

Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill

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Abstract

The growing number of public policy measures challenged through investor-state dispute settlement has raised critiques that international investment agreements could lead governments to avoid introducing new policy measures out of a fear that these could be challenged by foreign investors, often referred to as 'regulatory chill'. While the body of work on regulatory chill is still in its infancy, there is a need to interrogate extant studies to better understand the state of the knowledge and the methodological approaches being employed to produce an evidence base. Grounded in a critical review of the existing literature, this paper develops a conceptual framework of regulatory chill, identifying it as one possible policy response wherein investment agreements are internalised by policy makers as considerations during their policy decision-making. Three distinct bodies of work were identified in the literature which helped to populate this framework, including analysis of investment treaty language and awards, interviews with policy makers to explore internalisation of such treaties, and case studies of suspected regulatory chill policy responses. The conceptual framework is intended to help drive forward a cohesive research agenda on regulatory chill that can underpin the ongoing investment treaty reform.

Policy Implications

- Threats of international investment arbitration by powerful companies can be effective in guiding a state's regulatory behaviour.
- Regulatory chill is a relevant consideration for all public policy areas, not just within environmental regulation where the concept has originated and developed.
- Policy responses to a perceived threat of arbitration are mediated by political and economic factors including political will and financial capacity of the state.
- Improving policy maker knowledge of the obligations produced by international investment agreements and existing case law may reduce the chance of regulatory chill responses.

Introduction

International investment agreements (IIAs) are treaties between two or more states usually for the purpose of promotion and protection of cross-border investments. IIAs outline a set of rights for foreign investors, such as the right to fair and equitable treatment and the right to compensation in the case of direct or indirect expropriation (Bernasconi-Osterwalder et al., 2012). Most IIAs also provide for a form of international arbitration referred to as investor-state dispute settlement (ISDS), which gives foreign investors a process to sue states within which they have invested if government actions (broadly defined as 'measures' within such treaties) are perceived to negatively impact the value of their investment. The IIA indicates for the purposes of the

agreement 'who' is an investor and 'what' is an investment, informing which investors have access to ISDS and for which investments (International Institute for Sustainable Development and The Royal Institute of International Affairs, 2016).

IIAs were developed in response to the expropriation of foreign investments and other forms of mistreatment by governments in socialist and newly developing states, alongside a fear that courts in these states would be biased in favour of national interests (Tienhaara, 2016). For developed states IIAs have been claimed to provide an avenue to protect and promote foreign investment, and ensure fair and effective procedures for the peaceful resolution of disputes (Shekhar, 2016). For developing states they were considered a pathway to increased foreign direct investment

(FDI), which neoclassical economics argued would result in an influx of capital, knowledge and technology transfer, employment opportunities, and increased competition and efficiency in the host state (Mabey and McNally, 1999). However, IIAs have entered into a crisis of legitimacy, due in part to at least three reasons. The first is in regards to ISDS arbitration procedures which Mann has summed up as a system that ‘remains completely ad hoc, with no coordinating body, no appellate or political oversight mechanisms as exist in the WTO, limited transparency at best, and no legal processes available to correct incorrect decisions’ (Mann, 2008, p. 5). This is compounded by a number of concerns that have been raised around conflicts of interest with appointed arbitrators (Olivet and Eberhardt, 2012). The second reason is that evidence of IIA’s *raison d’être*, to increase FDI, has produced mixed results at best (Berger et al., 2011; Gallagher and Birch, 2006; Hallward-Dreimeier, 2003; Neumayer and Spess, 2005; Tobin and Rose-Ackerman, 2011; Yackee, 2010), and that treaties may not be effective in attracting FDI that is most beneficial from a host state perspective, for example, econometric evidence suggests they are more likely to attract FDI to the mining sector than the high-tech manufacturing sector (Bonnitcha, 2017). Finally, the aims and objectives of IIAs are being called into question as ISDS is increasingly being used to challenge a wide array of public policy measures, including measures on taxation, chemical and mining bans, environmental restrictions, transportation and disposal of hazardous waste, health insurance, tobacco, the price and delivery of water, and regulations to improve the economic situation of minority populations (Bernasconi-Osterwalder et al., 2012).

The growing number of public policy measures challenged through ISDS has raised critiques that IIAs could lead governments to avoid introducing new policy measures out of a fear that these could be challenged by foreign investors, often referred to as ‘regulatory chill’. The small body of existing scholarly work on regulatory chill, however, is often disconnected, using varying definitions of the concept and approaches to its study, with minimal conceptualisation of the phenomenon and its drivers, and divergent conclusions about whether current evidence supports its existence (Côté, 2014; Schill, 2007; Soloway, 2006; Tienhaara, 2011; Van Harten and Scott, 2015). In light of this, the aim of this paper is twofold. The first is to review the existing literature to better understand the current state of the knowledge on regulatory chill, how it is being investigated, what type of evidence is being produced, and how this work can inform a richer conceptualisation of this phenomenon. The second is to generate a conceptual framework of regulatory chill based on the critical review to drive a more cohesive research agenda investigating the implications of the internalisation of IIAs in national public policy governance. Ultimately such work can inform policy makers wishing to understand this complex regime and the implications for public policy, plus it can inform the ongoing investment treaty reforms resulting from their current legitimacy crisis.

