

STRAPPING DOWN REGULATORY SPACE WITH INVESTMENT ARBITRATION: A NEW BREED OF INTERNATIONAL SLAPPS

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ABSTRACT

Litigation cost asymmetries among governments and investors could hinder the ability of governments to exercise their legitimate rights to regulate and enforce their laws. A foreign investor facing government measures that adversely affect the investor's business interests might submit an arbitration claim, arguing that the host country violated provisions of an international investment agreement (IIA). If the investor enjoys litigation cost advantages over the host country, that country will be inclined to settle regardless of the merits of the claim. Investors, realizing that they enjoy such cost advantages, could choose to weaponize their right to arbitration and bargain over the contested measure in the shadow of investment arbitration. In these cases, investment arbitration imposes an unwarranted regulatory chill on countries, which exceeds the substantial obligations derived from their IIAs. These arbitration claims, referred to here as Strategic Arbitrations Against Public Policies (STRAPPs), resemble so-called "SLAPPs"—Strategic Lawsuits Against Public Participation—which are usually filed by large corporations against social activists who call for regulations that adversely affect the corporations' interests. The use of international investment arbitration to "STRAPP down" various measures is examined here in three different contexts: criminal investigations; health policies against tobacco products; and tax and antitrust policies. Drawing from the experience with SLAPPs, the deleterious effects of STRAPPs could be avoided by dismissing arbitration claims against well-defined types of measures unless the claimant can show evidence of damages and arbitrary or discriminatory treatment, while awarding governments punitive damages caused by the arbitration in such cases.

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* LL.B, LL.M, Hebrew University of Jerusalem. I am grateful to Ari Afilalo, Tomer Broude, Alex Stein, Ifat Taraboulos, Nir Deutch, Katya Zakharov-Assaf and Ari Pomson for their valuable comments. This research enjoyed the kind support of the Feinberg Fund for International Law at the Law Faculty of the Hebrew University of Jerusalem. © 2020, David Chriki.

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I. INTRODUCTION

Investment arbitration could be used to deter countries from exercising their regulatory powers, even when they are entitled to do in accordance with their obligations under international investment law. Once foreign investors face measures that adversely affect their business interests, they might submit arbitration claims against the country they invested in, arguing that the measures violated one or more provisions of an international investment agreement (IIA) between the regulating country and the respective countries of the investors. Notably, in many of these cases, the likelihood that the investor will prevail in arbitration is not high. However, I contend that governments are likely to settle, and cancel or alter the contested measure if the litigation costs they face are higher than those of the threatening investor, regardless of the scope of protection provided to investors in the countries’ IIAs and of the countries’ likelihood of prevailing in arbitration.¹

When an investor enjoys a cost advantage compared to the respondent country, that investor might “weaponize” its right to arbitration and cause the respondent country to cancel challenged measures, even if

1. See generally Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313 (2012) (arguing that “whether a right — indeed, any legal entitlement — is realizable will always critically depend on the relationship between two variables: [1] the cost a rightsholder would need to incur to vindicate the right; and [2] the cost faced by a challenger who wishes to attack and ultimately eliminate the right”).

the IIA does not provide the investor protection from such measures.² These arbitration claims, referred to here as Strategic Arbitrations against Public Policies (STRAPPs), raise concerns that investment arbitration imposes an unwarranted regulatory chill on countries which extends beyond the scope of the substantial obligations derived from their IIAs.

Consider the following hypothetical example. GoldCo, a Ruritania-based mining company, obtained mining concessions in a gold mine in Utopia, an emerging country with only one gold mine which is expected to increase the country's revenues. It came to light that GoldCo had obtained its mining rights by bribing Utopian government officials. The Utopian government withdraws GoldCo's mining license and prosecutes GoldCo's officials. In response, GoldCo submits an arbitration claim against Utopia based on the investment-state dispute settlement (ISDS) provision in the IIA concluded between Utopia and Ruritania. GoldCo argues that Utopia initiated arbitrary measures against it, and thereby unlawfully expropriated GoldCo's mining rights and violated Utopia's obligation to provide foreign investors fair and equitable treatment. Utopia has a strong case against GoldCo officials, and is confident it will prevail in arbitration. However, it soon realizes that litigation costs are onerous: legal fees could reach millions of dollars; the gold mine would be left undeveloped during the course of the legal proceedings; and other foreign investors would quickly become uneasy about the reliability of law enforcement authorities in Utopia, and then refrain from investing in the country. In contrast, GoldCo's legal fees would be somewhat lower than those of Utopia, and it would not bear any other litigation costs. Under such circumstances, if Utopian officials value the economic advantages of developing the gold mine more than they do the rule of law, they will be inclined to settle with GoldCo and drop the bribery allegations in order to avoid litigation costs and facilitate the development of the gold mine.

This example demonstrates that when a threatened government estimates that litigation costs will exceed the value it attaches to its right to carry out the challenged measure, it would be inclined to settle and avoid these litigation costs, regardless of its anticipated chances of

2. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 84 (2014) (demonstrating how "copyright trolls" who enjoy legal cost advantages weaponize their copyrights against infringers "[e]ven if the infringer has a strong fair use defense"); see also David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137, 143 (2016) (examining methods of "strategic legal bullying" which "asserts or frivolously defends a baseless legal position to derive advantage by exploiting the high cost of the legal system as a barrier to seeking a remedy").

success in the arbitration proceedings. Although legal costs borne by investors and respondent government are considered to be quite similar, governments often face litigation costs that extend beyond these direct legal costs.³ Arbitration claims that involve the development of valuable resources could result in difficulties in developing these resources throughout the duration of the arbitration proceedings; pending arbitration proceedings could harm foreign direct investments (FDI);⁴ and past arbitration proceedings could harm the country's reputation among foreign investors, regardless of their outcomes.⁵ When these costs exceed how much the government values the contested measure or the investor's costs of arbitration, the country will be inclined to settle upon being faced with a threat of arbitration.

These arbitration claims resemble "SLAPPs"—Strategic Lawsuits Against Public Participation.⁶ SLAPPs are filed by large corporations seeking to silence public scrutiny involving calls for new regulations that hinder their business interests. Unfounded tort claims of millions of dollars have been filed against social activists and non-profit organizations that led public struggles on a range of issues, such as environmental protection. Defendants usually enjoy limited resources, and often prefer to settle and muzzle their criticism rather than go through an expensive lawsuit. Ultimately, SLAPPs weaken the ability of the public to influence legislators and regulators to act against such corporations.

In contrast to conventional SLAPPs, which are aimed against social activists seeking to influence governmental officials, investment

3. LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES 36 (2015).

4. See, e.g., Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401, 423–24 (2011) (arguing that "each pending ICSID case against a government is associated with a \$55 million reduction in annual FDI on average, which suggests that "investors react not only negatively but also swiftly to an ICSID filing, without giving respondent governments the benefit of the doubt or allowing them the benefit of the arbitration hearing").

5. *Id.* at 423 ("[A]ppearing before ICSID attaches a stigma to governments that seems to linger past the date of initial filing [...] governments also experience notable FDI losses as the number of ICSID disputes filed in the past two and past five years increases."); Matthew T. Parish, Annalise K Nelson & Charles B. Rosenberg, *Awarding Moral Damages to Respondent States in Investment Arbitration*, 29 BERKELEY J. INT'L L. 225, 235–38 (2011).

6. GEORGE W. PRING & PENELOPE CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT 1 (1996) [hereinafter PRING & CANAN, GETTING SUED]; George W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1989) [hereinafter Pring]; Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989) [hereinafter Canan]; see also George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937 (1992) [hereinafter Pring & Canan, *SLAPPs*].

arbitration claims are filed directly against governments and aim to “silence” policies that run counter to the claimant’s interests. Arbitration claims of this kind targeting health and tax regulations and criminal investigations could significantly impede countries’ abilities to exercise their regulatory powers. When the investor enjoys a cost advantage over the host country, the latter might prefer not to enforce its regulations once the investor threatens arbitration.

Drawing on the experience from SLAPPs, avoiding the deleterious effects of unwarranted STRAPPs could be achieved by ending arbitration threats and claims against specific, well-defined measures at an early stage of the dispute, thus minimizing the cost to countries. For example, claims targeting specific types of measures and policies which cannot demonstrate a prima facie cause of action in the early stage of the proceedings should be dismissed promptly, unless the claimant has shown evidence of significant damages and arbitrary or discriminatory treatment. In addition, an international fund that will provide financing to countries throughout their legal process may also help reduce the costs of arbitration.

The distinctiveness of this Article is twofold. First, it significantly contributes to the current discourse on the effects of investment arbitration and IIAs on the regulatory space of countries. Concerns that investment arbitration imposes an excessive regulatory chill on countries have been receiving growing attention in the past two decades,⁷ causing many governments to amend their IIAs in a quest for more

7. See, e.g., SUSAN D. FRANCK, *ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION* 18–19 (2019); JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME* 238–244 (2017); MUTHUCUMARASWAMY SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 5 (2015) (“[T]here has been resistance to the rules that had been made in arbitral awards both by states, by arbitrators disinclined towards expansionary interpretations and by other interest groups, which stressed the importance of factors extraneous to the treaty, such as human rights, environmental protection and sustainable development.”); Stephan W. Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?*, 24 J. INT’L ARB. 469 (2007); Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 721 (Stephan W. Schill ed., 2010); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT’L ENVTL. L. 229, 229 (2018); Jennifer L. Tobin, *The Social Cost of International Investment Agreements: The Case of Cigarette Packaging*, 32 ETHICS & INT’L AFF. 153 (2018); Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat*, 3 W. J. LEGAL STUD. 1 (2013); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights*, 60 INT’L & COMP. L.Q. 573, 580 (2011); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 N.Y.U. L. REV. 30, 133 (2003).

significant regulatory space.⁸ While some argue that the scope of protection provided by IIAs is overreaching, others claim that the broad standards included in them create uncertainties as to how tribunals would interpret them.⁹ Arguably, such uncertainties could cause countries to avoid regulations that might be challenged in arbitration.¹⁰ Thus, the debate frequently focuses on whether the current balance between countries' regulatory space and the goal of protecting foreign investors reflects the choices of countries to make specific commitments in IIAs. Also under discussion is the possibility of arbitrators interpreting IIAs in a manner that would provide countries a more significant regulatory space in specific contexts, such as health regulations.¹¹ While there is some acknowledgement that the threat of arbitration could impose a regulatory chill on governments, this recognition usually focuses on the uncertainties that are attached to investment arbitration due to the vagueness or indeterminacy attributed to

8. See, e.g., U.N. Comm. on Int'l Trade Law, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session (New York, 23–27 April 2018), U.N. Doc. A/CN.9/935 (2018) ("The following considerations on the impact of unjustifiable inconsistency were also shared . . . the lack of clarity and inconsistency in international investment jurisprudence: (i) made it difficult for States to understand how they must act in order to comply with their legal obligations; (ii) led to challenges in considering new regulations; and (iii) could contribute to regulatory chill.") [hereinafter Report of Working Group III]; U.N. Conference on Trade and Dev., *IIA Issues Note: Taking Stock of IIA Reform: Recent Developments*, UNCTAD.ORG 2 (June 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf (last visited Aug. 19, 2019) ("All of today's new IIAs include several clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development . . . or follow UNCTAD's Road Map for IIA Reform as included in UNCTAD's Reform Package for the International Investment Regime The latter sets out five action areas: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.") [hereinafter *IIA Issues Note: Taking Stock of IIA Reform*].

