International Investment Regime, Tobacco Control and Regulatory Chill: Case Studies in the post-Soviet space

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by

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Declaration

I declare that the work presented in this thesis is the result of my own research, undertaken at the School of Law, Birmingham City University.

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Abstract

The project engages with the regulatory chill hypothesis which suggests that countries might refrain from regulating in the public interest because of a perceived or imminent threat of investor-State arbitration. It utilises quantitative and qualitative tools within three case studies to test the regulatory chill expectations in the context of tobacco legislation in the five former Soviet countries: Armenia, Azerbaijan, Belarus, Georgia and Ukraine (post-Soviet States). The thesis develops a bespoke methodology, deconstructs the concept of regulatory chill and presents novel empirical findings on the intersection between tobacco legislation and international investment agreements (IIAs). The findings reveal that despite the high level of tobacco-related illnesses, the post-Soviet States are yet to implement the WHO Framework Convention on Tobacco Control (FCTC), setting out specific regulatory requirements compulsory for the post-Soviet States. At the same time, it finds no direct evidence of regulatory chill (even though acknowledging that some evidence may not be available in the public domain). Instead, it finds that the regulatory development is likely to be mainly stalled by government concerns on the economic implications of legislation, such as capital flight, loss of jobs and budget revenues.

The powerful tobacco lobby in the post-Soviet States has also contributed to preventing the increase in tobacco control standards. The influence of the tobacco lobby has varied from state to state which was likely underpinned by the tobacco market share and the presence of multi-national businesses in the market. The post-Soviet States are continually encouraging and accepting tobacco foreign direct investment (FDI) whilst the industry expands its production facilities across the region. The fact transitional countries prioritise FDI over tobacco control is the main hurdle for the FCTC implementation and

sustainable development. The project concludes by deconstructing the regulatory chill concept and suggesting that a new approach to IIA reform needs to be taken.

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Contents

Abbreviations

AB	Appellate Body
BAT	British American Tobacco
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DoB	Denial of benefits
DSB	Dispute settlement body
EAEU	Eurasian Economic Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EPI	Environmental performance index

EU	European Union
FCTC	Framework Convention on Tobacco Control
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GTF	Grodno Tobacco Factory
IA-CEPA	Indonesia – Australia Comprehensive Economic Partnership Agreement
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International investment agreement
IIL	International investment law
IMF	International Monetary Fund
ISDS	Investor-state dispute settlement
JTI	Japan Tobacco International
MAI	Multilateral Agreement on Investment
MFN	Most-favoured-nation
MIRA	Multilateral Investment Reform Agreement
MMT	Methylcyclopentadienyl manganese tricarbonyl
MNC	Multinational corporation
MP	Member of parliament
NAFTA	North American Free Trade Agreement

NATT	Network for Accountability of Tobacco Transnationals
NCD	Non-communicable diseases
NGO	Non-governmental organisation
NORT	National Organisation of Retail Trade
NT	National treatment
OECD	Organisation for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PHS	Public health sovereignty
PMI	Philip Morris International
PTA	Preferential Trade Agreement
SSR	Soviet Socialist Republic
STEPS	STEPwise approach to surveillance
TPP	Trans-Pacific Partnership
TRIMS	Agreement on Trade Related Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
TTIP	Transatlantic Trade and Investment Partnership
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
US/USA	United States/United States of America

USD	US Dollar
USMCA	United States–Mexico–Canada Agreement
VAT	Value added tax
VCLT	Vienna Convention on the Law of Treaties
WG III	Working Group III
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
ZAZ	Zaporizhzhia Automobile Building Plant

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1. Regulatory Chill Not to Be Feared But Understood

Nothing in life is to be feared. It is only to be understood. Now is the time to understand more, so that we may fear less.[1]

Regulatory chill is a hypothesis driven by people's fear and characterised by largely fragmented knowledge about it. It claims that states might refrain from regulating in the public interest out of fear of a perceived or imminent threat of investor-state arbitration. Even though there is a dearth of evidence relating to the hypothesis, there has been an increasing fear that regulatory chill may occur and lead countries to forego necessary public health or other human rights-inspired measures. This has led to strong views that the existing system of international investment protection should be reformed to broaden the states' regulatory powers and prevent regulatory chill.

This thesis argues that reform – without a substantial understanding of the issue – is dangerous. Upon looking more closely at the concept and its evidence, it shows that there are no reasons to fear regulatory chill. The reform should not destroy the legal order that has worked for more than 40 years, arguably attracting FDI[2], and more importantly – protecting foreign investments and preventing military conflicts between the states. They say that a history

[1] Marie Curie, Physicist and Chemist, as quoted by Melvin A Benarde, *Our Precarious Habitat* (W W Norton & Company 1973) v.

[2] See Jonathan Bonnitcha, 'Foreign Investment, Development and Governance: What International Investment Law Can Learn from the Empirical Literature on Investment' (2016) JIDS 31.

forgotten might well result in history repeating itself.[3] On this note, let us rewind the tape back and remember how the system of international investment protection and the regulatory chill originally appeared.

The 1800s and early 1900s saw many acts of hostile nationalisation in Europe, Latin America and elsewhere.[4] Private investors had no choice but to involve their respective governments in resolving disputes with host states.[5] This interception escalated into international conflicts and threatening demonstrations of superior naval power known as 'gunboat diplomacy'.[6] The international investment regime emerged in the aftermath of post-World War II – a period of severe economic recession – as a 'hope' for peace and economic development in the world.[7] International investment treaties were drawn up to 'de-politicise' investment disputes by taking them outside the scope of the host states' influence and providing foreign investors with the protection of universal international standards and an effective enforcement mechanism.[8] For the first time in the history of international law, IIAs and investor-state dispute settlement (ISDS) enabled private parties to bring arbitration claims directly against the host state.[9] Such claims were to be resolved by independent arbitration tribunals under standardised procedure rules.[10] Further and more importantly, IIAs were expected to facilitate state growth based on a belief cultivated by the World Bank and other organisations that 'unless foreign investment was adequately protected, there would be no

[3] A similar point was made by Gary Born, 'A Multilateral Investment Court: History Repeated?' (The Renewed Role of States in Arbitration, 6th EFILA Annual Conference, Online, 14 January 2021).
[4] See eg Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) ch 1; Ali Ghassemi, 'Expropriation of Foreign Property in International law' (PhD thesis, the University of Hull 1999).
[5] See eg Kate Miles, *The Origins of International Investment Law* (CUP 2015); Andrew Paul Newcombe, Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) ch 1.
[6] See eg Thomas Johnson and Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P. Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (OUP 2012) 652–653.
[7] The international investment regime is commonly understood as comprising IIAs and ISDS case law. See eg Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 3, 239. For a full account of the historical evolution of IIAs, see Newcombe and Paradell (n 5) and Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP USA 2010).
[8] ibid.
[9] See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 7; Jan Paulsson, 'Arbitration Without Privity' (1995) 10 (2) ICSID Rev/FILJ 232; UNCTAD, *Dispute Settlement: Investor-State* (United Nations 2003).
[10] ibid.

flows of such foreign investment into a state. The development of the state would thereby be stunted'.[11]

From 1980-1990, the significance of FDI was augmented in a decade that witnessed a decline in foreign aid and increasing debt levels across many developing countries.[12] After several attempts to sign a multi-lateral investment treaty failed, states have embarked on more targeted arrangements – bilateral investment treaties (BITs) and preferential trade agreements (PTAs).[13] Communism and its hostility to private property had lost its power.[14] The dominant communist state, the Soviet Union, was on the verge of 'Perestroika' prompting sweeping changes politically, economically, religiously and ideologically.[15]