Method

We conducted a critical review of the regulatory chill literature. A critical review describes in a narrative manner the most significant works in the field, while also seeking to develop conceptual innovation, typically resulting in a hypothesis or model (Grant and Booth, 2009). We searched the Web of Science, ProQuest, ProQuest Dissertations, and Google Scholar databases using the terms ‘regulatory chill’ or ‘regulatory freeze’ in the title, abstract, or topic. Our search was conducted in September 2017 with the only inclusion criteria that the article was published in English. Our search returned 34 unique results, two of which were not accessible. We also permitted the inclusion of studies of regulatory chill mentioned in these results that were not captured in our original search, which resulted in the addition of one publication, providing a total of 33 articles to be reviewed. All articles were reviewed by the first author with an emphasis on how regulatory chill was defined, the study design, the type of evidence produced, and suggested drivers of potential regulatory chill. The results of the review directly informed the development of a conceptual framework. The framework was developed using an inductive approach, such that the concepts and processes that emerged from each article were used to generate and refine both the structure and content of the framework.

Results

The results of the review are presented below starting first with a look at how regulatory chill has been defined in the literature, followed by the different approaches to studying regulatory chill, including consideration of the type of evidence being produced. We then provide a synopsis of factors hypothesised to produce regulatory chill, including the treaty and arbitration context, corporate interference, and political and economic factors. The results section concludes with an overview of the conceptual framework.

Defining regulatory chill

IIAs are not the only international economic agreements associated with regulatory chill. Agreements of the World Trade Organisation (WTO) have also been investigated as potential sources of regulatory chill within public policy (Bennett, 2010; Chambers, 2004; Dong et al., 2012; Mulatu et al., 2003; Neumayer, 2001). Although these framings are not entirely consistent with the conceptualisation of regulatory chill being advanced in this paper, as they lack consideration of the types of investor rights and state obligations introduced by IIAs and enforced through ISDS, they provide the scaffolding upon which the regulatory chill concept within IIAs has developed.

Although this review of regulatory chill positions the concept as a response to the threat (real or imagined) of ISDS, as provided for in IIAs, not all investigations of regulatory chill frame it through this lens. One of the accounts of regulatory chill found in our review describes the deterrent to new

public policy, specifically environmental measures, as resulting from the increased mobility of capital facilitated by globalisation (Lydgate, 2012; Tienhaara, 2006). This framing of regulatory chill suggests states may be deterred from raising environmental standards out of a fear of capital flight – investors relocating their investments to states where operating costs are lower due to the reduced costs of complying with less onerous regulatory policy – irrespective of any IIA or ISDS procedure. Four of the studies in our review framed regulatory chill in this way (Bagwell et al., 2001; Bagwell and Staiger 2002; Sheldon, 2006; Tienhaara, 2006); and these archetypal components of environment regulation and fear of capital flight continue to permeate definitions of regulatory chill in other studies that have gone on to investigate this phenomenon within IIAs (Mander and Perkins, 1994).

Over time the concept of regulatory chill has expanded beyond environmental policy to broader concerns that the type of liability potentially imposed by IIAs may 'lead countries to forego needed environmental and social legislation that might negatively affect the value of foreign investment' (Gross, 2002, p. 899). In addition to branching out across public policy domains, we see the concept becoming more deeply embedded within the context of IIAs, such as Pérez-Rocha noting that 'investment rules that allow companies to circumvent national judicial systems and challenge responsible public policies can create what legal scholars have called a 'regulatory chill' (Pérez-Rocha, 2017, p. 235) or Matveev (2015, p. 358) stating that 'states might note the size and frequency of ISDS awards as well as the costs of the ISDS process and be deterred from regulating for fear of having to be respondents in ISDS claims. This phenomenon is known as 'regulatory chill'.

In the absence of a universal definition of regulatory chill, Shekhar (2016, p. 21) identified some common elements of the concept, such that it: (1) concerns the implementation of a new measure or standard; (2) involves the threat or fear of arbitration; (3) encompasses the alteration, modification, or total failure to enact a regulation; and (4) is exclusive to the *bona fide* nature of the regulation, that is, 'states must be capable to prove that the impugned new standard is enacted in a non-discriminatory manner, respecting due process and giving adequate compensation to the investors'. These elements can be seen in one of the more comprehensive definitions of regulatory chill to date from Tienhaara that it occurs when states '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)' (Tienhaara, 2011, pp. 5–6).