9. See Report of Working Group III, *supra* note 8; *IIA Issues Note: Taking Stock of IIA Reform*, *supra* note 8.

10. See, e.g., FRANCK, *supra* note 7, at 18–19; Tienhaara, *supra* note 7; Tobin, *supra* note 7; Tomer Broude, Yoram Z. Haftel & Alexander Thompson, *The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts*, 20 J. INT'L ECON. L. 391, 391–417 (2017); Lorenzo Cotula, *Do Investment Treaties Unduly Constrain Regulatory Space?*, 9 QUESTIONS OF INT'L J. 19, 19–31 (2014); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1 (2014); JONATHAN BONNITCHA, *SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS* 117–18 (2014); Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face Of Litigious Heat*, 3 W. J. LEGAL STUD. 1 (2013); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 606 (Chester Brown & Kate Miles eds., 2011); Aaken, *supra* note 7; Schill, *supra* note 7.

11. See FRANCK, *supra* note 7; Report of Working Group III, *supra* note 8.

provisions often contained in IIAs.¹² In contrast, I demonstrate that even if the scope of the substantial obligations in a certain IIA is ideal, if an investor enjoys litigation costs advantages, the mere possibility of arbitration could impose a regulatory chill that awards the investor wider, unwarranted protection than provided by that IIA.¹³ Overlooking the impact of such cost asymmetries and the possibility of investors weaponizing their right to arbitration could undermine current efforts to secure governments' regulatory space by amending their IIAs.

Second, this Article reveals similarities between STRAPPs and SLAPPs and, drawing on the SLAPP experience, proposes new methods that have not been discussed to date that could secure governments' regulatory space. These solutions could complement current proposals for reforms in IIAs.

The remainder of this Article proceeds as follows. Part II outlines the general characteristics of IIAs and investment arbitration and discusses current literature regarding the possible impact IIAs have on governments' regulatory space. As this section demonstrates, current

12. FRANCK, *supra* note 7, at 18; Tienhaara, *supra* note 10, at 610–15; BONNITCHA, POULSEN & WAIBEL, *supra* note 7, at 240; Stuart G. Gross, *Inordinate Chill: Bits, Non-NAFTA Mits, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 MICH. J. INT'L L. 893, 900–01, 954–59 (2003) (mentioning that “[a] number of structural factors, which are beyond the immediate scope of this Note, may influence less wealthy countries to cave in to investor threats of arbitration,” and concluding that substantial provisions of IIAs should be amended and that governments should consider terminating IIAs altogether); Stephanie Bijlmakers, *Effects of Foreign Direct Investment Arbitration on a State’s Regulatory Autonomy Involving the Public Interest*, 23 AM. REV. OF INT’L ARB. 245, 254 (2012) (“[W]here IIAs solely make reference to the objective of protecting and promoting FDI and arbitrators have various interpretive tools at their disposal, a tribunal need not apply such a balanced approach and its reasoning may manifest itself in favor of investment protection. An unknown number of awards are not made available to the public and indeed, arbitrary awards based on a narrow consideration of protecting investors’ interests are not uncommon. The application by arbitrary tribunals of the ‘sole effects’ doctrine to indirect takings is a case in point. In the *Metalclad* case, a NAFTA tribunal held that a measure in the form of an ecological decree taken by the respondent party Mexico was tantamount to expropriation on the sole basis of the effect of the measure on the investment, without taking the motives or intent of its adoption into consideration. Similar reasoning was upheld in the ICSID award of *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*. These cases indicate that legal issues that emerge from these clauses have been determined on ‘a reading solely or principally of the investor rights.’”); Steve Louthan, *A Brave New Lochner Era: The Constitutionality of NAFTA Chapter 11*, 34 VAND. J. TRANSNAT’L L. 1443–80 (2001) (“Because the stakes are high for California, international arbitration unpredictable, and international law on indirect takings remains unsettled, there is strong incentive to settle *Methanex*’s claims even though California’s actions would easily pass federal and state scrutiny. Defensive settlement in the face of high stakes has been the fate of at least one similar Chapter 11 suit.”).

13. Cf. BONNITCHA, POULSEN & WAIBEL, *supra* note 7, at 240.

literature underestimates the critical role litigation costs have on the ability of governments to defend themselves in arbitration. Part III then presents the main theoretical framework developed in this Article: that the impact of IIAs on governments' regulatory space is relationally contingent and depends on the relative litigation costs the threatening investor and the threatened government would have to bear. It further contends that when investors enjoy a cost advantage over a government, they can weaponize their rights to arbitration against the government in order to impose pressure on it, and "STRAPP down" the government's regulatory powers. Part IV provides concrete examples of STRAPPs which demonstrate how the effects of IIAs on governments' regulatory space is contingent on the level of litigation costs borne by the investor and the threatened government. Finally, Part V presents proposals for reforms in IIAs and arbitration rules that may reduce cost asymmetries and their impact on governments' regulatory space. A short conclusion follows.

II. INTERNATIONAL INVESTMENT ARBITRATION AND ITS POSSIBLE IMPLICATIONS ON GOVERNMENTS' REGULATORY SPACE

IIAs are treaties between two or more countries designed to protect foreign investors. Although IIAs are not always identical, they usually have a common basic structure.¹⁴ Almost all IIAs include: obligations to refrain from discriminating against foreign investors of a party to the agreement; prohibitions on the expropriation of property of foreign investors for an irregular purpose without proper compensation; and undertakings to grant investors fair and equitable treatment. IIAs also typically include ISDS mechanisms which allow foreign investors from one party to the agreement to submit arbitration claims stemming from potential violations of the IIA against the other party. As a result, a wide array of government measures that adversely affect business interests, from environmental and health measures to judicial award of

14. See, e.g., ANDREW PAUL NEWCOMBE & LUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 1–2, 43–46, 61 (2009); Wagner, *supra* note 10, at 20 (mentioning that “despite the bilateral nature of the field, there appear to be early signs of convergence given that many of the BITs are based on so-called model BITs which provide — at least for some states — a blueprint, with some deviation depending on the country’s counterpart”); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 79–90 (2005) (describing the general structure of most IIAs).

punitive damages and sovereign immunity in contract disputes, may be vulnerable to claims for staggering damages.¹⁵

During the past two decades, the use of investment arbitration has increased dramatically, from fewer than 100 cases for the entire period up to the end of the year 2000 to a total of 942 known disputes from that time up to 2018.¹⁶ As investment arbitration claims against sensitive legislative and administrative measures have increased, criticism of the international investment legal regime has become more vocal. Several governments,¹⁷ international institutions,¹⁸ NGOs, and academics have expressed concerns that IIAs could impose unwarranted restraints on governments' regulatory space.¹⁹

15. See, e.g., CME Czech Republic B.V. (The Netherlands) v. Czech Republic, Case No. T 8735-01, Final Award (UNCITRAL 2003), <https://www.italaw.com/sites/default/files/case-documents/ita0182.pdf> (award of more than \$350 million in damages); Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 876 (Oct. 5, 2012) (award of approximately \$1.7 billion); see also SORNARAJAH, *supra* note 7, at 7 (“Non-governmental organizations, interested in the impact of foreign investment on human rights, the environment and other areas, have shown concern over the impediments imposed by investment treaties on states to regulate harmful activity of foreign investors. Public anxiety has been caused as a result of huge damages awarded against states by investment tribunals.”); POULSEN, *supra* note 3, at 4 (arguing that “the vast majority of respondent governments have nevertheless complied with awards promptly and voluntarily”).

16. UNCTAD, FACT SHEET ON INVESTOR-STATE DISPUTE SETTLEMENT CASES IN 2018, UNCTAD.ORG (May 2019), https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf.

17. See generally Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. SOC'Y OF INT'L L. 410 (2018) (describing how different governments envision reform in IIAs).

18. See, e.g., U.N. Conference on Trade & Dev., *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, ¶ 83, U.N. Doc. UNCTAD/DIAE/IA/2011/5 (2012), http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (“The use of FET to protect investors' legitimate expectations can indirectly restrict countries' ability to change investment-related policies or to introduce new policies – including those for the public good – that may have a negative impact on individual foreign investors.”).

19. Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 365 (2018) (“Many scholars and NGOs contended that ISDS developed from coercive origins, reflects asymmetric power differentials, and, as a result, is unfair, imbalanced, and illegitimate. Although other scholars contested these depictions, the media often adopted this frame, emphasizing ISDS's undemocratic and highly clandestine nature.”); Tienhaara, *supra* note 7 (discussing possible chilling effects that investment arbitration could cause); David Chriki, *Is the Washington Consensus Really Dead: An Empirical Analysis of FET Claims in Investment Arbitration*, 41 SUFFOLK TRANSNAT'L L. REV. 291 (2018); Roland Kläger, *Revising Treatment Standards — Fair and Equitable Treatment in Light of Sustainable Development*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang & Markus Krajewski eds., 2016); Cotula, *supra* note 10; Bijlmakers, *supra* note 12; Tienhaara, *supra* note 10; S. A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037 (2010); V. S. Vadi,

Criticisms of IIAs are focused primarily on the broad scope of standards of treatment included in these IIAs.²⁰ Propositions for reform mainly revolve around institutional reforms meant to increase consistency in investment dispute rulings.²¹ Notably, some argue that because the obligation to provide foreign investors “fair and equitable treatment” has been implemented inconsistently and, at times, in a manner that is too far-reaching,²² such provisions should be more carefully worded.²³ Similarly, overly-expansive interpretations of provisions that prohibit indirect expropriation²⁴ resulted in changes to expropriation provisions in several IIAs.²⁵ Although there has been some reference to how the threat of arbitration could impose a regulatory chill on governments, this attention has usually focused on the uncertainties associated with investment arbitration due to the vagueness or indeterminacy attributed to provisions that are frequently contained in IIAs.²⁶

The next part of this Article demonstrates that the above solutions overlook the impact of cost asymmetries between investors and respondent governments. Such asymmetries could cause the respondent

Trademark Protection, Public Health and International Investment Law: Strains and Paradoxes, 20 EUR. J. INT'L L. 773, 773–803 (2009); Gross, *supra* note 12.