By 1991, the Soviet Union – once occupying about 1/6 of the earth's land surface with a population exceeding 293 million – collapsed. Its dissolution resulted in the emergence of 15 independent states committed to a free-market economy and 'liberalism from above'.[16] These newly-independent states began to compete with each other and the rest of the world for FDI, 'that was virtually the only capital available to fuel their development'.[17] Over the next 30 years, there was a drastic increase in the number, length and complexity of IIAs.[18] The treaties signed by the 15 Post-Soviet countries[19] alone constitute about 20% (18% excluding current EU members) of a total 2,901 BITs and 392 PTAs signed in the world.[20]

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[11] Sornarajah (n 4) 29. See also Andrew Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Va J Int'l L 639; Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015).
[12] See Miles (n 5); Newcombe and Paradell (n 5).
[13] See eg Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) [BITs and PTAs together referred to as IIAs].
[14] Sornarajah (n 4) 29.
[15] Mikhail Gorbachev, the General Secretary of the Communist Party of the Soviet Union (UNGA, New York, 7 December 1988) <https://undocs.org/pdf?symbol=ru/A/43/PV.72> accessed 28 December 2020.
[16] Razeen Sally, *Classical Liberalism and International Economic Order: Studies in Theory and Intellectual History* (Routledge 2002).
[17] See (n 11) and accompanying text. On competition for FDI, see Zachary Elkins, Andrew Guzman, and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' (2006) 60(4) IO 811.
[18] Andrew Newcombe, 'Developments in IIA Treaty-Making' in Armand De Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge 2013) 15.
[19] The 15 former Soviet Union ('Newly Independent') states are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan (some sources also include Estonia, Latvia and Lithuania).
[20] As of 27 December 2020, 15 former Soviet States signed 699 BITs and 294 PTAs in total; see 'UNCTAD, Investment Policy Hub: International Investment Agreements Navigator: IIAs by Economy' <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 27 December 2020 [hereinafter, UNCTAD (IIA)].

The 'honeymoon phase' in IIAs came to an end at the beginning of the 2000s with new political and economic realities.[21] Since the 1960s, when the investment regime emerged, [22] the concentration of corporate power had more than 10 times exceeded the development of low-income states.[23] To give an example, today's global tobacco market is dominated by six leading multi-national corporations (MNCs):

- Philip Morris International (PMI);
- Altria Group;
- British American Tobacco (BAT);
- ITC Limited;
- Japan Tobacco International (JTI); and
- Imperial Brands.[24]

Meanwhile, the current global revenue from cigarettes has surpassed USD 681 billion benchmark.[25] Notably, the former Soviet Union, experiencing a shortage of highly thought after 'Western' goods, has developed into one the largest markets for tobacco MNCs.[26] By the end of 2000, the tobacco MNCs had invested at least USD 2.7 billion into 10 countries in the region,[27] where they now own 60%-90% of the region's tobacco market.[28]

With the growth of wealth and influence, MNCs have become major political players which are now influencing public policies around the globe.[29] As political activist Noam Chomsky

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[21] See eg Srividya Jandhyala, Witold Henisz and Edward D. Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55(6) JCR 1047.

[22] The first BIT was signed in 1959 between Germany and Pakistan (Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of the Investments (signed 25 November 1959, entered into force 28 April 1962)).

[23] Notably, nominal revenues of the US' 500 largest companies had grown from USD 197.4 billion to USD 13.7 trillion between 1960 and 2019. See Yarik Kryvoi, 'Three Dimensions of Inequality in International Investment Law' (*British Institute of International Comparative Law*, 2 September 2020) <www.biicl.org/documents/117_tackling-inequalities-international-investment_law.pdf> accessed 4 December 2020.

[24] 'Largest Tobacco and Cigarette Companies by Market Cap' (2021) <https://companiesmarketcap.com/tobacco/largest-tobacco-companies-by-market-cap/> accessed 1 May 2021.

[25] Lewis Pearson, 'Cigars & Cigarettes Industries Overview: Key Trends and Strategies' *(Report Linker*, 2020) <www.reportlinker.com/ci02053/Tobacco.html > accessed 28 December 2020.

[26] Anna Gilmore, Martin McKee, 'Moving East: How the Transnational Tobacco Industry Gained Entry to the Emerging Markets of the Former Soviet Union— Part I: Establishing Cigarette Imports' (2004) 13(2) Tob Control (citations omitted).

[27] Anna Gilmore, 'Tobacco and Transition: Understanding the Impact of Transition on Tobacco Use and Control in the Former Soviet Union' (Center for Tobacco Control Research and Education 2005), Table 2-6.
Anna Gilmore, 'Tobacco and Transition: Understanding the Impact of Transition on Tobacco Use and Control in the Former Soviet Union' (Center for Tobacco Control Research and Education 2005), Table 2-6.

[28] See Oleksandra Vytiaganets, 'Smoking Chills? Tobacco Regulatory Chill, Foreign Investment, and the NCD Crisis in the Post-Soviet Space: A Case Study from Ukraine' (2020) 21(5) JWIT 753 (citations omitted).

[29] For an overview of the interaction between globalisation, MNCs and state regulatory agendas, see Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007).

very expressively pointed out: '[s]tates and corporations are very tightly linked. To a very large extent, concentrated private power just dominates the state; in fact, even staffs it … And it sets the constraints in which state policy is made'.[30] Indeed, it is well documented that tobacco companies have employed various disingenuous tactics to hinder the efforts of the states and the World Health Organisation (WHO) to regulate the tobacco industry,[31] which is hardly surprising given the enormous economic stakes of tobacco-control policies.[32]

The shift of power to MNCs has raised many questions in international law, including whether the international investment regime is needed in its current form.[33] This criticism has been further inflamed by the increasing number of arbitration disputes[34] involving matters of public interest, such as environmental,[35] public health concerns[36] and access to potable water[37] or medicine.[38] This has attracted rigorous attention around various aspects of the international investment regime.[39] One of the biggest critics is that the regime is capable of causing regulatory chill.

1.1. Regulatory Chill Thesis

[30] Jake Johnson, 'Noam Chomsky on Corporations' (*Words of Dissent*, 2017) <http://wordsofdissent.com/noam-chomsky-on-corporations/> accessed 4 May 2005.
[31] See eg Thomas Zeltner and others, 'Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization' (Committee of Experts on Tobacco Industry Documents 2000) <www.who.int/tobacco/en/who_inquiry.pdf?ua=1> accessed 24 April 2020.
[32] George Gay, 'Reaching for the Stars: Some Thoughts on Tobacco Taxation' (*Tobaccoreporter*, 1 May 2020) <https://tobaccoreporter.com/2020/05/01/reaching-for-the-stars/> accessed 28 December 2020.
[33] Kryvoi (n 23); James Zhan, Director of Investment and Enterprise, 'IIA Reform in Times of COVID-19' (UNCTAD Virtual IIA Conference 2020, 26 November 2020).
[34] 'UNCTAD: Investment Policy Hub: International Investment Settlement Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 27 December 2020 [hereinafter, UNCTAD (ISDS)].
[35] Eg *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB (AF)/97/1, Award (25 August 2000) (*Metalclad v Mexico*); *Chemtura Corporation v Government of Canada, UNCITRAL (formerly Crompton Corporation v Government of Canada)*, UNCITRAL, Award (2 August 2010).
[36] Eg *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Notice of Arbitration (31 May 2012) (*Vattenfall v Germany*); *Philip Morris Asia Ltd v Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility (17 December 2015) (*PMI v Australia*); and *Philip Morris Brands Sàrl v Oriental Republic of Uruguay*, ICSID Case No ARB/10/07, Award (8 July 2016) (*PMI v Uruguay*).
[37] *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006); and *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008).
[38] *Apotex Inc v The Government of the United States of America*, ICSID Case No UNCT/10/2, Award On Jurisdiction and Admissibility (14 June 2013); *Eli Lilly and Company v The Government of Canada*, UNCITRAL, Final Award (16 March 2017).
[39] For an overview of existing criticism, see Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, 'Introduction: The Legitimacy Crisis and the Empirical Turn' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds) *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP forthcoming). See also Bonnitcha 2016 (n 2).