The *bona fide* nature of the regulation is fundamental to defining regulatory chill and is essential for distinguishing between the intended impact of IIAs – deterring discriminatory and protectionist policies – and the unintended consequences – compromising legitimate public policy. Based on the work to date and with the intention of promoting a cohesive research agenda, we propose a comprehensive yet precise definition of regulatory chill as *delaying, compromising, or abandoning the formulation or implementation of bona fide*

regulatory measures in the interest of the public good as a result of a real or perceived threat of investor-state arbitration.

Disjointed conceptualisations of regulatory chill have likely underpinned the range of approaches to its study. First, there is the potential for what has been referred to as *precedential chill* which would see a government delay, compromise, or abandon a regulation in response to settled or resolved investor-state arbitration. This is most apparent in studies analysing treaty text and arbitral awards for their potential to induce regulatory chill. Alternatively, it has been suggested that some authors have taken a broad approach to the study of regulatory chill wherein the assumption is that policy makers internalise the concern of investor-state dispute before policy is even drafted, meaning that regulatory progress could be stalled across all policy areas that may potentially impact foreign investors (Tienhaara, 2010). This approach is reflected in studies on IIA internalisation and similar to what Tietje and Baetens (2014) label *anticipatory chill*. It is agreed that this is the most difficult kind of regulatory chill to identify and measure (Tienhaara, 2010; Tietje and Baetens, 2014). Finally, the regulatory chill literature also looks at what has been referred to as *specific response chill*, where a specific regulatory measure proposed or adopted is chilled after the government becomes aware of a potential investor-state dispute, usually from an investor opposing the adoption of such regulation (Tienhaara, 2010; Tietje and Baetens, 2014). This is most similar to studies of policy responses. The evidence produced from each of these three approaches to regulatory chill – analyses of treaties and awards (precedential chill), internalisation (anticipatory chill), and policy responses (specific response chill) – is reviewed in the following sections.

Approaches to studying regulatory chill

Empirical study of regulatory chill has proved challenging; Mabey and McNally note, 'that there is little statistical evidence of this 'chilling effect' is unsurprising, because evidence is needed of what has not happened' (Mabey and McNally, 1999, p. 43). Yet, a growing interest in regulatory chill as it relates to ISDS has prompted an emergent body of methodologically diverse studies. The analyses in our review can be categorised into one of three types: (1) those that examine IIA text and awards in relation to their capacity to contribute to regulatory chill in public policy, largely based on legal analysis or expert opinion; (2) those that investigate the internalisation of IIAs by public policy makers during decision-making using key informant interviews or surveys with relevant public policy makers; and (3) those that investigate suspected regulatory chill policy responses, which have varied from anecdotal accounts to more comprehensive case studies.

Analyses of treaties and awards

Four of the studies in our review undertook the approach of analysing treaties or awards when studying regulatory chill. For example, Gross conducted a legal analysis of the

international investment treaties that Indonesia was a party to in light of threats the government had received from foreign companies that they would initiate investor-state arbitration if Indonesia proceeded with a ban on open pit mining (Gross, 2002). Although Indonesia modified the policy, ostensibly out of a fear of such arbitration, in Gross' expert opinion the analysis demonstrated that the Indonesian government could 'likely have beaten some or all of the mining companies' claims at a jurisdictional stage and almost certainly on the merits' (Gross, 2002, p. 954).

The other three studies used expert opinion to examine the potential of arbitral awards in three cases to influence future regulatory chill. Hepburn and Nottage for example commented on the recent outcome of the *Philip Morris v Australia* case (Hepburn and Nottage, 2017). They suggested that even though Philip Morris' claims were dismissed on jurisdictional grounds, providing no guidance on the substantive validity of tobacco plain packaging measures for other states, recent successes on tobacco plain packaging measures in Australia and Uruguay, combined with, in their opinion, increasingly pro-state outcomes in arbitration more generally, would mean that any further delay of such measures by other states would have little to do with fears of ISDS. Létourneau-Tremblay and Behn also considered the implications of the *Bilcon v Canada* case for potential regulatory chill (Létourneau-Tremblay and Behn, 2016). They highlighted an important aspect of the nature of many ISDS cases involving public policy, that 'the violation of the treaty in this case does not relate to the substantive content, validity or legitimacy of a State's environmental regulations; rather, the violation stems from what the Tribunal considered to be due process and rule of law deficiencies in a State's implementation of its own environmental assessment (EA) regulations' (Létourneau-Tremblay and Behn, 2016, pp.823–824). They noted that the case does raise questions about the role of state sovereignty to review the legality of its own laws, calling attention to the dissent from Respondent-appointed arbitrator, Donald McRae, that it was a significant intrusion into domestic jurisdiction that would create a chill on the operation of environmental review panels. Finally, in Clapp's expert opinion she suggested that the result of the *Metalclad v Mexico* case will likely result in regulatory chill, discouraging Mexico from imposing new regulatory standards for hazardous waste treatment facilities (Clapp, 2002).

