further stated that the "60% minimum threshold for pictograms creates juridical uncertainty for domestic and international investors and may violate international commitments, which may then lead to a modification of the law."[40] Thus, while there were a number of reasons for and against increasing health warnings on tobacco packaging, fear of penalties under ISDS held an important position in the argument against the laws, which failed to pass.

The case of Honduras is quite similar to that of Guatemala. In 2010 the Congress of Honduras passed a law requiring health pictograms on a minimum of 80 percent of packaging; but in 2011 it modified the law to 50 percent, citing the possibility that the larger percentage would be a violation of international commercial commitments.[41]

In 2013 Chile amended its cigarette packaging regulations (and updated them in 2016) to comport with the WHO guidelines of at least 50 percent coverage of health warnings.[42] The discussion there revolved around whether Chilean regulations should follow this minimum coverage, as many countries had done, or if they should go further as in Australia and Uruguay. Chilean legislators clearly understood the potential for costly ISDS in determining the final legislation. A number of legislators feared that plain packaging would be seen as both arbitrary discrimination and a violation of intellectual property laws, both of which could result in domestic and international arbitration.

Should We Care about Regulatory Chill?

The cases above demonstrate that tobacco packaging laws in a number of countries have been delayed or reduced as a result of fears of potential arbitration among the government and legislators. This regulatory chill is normatively problematic for two reasons. First, it suggests that states may be giving up more of their regulatory authority than they initially realized. Of course, countries need to give up some of their domestic sovereignty in order to reap the benefits of international treaties. In the case of IIAs, to credibly signal a commitment to a strong property rights environment for foreign investors, countries committed themselves to ISDS.

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But the cases above suggest that perhaps this compliance mechanism has gone too far.

Second, sovereignty in international affairs is increasingly framed as entailing not only rights but also responsibilities. That is, sovereignty is not just a matter of effective control or autonomy; it may be conditional upon a state's ability to protect its citizens and secure their basic rights. If regulatory chill represents an unforeseen impediment to a state's ability to protect its own citizens through regulation, this would further undermine the very basis on which its sovereignty is established.

The ability of firms to use ISDS in a strategic manner means that even countries committed to secure property rights may fail to regulate in the best interests of their citizens—not because it will signal an insecure property rights environment, but solely out of fear of arbitration. The lack of precedent in ISDS means that decisions in one case do not necessarily influence later cases—thus, we are likely to see continued arbitration by major tobacco companies to reduce or delay new packaging regulations. Recognizing this, the World Health Organization guides countries on how to formulate legislation on cigarette packaging so that arbitration will find on behalf of the state. Further, Bloomberg Philanthropies and the Gates Foundation provide support (through the Anti-Tobacco Trade Litigation Fund) to developing countries facing litigation through IIAs.[43] Yet as we have seen, even if governments routinely win arbitrations against tobacco companies, arbitration can be costly and legislation can be delayed.

Perhaps the most important factor to consider in this discussion is the cost of a failure or delay in the implementation of stringent tobacco packaging regulations (or other such public health–related regulations) in terms of citizens' right to health. Research convincingly demonstrates that packaging restrictions, including plain packaging, are effective at restricting the ability of tobacco companies to attract new smokers and to maintain brand loyalty.[44] Notably, a number of peer-reviewed studies of Australia's plain packaging and increased health warning legislation have found that these measures have (1) reduced the appeal among smokers (with a greater reduction in appeal among young adults),[45] (2) increased smoking-related health concerns and quitting-related behaviors,[46] and (3) increased calls to quit-smoking hotlines,[47] among other positive behavioral changes. And while the smoking industry has put out its own research arguing against these trends, a peer-reviewed article reanalyzing the data used by tobacco company researchers found that Australia's 2012 packaging changes were

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associated with a "clear and statistically significant reduction in smoking prevalence."[48] Further, an Australian government–funded study found that after controlling for a number of variables, including increased excise taxes, between December 2012 and September 2015 the use of plain packaging in combination with graphic health warnings was associated with a 0.55 percent decrease in smoking prevalence—or approximately 108,000 fewer smokers in Australia.[49]

The preponderance of the evidence points to the simple fact that plain packaging and increased size of health warnings reduces the number of individuals who smoke either through quitting or because they never start. Thus, there is a social cost not only to countries limiting their regulations to avoid costly arbitration but also to delays in that legislation. Notably, ISDS and the possibility of regulatory chill goes well beyond the case of tobacco. Arbitration in areas as diverse as environmental regulation,[50] health,[51] pharmaceuticals,[52] mining,[53] and energy reform[54] have all seen challenges by firms against regulations made in the interests of states and their citizens.