What is regulatory chill? In the legal context, regulatory chill is a rather nebulous term that comprises various scenarios when *one* system of rights and freedoms detrimentally affects the development of *another one* as a result of their inherent conflict.[40] Such conflict naturally exists within the same legal order (e.g. between constitutional rights of freedom of speech and protection of private life) and between different legal orders (e.g. free trade under the WTO regime and access to medicine).[41] In the context of the international investment regime, intrinsic tensions exist between the protection of investment under IIAs and various aspects of public interest, including the right to a safe environment or healthcare under national constitutions and international treaties.[42]

As a result of those conflicts of interest, host states have to balance investment protection with matters of public interest when enacting legislation or adopting decisions affecting the public interest. The limits of state power to balance those matters and its implications depend on the regime and, more importantly, on a state's decision to engage with it.[43] Unlike the WTO dispute resolution body, investment tribunals cannot order a sovereign state to revoke its national law when it is found to be in breach of IIAs, but it would usually award monetary compensation to an aggrieved investor.[44] The prevalence of monetary compensation in investment arbitration (often reaching hundreds of millions of US Dollars) has prompted wide ranging criticism in recent years.[45] It has been argued that the risk of large adverse awards may discourage the host states from adopting regulatory measures that might be non-compliant with investment treaties.[46]

The first wave of regulatory chill debates were ignited in the early 2000s with investment disputes challenging state environmental decisions predominantly concerned with the IIAs' impact on national environmental regulations and climate change.[47] This predated PMI's

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[40] The term 'chilling effect' has arguably emerged in U.S. constitutional law to describe the 'inhibition or discouragement of the legitimate exercise of a constitutional right … by the potential or threatened prosecution under, or application of, a law or sanction'. Jonathan Wallace and Susan Ellis Wild, *Webster's New World Law Dictionary* (Wiley Publishing 2006) 70.
[41] See ch 2.
[42] On the interaction between international investment law (IIL) and public health, see Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2013).
[43] James Crawford, 'Sovereignty as a Legal Value' in James Crawford, Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 122.
[44] Christoph Schreuer, 'Investment arbitration' in Cesare Romano, Karen J Alter, Yuval Shany (eds), *The Oxford International Handbook of International Adjudication* (OUP 2014) (citations omitted).
[45] Behn, Fauchald and Langford (n 39); see also Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (CEO 2012) <https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf> accessed 30 December 2020.
[46] See ch 2.
[47] ibid.

claims against Australia's and Uruguay's tobacco-control measures, which have become textbook examples of regulatory chill in the context of IIAs.[48] The 'tobacco disputes saga' lasted for several years, during which Paraguay, New Zealand and Costa Rica allegedly put their similar tobacco control initiatives on hold whilst awaiting the outcome of the disputes.[49] This has prompted wide interest among civil society, academia and lawyers, questioning the impact of the international investment arbitration on the state's ability to enact smoke-free policies.[50]

More recently, the critique has resurfaced in light of negotiations of regional treaties regulating trade and investment relations between the largest and most developed countries in the world, including the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA).[51] The concerns that public health and environmental regulations may be stalled as a result of imminent or potential investment claims under those treaties have dominated the debates, particularly with respect to the global agenda for sustainable development. [52]

At the outset, it is important to highlight that there is very little clarity to date in relation to what can be defined as 'regulatory chill' and whether the evidence supports its existence. As Schram and colleagues put it, the existing studies on the matter are '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'.[53] In simple terms, the regulatory chill thesis argues that policymakers may be dissuaded from enacting effective regulatory measures in the public interest because of an imminent or potential threat of investment arbitration.[54] At the same time, the scope of

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[48] ibid; *PMI v Uruguay* (n 36); *PMI v Australia* (n 36).
[49] See ch 2.
[50] ibid.
[51] Trans-Pacific Partnership Agreement (signed 4 February 2016, not in force); Transatlantic Trade and Investment Partnership (not signed); Comprehensive and Economic Trade Agreement (signed 30 October 2016, provisional application 21 September 2017). See also Ronald Labonté, Ashley Schram and Arne Ruckert, 'The Trans-Pacific Partnership: Is It Everything We Feared for Health?' (2016) 5 (8) Int J Health Policy Manag 487; Christine Côté, 'A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment' (PhD thesis, LSE 2014) 68 et seq.
[52] See eg Friends of the Earth Europe, 'Unfair Privileges for Investors' <www.foeeurope.org/isds>; Center for International Environmental Law, 'Statement of Carroll Muffett President and CEO Center For International Environmental Law (CIEL) on Behalf of CIEL, Friends of The Earth and Sierra Club' (24 July 2013) <www.ciel.org/Publications/Muffett_Statement_24July2013.pdf> both accessed 12 July 2018.
[53] Ashley Schram and others, 'Internalisation of International Investment Agreements in Public Policymaking: Developing of Conceptual Framework of Regulatory Chill' (2018) 2 Global Policy 9, 194. Compare Côté (n 51) (finding no direct evidence of regulatory chill) and Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 (1) J Int'l Disp Settlement 92 (finding evidence in favour of the regulatory chill thesis).
[54] For a more comprehensive definition, see s 2.1.5.

regulatory chill is uncertain. Sattorova, observed that regulatory chill as a concept might be understood in both wide and narrow terms.[55] In the wide sense, regulatory chill can manifest itself in watering down legislative initiatives that may unfavourably affect foreign investors.[56] Because of the risk of investor-state claims being initiated by affected investors, national policymakers could arguably prioritise the avoidance of such disputes even before they start to design new environmental or human-rights inspired measures.[57] This has been categorised as 'internalisation' or 'perceived' regulatory chill.[58]

Meanwhile, the narrow conception of regulatory chill represents the chilling effect of investment law on a specific piece of legislation that has already been proposed or in the process of its adoption.[59] This form of regulatory chill would manifest itself only after the host state government has been made aware of the potential dispute by foreign investors whose economic interests would be affected by the proposed legislation.[60]. As a result of fears over economic, reputational and other implications of investor-state arbitration, the government might respond to the threat of an investment arbitration claim by failing to adopt or implement public policy measures. Alternatively, the government can amend the legislation 'to such an extent that their original intent is undermined or their effectiveness is severely diminished'.[61] This is commonly known as 'specific response' regulatory chill.[62]