20. See, e.g., FRANCK, *supra* note 7, at 18–19; Roberts, *supra* note 17; Puig & Shaffer, *supra* note 19; Tienhaara, *supra* note 7; Tobin, *supra* note 7; Broude, Haftel, & Thompson, *supra* note 10; Sergio Puig & Gregory Shaffer, *A Breakthrough with the TPP: The Tobacco Carve-out*, 16 YALE J. HEALTH POL'Y L. & ETHICS 327, 330 (2017); Cotula, *supra* note 10; Wagner, *supra* note 10; BONNITCHA, *supra* note 10, at 117–18; Brown, *supra* note 10; Tienhaara, *supra* note 10; Aaken, *supra* note 7; Schill, *supra* note 7.

21. See, e.g., Roberts, *supra* note 17; Puig & Shaffer, *supra* note 19.

22. Chriki, *supra* note 19, at 297–302; BONNITCHA, POULSEN, AND WAIBEL, *supra* note 7, at 238–244; Kläger, *supra* note 19, at 67 (“[T]he dynamic development of international investment has also caused problems and concerns as the case law, especially on fair and equitable treatment . . . is often perceived as being too far-reaching and inconsistent.”).

23. U.N. Conf. on Trade & Dev., *Investment Policy Framework for Sustainable Development*, 83, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (Dec. 23, 2015), https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

24. U.N. Conf. on Trade & Dev., *Expropriation: UNCTAD Series on Issues in International Investment Agreements II*, 17–29, U.N. Doc. UNCTAD/DIAE/IA/2011/7 (2012), https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf; SORNARAJAH, *supra* note 7, at 208–220.

25. SORNARAJAH, *supra* note 7; see also Armand de Mestral, *When Does the Exception Become the Rule? Conserving Regulatory Space under CETA*, 18 J. INT'L ECON. L. 641 (2015).

26. SORNARAJAH, *supra* note 7, at 118; Tienhaara, *supra* note 10, at 610–15; BONNITCHA, POULSEN & WAIBEL, *supra* note 7, at 240; Gross, *supra* note 12, at 900–01, 954–59 (mentioning that “[a] number of structural factors, which are beyond the immediate scope of this Note, may influence less wealthy countries to cave in to investor threats of arbitration,” and concluding that substantial provisions of IIAs should be amended and that governments should consider terminating IIAs altogether).

government to bargain in the shadow of arbitration²⁷ and settle with the investor while amending its original measures, notwithstanding the scope of protection provided to the investor in the applicable IIA.²⁸

III. WEAPONIZING THE RIGHT TO ARBITRATION: THEORETICAL FRAMEWORK AND EXAMPLES

It has long been acknowledged that “[t]he principal contribution of courts to dispute resolution is the provision of a background of norms and procedures, against which negotiations and regulation in both private and governmental settings takes place.”²⁹ Similar contentions have been made with respect to international trade law,³⁰ as the majority of trade disputes in the World Trade Organization (WTO) are settled before the issuance of a Panel Report.³¹ Is the same true about investment arbitration?

At the outset, it is useful to note that approximately one third of all *known* investment arbitration disputes are settled before a tribunal issues a final award.³² The actual rate of early settlements in investment

27. Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117 (1983); Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 *FORDHAM INT’L L.J.* 158 (2000); W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, 24 *ICSID REV. FOREIGN INV. L.J.* 185 (2009); *see also* Julian Arato, *The Private Law Critique of International Investment Law*, 113 *AM. J. INT’L L.* 1 (2019); *Cf.* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

28. Admittedly, propositions to exclude ISDS chapters from IIAs do address these concerns. However, they reduce the protection provided to foreign investors significantly. *See generally* Puig & Shaffer, *supra* note 19.

29. Galanter, *supra* note 27, at 121; Mnookin & Kornhauser, *supra* note 27, at 950 (“We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities.”).

30. Busch & Reinhardt, *supra* note 27, at 168 (“The point here is not that the institution is ineffective, but rather that, as highlighted above, whatever positive effect it has on a defendant’s willingness to liberalize occurs prior to rulings, in the form of early settlement. To put it another way, we cannot judge the institution’s effectiveness by looking at compliance alone.”).

31. *Id.* at 161. (“[I]n a substantial majority of disputes [roughly 55%], no panel is ever established. A further 8% or so end prior to the issuance of a panel report. Settlement and the withdrawal of cases are thus the norm, not the exception.”).

32. UNCTAD, *Investment Dispute Settlement Navigator*, UNCTAD.ORG, <https://investmentpolicy.unctad.org/investment-dispute-settlement> (last visited Aug. 11, 2019) (demonstrating that 201 of all 602 known disputes that were concluded as of December 31, 2018, were settled or “discontinued”); Wolf von Kumberg, Jeremy Lack & Michael Leathes, *Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come*, 29 *ICSID REV. - FOREIGN INV. L.J.* 133, 135 (2014) (“Around 40 percent of all ICSID cases settle or are discontinued before an award is rendered, and the same is probably true for other investor-State arbitral forums.”); Roberto

disputes is bound to be higher.³³ Not all investment arbitrations are public knowledge, and cases of governments settling with an investor after being threatened with arbitration and before the dispute is submitted to the International Centre for Settlement of Investment Disputes or other institutions may not even be publicly known.³⁴ This situation suggests that the effect of investment arbitration extends beyond formal awards, and should be examined with respect to its impact on the parties to a dispute before a final award is rendered. In effect, to understand the impact of the international investment legal regime on countries and investors requires an examination of how they negotiate in the shadow of investment arbitration. Although the role of the mere threat of arbitration on the countries' decision to settle is unclear, at least in some of these cases, the threat of arbitration played some role in the government's decision to settle and amend the contested measure.³⁵

Echandi & Priyanka Kher, *Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 ICSID REV. - FOREIGN INV. L.J. 41, 58 (2014) (“[E]mpirical evidence suggests that settlements are increasingly taking place earlier in the arbitration proceedings.”); Emilie M. Hafner-Burton, Zachary C. Steinert-Threlkeld & David G. Victor, *Predictability Versus Flexibility: Secrecy in International Investment Arbitration*, 68 WORLD POL. 413, 415 (2016) (“In two-fifths of the 246 investment cases concluded from 1972 to the beginning of 2012 at icsid, there is no official public record as to whether or why a government was found liable for harming an investor or of the contents of settlements.”).

33. See also Kevin P. Gallagher & Elen Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal*, 12 J. WORLD INV. & TRADE 919, 921–23 (2011) (stressing that “[i]t is commonly held that threats of claims against government occur much more frequently than actual cases,” and quoting Luke Eric Peterson, publisher of the Investment Law Reporter arguing that “[t]here is no obvious way to measure how often investment treaties are used in informal contexts by foreign investors in the context of negotiation or lobbying;” that “[h]owever, in my experience as a journalist tracking this area, I would not be the least bit surprised if there were dozens upon dozens of such informal treaty-uses for very claim that actually gets arbitrated;” that “[v]irtually every lawyer I now professes to use these treaties in negotiations on behalf of their clients with governments;” and that “[a]s a reporter it’s frustrating to know that the primary use of these treaties is in such non-arbitration contexts, but to lack fuller details of such uses - including the legal, policy and financial impacts”).

34. See, e.g., FRANCK, *supra* note 7, at 150 (“As the dataset focused on cases with a public award, all of the cases settled or discontinued had taken the provocative step of initiating arbitration [rather than negotiating settlement prior to filing a case] and receiving an initial tribunal award. This means the data inevitably under-represents settled cases and does not address treaty conflict settled prior to an arbitration request or disputes settled after initiating arbitration but before an award.”); Echandi & Kher, *supra* note 32 at 43 (expressing similar opinion as FRANCK, *supra* note 7, at 150).

35. Tienhaara, *supra* note 10, at 610 (“In some circumstances, governments will respond to a high [perceived] threat of investment arbitration by failing to enact or enforce bona fide regulatory measures [or by modifying measures to such an extent that their original intent is undermined or their effectiveness is severely diminished].”); Been & Beauvais, *supra* note 7 at

One crucial factor that could influence the bargaining powers of investors and governments when the threat of arbitration has been made is the litigation costs the parties are expected to bear. As stressed by Parchomovsky and Stein, “rights are meaningful only when the cost of protecting them is lower than the cost of attacking them.”³⁶ This insight is equally valid in the context of international investment arbitration. The ability of investors to defend rights provided by IIAs, as well as the ability of governments to protect contested measures that are in accordance with the obligations contained in IIAs, is contingent upon the costs each party to the dispute will incur in arbitration. This means that when the costs borne by governments are lower than those borne by investors, the ability of investors to realize their rights is limited.³⁷ Conversely, when governments face higher litigation costs than the investor, they are inclined to avoid arbitration notwithstanding their likelihood of success.³⁸

The costs of arbitration borne by governments are not limited to legal expenses. Arbitration claims involving the development of valuable resources could result in difficulties in developing these resources for the duration of arbitration proceedings. In addition, pending

132–34 (“[F]oreign investors already have used NAFTA claims or the threat of such claims in several instances as a ‘sword’ in opposing regulation.”); *see also infra* Part IV.

36. Parchomovsky & Stein, *supra* note 1, at 1314.

37. This concern has been somewhat alleviated during the past decade since third-party funding provided to investors increased. *See generally* Eric De Brabandere & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27 ICSID REV. - FOREIGN INV. L.J. 379 (2012); Frank J. Garcia, *Third-Party Funding as Exploitation of the Investment Treaty System*, 59 B.C. L. REV. 2911 (2018); Victoria Sahani, Mick Smith & Christiane Deniger, *Third-Party Financing in Investment Arbitration*, in CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 27 (Christina L. Beharry ed., 2018).