Of course, it can be argued that the increased economic growth and foreign direct investment that comes from access to IIAs outweighs the potential costs of a reduction in sovereignty, both in terms of the state's lost regulatory autonomy and in terms of citizens' overall health. However, the cases above should make us reconsider the inherent costs of ISDS and how it may be affecting regulatory sovereignty in unintended ways. IIAs, through their reliance on ISDS as a compliance device, may have moved beyond the original intent of signaling commitment to a strong investment environment, creating a regulatory chill that exacts social costs to a greater extent than many governments originally anticipated.

NOTES

[1] IIAs come in many different forms, including one of the most popular—bilateral investment treaties (BITs).

[2] UNCTAD, "Bilateral Investment Treaties 1959–1999" (New York: United Nations, 2000); and UNCTAD, "Investment Policy Hub: International Investment Agreements Navigator," investmentpolicyhub.unctad.org/IIA.

[3] "Investment Policy Hub: Investment Dispute Settlement Navigator," investmentpolicyhub.unctad.org/ISDS.

[4] Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, "Award" (August 30, 2000). Although Metalclad's claims were brought under the North American Free Trade Agreement (NAFTA), the protections granted to investors under this agreement were modeled after—and are almost identical to—those afforded under bilateral investment treaties (BITs).

[5] In this essay, I take a broad view of sovereignty as conferring not only rights but responsibilities for governments. See, for example, Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, and I. William Zartman, *Sovereignty As Responsibility: Conflict Management in Africa* (Washington, D.C.: Brookings Institution Press, 1996).

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[6] Robert O. Keohane, “International Relations and International Law: Two Optics,” *Harvard International Law Journal* 38, no. 2 (1997), p. 487; and Beth A. Simmons, “Compliance with International Agreements,” *Annual Review of Political Science* 1, no. 1 (1998), pp. 75–93.

[7] Abram Chayes and Antonia Handler Chayes, “On Compliance,” *International Organization* 47, no. 2 (1993), pp. 175–205.

[8] Beth A. Simmons, “International Law and State Behavior: Commitment and Compliance in International Monetary Affairs,” *American Political Science Review* 94, no. 4 (2000), pp. 819–35.

[9] Oona A. Hathaway, “Do Human Rights Treaties Make a Difference?” *Yale Law Journal* 111, no. 8 (2002), pp. 1935–2042.

[10] Simmons, “International Law and State Behavior,” pp. 819–35.

[11] While under the WTO, governments are able to avail themselves of a dispute settlement mechanism, disputes are between countries (as opposed to an investor filing against a government in ISDS), and the panel is constituted by the WTO dispute settlement board as opposed to being selected by the parties to the dispute under ISDS. IIAs are the sole international treaty to give investors the right to sue governments under international arbitration.

[12] Rudolf Dolzer, Margrete Stevens, and International Centre for Settlement of Investment Disputes, *Bilateral Investment Treaties* (The Hague: M. Nijhoff, 1995).

[13] Rudolf Dolzer and Felix Bloch, “Indirect Expropriation: Conceptual Realignments?” *International Law FORUM du droit international* 5, no. 3 (2003), pp. 155–65.

[14] Dolzer et al., *Bilateral Investment Treaties*.

[15] Jarrod Wong, “Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes,” *George Mason Law Review* 14 (2006), p. 137. Although BITs can grant access to a number of autonomous institutions to serve in this dispute resolution capacity, ICSID is the most frequently used tribunal. ICSID is established under the auspices of the World Bank, providing a forum for investment disputes and a set of basic international arbitration rules.

[16] According to UNCTAD, as of January 2017 there are 817 publicly known treaty-based investor-state arbitrations either ongoing or concluded. See investmentpolicyhub.unctad.org/ISDS.

[17] Luke Eric Peterson, “Bilateral Investment Treaties and Development Policy-Making” (Winnipeg: International Institute for Sustainable Development, November 2004).

[18] ISDS panels typically consist of three arbitrators: one is selected by the state, the second by the investor, and the third is chosen by the first two arbitrators (with oversight from the parties).

[19] See Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,” *Fordham Law Review* 73, no. 4 (2005), p. 1521 for an early discussion of a number of diametrically opposed ISDS decisions.

[20] Antonio R. Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment,” *ICSID Review* 12, no. 2 (1997), pp. 287–364.

[21] Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000,” *International Organization* 60, no. 4 (2006), pp. 811–46; and Jennifer L. Tobin and Susan Rose-Ackerman, “When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties,” *Review of International Organizations* 6, no. 1 (2011), pp. 1–32.