In addition, Tienhaara distinguished the third type of regulatory chill – 'cross border' regulatory chill.[63] By its nature, it is similar to specific response chill. For it to occur, an implicit threat should arise in the response to launch an investment arbitration claim against another state.[64] I can certainly point to specific examples which relate to tobacco control regulatory measures. [65] In 2010-2011, Uruguay (and later Australia) enacted similar tobacco regulatory

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[55] Mavluda Sattorova, 'Investment Protection Agreements, Regulatory Chill and National Measures on Childhood Obesity Prevention' in Amandine Garde, Joshua Curtis and Olivier De Schutte (eds), *Ending Childhood Obesity: A Challenge at the Crossroads of International Human Rights and Economic Law* (Edward Elgar 2020).
[56] ibid.
[57] ibid.
[58] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011); Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (Study Prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, Ecorys Rotterdam, 24 June 2014); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (CUP 2014) ch 3.
[59] Tienhaara 2011 (n 58) 607.
[60] ibid.
[61] ibid 610.
[62] See (n 58).
[63] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) TEL 229.
[64] ibid.
[65] See s 2.2.1.5.

measures – unprecedented at that time. The measures required brands, trademarks and logos to be removed from all cigarette packs.[66] Immediately, branches of PMI instigated investor-state arbitral proceedings against both States. As a result, Uruguay was reportedly on the verge of watering down its tobacco-control measures.[67] Other countries with similar public health initiatives (including Paraguay, New Zealand and Costa Rica) allegedly put their measures on hold while awaiting the outcome of the disputes.[68]

Nonetheless, when PMI's claims were dismissed, the critics announced that '[a]fter Philip Morris II: The "regulatory chill" argument failed – yet again'.[69] Accordingly, sceptics argue regulatory chill is purely a theoretical concern and, in the majority of investment disputes, arbitrators have demonstrated a great degree of deference to sovereign regulatory measures, notably to protect both the environment and public health.[70] In fact, since PMI's original claims against Australia and Uruguay, no arbitration claims challenging tobacco control measures have been reported. Recent case law has increasingly recognised the state's right to regulate.[71] Many countries worldwide have progressed their tobacco control initiatives; and some including the Republic of Ireland, the UK, New Zealand and Thailand also followed Australia's and Uruguay's leads and went ahead to introduce plain packaging measures.[72]

In the light of the above, Hepburn and Nottage, for instance, conclude that regulatory chill in the context of tobacco control is no longer possible and that any subsequent delays with plain packaging measures in other countries would have little to do with investment claims.[73] The authors argue that the hypothesis 'should be qualified rather than rejected'.[74] In particular, that the writers draw attention to the grounds for deciding PMI's claims and a disagreement between arbitrators on the fair and equitable treatment (FET) claim in the case of Uruguay.[75] Voon argues that the latter's case Award 'leaves some uncertainty about the level of evidence

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[66] *PMI v Australia* (n 36) para 110.
[67] Rory Carroll, 'Uruguay Bows to Pressure Over Anti-Smoking Law Amendments' (*The Guardian*, 27 July 2010) < www.theguardian.com/world/2010/jul/27/uruguay-tobacco-smoking-philip-morris> accessed 10 March 2020.
[68] Sophie Boot, 'Tobacco Firm Ponders Challenge As Plain Packaging Bill Passes' (*NZ Herald*, 9 September 2016) <www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11707230> accessed 10 March 2020.
[69] Nikos Lavranos, 'After Philip Morris II: The "Regulatory Chill" Argument Failed – Yet Again' (*Kluwer Arbitration Blog*, 18 August 2016) <http://arbitrationblog.kluwerarbitration.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/> accessed 16 May 2019.
[70] Schreuer (n 44) 314; Brower and Blanchard (n 86).
[71] Eg *Sun Reserve v Italy* (n 346).
[72] See eg Tobin (n 267), Bryan Mercurio, 'Smoke Them Out: Why Excluding Tobacco from the Scope of International Investment Agreements is Unwise and Unnecessary' (2018) 37 (1) Med Law 125.
[73] Hepburn and Nottage (n 268).
[74] Bonnitcha 2014 (n 58) 121.
[75] Tania Voon, 'Philip Morris v Uruguay: Implications for Public Health' (2017) 18 JWIT 320. See s 2.2.1.5 for further analysis.

and processes required to satisfy the FET standard'.[76] Consequently, states still 'need to amass evidence and conduct formal domestic processes in the development of innovative measures, particularly where they are not explicitly endorsed by international standards'.[77] This leaves the host States open to potential claims when increasing regulatory standards. Along the same lines, Sattorova states that even though both tobacco claims ultimately failed, concerns about the implications of investment treaty obligations on public health measures remain.[78] Indeed, investment arbitration practice on the State's right to regulate in the public health interest is still far from being settled.[79] The uncertainty about the dispute outcome is the variable that increases the propensity of regulatory chill.[80] Each case turns on its facts and even the FCTC-required measures – if challenged – would still need to go through a thorough analysis and satisfy each limb of the FET test and the tests on any other claims which might be invoked. The bottom line is that the regulatory chill debate in the context of tobacco legislation is yet to be put to rest.

Recent trends in investment treaty negotiation further support this point. Some treaties have specifically excluded tobacco control measures from the scope of investment protection. This regulatory trend was initially proposed in Article 29.5 of the TPP, which enables State Parties to 'elect' the denial of benefits with respect to claims challenging tobacco-control measures.[81] Such claims would not be submitted to arbitration and would be dismissed if the election were made even when the case is ongoing.[82] As a further example, Australia and Singapore amended their longstanding Free Trade Agreement (FTA) to exclude tobacco-control measures from the scope of the arbitration clause.[83] Notably, the amendment was signed after both tobacco claims against Australia and Uruguay were dismissed. This illustrates that States at least contemplate potential ISDS claims to challenge tobacco legislation and thereby attempt to exclude or minimise this possibility altogether.[84] In turn, this acts as testimony to the idea that the host States might still internalise the threat of arbitration claims to challenge tobacco measures even after both PMI claims have failed.

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[76] ibid 330.
[77] ibid 331 (citations omitted).
[78] Sattorova 2020 (n 55).
[79] See s 2.1.4.
[80] ibid.
[81] TPP (n 51).
[82] ibid.
[83] See Agreement to Amend the Singapore–Australia Free Trade Agreement (signed 13 October 2016, entered into force 1 December 2017) art 22.
[84] Also observed by Labonté, Schram and Rucket (n 51).

That being said, 'the extent to which investment treaties cause regulatory chill is one of the most controversial issues in contemporary debates about investment treaties'.[85] The existing knowledge about the phenomenon is largely fragmented and disconnected. The thesis to date has predominantly been supported by anecdotal evidence of what one frames as regulatory chill whilst the conceptualisation of it is not precisely defined. There are no robust accounts for IIAs systematically leading to regulatory chill, nor much cohesive and consistent research on circumstances when it may occur, whilst more comprehensive attempts to study the phenomenon have rendered conflicting results.[86] The interdisciplinary understanding of regulatory chill is not cohesive and whilst studies from politics, economics, public health or environmental disciplines could shed light on certain aspects of the interaction between the international and national legal orders, they fail to understand and analyse in-depth the law as the core theme of regulatory chill.