38. *Cf.* Parchomovsky & Stein, *supra* note 1, at 1345 (“Take a firm whose litigation cost is \$1000 per case and pit it against an individual entitlement holder whose parallel expenditure is \$5000. Under this recurrent scenario, the entitlement holder will be willing to avoid litigation—no matter how successful it promises to be, as far as merits are concerned—by paying the firm any sum up to \$5000. And if the entitlement holder values her entitlement below \$5000, she will surrender to the firm’s pressure and forfeit her entitlement altogether.”). One might argue that government officials might not fully internalize the risk of the legal dispute due to a principal-agent problem, and therefore this analysis does not fully apply to decision making of government officials. Particularly, government officials might litigate if they believe the chances of winning are great even if the net value of litigating is negative, hoping to gain positive public opinion. This concern is alleviated when the decision to litigate is made by unelected officials. In such cases, the motivation to gain a positive public opinion seems to be secondary to the ambition to fulfill the goals of their office and achieve the best economic outcome. *See, e.g.*, Alberto Alesina & Guido Tabellini, *Bureaucrats or politicians? Part I: a single policy task*, 97 AM. ECON. REV. 169 (2007).

arbitration proceedings could harm foreign direct investment (FDI),³⁹ and past arbitration proceedings could harm the country's reputation among foreign investors, regardless of their outcomes.⁴⁰ If these costs exceed the value the government places on the contested measure or the investor's costs of arbitration, the government will be inclined to settle when faced with a threat of arbitration. Investors who realize such cost advantages might weaponize their right to arbitration in order to prevent countries from imposing or enforcing measures or regulations, regardless of the validity of their claims.⁴¹ These are, therefore, Strategic Arbitrations Against Public Policies—STRAPPs.⁴²

The use of legal rights as “weapons” against proposed regulations, primarily by social activists, has been well known since the 1980s as SLAPPs—a term coined by George W. Pring and Penelope Canan.⁴³ When the claimant enjoys litigation costs advantages, the defendant will be willing to avoid litigation regardless of its likelihood of success in the dispute.⁴⁴ SLAPPs are legal claims most commonly made by corporations weaponizing their right to litigate against social activists in order to prevent public criticism directed against the corporations.⁴⁵ In their study, Pring and Canan highlighted three typical stages of a SLAPP.⁴⁶ First, citizens form an opinion on a particular issue that disturbs them and choose to express it publicly. Second, these citizens are sued by parties fearing that a change in policy will harm their economic interests. Finally, the defendant settles and agrees to cease the public activity that disturbs the plaintiff in exchange for the termination of the claim. In

39. See, e.g., Allee & Peinhardt, *supra* note 4, at 423–24 (“[E]ach pending ICSID case against a government is associated with a \$55 million reduction in annual FDI on average. This finding suggests that investors react not only negatively but also swiftly to an ICSID filing, without giving respondent governments the benefit of the doubt or allowing them the benefit of the arbitration hearing.”).

40. *Id.* (“[A]ppearing before ICSID attaches a stigma to governments that seems to linger past the date of initial filing [...] . . . governments also experience notable FDI losses as the number of ICSID disputes filed in the past two and past five years increases.”); Parish, Nelson & Rosenberg, *supra* note 5, at 235–38.

41. See also Arato, *supra* note 27, at 49 (“The intellectual property cases do give some cause for cautious optimism. More importantly, they provide a roadmap for how tribunals ought to approach all kinds of private legal rights. But given the diffuse nature of the ISDS regime, the structural risk of distortion remains—both in future cases, and informally, through investor pressure under the shadow of litigation.”).

42. *Cf.* Orozco, *supra* note 2.

43. See Pring & Canan, *SLAPPS*, *supra* note 6; see also Parchomovsky & Stein, *supra* note 1, at 1365.

44. Parchomovsky & Stein, *supra* note 1, at 1338–39.

45. See Canan, *supra* note 6.

46. See Pring & Canan, *SLAPPS*, *supra* note 6.

the exceptional case in which the legal proceedings continue, the defendant will usually prevail, although the legal proceedings might still cause the defendants and other citizens to refrain from participating in future public activity.⁴⁷

Therefore, SLAPPs cause a chilling effect on public participation resulting from a claim filed against activists, or from the fear that a claim would be submitted against them in the future if they act in the public sphere.⁴⁸ A chilling effect on public participation significantly reduces the possibility that public activity will propel regulatory changes and undermines the democratic process, imposing limitations on freedom of speech.

Similar to SLAPPs, which may limit the freedom of speech exercised by individuals in efforts to influence society,⁴⁹ threats of arbitration against countries exercising their legitimate regulatory powers could limit their most essential ability to influence society. Although investment arbitration targets governments, and not individuals, several investment arbitration claims strikingly resemble “conventional” SLAPPs. The direct and indirect costs of arbitration cause countries to settle and “STRAPP down” their regulatory powers, regardless of their likelihood of success in arbitration.

IV. EVIDENCE OF STRAPPS: A NEW BREED OF INTERNATIONAL SLAPPs

Uncovering SLAPPs is difficult, since they usually end with a settlement between the parties before a court issues a judicial decision.⁵⁰ Thus, the phenomenon of SLAPPs is often illustrated through anecdotal evidence of social activists describing how they were forced to cease their public activity in order to avoid expensive legal proceedings.⁵¹ Uncovering investment arbitration STRAPPs is even harder.

47. Ralph Michael Stein, *SLAPP Suits: A Slap at the First Amendment*, 7 *PAGE ENVTL. L. REV.* 45 (1989).

48. See Canan, *supra* note 6. .

49. Colin Quinlan, *Erie and the First Amendment: State Anti-Slapp Laws in Federal Court after Shady Grove Note*, 114 *COLUM. L. REV.* 367 (2014) (“Certain lawsuits—often called ‘strategic lawsuits against public participation,’ or ‘SLAPPs’—not only impose burdens on the First Amendment rights of their targets, but also threaten to chill citizen participation in government.”); PRING & CANAN, *GETTING SUED*, *supra* note 6, at 8 (“[SLAPPs] happen when people participate in government, and they effectively reduce future public participation.”).

50. Kathryn W. Tate, *California’s Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 *LOY. L.A. L. REV.* 801, 804 (2000) (“SLAPP suits ‘masquerade as ordinary lawsuits’ and thus are not easy to recognize, even by the courts.”).

51. See, e.g., Marnie Stetson, *Reforming Slapp Reform: New York’s Anti-Slapp Statute Note*, 70 *N.Y.U. L. REV.* 1324, 1330 (1995) (“Despite extensive research on SLAPP suits, it is difficult to quantify

Many arbitration proceedings are confidential, and fear of public criticism may incentivize government officials not to reveal that they agreed to change policies due to a threat of arbitration.⁵²

This section presents anecdotal evidence of the use of international investment arbitration to “STRAPP down” regulatory powers in three different contexts: health policies against tobacco products; and tax and antitrust policies. These examples illustrate how investment arbitration may be used to circumvent countries’ legitimate regulatory powers, particularly their ability to exercise their police powers.

Many investment arbitration tribunals recognize the right of countries to implement their police powers under customary international law in a way that overrides the provisions of IIAs.⁵³ Thus, a country’s “reasonable” good faith and nondiscriminatory exercise of its police powers is not considered a breach of the obligation to refrain from indirect expropriation.⁵⁴ The doctrine of “police powers” of countries in the context of international investment law has been developed over decades, acknowledged by several international conventions, and recognized by international organizations such as the United Nations and the OECD. As a result, these powers have come to be recognized as customary law.⁵⁵ Tribunals often hold that central to these police powers are those measures that lie at the core of the police powers doctrine: the authority of the countries to impose taxes, proceed with criminal proceedings against suspects, and apply policies designed to protect public health.⁵⁶

Given the importance of countries’ police powers, the possibility of a new breed of SLAPPs that limits these powers warrants special

the number of activists who have been deterred by the proliferation of SLAPP suits. Nonetheless, anecdotal evidence abounds as to the chilling effect that these suits have locally.”).

52. POULSEN, *supra* note 3, at 144–45 (stating that information regarding threats of arbitration “is typically not in the public domain”).

53. See generally 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 (2001); Charles N. Brower & Stephen W. Schill, *Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law*, 9 CHI. J. INT’L L. 471 (2008); NEWCOMBE & PARADELL, *supra* note 14, at 358; Catharine Titi, *Police Powers Doctrine and International Investment Law*, in GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 323 (2018).

54. Titi, *supra* note 53.

55. See, e.g., Alain Pellet, *Police Powers or the State’s Right to Regulate*, in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 447 (Meg Kinnear et al. eds., 2016); Veijo Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. WORLD INV. & TRADE 215 (2007); Titi, *supra* note 53.

56. Noam Zamir, *The Police Powers Doctrine in International Investment Law*, 14 MANCHESTER J. INT’L ECON. L. 318 (2017); Titi, *supra* note 53, at 324; NEWCOMBE & PARADELL, *supra* note 14, at 358.

attention. More specifically, the ability to “STRAPP down” criminal investigations carried out by host countries by way of investment arbitration may have far-reaching implications on the ability of (poor) countries to investigate suspicions of bribery. Once faced with such an investigation, a foreign investor might attempt to shut it down by threatening long and expensive investment arbitration claims against the country. The following sections illustrate that this concern is not merely theoretical.

A. *Avoiding Criminal Proceedings: The Case of Foreign Bribery*

Foreign investors who are subject to bribery investigations in the country they invested in might submit an arbitration claim against it, aiming to pressure it to settle and cease all interrogations against them.⁵⁷ Investors could claim, for example, that political motives are driving the investigations. Since tribunals rarely acknowledge any lack of justiciability regarding investment disputes in cases involving bribery allegations,⁵⁸ these proceedings could be lengthy and, ultimately, expensive. Governments seeking to use bribery allegations as a shield in investment disputes must prove such allegations.⁵⁹ This is a difficult task, especially in the early stages of investigations.⁶⁰ Therefore, in certain situations, it might prefer avoiding the costs and risks of arbitration and feel compelled to settle with the investor, offering to terminate the investigations in return for the withdrawal of the claims of the investor. This is especially true if the investor acquired rights for developing unique resources that would not be developed for the duration of the arbitration. The cost of leaving such resources undeveloped may outweigh the value of the rule of law.

The ongoing transnational foreign bribery investigations against Benny Steinmetz and his company, BSG Resources (BSGR), provide a

57. See, e.g., *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000); *Niko Res. (Bangladesh) Ltd. v. Bangladesh Petroleum Expl. & Prod. Co. Ltd. (“Bapex”)* and *Bangladesh Oil Gas & Mineral Co. (“Petrobangla”)*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction (Aug. 19, 2013).

58. Cameron A. Miles, *Where the Shadow Falls: Corruption in International Investment Arbitration*, 17 J. WORLD INV. & TRADE 489 (2016); Carolyn B. Lamm, Brody K. Greenwald & Kristen M. Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29 ICSID REV. 328 (2014).