Analyses of policy-maker internalisation

Our review captured two recent studies, both conducted in Canada, which explored the process of policy-maker internalisation of IIAs during decision-making, drawing quite conflicting conclusions. The first was an electronic survey of 114 Canadian regulators which examined regulator awareness of IIAs and the extent to which they take these into consideration in the regulatory development process (Côté, 2014). The author concluded that 'while there are some findings which raise the possibility of influence by IIA ISDS cases on the regulatory development process or trends in regulation,

there is no consistent observable evidence to suggest the possibility of regulatory chill' (Côté, 2014, p.187). More recently a series of in-depth interviews were conducted with 52 current or former government officials in ministries with an environmental or trade mandate in the Canadian province of Ontario. The authors found evidence to support the conclusion that the ministries had changed their decision-making to account for trade concerns, including ISDS; that government lawyers were key actors in assessing potential ISDS risks; that the government was looking to expand a centralised regulatory assessment process to evaluate ISDS in policy decisions, which together with the trade ministry was viewed by some as creating an undesirable obstacle to environmental decision-making; that the concern regarding ISDS within individual ministries was higher after they had been drawn into an ISDS case; and that while most informants declined to discuss case specifics some references were made to times when ISDS concerns had been considered and the policy proposal changed as a consequence (Van Harten and Scott, 2015).

Analyses of policy response

The majority of studies in our review took the approach of analysing policy responses to study regulatory chill. A number of studies produced anecdotal accounts of regulatory chill, for example Pérez-Rocha described how the Guatemalan government was advised by the Inter-American Commission on Human Rights to close the Marlin mine due to negative social and environmental impacts on the surrounding region and its indigenous populations (Pérez-Rocha, 2017). While Guatemala briefly complied with the recommendation, the government reopened the mine noting that the mine's owners could invoke international arbitration clauses within its free trade agreement and sue for damages from the state. Siles-Brugge and Butler suggested that negotiations of the Trans-Atlantic Trade and Investment Partnership between the United States and the European Union (EU) was already inducing regulatory chill, citing evidence from meeting minutes acquired through an access to information request that EU intentions to regulate endocrine-disrupting chemicals in pesticides linked to cancer and male infertility were abandoned following pressure from US trade negotiators and business interests (Siles-Brügge and Butler, 2015). They conclude that 'by having to subject their proposals to such scrutiny – where the principal metric is the extent to which such measures unduly impinge on transatlantic trade rather than a broader social, environmental or public health objective – the ability of governments to regulate in the public interest would be constrained'.

A number of more comprehensive case studies have been conducted, such as Tienhaara's exploration of the government overturning mining bans in Ghana following a threat of arbitration by Canadian and American companies (Mander and Perkins, 1994); and modifications to forestry laws in Indonesia to make exceptions for open-pit mining in protected areas after threats of international arbitration by investors (Tienhaara, 2016). The open-pit mining case has

been the focus of a number of studies. As noted above Gross conducted a legal analysis of this case; however, he also explored channels that connected Indonesia's decision to modify the ban to the arbitration threats of 23 mainly foreign-owned mining companies. He concluded that there was support for the relationship between the threats and modification of the policy based on the speed with which the government took action on the issue, more specifically that they began modifying the policy six months after receiving the threats, the exact amount of time they were given to resolve the matter before arbitration could commence, despite two years of previous inaction related to mining company complaints regarding the law that did not invoke ISDS; and that the companies being granted relief from the ban coincided perfectly with those companies making the threat (Gross, 2002). In addition to a similar look at the Indonesia case, Brown explored the decision by multinational mining company Pacific Rim (now OceanaGold) to sue El Salvador. Pacific Rim was suing for compensation after El Salvador refused it the necessary permit to dig for gold after it had spent millions of dollars to undertake mineral exploration activities. Brown presented expert opinion of the illegitimacy of Pacific Rim's claim, and that evidence showed that El Salvador had operated in a non-discriminatory manner giving Pacific Rim due process within its national legal framework (Brown, 2013). While at the time of Brown's assessment the case was ongoing, the investor's claims were ultimately dismissed in 2016 with the company ordered to pay \$8m to cover the majority of El Salvador's legal costs. One commentator on the case noted that 'for seven years, it has put a chill on policymaking that could respect the decision of Salvadorans to prohibit metal mining and protect local communities and the environment' ((Provoost and Kennard, 2016).