There remains an existing research gap that can also be explained by the difficulties in researching and proving the regulatory chill thesis. It is a commonly-held belief that proving regulatory chill is difficult because evidence is required about regulatory measures that would have existed in the absence of purported chilling;[87] i.e. of 'what has not happened'.[88] It has been further argued that relevant documents related to policy-making are frequently not publicly available.[89] And finally, causation is difficult to substantiate. As Alvarez and colleagues put it, it is 'virtually impossible … to discover … whether ISDS-related risks, more than other risks (e.g. related domestic legal procedures by nationals) constituted the determining factor in chilling proposed legislation'.[90]

This study will attempt to fill the gap and add to the burgeoning body of literature and knowledge of IIL. It will challenge the alleged impossibility of tracing regulatory chill, demonstrate the deficiencies in the existing conceptualisation of the phenomenon and its

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[85] Bonnitcha, Poulsen and Waibel (n 7) 239.

[86] For evidence in favour of regulatory chill, see Tienhaara 2011 (n 58); Van Harten and Scott (n 53); Julia G Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat' (2013) 3(1) UWO J Leg Stud 11; Stuart Gross, 'Inordinate Chill: BITs, Non-NAFTA MITs and Host-State Regulatory Freedom – An Indonesian Case Study' (2003) 24 Mich J Intl L 893; but see Côté (n 51); Vytiaganets (n 28); Charles Brower and Sadie Blanchard, 'What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52 Columbia JTL 689.

[87] Eric Neumayer, *Greening Trade and Investment: Environmental Protection Without Protectionism* (Earthscan Publications Limited 2001) 78; Bonnitcha (n 58) 115.

[88] Nick Mabey and Richard McNally, 'Foreign Direct Investment and the Environment: From Pollution Heavens to Sustainable Development' (WWF-UK 1999) <www.oecd.org/investment/mne/2089912.pdf> accessed 7 June 2020.

[89] Bonnitcha 2014 (n 58) 116.

[90] Gloria Maria Alvarez and others, 'A Response to the Criticism against ISDS by EFILA' (2016) 33 J Int Arbitr 1, 9.

research. In addition suggestions for a balanced approach to framing and an effective methodology to study the phenomenon will be provided. Tobacco legislation is used as a prism to test and deconstruct regulatory chill in this thesis. Having set out the ambitions of this study, the sections that follow will introduce the issues of tobacco control and the 'paradigm shift' in IIL, set out the research design and present the envisaged contribution to knowledge.

1.2. Tobacco Control and Sustainable Development Goals

The FCTC is the first legally binding public health international treaty signed under the auspices of the World Health Organisation. [91] To date, it comprises 182 parties, including the post-Soviet States. [92] The FCTC stipulates specific measures to be implemented, including measures for protection from exposure to tobacco smoke; requirements for contents of tobacco products; packaging and labelling; and tobacco advertising, promotion and sponsorship.[93] The FCTC has been supplemented by the guidelines for implementation of the FCTC and the MPOWER technical assistance package intending to 'assist in the country-level implementation of effective interventions to reduce the demand for tobacco, contained in the WHO FCTC'. [94] The treaty implementation is facilitated/enforced by (i) specific implementation deadlines provided for some measures; and (ii) the parties' obligations to submit periodic reports on the implementation progress to the Conference of the Parties and the Convention Secretariat.[95]

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[91] World Health Organisation Framework Convention on Tobacco Control (opened for signature 16 June 2003, entered into force 27 February 2005) 2302 UNTS 166.

[92] 'United Nations Treaty Collection: STATUS AS AT : 22-12-2021 10:15:40 EDT: Chapter IX: Health: 4. WHO Framework Convention on Tobacco Control' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en> accessed 22 December 2021.

[93] FCTC (n 91.

[94] 'FCTC: Guidelines for implementation of the WHO FCTC' <www.who.int/fctc/treaty_instruments/adopted/guidel_2011/en/ >; 'World Health Organisation: Initiatives: MPOWER' <www.who.int/initiatives/mpower> both accessed 22 December 2021.

[95] FCTC (n 91) Art Art 11, 13 and 21; 'FCTC: Home: Reports' <https://untobaccocontrol.org/impldb/> accessed 22 December 2021. See further Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar Publishing 2014).

Despite the accountability measures, the parties are yet to implement the FCTC, and the significance of tobacco control has not faded with time.[96] In 2015, United Nations (UN) Member States agreed on a universal call to end poverty, protect the environment, and ensure sustainable development and prosperity – known as 17 Sustainable Development Goals (SDGs).[97] Nowadays, SDGs reflect a myriad of challenges that the international community faces, including poor health and well-being.[98] The prevention of Non-Communicable Diseases (NCDs) in this context is one of the most salient matters;[99] NCDs and specifically its risk factors (such as: tobacco, alcohol and physical inactivity), are responsible for 71% of premature deaths worldwide.[100] Strengthening the implementation of the FCTC[101] has been specifically endorsed in the UN's SDG.[102]

The former Soviet States have played a dominant role in the NCDs statistics. NCDs death rates in Eastern Europe have exceeded the rates in other regions, including Africa and Asia.[103] NCDs are accountable for nearly 86% of deaths and 77% of the disease burden in the WHO European Region;[104] this Region has the highest proportion of deaths (16%) attributable to tobacco use (about 1.6 million people die of tobacco-related illnesses every year).[105] Therefore, strengthening tobacco control and the implementation of the FCTC is a solemn problem for the post-Soviet space, which has also accepted billions of US Dollars in investment in the tobacco industry in the past 20 years. These novel public health challenges, economic and political realities, as well as the possibility that IIAs may blunt the effect of FCTC measures have

[96] Andrea Glahn and others, 'Tobacco Control Achievements and Priority Areas in the WHO Europe Region: A Review' (2018) 4(5) Tob Prev Cessation 1; Campaign for Tobacco-Free Kids, 'Tobacco Control Laws' <www.tobaccocontrollaws.org/legislation/ > accessed 20 December 2021.
[97] 'United Nations: Sustainable Development Goals: SDG Indicators' <https://unstats.un.org/sdgs/metadata?Text=&Goal=&Target=3.a> accessed 22 December 2020.
[98] ibid.
[99] 'Noncommunicable Diseases and Their Risk Factors: Major NCDs and Their Risk Factors' <www.who.int/ncds/introduction/en/#:~:text=The%20rise%20of%20NCDs%20has,threatens%20to%20overwhelm%20health%20systems> accessed 30 December 2020.
[100] ibid.
[101] FCTC (n 91).
[102] United Nations (n 97).
[103] United Nations, 'World Population Prospects: The 2017 Revision' (UN Department of Economic and Social Affairs, 21 June 2017).
[104] World Health Organisation, 'Action Plan for the Prevention and Control of Noncommunicable Diseases in the WHO European Region' (WHO Regional Office for Europe 2016).
[105] World Health Organisation, 'Roadmap of Actions to Strengthen Implementation of the WHO Framework Convention on Tobacco Control in the European Region 2015–2025' (EUR/RC65/10 WHO Regional Office for Europe, Copenhagen 2015) [hereinafter, WHO (Roadmap)].

ultimately led to changes in international investment protection ideology or this 'paradigm shift' in the regime, which is discussed in the next section.[106]

1.3. The 'Paradigm Shift' and IIAs

The 'paradigm shift' can be described as the idea that international investment protection should no longer be the sole priority of IIAs. It rests on the idea that the previous liberal ideology of investment protection is archaic and therefore, the new ideology of sustainable development should prevail in international investment protection. Therefore, the existing regime shall be reformed to pave the way to achieve SDGs and re-assert the role of the State in IIAs.[107] The views of the host States on the matter diverge; some of them arrive at more radical solutions and disengage from the system altogether,[108] whilst others are more cautious about any changes to the existing treaties.[109] The latter can be explained by the fact that IIAs have long been considered as a tool to attract FDI and that to achieve the SDGs and specifically, to protect public health, developing States face a shortfall of trillions of US Dollars and FDI remains the main source of external funding.[110]

That being said, from the late 2010s, the reform of IIAs has become a global task, effectively led by the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Settlement of Investment Disputes (ICSID).[111] In 2017, the reform movement culminated in the emergence of the United Nations Commission on International

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[106] Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016); Maria Malaguti, 'EU Policies on Investment Treaties and Investment Arbitration' (9th Asia Pacific ADR Virtual Conference, 6 November 2020).