59. Lamm, Greenwald & Young, *supra* note 58.

60. Florian Haugeneder & Christoph Liebscher, *Corruption and Investment Arbitration: Substantive Standards and Proof*, 2009 AUSTRIAN ARB. Y.B. 539.

glimpse into this scenario.⁶¹ BSGR acquired mining rights in a large iron ore deposit in Guinea in 2008, shortly before the death of the late Guinean President, Lansana Conté. Following suspicions that BSGR obtained its mining rights by bribing Conté's wife, Mme Touré, who allegedly influenced him weeks before his death to award the mining rights to BSGR, criminal investigations took place in several jurisdictions. These investigations established presumptive evidence supporting the suspicions. Indeed, investigations in the United States led to the imprisonment of a former BSGR advisor who admitted to attempting to disrupt the investigation procedures.⁶² In addition, an Israeli court found sufficient presumptive evidence to forfeit the assets of an Israeli BSGR official.⁶³ Consequently, after publishing a preliminary investigation report, Guinea revoked BSGR's mining rights.⁶⁴ In response to Guinea's actions, BSGR initiated arbitration proceedings against the country, arguing that it had unlawfully expropriated BSGR's mining rights.⁶⁵ Meanwhile, the mine was left undeveloped.⁶⁶

As the bribery investigations proceeded, the arbitration tribunal concluded a nine-day hearing on the merits and on jurisdiction in June 2017.⁶⁷ Shortly after the first arbitration hearing and several months

61. See generally *BSG Res. Ltd. (in administration), BSG Res. (Guinea) Ltd. (British), & BSG Res. (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22.

62. Press Release, U.S. Dep't of Justice, French Citizen Pleads Guilty to Obstructing Criminal Investigation into Alleged Bribes Paid to Win Mining Rights in the Republic of Guinea (Mar. 10, 2014), <https://www.justice.gov/opa/pr/french-citizen-pleads-guilty-obstructing-criminal-investigation-alleged-bribes-paid-win> (last visited May 8, 2019); Press Release, U.S. Dep't of Justice, French Citizen Sentenced for Obstructing a Criminal Investigation into Alleged Bribes Paid to Win Mining Rights in Guinea (July 25, 2014), <https://www.justice.gov/opa/pr/french-citizen-sentenced-obstructing-criminal-investigation-alleged-bribes-paid-win-mining> (last visited May 8, 2019); Ian Cobain & Agencies, *Beny Steinmetz Associate Jailed over African Investigation Obstruction*, *GUARDIAN* (July 25, 2014), <https://www.theguardian.com/business/2014/jul/25/beny-steinmetz-frederic-cilins-jailed-african-investigation-obstruction>.

63. Magistrate Court (Rishon Lezion) 42831-12-16 Avidan v. State of Israel (2017) (Isr.).

64. See, e.g., Tom Burgis, *Guinea Inquiry Finds Steinmetz Unit Won Mining Rights Corruptly*, *FIN. TIMES* (Apr. 29, 2014), <https://www.ft.com/content/be0d00bc-bfc3-11e3-9513-00144feabdc0>.

65. *BSG Res. Ltd. (in administration), BSG Res. (Guinea) Ltd. (British), & BSG Res. (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Request for Arbitration (Aug. 1, 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw7371.pdf>.

66. See, e.g., Franz Wild & Thomas Biesheuvel, *Mining Billionaire Ends Bitter Guinea Dispute After Months of Secret Negotiations*, *BLOOMBERG* (Feb. 25, 2019), <https://www.bloomberg.com/news/articles/2019-02-25/steinmetz-stages-guinea-comeback-in-sarkozy-brokered-deal>.

67. ICSID, *Case Details to BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (ICSID Case No. ARB/14/22)*, ICSID.WORLDBANK.ORG, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/22> (last visited Jan. 12, 2019).

after the Israeli court's ruling forfeiting BSGR's official's assets, sources close to Guinea's current president stressed that a settlement agreement between Guinea and BSGR would soon be achieved.⁶⁸ Approximately one year later, Guinea and BSGR announced they had reached an agreement to cease all ongoing legal proceedings between them.⁶⁹ This settlement presumably refers to criminal proceedings brought by Guinea against BSGR for bribery suspicions, and to the investment arbitration initiated by BSGR against Guinea.⁷⁰ Accordingly, the investment arbitration tribunal issued a procedural decision declaring that: "the proceeding is suspended under the parties' agreement."⁷¹

Just several weeks before the investment arbitration proceedings of BSGR against Guinea were suspended, a separate London Court of International Arbitration (LCIA) award was issued in a dispute between BSGR and a Brazilian mining company that had participated in a joint

68. Damien Charlotin, *Several African Disputes Are Reportedly Resolved, with Investment Arbitration Claims Likely to Be Withdrawn*, IAREPORTER (Feb. 28, 2019), <https://www.iareporter.com/articles/several-african-disputes-are-reportedly-resolved-with-investment-arbitration-claims-likely-to-be-withdrawn/>; Zohar Shahar Levy, *Clutching at \$20-billion Chinese Loan, Guinea to Drop Graft Claims Against Israeli Billionaire*, CTECH (Nov. 12, 2017), <https://www.calcalistech.com/ctech/articles/0,7340,L-3727099,00.html>.

69. Neil Hume, *Beny Steinmetz Ends Iron Ore Dispute with Guinea*, FIN. TIMES (Feb. 25, 2019), <https://www.ft.com/content/a2b3f268-38d0-11e9-b72b-2c7f526ca5d0>; Simon Goodley, *Beny Steinmetz Settles Dispute with Guinea over Iron Ore Project*, GUARDIAN (Feb. 25, 2019), <https://www.theguardian.com/business/2019/feb/25/beny-steinmetz-settles-dispute-guinea-iron-ore-simandou>.

70. Stephanie Nebehay et al., *Geneva Prosecutors Indict Billionaire Steinmetz in Guinea Corruption Case*, REUTERS (Aug. 12, 2019), <https://www.reuters.com/article/us-swiss-guinea-bsr-idUSKCN1V21HI> ("Guinea's mines minister, Abdoulaye Magassouba, told Reuters that the government was not involved in trying to prosecute Steinmetz, given February's agreement. 'We have signed specific agreements with Steinmetz and we will fully respect the terms of the agreement. It is not possible for a hostile action against BSGR to come from the government,' he said.").

71. ICSID, *supra* note 67. Notably, the possibility of a settlement agreement that requires the host State not to pursue criminal proceedings against the investor is not unprecedented. For example, in *Sanum Investments Ltd. v. Lao People's Democratic Republic*, bribery suspicions that arose after the commencement of the arbitration led the parties to reach a settlement agreement that specifically stated, among other provisions, that "Laos shall discontinue the current criminal investigations against Sanum / Savan Vegas and its management or other personnel and shall not reinstate such investigations provided that the terms and conditions agreed herein are duly and fully implemented by the Claimants." *Sanum Inv. Ltd. v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Deed of Settlement, ¶ 23 (UNCITRAL 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw3235.pdf> (last visited May 7, 2019). It seems that the Claimant's owner in *Azpetrol v. Azerbaijan* was seeking for similar protection, although such efforts have seemingly failed. See *Azpetrol Int'l Holdings B.V., Azpetrol Grp. B.V. & Azpetrol Oil Serv. Grp. B.V. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award, ¶ 86-88 (Sept. 8, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0059.pdf> (last visited Jan. 9, 2019).

venture with BSGR in Guinea, finding that BSGR had bribed Conté's wife.⁷² In view of this finding and those of the Israeli court, as well as the conviction of BSGR's former advisor in the United States, Guinea's decision to terminate the legal proceedings against BSGR seems somewhat surprising. Ultimately, this raised concerns that Guinea was seeking an "easy way out" of the expensive arbitration proceedings, despite the fact that independent judicial systems had also found that the suspicions of bribery were well established. Guinea's Minister for Mining clearly expressed the rationale for the settlement: "[i]t's for the good of the people. It's with this aim that the government will try hard to work in a win-win partnership with the investors."⁷³ The absence of any acknowledgement of the bribery allegations in this statement is striking. The primary justification for accepting the settlement seems to be the costs of leaving the mine undeveloped, notwithstanding the bribery allegations. These concerns recently became quite material, as the Prosecutor's Office of the Canton of Geneva announced it decided to indict Steinmetz for foreign bribery despite Guinea's decision to drop its allegations against him.⁷⁴

B. Health Regulations: Investment Arbitration Against Tobacco Packaging

Philip Morris's arbitration claim against Uruguay demonstrates how investment arbitration could be used to "STRAPP down" health regulations. The World Health Organization (WHO) promotes policies aimed at weakening the positive image of smoking in order to reduce the level of smoking among individuals.⁷⁵ To this end, the WHO called upon countries to adopt a policy that permits only the use of uniform tobacco packages, better known as "plain packaging."⁷⁶ Plain packaging contents include: ample verbal and graphic warnings that illustrate the dangers associated with smoking; a uniform color and identical font for

72. *Vale S.A. v. BSG Res. Ltd.*, LCIA Arbitration No.142683, Award (Apr. 4, 2019).

73. Wild & Biesheuvel, *supra* note 66.

74. Nebhay et al., *supra* note 70; Neil Munshi & Sam Jones, *Beny Steinmetz Denies Swiss Bribery Charges over Mining Deal*, FIN. TIMES (Aug. 13, 2019), <https://www.ft.com/content/26bc2c9c-bddd-11e9-89e2-41e555e96722> (last visited Aug. 20, 2019).

75. WHO, TOBACCO CONTROL LEGISLATION: AN INTRODUCTORY GUIDE (D. Douglas Blanke & Vera da Costa e Silva eds., 2004) [hereinafter TOBACCO CONTROL LEGISLATION: AN INTRODUCTORY GUIDE].

76. WHO, PLAIN PACKAGING OF TOBACCO PRODUCTS: EVIDENCE, DESIGN AND IMPLEMENTATION (2016), <http://apps.who.int/iris/handle/10665/207478> (last visited Jan 13, 2019).

all tobacco brands, thus eliminating the use of trademarks on tobacco packages; and the use of one type of cigarette for each brand name.⁷⁷

Tobacco companies have opposed these regulations and have employed strong lobbies in many countries to prevent their implementation.⁷⁸ This struggle has been led by leading tobacco manufacturers such as Philip Morris (PM).⁷⁹ One tactic that was reportedly used by PM to fight plain packaging or other similar policies was to threaten countries that considered adopting such regulations with investment arbitration claims valued in millions and billions of dollars.⁸⁰

Two well-known cases of the use of these tactics are those of Uruguay and Australia.⁸¹ Uruguay was among the first countries to impose significant restrictions on tobacco packaging, although its policies were less

77. *Id.* at 22–24.

78. See Jenny Hatchard, *How Tobacco Industry “Uses Third-Parties to Lobby Against Plain Packaging Laws”*, NEWSWEEK (Oct. 18, 2016), <https://www.newsweek.com/plain-cigarette-packs-cigarettes-tobacco-companies-health-lobbys-511239>.