Drivers of regulatory chill

Several studies in our review suggested potential drivers of regulatory chill responses. First, a number of studies made note of the importance of the international investment treaty environment. Matveev raised the role of treaty context, noting that 'if there is greater certainty as to the precise delimitation of permissible regulatory power under IIAs and if there are clear exceptions and regulatory carve-outs in place for public interest regulation, then States will be more confident enacting appropriate regulation without fear of losing ISDS arbitral cases' (Matveev, 2015, p.379). The lopsided nature of the arbitration context was also mentioned, that 'the ISDS mechanism is like playing soccer on one half of the field. Corporations have the freedom to attack, while small countries are forced to merely defend themselves. The best a government can do is reach the end of the game with no goals scored' (Pérez-Rocha, 2017, p. 238). The study from Gross raised concerns about the lack of binding precedent and effective appeal, the ad hoc nature and perceived pro-business orientation of the tribunals, and the high cost of defending against these suits and potentially large awards (Gross, 2002). Moreover, Gross raised concerns about

an inadequate understanding of the applicable law on the part of decision-makers in Indonesia in the case of the open pit mining ban (Gross, 2002).

The significance of corporate influence was another common theme, as threats of both loss of investment and arbitration were considered important factors in the Ghanaian (Mander and Perkins, 1994; Zarsky, 2006) and Indonesian (Gross, 2002) cases. Gross (2002, p. 960) remarked that 'at the end of the day investor decisions are based upon business considerations, and the decision to threaten arbitration is no different. As long as it is cheap and effective to make such threats investors will do so. It is the host-State's obligation to its people to make sure that it is not'. However, the study from Cooper and colleagues demonstrated that corporate threats are not always successful, noting the case of *Dow AgroSciences v Canada* that was settled without compensation and without removing the measure under dispute (Cooper et al., 2013). Moreover, they suggested that it failed to chill pesticide bans in either the province of Québec (where the measure of interest was being challenged) or across the rest of Canada.

Finally, the need to consider political and economic factors was noted, including the government capacity and desire to act, the political and economic power of the sector being regulated, the level of risk aversion within the state body, and political actor ideological commitment to neoliberal policies or desire to hide behind foreign actors and ISDS threats to pass unpopular domestic policies (Bagwell and Staiger 2002; Van Harten and Scott, 2015; Zarsky, 2006).