[107] Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016).

[108] Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International. Law Through Inconsistent Decisions' (2005) 73(4) Fordham L Rev 1521; David Caron and Esme Shirlow, 'Dissecting Backlash: the Unarticulated Causes of Backlash and its Unintended Consequences' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP 2018).

[109] Alexander Thompson, Tomer Broude and Yoram Z Haftel, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach' in Anthea Roberts and others (eds) *Comparative International Law* (OUP 2018) [hereinafter, Thompson, Broude and Haftel 2018a]; Alexander Thompson, Tomer Broude and Yoram Z Haftel, 'Once Bitten, Twice Shy? How Disputes Affect Regulatory Space in Investment Agreements' (Annual Conference on The Political Economy of International Organizations, Madison, Wisconsin, 8-10 February 2018) [hereinafter, Thompson, Broude and Haftel 2018b]; Tomer Broude, Yoram Haftel and Alex Thompson, 'Legitimation through Modification: Do States Seek More Regulatory Space in Their Investment Agreements?' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds) *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP forthcoming).

[110] Vanessa Fajans-Turner, 'Filling the Finance Gap' (*UNA-UK*, 19 June 2019) <www.sustainablegoals.org.uk/filling-the-finance-gap/> accessed 22 March 2020.

[111] 'UNCTAD: Investment Policy Framework for Sustainable Development' <investmentpolicy.unctad.org/investment-policy-framework> accessed 22 March 2019; ICSID, 'Proposals for Amendment of the ICSID Rules – Working Paper' (3 ICSID Secretariat 2 August 2018) paras 302-305.

Trade Law (UNCITRAL) Working Group III (WG III) on ISDS Reform, comprising of representatives of the States, observer international and non-governmental organisations, which presently discuss various reform proposals, including introducing regulatory exceptions and achieving uniformity of IIAs' application through such instruments as the EU Investment Court and the Multi-lateral Investment Reform Agreement (MIRA).[112]

Consequently, the existing international investment regime is in flux and we are standing on the verge of dramatic changes to the system. It is unclear how international investment protection will look like in another 10 years. It is imperative though, to acknowledge that FDI and sustainable development are intimately linked; that the benefits of the system may outweigh possible concerns about competing public interests; and that some changes if introduced, may ultimately destroy the existing system of international investment protection.[113] In turn, this may result in a sharp decline in FDI inflow.[114]

During 2020 and 2021, the significance of these issues has even amplified as a result of the COVID-19 pandemic resulting in a 49% decrease in FDI worldwide.[115] The global community has acknowledged that the pandemic set back the States' course to achieve SDGs. [116] After the pandemic, swift measures need to be taken to recover national economies; and the role of FDI in this process is more prominent than ever.[117] The demise of the system may sway the policy to 'destructive nationalists' wings' and take us back to 'gunboat diplomacy', which 'marks nationalists vision'.[118] It is therefore crucial that any changes to the existing international investment regime should be well thought-through and informed by substantial research on related matters. But are they or will they continue to be?

The ongoing reform has been largely driven by regulatory chill concerns and the uncertainties surrounding it;[119] the literature has not been matching this demand.[120] To quote Bonnitcha, Poulsen and Weibel, '[d]espite the centrality of regulatory chill to public debate

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[112] 'United Nations: Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 2 December 2020.
[113] See eg Schreuer (n 44) 296; Brower and Blanchard (n 86).
[114] Shaun Donnelly, United States Council for International Business, 'IIA Reform in Times of COVID-19' (UNCTAD Virtual IIA Conference 2020, 26 November 2020).
[115] 'UNCTAD: Investment Trend Monitor: 2020 H1 FDI Down 49%. Biggest Declines in Europe and the United States. Outlook Negative as New Project Announcements Drop 37%' (October 2020) <https://unctad.org/system/files/official-document/diaeiainf2020d4_en.pdf> accessed 29 November 2020.
[116] Caroline Kollau, Winand Quaedvlieg and Carlo Pettinato, 'IIA Reform in Times of COVID-19' (UNCTAD Virtual IIA Conference 2020, 26 November 2020).
[117] ibid.
[118] Patrick Pearsall, 'Current Status and Progress of Reforms in the Investor State Dispute Settlement and its Impact on Investment Treaty Policies' (9th Asia Pacific ADR Virtual Conference, 6 November 2020).
[119] Also observed by Bonnitcha, Poulsen and Waibel (n 7) 239.
[120] See s 2.3.1.

and treaty practice, however, there is surprisingly little research on whether and to what extent concerns of regulatory chill are justified'. [121] Does it imply that the fears about regulatory chill are misplaced? Will the reform of the existing regime be a Pyrrhic victory for developing countries?

1.4. Research Question and Methodology

This thesis will attempt to fill the gap in the literature on regulatory chill and add to the body of literature and knowledge of IIL and to suggest a unique and comprehensive conceptual and methodological tool to examine the extent to which IIAs affect the regulatory development of the host States. It will aim to provide evidence on regulatory chill thesis that is both eloquent and edifying. In doing so, this research will conduct case studies on the impact of IIAs on tobacco regulatory development in five former Soviet countries – Armenia, Azerbaijan, Belarus, Georgia and Ukraine (hereinafter, the post-Soviet States). The thesis will endeavour to answer the following research question:

> to what extent, if any, IIAs affect tobacco regulations and lead to regulatory chill in the post-Soviet States?

To tackle the research question, the study will utilise qualitative and quantitative tools to conduct a comparative case study analysis.[122]

1.5. Justification

This thesis is entwined with legal practice and policymaking. It is anticipated and intended that the research will be of considerable value and guidance to the host States in the utility and drafting of IIAs commensurate with their economic interests in the pursuit of FDI; as well as UNCTAD and ICSID which lead the ongoing reform of IIAs. It is also expected that the study will serve as useful guidance to policymakers, the WHO and other agencies and organisations in promoting future tobacco control policies and NCDs preventive measures more generally. Furthermore, it is intended to be of assistance to academics in any future studies in the field of

[121] Bonnitcha, Poulsen and Waibel (n 7) 239.
[122] See ch 3.

IIL, and specifically on regulatory chill. It will be of value to practitioners, advisors and foreign investors who seek to advance business interests in the post-Soviet States and need to be acutely aware of the international and national instruments available in the context of investment protection. And finally, this thesis is anticipated to guide future research on regulatory chill in tobacco control and other sectors, and the research on the interaction between different legal orders more broadly. It will re-assess the way we analyse, accumulate knowledge and employ legal expertise in academia and enable further research (and ongoing reconsideration of research) more broadly.