79. See, e.g., Emily Dugan, *The Unstoppable March of the Tobacco Giants*, THE INDEP. (May 29, 2011), <https://www.independent.co.uk/life-style/health-and-families/health-news/the-unstoppable-march-of-the-tobacco-giants-2290583.html>; Nick O’Malley, *A Hard Sell in a Dark Market*, SYDNEY MORNING HERALD (Apr. 24, 2010), <https://www.smh.com.au/national/a-hard-sell-in-a-dark-market-20100423-tj3n.html>.

80. See, e.g., Matthew C. Porterfield & Christopher R. Byrnes, *Philip Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing up in Smoke?*, INV. TREATY NEWS (July 12, 2011), <https://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>; Todd Weiler, *Philip Morris vs. Uruguay, An Analysis of Tobacco Control Measures in the Context of International Investment Law*, INVESTOR-STATE LAWGUIDE (July 28, 2010), <http://investorstatelawguide.com/documents/documents/IC-0130-02.pdf> (last visited May 2, 2017).

81. For a comprehensive presentation and analysis of these cases, see, for example, Tania Voon, *Philip Morris v. Uruguay: Implications for Public Health: Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (Piero Bernardini, Gary Born, James Crawford), 18 J. WORLD INV. & TRADE 320 (2017); Ulf Linderfalk, *Philip Morris Asia Ltd. v. Australia — Abuse of Rights in Investor-State Arbitration*, 86 NORDIC J. INT’L L. 403 (2017); *International Arbitration — Investor-State Dispute Settlement — Tribunal Holds That Uruguay’s Anti-Tobacco Regulations Do Not Violate Philip Morris’s Investment Rights Recent International Decision*, 130 HARV. L. REV. 1986 (2016); Nicole D. Foster, *Philip Morris Brands Sarl v. Oriental Republic of Uruguay International Decisions*, 110 AM. J. INT’L L. 774 (2016); Vivian Daniele Rocha Gabriel & Alebe Linhares Mesquita, *Repacking Intellectual Property Protection in International Investment Law: Lessons from The Philip Morris v. Uruguay Case*, 49 GEO. J. INT’L L. 1117 (2017); Yannick Radi, *Regulatory Measures in International Investment Law: To Be or Not to Be Compensated—A Commentary of Philip Morris v. Uruguay*, 33 ICSID REV. 74 (2018); Jarrod Hepburn & Luke Nottage, *A Procedural Win for Public Health Measures: Philip Morris Asia Ltd. v. Commonwealth of Australia, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility, 17 December 2015* (Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler, Donald M. McRae), 18 J. WORLD INV. & TRADE 307 (2017).

stringent than the WHO's plain packaging proposals.⁸² Later, Australia became the first country to adopt in full the WHO's plain packaging proposals.⁸³ Shortly after Uruguay and Australia adopted their new policies, PM submitted arbitration claims against both countries. PM's claim against Australia was rejected in 2015 due to lack of jurisdiction. This dismissal was made after several years of discussions, which cost Australia approximately 36 million U.S. dollars, of which approximately half was reimbursed.⁸⁴ The claim against Uruguay was dismissed on its merits after six years, following a lengthy legal process.⁸⁵ Uruguay's limited resources led it to consider settling and canceling the regulations, though it finally decided to continue in arbitration by accepting an external donation, provided by Michael Bloomberg.⁸⁶

Essentially, the tribunal in the Uruguay case determined that well-established public health regulations cannot constitute a violation of the IIA. This ruling was made despite the fact that earlier in the proceedings, the tribunal rejected a preliminary objection raised by Uruguay that the tribunal had no jurisdiction over policies designed to protect public health.⁸⁷ PM's main arguments were that Uruguay had effectively expropriated PM's trademarks and had failed to accord PM fair and equitable treatment.⁸⁸ PM argued that Uruguay's policy impaired PM's ability to use its trademarks by requiring that the trademarks should not exceed twenty percent of the surface of the cigarette pack, and by eliminating the possibility of presenting different types of cigarettes. PM claimed that this limitation on its trademark usage effectively constituted an illegitimate expropriation according to the Switzerland-Uruguay IIA. Also, PM claimed that Uruguay's policy frustrated its legitimate expectations of being able to use its trademarks.⁸⁹

Many IIAs include exceptions that allow the parties of the agreement to violate provisions in the IIA in order to take steps that are intended

82. Benedict Mander, *Uruguay's Smoking Laws Draw Tobacco Fire*, FIN. TIMES (May 9, 2014), <https://www.ft.com/content/be23ffce-d5e4-11e3-a017-00144feabdc0>.

83. See TOBACCO CONTROL LEGISLATION: AN INTRODUCTORY GUIDE, *supra* note 75.

84. Philip Morris Asia Ltd. v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Nov. 21, 2011); see also Hepburn & Nottage, *supra* note 81.

85. Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016) [hereinafter PM v. Uruguay].

86. Jarrod Hepburn, *Final Costs Details Are Released in Philip Morris v. Australia Following Request by IAREporter*, INV. ARB. REP. (Mar. 21, 2019), <https://www.iareporter.com/articles/final-costs-details-are-released-in-philip-morris-v-australia-following-request-by-iareporter/>.

87. Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (Jul. 2, 2013).

88. PM v. Uruguay, *supra* note 85, at 3-4.

89. *Id.* at 53-57.

to protect public health.⁹⁰ However, the Switzerland-Uruguay IIA⁹¹ did not include an exception of this kind. Therefore, the tribunal in the Uruguay case relied on, among other things, the determination that customary international law permits countries to adopt policies designed to protect public health considerations as part of their “police powers.”⁹² This decision reinforced a series of arbitration awards made in recent years that recognize the importance of the doctrine of police powers,⁹³ suggesting that, according to the tribunal, almost no public health policy would result in liability for foreign investors’ damages caused by it, notwithstanding the existence of a public health exception in the host country’s IIA.⁹⁴

The second main argument raised by PM, that Uruguay failed to accord it fair and equitable treatment, was also rejected. The tribunal ruled that Uruguay’s regulatory changes setting certain restrictions on tobacco products’ packaging for health reasons, along with the international consensus on the harmful effects of smoking, could not create a legitimate expectation that Uruguay would refrain from taking further measures to restrict tobacco marketing in the country. Accordingly, the tribunal determined that the policy adopted by Uruguay did not violate the Fair and Equitable Treatment (FET) provision.⁹⁵

As with SLAPPs, PM reportedly threatened arbitration against other countries with limited resources, which may have resulted in the deregulation of tobacco packaging in some countries.⁹⁶ Uruguay itself had

90. See Julie Kim, *Balancing Regulatory Interests through an Exceptions Framework Under the Right to Regulate Provision in International Investment Agreements*, 50 GEO. WASH. INT’L L. REV. 289, 293–94 (2017) (“Of the eighteen IIAs concluded in 2016 — all of which provide for the right to regulate as a sustainable development objective — nine contain general exceptions including the protection of human, animal or plant life or health; the conservation of exhaustible natural resources; a stipulation that health, safety, or environmental standards should not be compromised to attract investment; and/or a statement in the preamble that refers to sustainable development objectives, although in varying degrees.”); see generally Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L. REV. 2825 (2018).

91. Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, Switz.-Uru., (Oct. 7, 1998), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3121/download>.

92. PM v. Uruguay, *supra* note 85, at 65–88.

93. See, e.g., Kate Mitchell, *Philip Morris v Uruguay: An Affirmation of ‘Police Powers’ and ‘Regulatory Power in the Public Interest’ in International Investment Law*, EJIL: TALK! (July 28, 2016), <https://www.ejiltalk.org/philip-morris-v-uruguay-an-affirmation-of-police-powers-and-regulatory-power-in-the-public-interest-in-international-investment-law/>.

94. Voon, *supra* note 81.

95. PM v. Uruguay, *supra* note 85, at 111–23.

96. See Tienhaara, *supra* note 7, at 237 (“Tobacco corporations have certainly directly threatened countries with legal action — for example, in Namibia, Togo and Uganda.”).

almost decided to repeal the regulation it had adopted until Michael Bloomberg's announcement that he would finance the costs of the arbitration process.⁹⁷ Although both of PM's arbitration claims were rejected, it seems they caused a "chilling effect" on the willingness of other countries to adopt similar regulations.⁹⁸ Indeed, other countries refrained from adopting such policies for the duration of the proceedings.⁹⁹ However, shortly after the arbitration claim against Australia was dismissed for lack of jurisdiction, a few additional countries declared their intention to adopt plain packaging regulations. Moreover, after the conclusion of the proceedings against Uruguay, at least six countries applied similar restrictions.¹⁰⁰

The effects of SLAPPs and PM's arbitration proceedings are thus quite similar. SLAPPs, by curtailing public activities of individuals, reduce the likelihood that a government will adopt certain regulations. PM's arbitration proceedings undermined the likelihood that countries would adopt regulations that threatened PM's interests, despite the fact that the

97. See, e.g., *id.* at 237. ("In the case of Uruguay, the government has acknowledged that it would not have been able to defend itself in ISDS without the financial support of a foundation set up by Michael Bloomberg."); Kelly Henning, *Supporting Uruguay in Their Fight Against Big Tobacco*, BLOOMBERG PHILANTHROPIES PUB. HEALTH TEAM (July 18, 2013), <https://www.bloomberg.org/blog/supporting-uruguay-in-their-fight-against-big-tobacco/>.

98. See also Krzysztof J. Pelc, *What Explains the Low Success Rate of Investor-State Disputes?*, 71 INT'L ORG. 559, 568–69 (2017); Tienhaara, *supra* note 7, at 237–38.

99. Margaret Chan, Director-General, WHO, Keynote Address at the 15th World Conference on Tobacco or Health (Mar. 20, 2012), https://www.who.int/dg/speeches/2012/tobacco_20120320/en/ ("The high-profile legal actions targeting Uruguay, Norway, Australia, and Turkey are deliberately designed to instill fear in countries wishing to introduce similarly tough tobacco control measures."); Tienhaara, *supra* note 7, at 237; Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383, 412 (2016) ("This case study exemplifies sophisticated, strategic, and coordinated litigation before different ICs. The use of ICs affords the industry, or at least some of its members like PMI, an opportunity to shape the interpretation of international rules to set limits on the regulation of tobacco marketing, and perhaps even chill control efforts. In fact, according to the Campaign for Tobacco Free Kids, tobacco companies have threatened international litigation against several poor African countries that are considering tobacco control legislation.")