[22] Lauge N. Skovgaard Poulsen, “Bounded Rationality and the Diffusion of Modern Investment Treaties,” *International Studies Quarterly* 58, no. 1 (2014), pp. 1–14; and Lauge N. Skovgaard Poulsen and Emma Aisbett, “When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning,” *World Politics* 65, no. 2 (2013), pp. 273–313.

[23] See Sophie Boot, “Tobacco Firm Ponders Challenge As Plain Packaging Bill Passes,” *New Zealand Herald*, September 10, 2016, www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11707230.

[24] For text and updates to the Tobacco Plain Packaging Act 2011, see the Australian Government Federal Register of Legislation at www.legislation.gov.au/Details/C2016C00892.

[25] Australian Government, National Preventative Health Taskforce, “Australia: The Healthiest Country by 2020” (Canberra: Commonwealth of Australia, 2009), www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/nphs-roadmap.

[26] Australian Government, National Preventative Health Taskforce, “Technical Report 2, Tobacco Control in Australia: Making Smoking History” (Canberra: Commonwealth of Australia, 2009), www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/96CAC56D5328E3D0CA2574DD0081E5C0/$File/tobacco-jul09.pdf.

[27] Judith J. Prochaska et al., “Evaluation of an Evidence-Based Tobacco Treatment Curriculum for Psychiatry Residency Training Programs,” *Academic Psychiatry* 32, no. 6 (2008), pp. 484–92; Marvin

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E. Goldberg, John Liefeld, Judith Madill, and Harrie Vredenburg, "The Effect of Plain Packaging on Response to Health Warnings," *American Journal of Public Health* 89, no. 9 (1999), pp. 1434–435; and P. Beede, and R. Lawson, "The Effect of Plain Packages on the Perception of Cigarette Health Warnings," *Public Health* 106, no. 4 (1992), pp. 315–22. For further evidence, see Australian Government (2009) National Preventative Health Taskforce,"Australia: The Healthiest Country by 2020" (Canberra: Commonwealth of Australia), www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/nphs-roadmap.

[28] Philip Morris Asia v. Australia, PCA Case No. 2012–12.

[29] PMI along with British American Tobacco, Japan Tobacco International, and Imperial Tobacco also initiated claims on the same grounds in Australia's high court.

[30] The arbitral tribunal agreed with Australia's claim that PMI had reorganized its assets to make PM-Australia a wholly owned subsidiary of PM-Asia in Hong Kong solely to have access to the Hong Kong-Australia BIT.

[31] FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, "Request for Arbitration" (February 19, 2010), paragraphs 3, 4, and 5.

[32] Ibid., paragraphs 77, 82, and 83.

[33] Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic Of Uruguay, ICSID Case No. ARB/10/7, "Award" (July 8, 2016), para. 271.

[34] Ibid., para. 302.

[35] To do this, I have analyzed the legislative documents (parliamentary debates, floor speeches, and position papers) of a similar set of countries to determine whether decisions over enacting new regulations are influenced (positively or negatively) by the potential for costly international arbitration. I focused on Latin America for three reasons: (1) the common language across the majority of the region makes text analysis easier, (2) most countries make parliamentary documents accessible, and (3) through regional proximity, most countries were likely aware of the arbitration against Uruguay. Of the seventeen Spanish- and English-speaking countries in Central and South America, five (Belize, Bolivia, Colombia, Panama, and Venezuela) either banned access to most of their plenum discussions and their respective commissions' position papers completely, or access was so limited or unreliable that a proper investigation of the registries could not be conducted. Twelve countries provided access to most of their plenum discussions and the position papers of some of their commissions online, and had legislative initiatives that sought to strengthen tobacco legislation. In seven of these countries (Argentina, Costa Rica, Ecuador, El Salvador, Nicaragua, Paraguay, and Peru), I found no references by legislators concerned that the laws in question violated international treaties. For the remaining five countries that provide access (Chile, Guatemala, Honduras, Mexico, and Uruguay), I found evidence that during debates over new tobacco regulations there were concerns among regulators that new laws could lead to costly international arbitration.

[36] Uruguay: "Política De Control De Tabaquismo," Versión taquigráfica de la reunión realizada el día 10 de agosto de 2010.

[37] Ibid.

[38] Mexico: Gaceta Parlamentaria, año XVI, número 3731-V, martes 19 de marzo de 2013.

[39] Guatemala: "Dictamen: 002-2010, A la Iniciativa de Ley numero 4150: Ley para el Control y Regulación del Empaquetado y Etiquetado de los Productos de Tabaco Guatemala," p. 17. Translated by author.

[40] Guatemala: Comisión de Salud y Asistencia Social, Congreso de la Republica. Iniciativa Número 4908 que Dispone Aprobar la Ley Para La Proteccion de la Salud a Traves del Control del Tabaco, pp. 6–8. Translated by author.