1.6. Argument and Chapter Overview

The overarching argument is that regulatory chill is an undeveloped theory that is mainly driven by feelings of fear. This study argues that the existing knowledge of the regulatory chill thesis is largely fragmented. With minimal, if any, conceptualisation of the phenomenon, the literature is often disconnected, representing the view from various disciplines and adopting different approaches. Writers adopt contesting if not mutually exclusive definitions of what they understand to be regulatory chill. It is fair to state that regulatory chill remains an undeveloped theory, suffering from under-conceptualisation and methodological limitations. Given the limitations of the existing conceptualisation, it is very problematic if not impossible to provide credible and uncontested evidence of regulatory chill. These flaws, *per se*, however, do not refute the hypothesis.

That being said, the review of existing literature helps to illuminate that there is little – and contestable – evidence in support of the regulatory chill thesis. The question of causation is crucial; even in case studies where regulatory development was arguably delayed, there were concurrent factors that could also result in delay.[123] Certain instances of the alleged regulatory chill could not be framed as such. Under-conceptualisation and the limitations of the methods used have prevented rendering credible results to either support or refute the hypothesis.

Building on these preliminary findings this thesis proceeds to deconstruct the concept of regulatory chill and test the hypothesis in the context of tobacco control regulatory development in the post-Soviet States. As a preliminary matter, it finds that the current level of tobacco control regulation is not adequate; despite the high level of tobacco-related illnesses,

[123] See ch 2.

the post-Soviet States are yet to implement the FCTC setting out compulsory regulatory requirements. Nonetheless, the inadequate regulatory development is likely to be predominantly attributed to government concerns over potential industrial flight and economic implications of progressive tobacco control (e.g. loss of jobs and budget revenues, etc). The powerful tobacco lobby has also impugned the increase in tobacco control standards. The influence of the tobacco lobby has varied from State to State which was likely underpinned by the tobacco market share and the presence of MNCs in the market. The post-Soviet States are continually encouraging and accepting tobacco FDI, whilst the industry is expanding its production facilities in the region. The fact that the transitional countries prioritise FDI over tobacco control is likely to be the main hurdle for the FCTC implementation and sustainable development. Finally, given the patterns of development, these findings may – to some extent – be extrapolated to other sectors and jurisdictions. The bottom line being, there is no direct evidence on regulatory chill in the post-Soviet States (even though the thesis acknowledges that some evidence may not be available in the public domain).

Drawing upon the empirical findings, this study argues that the existing regulatory chill conceptualisation is not sophisticated and broad enough to capture all the aspects of regulatory chill and the mechanics of the regulatory process. More specifically, the literature to date has had a propensity to construe regulatory chill as the phenomenon driven by one or two definite triggers, such as IIAs and their arbitration mechanism. Because of the restricted focus, scholars have often failed to consider other potential causes of regulatory chill. By not acknowledging other triggers that could lead to an identical outcome, the studies could misjudge the causation and produce inaccurate findings. This study develops the regulatory chill concept so that its use in future studies will be more robust and concludes by presenting some policy proposals and suggestions for future research. The rest of this section will guide readers through the eight Chapters of this thesis.

Chapter 2 will draw out the assumptions on which existing debate rests so that these assumptions can be tested against evidence. It argues that the existing conceptualisation of regulatory chill in IIL is not adequate, which challenges the extent to which existing studies are theoretically rigorous and analytically precise. Given that, it clarifies the measures affected by regulatory chill, the nature of the deterrence effect, the distinction between *bona fide* and *non-bona fide (bona male)* public regulations, establishes regulatory chill drivers and external variables, and formulates the regulatory chill hypothesis. It will assert that the emerging body of literature on regulatory chill does not provide a clear answer to support or refute regulatory chill theory. And, that the limits and deficiency in the methodological approaches of previous

studies have undermined their results leaving the question of whether IIAs affect public regulations leading to regulatory chill, unanswered.

Informed by the conceptual framework, Chapter 3 will set out the methodology employed in the study. It proposes that to investigate whether IIAs exert a chilling effect on tobacco legislation, the latter shall be compared against the required regulatory standard – the FCTC. If the inadequacy of tobacco regulations is established, the in-depth analysis of primary and secondary sources, including: IIAs, ISDS, national legislation on investment protection, white and green papers, media reports, etc can help to trace evidence of regulatory chill. And, in doing so, it will establish the causal correlation between IIAs and inadequate tobacco legislation.

Chapter 4 presents the results of the case study on the effect of IIAs on tobacco control laws in Ukraine. It will argue that no consistent, observable evidence has been found to support the hypothesis that IIAs and its arbitration mechanisms affect tobacco regulations and lead to regulatory chill in Ukraine. Both empirical findings and legal analysis of Ukrainian IIAs and national legislation suggest that the State's policymaking is unlikely to be affected by a perceived threat of investment arbitration claim. Instead, the study revealed that the implementation delay has been predominantly driven by capital flight and economic concerns, as well as the magnitude and the range of industry influence on the policymaking process.

Chapter 5 presents a case study on Belarus. It will argue that the study finds no direct evidence to confirm the regulatory chill hypothesis. Whilst tobacco regulation in Belarus is arguably more advanced than in other post-Soviet States, its tobacco tax policy has been delayed as a result of the State's economic interest and concerns over capital flight. It follows that the regulatory delay in Belarus can be better explained from the standpoint of the political economy of FDI rather than the regulatory chill theory.

Chapter 6 presents a case study on Transcaucasia. It will contend that the case study consistently shows no evidence of regulatory chill. This study found no evidence that international investment obligations hamper tobacco regulatory measures leading to regulatory chill in the region. It will argue that the Transcaucasian States' reliance on the tobacco sector and its FDI impedes effective tobacco policies.

Chapter 7 will then draw on the main findings of the research and present a comparative analysis of the study outcomes in the context of:

- (i) the implementation of the FCTC and the level of tobacco control more generally;

- (ii) the trends in the IIAs negotiations and national legislation on investment protections;
- (iii) the interactions between international and national law on investment protection and the legislation on the public health protection;
- (iv) the conceptualisation of regulatory chill; and
- (v) the tobacco control regulatory space and the reasons for tobacco control regulatory delay in the post-Soviet States.

It will ascertain that the international investment regime, by and large, does not affect tobacco control regulatory development in the post-Soviet States. Based on the evidence available in the public domain, it is conceivable that tobacco legislation has been stalled by the government concerns on capital flight and the powerful tobacco lobby.

Chapter 8 will conclude the thesis by encapsulating the main arguments and presenting some regulatory suggestions and other points for reflection. As before, this study argues that the existing knowledge about regulatory chill is largely fragmented, regulatory chill is not well supported by evidence and is driven by feelings and repetition of unsubstantiated statements rather than comprehensive research. It discusses that a uniform reform proposal based on the principle 'one size fits all' may not be desirable for the States and that more research is required to make sure that the reform will not be a Pyrrhic victory for developing countries. To avert and prevent potential risks for tobacco control and other legislation, it suggests including the public interest agenda in further human rights and trade regional agreements, to conduct effective monitoring and the assessment of tobacco impact on public health and State economies and exclude tobacco from the protection of IIAs altogether. And lastly, it will reflect on the way we analyse, employ legal expertise and accumulate knowledge in the field. It will argue that this thesis has more broad implications for future research and lawmaking.