100. A partial list includes Hungary (Aug. 2016), New-Zealand (Sept. 2016), Romania (Oct. 2016), Norway (Dec. 2016), Slovenia (Feb. 2017), Ireland (March 2017), and Israel (2019). See, e.g., *Standardized or Plain Tobacco Packaging: International Developments*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jul. 1, 2019), https://www.tobaccofreekids.org/assets/global/pdfs/en/standardized_packaging_developments_en.pdf. Regarding the developments in Ireland, see, for example, Paul Cullen, *Plain Packaging for Cigarettes to Begin in September*, THE IRISH TIMES (Mar. 29, 2017), <http://www.irishtimes.com/news/health/plain-packaging-for-cigarettes-to-begin-in-september-1.3028834>; see also Tienhaara, *supra* note 7, at 238 ("New Zealand's decision to delay plain packaging until the dispute against Australia had been resolved is a clear-cut case of regulatory chill."); Tobin, *supra* note 7, at 159.

claims brought by PM were unfounded.¹⁰¹

Moreover, this case demonstrates how asymmetries in legal costs could have a detrimental effect on the ability of governments to practice their police powers. PM also threatened several other countries with similar claims, thus enjoying lower legal costs for each case on its own. However, the countries facing these claims faced much higher costs, as they had no economy of scale as did PM. As noted, Uruguay almost settled with PM since it did not have sufficient funds for its legal costs, and was able to proceed with the cases only after receiving third party funding, ultimately obtaining a favorable award.¹⁰²

C. *Tax and Antitrust Regulations: Noble Energy and the Regulatory Framework of Natural Resources in Israel*

Threats of investment arbitration may have “STRAPPED down” tax and antitrust regulations in Israel. The discovery of several significant natural gas reservoirs in the economic waters of Israel since 2009 has triggered several modifications of Israel’s regulatory and legal standards applicable to natural resources. Among others, these included a significant tax increase on profits made from natural resources, limitations on natural gas exports, and antitrust restrictions.¹⁰³

Given the significant changes in the applicable legal environment, Israel was faced with the possibility that one of the main stakeholders, Noble Energy, would submit an arbitration claim against it. According to Israeli government officials, Noble Energy argued that Israel had frustrated its “legitimate expectations” which were protected according

101. See Tobin, *supra* note 7; Voon, *supra* note 81.

102. Multiple threats of arbitration may also make the threat seem more reliable — and cause respondents to miscalculate the costs of arbitration. See, e.g., Orozco, *supra* note 2, at 158 (“In some cases, a baseless legal position is extended multiple times in future cases. At this point, the bully creates the illusion of a valid claim through what is labeled here as ‘sham precedent.’ The illusion of sham precedent can have a snowball effect since it becomes stronger each time a target capitulates. As an egregious form of rent-seeking and legal abuse, the use of sham precedent has severe negative economic consequences since it deters what would be otherwise productive economic activity and competition.”); Gary Myers, *Litigation as a Predatory Practice*, 80 Ky. L.J. 565, 598 (1991) (similar).

103. Arie Reich, *Israel’s Foreign Investment Protection Regime in View of Developments in Its Energy Sector*, 19 J. WORLD INV. & TRADE 41 (2018); Rachel Frid De Vries, *Stability Shaken? Israeli High Court of Justice Strikes Down the Stabilization Clause in the Israeli Government’s Gas Plan: HCJ 4374/15, The Movement for Quality Government in Israel v Prime Minister, Judgment*, 27 March 2016, 18 J. WORLD INV. & TRADE 332 (2017).

to an IIA between Israel and Cyprus.¹⁰⁴ In order to avoid arbitration, Israel initiated negotiations with the relevant gas companies that culminated in an official government decision outlining a “gas framework.” The gas framework was intended to enhance the development of the gas reservoirs by increasing regulatory certainty. To this end, it outlined the core regulations of taxation, export, and gas pricing. Also, it included a stability clause which declared that, for the next decade, the government would not initiate regulatory changes on issues relating to gas taxation, export limits and antitrust restrictions, and would oppose private bills relating to these issues throughout that period.¹⁰⁵ The government’s decision raised some legal difficulties and provoked broad public criticism, which was fueled by the Antitrust Commissioner’s objection to the gas framework.

Consequently, a petition against the legality of the framework was submitted to the Israeli Supreme Court.¹⁰⁶ Although most claims were rejected, the Court disqualified the stability clause of the framework, since it limited the regulatory freedom of future governments. Notably, several justices indicated that a stability clause could increase the risk of future arbitration proceedings.¹⁰⁷

Once the gas framework was brought before the Israel Knesset’s Economic Affairs Committee, several Israeli Knesset members opposed it, arguing that a better arrangement could have been achieved had it not been for the threat of arbitration.¹⁰⁸ Members of the team that led the negotiations with Noble Energy acknowledged that the framework was the best possibility available given the circumstances. Interestingly, it seems that government officials were primarily worried about the threat of arbitration, despite being skeptical that Noble Energy would

104. פרוטוקול מס' 98 מישיבת ועדת הכלכלה [Minutes of Meeting of Economic Committee], ISR. ECON. AFF. PARLIAMENTARY COMMITTEE, 141–42 (Nov. 29, 2015), https://fs.knesset.gov.il//20/Committees/20_ptv_316825.doc [hereinafter ISR. ECON. AFF. PARLIAMENTARY COMMITTEE]. Foreign investors’ “legitimate expectations” are commonly attributed to two main obligations that are frequently included in IIAs: the obligation to provide foreign investors “fair and equitable treatment” and to avoid so-called “indirect” expropriations. See, e.g., Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88 (2013). Such obligations are included in the IIA between Israel and Cyprus.

105. ISR. ECON. AFF. PARLIAMENTARY COMMITTEE, *supra* note 104; Frid De Vries, *supra* note 103; Reich, *supra* note 103; HCJ 4374/15 Movement for Quality Government in Israel v. Prime Minister (2016) (Isr.).

106. HCJ 4374/15 Movement for Quality Government in Israel v. Prime Minister (2016) (Isr.).

107. *Id.*

108. ISR. ECON. AFF. PARLIAMENTARY COMMITTEE, *supra* note 104.

ultimately succeed. For example, the Deputy Head of the Israel National Economic Council argued that: “It was clear to us that arbitration proceedings are very long. They will take several years, and eventually we will probably reach the same point, or very close to the point where we are today, though suffering from a much more significant and stressful shortage of gas.”¹⁰⁹

These events demonstrate the risk of a possible regulatory chill imposed by STRAPPS on policies that are commonly considered to be at the heart of countries’ police powers: the ability to adjust taxes to a country’s needs and to impose antitrust restrictions on monopolies.¹¹⁰ The resemblance to “ordinary” SLAPPS is quite clear. Tax and antitrust regulations regarding the natural gas industry were undergoing public scrutiny. Once the government considered imposing new regulations, Noble Energy threatened international arbitration, seeking to achieve better outcomes in negotiations and reduce the effects of the public protest. Although the government seemed to estimate the risk of Noble Energy succeeding in such arbitration as low, it was concerned about the lengthy and costly legal proceedings, especially in light of the limited natural gas resources available at the time. Therefore, it settled with Noble Energy and avoided those legal proceedings, nonetheless acknowledging that a better outcome may have been achieved were it not for the threat of arbitration. This outcome raises cause for concern. The ability of the government to practice its fundamental police powers was hindered by the mere threat of arbitration, as government officials, despite estimating that the government had not breached its international obligations, feared that the costs of arbitration would be too high.

V. PROPOSED SOLUTIONS

The problems caused by STRAPPS could be addressed, for the most part, using two methods. The most extreme and effective approach is abandoning investor-state arbitration mechanisms altogether. However, this could reduce the effectiveness of investment agreements, as it would reduce the enforceability of such agreements.¹¹¹ Assuming

109. *Id.* at 19.

110. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (4th ed. 2017); Daniel Clough, *Regulatory Expropriations and Competition Under NAFTA*, 6 J. WORLD INV. & TRADE 553 (2005); Chriki, *supra* note 19 (demonstrating that tax regulations usually do not establish a violation of “fair and equitable treatment” provisions).

111. *See, e.g.*, Salacuse & Sullivan, *supra* note 14, at 89 (“The BIT treaty provisions, together with their enforcement mechanisms, and the fact that arbitral tribunals hold host countries

investor-state arbitration is desired, STRAPPs could also be restrained by “evening out” or leveling the costs of arbitration.¹¹² This could be achieved by both lowering the litigation costs for respondent countries and increasing them for investors submitting groundless claims.¹¹³ As with SLAPPs, this approach requires a mechanism that will deter claimants from filing a lawsuit in the first place. It also requires a mechanism that will allow the defendants to dismiss the lawsuit filed against them quickly and inexpensively to minimize the chilling effect that accompanies the claim. Given the similarity between SLAPPs and STRAPPs, proposed solutions for SLAPPs could be applied to STRAPPs as well.¹¹⁴

The remainder of this section describes three main solutions proposed for coping with SLAPPs, and applies these solutions to STRAPPs.

A. Preventing SLAPPs

Throughout the past decades, several states in the United States have adopted “anti-SLAPP” legislation, which allows for quick settlement of SLAPPs and imposes the costs of the proceedings on the plaintiff.¹¹⁵ A striking example of anti-SLAPP legislation is the California law which permits speedy dismissals of SLAPPs while imposing punitive damages on the claimant.¹¹⁶ Once a claim is submitted, the defendant may submit a motion to dismiss the claim on the ground that the claim undermines the defendant’s right to freedom of speech. The court is required to conclude a hearing on the matter within 30 days after the motion to dismiss is submitted, and all disclosure proceedings are suspended in the meantime. During this preliminary hearing, the defendant must prove that the defendant is being sued for exercising the right to freedom of speech. If the defendant succeeds in establishing this, the burden of proof then shifts to the plaintiff, who must establish at this early stage of the case “that there is a probability that the plaintiff

accountable, constitute an external discipline upon governments’ behavior in their relations with foreign investors. This results in a relatively effective system of foreign investment protection.”).

112. See Parchomovsky & Stein, *supra* note 1, at 1359 (“In theory, the solution is quite simple: it is necessary to level the legal playfield. This can be achieved either by raising litigation costs for parties who currently enjoy a cost advantage or by lowering litigation costs for disadvantaged parties.”).

113. *Id.* at 1359–60.

114. The use of anti-SLAPP legislation as a benchmark for other legal “bullying” practices was also examined by Rebecca Schoff Curtin, *SLAPPING Patent Trolls: What Anti-Trolling Legislation Can Learn from the Anti-SLAPP Movement*, 18 STAN. TECH. L. REV. 39 (2014).

115. Benjamin Ernst, *Fighting SLAPPs in Federal Court: Erie, the Rules Enabling Act, and the Application of State Anti-SLAPP Laws in Federal Diversity Actions*, 56 B.C. L. REV. 1181 (2015).