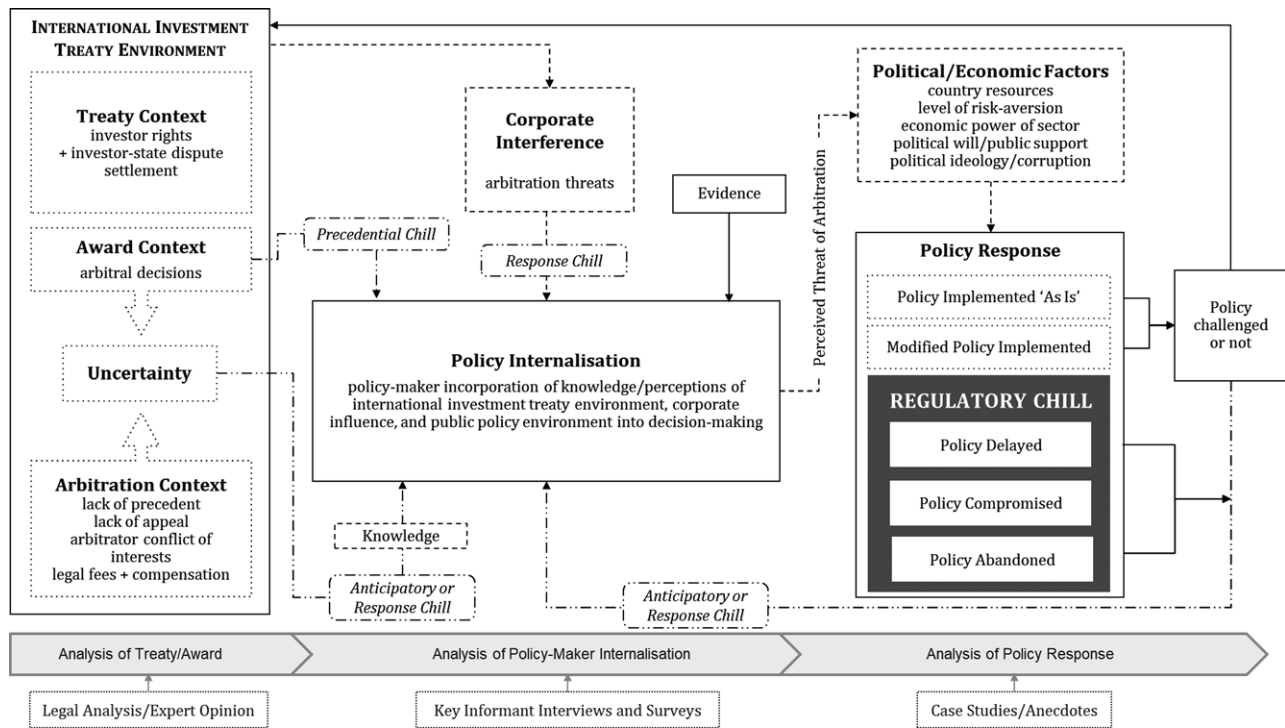
Conceptual framework

One of the principle aims of this paper is to develop a conceptual framework that captures and integrates the complex conceptualisations of regulatory chill in the current body of literature, to support future study in this area (see Figure 1). The three main approaches to studying regulatory chill that emerged from the literature helped shape the primary structure for this framework, specifically, connecting features of the treaty environment to a range of public policy responses through the process of policy internalisation. It also became evident that there would be strength in a framework that could attempt to insert some balance into this polarised body of work. It is the intent of this framework to situate regulatory chill as one of a number of potential public policy responses to IIAs, while mapping out where in the policy process chilling effects may be produced and introducing political and economic conditions that may influence whether perceived threats of arbitration are more or less likely to result in a chilling response.

International investment treaty environment

The framework begins on the left with the international investment treaty environment and its composite elements which were revealed in the review as potential sources of content that could be internalised by policy makers and

Figure 1. Conceptual Framework of the Internalisation of IIAs in Public Policy



potential sources of regulatory chill responses. It is composed of the treaty context (i.e. the set of investor rights and investor-state dispute settlement procedures provided in the IIA), the award context (i.e. the body of concluded arbitral decisions), and the arbitration context (i.e. the procedural features of ISDS). We propose that policy-maker knowledge or perceptions of the investment treaty environment can be internalised during decision-making. We also propose that consistent support for the right to regulate and enhanced certainty in treaty text and arbitral awards, along with refinements to arbitral procedures, internalised by well-informed policy makers during decision-making would reduce the likelihood of a regulatory chill response as defined here. However, in the absence of that, we propose three distinct pathways through which regulatory chill might be produced.

Regulatory chill pathways

Moving from top to bottom in the framework, the first pathway is potential specific response chill produced through corporate interference. While a number of studies in our review suggested that corporations have been able to threaten capital flight since the advent of globalisation, picking up and moving shop is not always an efficient or financially sensible business decision, and in the case of natural resource extraction it is even less likely. Thus, ISDS is a powerful resource for corporations to threaten or challenge specific policies in the formulation or implementation phase that would be unfavourable for their profits without having to make any changes to their business operations. As noted

above, as long as it is cheap and effective to make such threats, investors will continue to do so (Gross, 2002).

The second pathway runs directly from the body of arbitral decisions which, when internalised by policy makers, have the capacity to stimulate or diminish precedential chill. A consistent set of arbitral decisions considerate of the state's right to regulate may deter regulatory chill responses, although this would not be guaranteed in the continuing absence of binding precedent; while awards such as that in *Bilcon v Canada* have raised concerns from legal experts that these decisions may give other states pause in their own regulatory proceedings (Létourneau-Tremblay and Behn, 2016).

Finally, we propose that the level of uncertainty produced by features of the investment treaty environment may be internalised by policy makers, although as noted by Gross in the case of Indonesia (Gross, 2002) this is likely to be moderated by policy maker knowledge. This general uncertainty in the system may be a source of anticipatory chill, meaning that regulatory progress could be stalled across all policy areas that may potentially impact foreign investors. Equally, it could be a source of specific response chill as different tribunals have come to different or opposite conclusions regarding the same standard in the same treaty, or regarding disputes involving the same facts, related parties, and similar investment rights (Franck, 2005).

Political and economic factors

If we assume that IIAs are internalised in the policy making process (Van Harten and Scott, 2015) then likely some

assessment, formal or informal, is made about the perceived threat of arbitration. However, it is unlikely that this assessment of a threat directly translates into a policy response, but rather would be moderated by a set of political and economic factors. A number of factors were raised in the review, which have been reflected in the framework Bagwell and Staiger 2002; Zarsky, 2006). Enhanced financial and political resources within a state may reduce the possibility of a regulatory chill response; while greater economic power of the sector implicated by the public policy measures within the state or an increased level of risk aversion among decision-makers may increase such a possibility. Strong political will and public support for a policy may make a government more likely to pursue policy even if the perceived threat of arbitration is high; while a dominant political ideology more heavily weighted towards a greater prioritisation of trade and investment liberalisation over social welfare and regulatory policy may make the same government less likely to continue pursuing such policy. Finally, some level of political corruption is possible where ISDS could be used as a scapegoat to abandon divisive or unprofitable domestic policy, for example, it may be worth considering whether any key figures involved in the decision-making process to abandon or modify open pit mining bans stood to benefit financially from continued operations.