[41] Honduras: La Gaceta, Republica de Honduras, No, 32,488, Sección A, Acuerdos y Leyes, Poder Legislativo, Decreto Nacional No. 12-2011.

[42] República de Chile, Diaro de Sesiones del Senado, Publicación Oficial, Legislatura 363ª, Sesión 10ª, En Miércoles 15 De Abril De 2015, Sesión Ordinaria; República de Chile, Diaro de Sesiones del Senado, Publicación Oficial, Legislatura 363ª, Sesión 33ª, En Miércoles 8 De Julio De 2015, Sesión Ordinaria; República de Chile, Diaro de Sesiones del Senado, Publicación Oficial, Legislatura 363ª, Sesión 35ª, En Miércoles 15 De Julio De 2015, Sesión Extraordinaria; República de Chile, Diaro de Sesiones del Senado, Publicación Oficial, Legislatura 363ª, Sesión 9ª, En Martes 14 De Abril De 2015, Sesión Ordinaria.

[43] Global Legal Center, "The Anti-Tobacco Trade Litigation Fund," www.global.tobaccofreekids.org/what-we-do/global/legal/trade-litigation-fund.

[44] Becky Freeman, Simon Chapman, and Matthew Rimmer, "The Case for the Plain Packaging of Tobacco Products," *Addiction* 103, no. 4 (2008), pp. 580–90; Melanie Wakefield et al., "Australian Adult Smokers' Responses to Plain Packaging with Larger Graphic Health Warnings 1 Year after Implementation: Results from a National Cross-Sectional Tracking Survey," *Tobacco Control* 24,

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[45] Wakefield et al., "Australian Adult Smokers' Responses to Plain Packaging with Larger Graphic Health Warnings 1 Year after Implementation"; and Sally M. Dunlop, Timothy Dobbins, Jane M. Young, Donna Perez, and David C. Currow, "Impact of Australia's Introduction of Tobacco Plain Packs on Adult Smokers' Pack-Related Perceptions and Responses: Results from a Continuous Tracking Survey," *BMJ Open* 4, no. 12 (2014), pp. 1–10.

[46] Emily Brennan et al., "Are Quitting-Related Cognitions and Behaviours Predicted by Proximal Responses to Plain Packaging with Larger Health Warnings? Findings from a National Cohort Study with Australian Adult Smokers," *Tobacco Control* 24, Issue Suppl. 2 (2015), pp. ii33–ii41.

[47] Jane M. Young et al., "Association between Tobacco Plain Packaging and Quitline Calls: A Population-Based, Interrupted Time-Series Analysis," *Medical Journal of Australia* 200, no. 1 (2014), pp. 29–32.

[48] Pascal A. Diethelm and Timothy M. Farley, "Refuting Tobacco-Industry Funded Research: Empirical Data Shows a Decline in Smoking Prevalence Following the Introduction of Plain Packaging in Australia," *Tobacco Prevention & Cessation* 1 (2015), p. 23.

[49] Tasneem Chipty, Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia, "Appendix A, Post-Implementation Review Tobacco Plain Packaging" (2016).

[50] See, for example, Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, "Award" (May 29, 2003).

[51] See, for example, Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2.

[52] See, for example, Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A. S. v. Republic of Poland, United Nations Commission on International Trade Law.

[53] See, for example, Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia, United Nations Commission on International Trade Law.

[54] See, for example, Portigon AG v. Kingdom of Spain, ICSID Case No. ARB/17/15.

Abstract: National governments have signed and ratified over three thousand International Investment Agreements (IIAs), which for the first time give multinational firms standing to sue host governments in international arbitration tribunals. IIAs have led to a host of high-profile and controversial legal disputes that have led to claims that investor state arbitration may be impeding governments in their ability to regulate and to protect their citizens' well-being, a phenomenon known as "regulatory chill." To understand the normative implications of regulatory chill, I analyze investor state arbitration over tobacco in Australia and Latin America. I examine legislative discussions over possible regulatory changes in Australia and Uruguay, the two cases that have faced disputes over tobacco laws, as well as in Latin American countries that provide access to the legislative debates and had legislative initiatives that sought to strengthen tobacco legislation. These cases demonstrate that tobacco packaging laws in a number of countries have been delayed or reduced as a result of fears of potential arbitration among the government and legislators. This regulatory chill is normatively problematic as it suggests that states may be giving up more of their regulatory authority than they initially believed they would have to under IIAs.

Keywords: foreign direct investment, investor state dispute resolution, international investment agreements, bilateral investment treaties, regulatory chill

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