116. Tate, *supra* note 50.

will prevail on the claim.”¹¹⁷ If the plaintiff fails to meet this burden of proof, the claim will be dismissed. This will occur within just a few weeks after the motion to dismiss is submitted, and without the defendant having to participate in unnecessary hearings and expensive procedures.

Pring presented an additional solution, of providing immunity to social activists, that suffers from practical difficulties and has not been adopted.¹¹⁸ Although this solution would completely block SLAPPs, it may be perceived as overreaching, as it blocks the plaintiff completely, even in cases where the claim may be justified. Alternatively, a state-backed fund designated for covering legal costs in the case of a claim relating to freedom of speech, together with the determination that this type of claim is eligible for free representation by law, could reduce the chilling effect that accompanies SLAPP claims.¹¹⁹

B. *Anti-SLAPP Solutions as Possible Mechanisms for Preventing STRAPPs*

A significant characteristic of SLAPPs, which provoked recognition of the need to create solutions to prevent them, is that SLAPPs are filed following the voicing of public criticism against the plaintiff. Consequently, potential SLAPPs exist only when a claim is brought in the wake of public criticism. As demonstrated by California’s anti-SLAPP legislation, this feature makes it possible to address claims that may infringe upon freedom of speech differently than other claims.¹²⁰

The situation is more complicated with respect to investment law. Any dispute may impose a regulatory chill on the respondent countries or other countries, regardless of its justification. Adopting anti-SLAPP-like solutions for any investment arbitration claim appears overreaching, as it may limit the rights of investors more than necessary and could prove impractical. Such solutions could significantly reduce the ability of investors to bring countries to arbitration, especially in cases where it is difficult to prove factual claims without discussions.

However, not every arbitration claim requires clarification of factual disputes between the investor and the country. Notably, in PM’s case against Uruguay, the tribunal had very few factual claims to address, and focused primarily on Uruguay’s authority to adopt a policy to protect public health. The central dispute in that case involved the limits that should be imposed on the authority of countries to protect public

117. Cal. Civ. Proc. Code § 425.16(b)(1) (2015).

118. See Pring, *supra* note 6, at 13.

119. See Ernst, *supra* note 115.

120. Tate, *supra* note 50.

health. The tribunal determined that this authority was almost unlimited, given that it is a significant component of the country's police powers.¹²¹

In addition, countries could clearly identify specific types of measures for which they would like to obtain a more significant regulatory space and which are prone to cost asymmetries. They could then adopt anti-SLAPP-like solutions that would secure these policy areas without completely eliminating the protection provided to investors.¹²²

The adoption of procedural rules similar to those of the anti-SLAPP legislation adopted in California that place the burden of proof and impose punitive costs on the complainant, and ensure a hearing on the matter within a short period, may significantly reduce the chilling effect of such arbitration proceedings. By imposing the burden of proof on the claimant, such rules could reduce the concern about arbitration claims triggered by the adoption of measures that are within a country's police powers. In addition, such anti-SLAPP measures could shorten the period during which other countries would suffer from a regulatory chill. Finally, imposing punitive costs on the claimant would deter parties from filing claims designed solely to deter countries from adopting a policy that investment laws generally allow.¹²³ As mentioned above, in *Philip Morris v. Uruguay*, Uruguay sought to dismiss the arbitration claim, arguing that the tribunal had no authority to deal with the dispute because at issue was Uruguay's ability to protect public health. The tribunal rejected this argument, stating that the IIA on which the arbitration was based did not stipulate that a tribunal could not discuss actions taken to protect public health, and therefore the tribunal must discuss claims that Uruguay had acted within the framework of its police powers only in its final award.¹²⁴ Had the tribunal determined that it lacked jurisdiction over this issue, it would have prevented the chilling effect that arguably lasted more than half a decade.

121. *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 65–88 (July 8, 2016).

122. *Cf. Puig & Shaffer*, *supra* note 20 (discussing the impacts of specific carve-outs in IIAs); de Mestral, *supra* note 25 (similar).

123. *See Parish, Nelson & Rosenberg*, *supra* note 5; Christine Sim, *Security for Costs in Investor-State Arbitration*, 33 *ARB. INT'L* 427 (2017).

124. *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, Decision on Jurisdiction, 58 (July 2, 2013), (“Article 2[1] is concerned solely with admission, although it is subject to the subsequent regulation of investments in ways consistent with the BIT. Whether the regulations here are in conformity with the BIT is thus an issue for the merits.”).

Arbitration tribunals enjoy the authority to determine whether they have jurisdiction over a specific dispute and dismiss arbitration claims where they believe they lack jurisdiction.¹²⁵ This jurisdictional decision could be affected by a tribunal's determination of whether the proceedings may harm public policy considerations,¹²⁶ and whether the claimant's arguments reveal a prima facie cause of action. The existence of a prima facie cause of action is commonly determined by examining whether the claimant's claims should be accepted, given the assumption that all of its factual claims are accurate.¹²⁷

These two exceptions may serve as a conduit for the incorporation of an anti-SLAPP rule, like that in California, into investment arbitration. Given the importance of the police powers of government, it is arguable that when the very existence of the arbitration process may harm a country's police powers, the SLAPP arbitration could endanger public policy considerations. Accordingly, if the plaintiff fails to prove a reasonable chance of winning the claim at an initial stage, the tribunal could determine that the dispute is not arbitrable, and therefore is not within its jurisdiction. Furthermore, given the assertion that, as a rule, police powers override violations of the terms of IIAs, it seems that a claim against actions at the heart of countries' police powers will usually not suffice to establish a cause for action.¹²⁸

Accordingly, in cases where the country succeeds in persuading a tribunal that the policy it adopted is at the heart of its police powers, the claimant, in order to establish the tribunal's authority to hear the case, would have to prove that the chances of success of the claim are reasonable. If the claimant fails to establish this, or cannot demonstrate that there is no harm to the country's police powers, the tribunal would reject the claim outright on the basis that it does not establish a cause of action, or because it is contrary to public policy interests.

While adoption of these solutions is at the discretion of tribunals, countries could also amend their IIAs to ensure that strategic arbitration claims are disposed of quickly. Such provisions could, for example, require that once a request for arbitration is submitted, the respondent may argue that the tribunal has no authority to adjudicate the dispute between the host country and the investor as it pertains to the country's

125. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 10.37, 596–97 (5th ed. 2009).

126. *Id.* § 2.117, at 125.

127. Audley Sheppard, *The Jurisdictional Threshold of a Prima-Facie Case*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 932, 951–60 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

128. Mitchell, *supra* note 93.

police powers, or specific types of measures. Once the host country argues that the arbitration notice hinders its police powers or such specific measures, the tribunal would conduct timely hearings. During these hearings, the investor would have to prove these claims do not hinder the country's police powers or other policies defined in the applicable IIA, or that, although these claims do affect these policies, the claims have reasonable chances to succeed, because, for example, the policy discriminates against foreign investors. Finally, such a provision could also impose punitive damages against the plaintiff in cases where the country's arguments for dismissal are accepted.¹²⁹

The establishment of an insurance fund to provide countries with liability insurance or legal financing aid for arbitration may also help reduce the concerns regarding the regulatory chill engendered by arbitration.¹³⁰

Governments already use liability insurance in other contexts.¹³¹ As government immunity from tort liability diminished, local governments began purchasing liability insurance.¹³² This allowed them to avoid devastating consequences if found liable for significant damages. Insurance is usually acquired from private carriers or by joining municipal risk pools which are sponsored and administered by non-profit organizations. This enables several municipalities to join together and pay premiums in return for liability coverage.

Particularly, errors and omissions (E&O) policies provide coverage for any act of neglect or breach of duty. These commonly cover claims arising from decisions made by elected or appointed officials that allegedly cause loss of revenue or property rights, including planning and zoning issues. Similar claims may constitute breaches of IIA obligations to provide foreign investors fair and equitable treatment and their limitations on indirect expropriation. ISDS liability insurance could provide a sort of E&O insurance to participating countries in the event of certain ISDS claims.

While insurance could mitigate concerns of a regulatory chill, an insurer might be concerned that insured governments would not act as carefully toward foreign investors as they would in the absence of insurance.

Moreover, it could be argued that such insurance would render the obligations in IIA null. In theory, the insurance could exclude deliberate violations of IIAs. However, determining intent is likely to be

129. Cf. Parish, Nelson & Rosenberg, *supra* note 5.

130. See David Chriki, *Investment Arbitration Liability Insurance: A Possible Solution for Concerns of a Regulatory Chill?*, 223 COLUM. FDI PERSP. (2018).

131. Gerald R. Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588 (1959); Christopher Serkin, *Insuring Takings Claims*, 111 NW. U. L. REV. 64 (2016).

132. Serkin, *supra* note 131.

impossible, and efforts to do so might undermine the purpose of enhancing stability and predictability. Thus, insurers could use objective criteria to determine what types of measures should be covered by the policy. For example, the insurance could be limited to measures that promote clearly defined public interests, such as bribery investigations or certain types public health policies. Other possible mechanisms could also reduce the risk of moral hazard. Insurance policies could have coverage limits and large deductibles which would expose governments to a high risk for violating IIAs. Premiums could be determined in relation to the level of care countries adopt by considering losses in arbitration, and could be linked to the characteristics of each country's IIA. These mechanisms reduce moral hazard concerns while limiting the possible chilling effect of arbitration claims.

VI. CONCLUSION

Scholars have been increasingly critical of the chilling effect that may accompany the international arbitration mechanisms that exist in IIAs. This criticism often calls for changes in existing IIAs by limiting the scope of protection provided to foreign investors. However, these solutions overlook the impact of cost asymmetries on the regulatory space of governments.

This Article sought to demonstrate that cost asymmetries could cause governments to settle with investors and amend contested measures regardless of the countries' likelihood of success in arbitration. Therefore, some of the chilling effects caused by investor-state dispute settlement mechanisms in IIAs are somewhat similar to those of SLAPPs. These arbitration claims, referred to in this Article as Strategic Arbitrations against Public Policies (STRAPPs), are evidence of the ability of investors to weaponize their right to arbitration in order to cause the government to alter or cancel contested measures. When these claims are unfounded, the problem arises that investment arbitration imposes an unwarranted regulatory chill on countries, which extends beyond the substantial obligations derived from their IIAs. Ultimately, three different examples of STRAPPs, actual and potential, were described in this Article, demonstrating how the mere threat of investment arbitration imposed a regulatory chill on criminal investigations, health policies, and antitrust and tax policies.

Notably, by examining the chilling effect caused by the mere submission of arbitration claims, regardless of the actual scope of protection these agreements grant to investors, this Article contributes a significant dimension to the discussion among scholars regarding the potential chilling effects of IIAs.