Policy response

After the potential threat of arbitration had been moderated through a set of complex political and economic factors, a policy response would be made which we have distinguished as either a regulatory chill response or not. First, it is possible that the policy would be formulated and implemented 'as is' with no change to the content as a result of internalising IIAs in the decision-making process, whether as a result of there being no perceived threat of arbitration, or simply enough resources and political will to proceed with the policy regardless. To the extent that *non-bona fide* policy is pursued, one could argue that this is where the case for IIAs as a positive governance tool can be made. For example, a previously attempted US policy banning flavour additives to tobacco to reduce youth smoking did so in a discriminatory manner by banning foreign produced products (e.g. clove-flavoured cigarettes) but not similar domestically produced products (e.g. menthol-flavoured cigarettes) both known to appeal to the youth market (Drope and Lencucha, 2013). Second, as a result of internalisation the policy may be modified in a manner that brings it into compliance with the terms of the IIA without altering the integrity of the policy. For example, in the policy above a non-protectionist version could have been pursued where the ban was extended to both clove- and menthol-flavoured cigarettes, which would not only have brought the policy into compliance without undermining or diminishing its value, it would also have improved its effectiveness from a public health viewpoint. This scenario highlights the important distinction between abandoning or modifying *bona fide* regulatory

measures (regulatory chill) and abandoning or modifying discriminatory or protectionist policies to comply with international obligations.

Alternatively, the internalisation of IIAs in the decision-making process may produce a regulatory chill response as highlighted in a number of the analyses of policy responses. Anecdotal accounts were provided about Guatemala abandoning the closure of a mine after ISDS threats, despite negative social and environmental impacts on the surrounding region and its indigenous populations (Pérez-Rocha, 2017); about the EU abandoning regulation of endocrine-disrupting chemicals in pesticides linked to cancer and male infertility following pressure from US trade negotiators and business interests (Siles-Brügge and Butler, 2015); and about the government of New Zealand delaying tobacco plain packaging policy while it waited for an award to be made in the *Philip Morris v Australia* case (Hepburn and Nottage, 2017; Shekhar, 2016). Likewise, case study evidence supported conclusions that the government of Ghana abandoned mining bans following a threat of arbitration by Canadian and American companies (Mander and Perkins, 1994); and that Indonesia compromised forestry laws to make exceptions for open-pit mining in protected areas after threats of international arbitration by investors (Brown, 2013; Gross, 2002; Tienhaara, 2016).

We also propose in this framework that these policy responses have feedback loops into policy internalisation. First, if the policy is pursued 'as is' it may be challenged by a foreign investor through investor-state arbitration. In this circumstance it is possible to have a chilling effect, either anticipatory, as one commentator suggested the *Pacific Rim v El Salvador* case may have put a chill on policy making around metal mining for seven years while the case was deliberated (Provost and Kennard, 2016); or a specific response chill, as noted with New Zealand delaying its tobacco plain packaging policy while similar policy was being challenged in arbitral proceedings (Hepburn and Nottage, 2017; Shekhar, 2016). Alternatively, if the policy goes unchallenged this may also send positive signals to states to proceed with similar policy measures. Lastly, if a state does elect to chill policy and it becomes public knowledge, this may be internalised by policy makers within the home state and abroad that such policies are perceived to have a high threat of potential investment arbitration, thereby aiding a domino chilling effect.

One feature that did not emerge clearly in our review was what role, if any, authors felt evidence has or could play in this process. We have elected to capture evidence in the framework as a possible influential factor during the policy internalisation phase primarily to encourage greater consideration of the role of evidence in future investigations of regulatory chill and the internalisation of IIA literature writ large. Finally, along the bottom of the framework we have laid out the common methodological approaches and methods for studying these three phases of regulatory chill to develop stronger connections between methods and conceptual development.

Discussion

Varied understandings of regulatory chill in the literature emphasise the need to develop and observe a cohesive definition moving forward. Specifically, there is a need to distinguish between 'first-wave' regulatory chill motivated by threats of capital flight and facilitated by globalisation versus a 'second-wave' regulatory chill motivated by threats of ISDS and facilitated by IIAs. It is also essential to keep this conceptually distinct from chill potentially induced by the state-state dispute mechanism of the WTO. This differs in fundamental ways to ISDS, including more effective appeal mechanisms, a lack of direct access by investors, and an inability to award financial compensation to private investors, to name just a few. We propose that it is also valuable to consistently extend the concept of regulatory chill to all public policy measures, rather than have it be the exclusive domain of environmental regulation. Finally, it is crucial to have the *bona fide* nature of policy become part and parcel of the concept of regulatory chill to avoid criticisms that chilling policy may be a desirable effect, that is, when the types of legitimate public policy that may be chilled as a result of IIAs are conflated with the discriminatory or protectionist policy that some claim these agreements are intended to chill (Shekhar, 2016).

A critical point was raised in Létourneau-Tremblay and Behn's review of the implications of the *Bilcon v Canada* case (Létourneau-Tremblay and Behn, 2016), specifically, that often what is challenged in arbitration does not relate to the substantive content, validity or legitimacy of the measure itself but rather a deficiency in due process or rule of law. This distinction did not emerge consistently across the review and future investigations of policy internalisation should seek to understand if and how IIAs are being internalised during the substantive formulation of policy as well as in the policy formulation and implementation procedures.

The various methodological approaches to the study of regulatory chill are a strength within this body of work. Additional analyses of the treaty and the award context in light of the right to regulate will be valuable, such as the growing body of work produced by the United Nations Conference on Trade and Development regarding investment treaty reform (United Nations Conference on Trade and Development, 2014, 2015, 2017). Additionally, the type of legal analysis offered by Gross (2002) and others (Voon, 2011; Voon and Mitchell, 2012) regarding the ability of public policy measures to endure investor-state arbitration, while far from a guarantee for states given the level of uncertainty in the arbitration context, are highly beneficial for assessing the legitimacy of investor threats. Studies of policy internalisation are relatively new and likely to grow as interest in regulatory chill does. Our review revealed only two studies, both of which were conducted in the Canadian context, likely due to Canada's high frequency of engagement in ISDS cases as the respondent state. However, it would be useful to see these types of studies replicated in additional states, particularly across varying levels of development and engagement with ISDS to date. The analyses of policy responses in our review

were highly varied in their level of comprehensiveness, however, in all instances such work would benefit from more robust case study design, combining interviews with process tracing, as well as more empirical investigations into underlying political and economic factors, such as those identified in the framework.

A recent commentary from Blouin (2017) noted that we need better evidence on the role of investment protection provisions in creating regulatory chill and posed a series of questions that are worth repeating here:

- To what extent have policy makers in national agencies decided against, or modified certain policy and regulations because they feared that it would lead to trade (investment) disputes?
- Even when policy makers are made aware of a potential risk, that is, that a measure could be challenged by foreign investors, how much does this information influence their decision-making?
- Can we identify political or economic conditions that are more likely to lead to regulatory chill in health policy making?
- To what extent are trade and investment treaties seen and used as a resource by industry to oppose a specific policy?

The conceptual framework developed in this paper aims to assist in driving a comprehensive, coordinated, and empirically robust research agenda in regulatory chill that can work towards answering the questions posed above, and the study of the internalisation of IIAs and public policy responses more broadly. Additionally, we anticipate that this work will be informative for policy makers by providing an overview of the various conceptualisations of regulatory chill, theorised sources of regulatory chill in the policy-making process, and the current evidence supporting various claims. Emphasising the work from Gross (32) may demonstrate to policymakers, particularly those with less experience with ISDS proceedings, the value in having legal scholars or advisors screen arbitration threats for an initial assessment of legitimacy. Moreover, the role of policymaker knowledge as a potential mediator of regulatory chill processes may also reinforce the need for public policy and legal scholars to find increasingly effective ways of communicating IIA legal obligations and arbitral decisions to policymakers. One essential element in these communications will be achieving balanced representation, such that they neither downplay the risk of litigation nor exaggerate the possibility, particularly in light of government often being a risk adverse organisation. Finally, policymakers may more clearly see the value in contributing to new knowledge in this area of study by participating in interviews and clearly communicating if and how they internalise IIAs during policymaking and what role, if any, evidence plays in such decisions.

Conclusion

Best practices in public policy change over time and policy makers must be free to adjust legislation and regulatory

measures accordingly. However, concerns have been expressed that IIAs may interfere with a state's ability to legislate freely based on domestic interests (Brown, 2013). This paper has integrated current literature on regulatory chill, and worked towards refining a definition of the concept as well as developing a conceptual framework to guide future research in this area. The perspective of regulatory chill offered here is that it is neither an inevitability nor a fictional concern, but rather one possible response to a complex set of interacting conditions that vary across political and economic contexts. Additionally, it is suggested that regulatory chill, and the study of the internalisation of IIAs in public policy more broadly, requires a coordinated effort to produce a comprehensive and empirically robust body of work, which can ultimately contribute to shaping investment treaty reform.

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