2. Defragmentation of Knowledge on Regulatory Chill

There is no fragmentation of international law but there is a fragmentation of knowledge in international law[124]

2.1. Different Faces of Regulatory Chill

How would one define regulatory chill? Even a cursory overview of the literature on regulatory chill illustrates the plethora of various definitions and contexts which epitomises the phenomenon. Earlier studies have been mainly concerned with regulatory chill in the context of environmental regulations and competition for capital markets. Neumayer defined regulatory chill as a situation where states either decrease regulatory standards or fail to raise them because of fear that foreign capital will move to a country with lower regulatory requirements.[125] In the environmental context, this would result in a 'pollution haven' for the industry.[126] Grey considered regulatory chill as a scenario 'where countries refrain from enacting stricter environmental standards in response to fears of losing a competitive edge'.[127] Such inter-country 'competition' for foreign capital was often considered through the prism of

[124] Ilze Dubava, Latvian Government Lawyer, 'Renewed Role of States in Arbitration' (6th EFILA Annual Conference, Online, 14 January 2021).
[125] Neumayer 2001a (n 87) 69.
[126] Eric Neumayer, 'Do Countries Fail to Raise Environmental Standards? An Evaluation of Policy Options Adressing "Regulatory Chill"' (2001) 4(3) Int J Sustain Dev 231.
[127] Kevin R Grey, 'Foreign Direct Investment and Environmental Impacts – Is the Debate Over?' (2002) 11(3) RECIEL 306, 310.

a proverbial 'race to the bottom'.[128] Similarly, Clapp and Dauvergne framed regulatory chill as the hypothesis that the states would be deterred from improving environmental standards because this could prevent the income of new investment or cause the industrial fight.[129] Along the same lines, convergence theorists assert that foreign investment and trade drive national policy development process through the 'threat of exit' of MNCs, representing a transfer of authority from the national government to private investors.[130]

It has been put forward that developing countries generally are more prone to lowering regulatory standards to attract FDI.[131] As Colen, Maertens and Swinnen argue '[i]n order not to lose investment and jobs, developing countries are … forced to lower their standards and corrupt governments are supported as long as they favour the company's objectives'.[132] However, industrialised countries, as well have been reported to 'race to the bottom' to prevent capital flight.[133] Recently, this concern has arisen as a result of the UK Government's temporary authorisation for the use of a pesticide banned by the EU as suspected of being harmful to bees.[134] The UK Government explained it was concerned with insect pests attacking sugar beets. The EU chief Brexit deal negotiator warned that any lowering of regulatory standards by the UK will be penalised: '[p]esticides concern public health, the health of farmers, farm workers and consumers … Depending on where you set the threshold in that area it can also have an impact on *competition and competitiveness'.*[135]

Another strand in the literature suggests that globalisation results in divergence of regulatory policies because MNCs' motivation for investment is broader than 'lowest-cost production' and the governments need to offset the adverse effect of globalisation in which institutional strength is a key aspect.[136] In addition, the industrial flight and 'race to the bottom'

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[128] Jennifer Clapp, 'What the Pollution Havens Debate Overlooks' (2002) 2(2) Glob Environ Polit 11, 17; Nita Rudra, *Globalization and the Race to the Bottom in Developing Countries: Who Really Gets Hurt?* (CUP 2008); Gareth Porter, 'Trade Competition and Pollution Standards: "Race to the Bottom" or "Stuck at the Bottom"' (1999) 8(2) J Environ Dev 133.

[129] Jennifer Clapp and Peter Dauvergne, *Paths to a Green World: The Political Economy of the Global Environment* (The MIT Press 2005) 169.

[130] Layna Mosley, *Global Capital and National Government* (2003 CUP) 7. See also Côté (n 51) 21 et seq.

[131] Miles (n 5) 181; Vadi 2013 (n 42) 9; Kyla Tienhaara, 'Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana' (2006) 6 Int Environ Agreem-P 371.

[132] Liesbeth Colen, Miet Maertens and Johan Swinnen, 'Foreign Direct Investment as an Engine of Economic Growth and Human Development' in Olivier de Schutter, Johan Swinnen and Jan Wouters (eds), Foreign Direct Investment and Human Development: the Law and Economics of International Investment Agreements (Routledge 2013) 108.

[133] Miles (n 5) 181.

[134] Sam Fleming and Jim Brunsden, 'Barnier Warns Post-Brexit Border Friction is the New Normal' *Financial Times* (13 January 2021) <www.ft.com/content/4788c361-7b72-46e9-b861-1d29d0662ad2> accessed 15 January 2021.

[135] ibid [emphasis added].

[136] Côté (n 51) 21 et seq.

hypotheses have been criticised on various grounds including its methodological and conceptual flaws.[137]

Scholarship turned to more specific features of the globalisation process.[138] The growing caseload of the World Trade Organisation's (WTO) [139] decisions obliging states to revoke their public health and environmental regulations, have resulted in vibrant debates in many circles that the WTO regime could dissuade states from regulating in the public interest, i.e. 'chill' vital national policies.[140] This concern has been considered in the context of tobacco-control regulations after Indonesia initiated a successful WTO claim contesting the US ban on clove-flavoured cigarettes.[141] Yet, the argument that the WTO regime chills national regulatory development has been difficult to sustain because the WTO agreements: (i) include a wide range of exceptions for public regulatory measures,[142] (ii) involve a thorough adjudicatory mechanism and finally, (iii) do not require monetary compensation to be paid by the States in breach. This means that 'the only cost to adopting a WTO-inconsistent measure is that of defending it before the WTO'.[143] Again, in the absence of compelling evidence and thorough research, the WTO-related regulatory chill theory has remained a merely hypothetical concern.[144]

With the rise of international investment disputes, the focus of regulatory chill criticism has shifted to IIAs. Unlike the WTO policy review process that is not backed by monetary sanctions, a legal challenge to policies in contentious proceedings under IIAs (if successful) would usually result in hundreds of thousands and millions of US Dollars in monetary compensation payable to aggrieved investors.[145] The prevalence of monetary sanctions in

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[137] Clapp 2002a (n 128), and Laura Strohm, 'Pollution Havens and the Transfer of Environmental Risk' (2002) 2 Glob Environ Politics 2, 29. Also observed by Kyla Tienhaara, 'What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries' (2006) 4(6) Glob Environ Politics 85.

[138] Tienhaara 2006 (n 137) 85.

[139] 'World Trade Organisation: About WTO' <www.wto.org/> accessed 1 December 2020. See also Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005).

[140] Manuel Pérez-Rocha, 'Free Trade's Chilling Effects' (2017) 48 (3) NACLA Report on the Americas; Jeffrey Drope and Raphael Lencucha, 'Tobacco Control and Trade Policy: Proactive Strategies for Integrating Policy Norms' (2012) 34 (1) J Public Health Policy 1. But see Kyle Bagwell and Robert W Staiger, 'The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues' (2001) 15(3) J Econ Perspect 69.

[141] WTO, *United States: Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Appellate Body (4 April 2012) WT/DS406/AB/R, paras 222-223. See also Drope and Lencucha (n 140).

[142] General Agreement on Tariffs and Trade (1994) 33 I.L.M. 1153 (15 April 1994) [hereinafter, GATT 1994]; Doha WTO Ministerial 2001: Ministerial Declaration WT/MIN(01)/DEC/1 Ministerial Declaration of 20 November 2001.

[143] Alasdair Young, 'Picking the Wrong Fight: Why Attacks on the World Trade Organization Pose the Real Threat to National Environmental and Public Health Protection' (2005) 5(4) Glob Environ Politics 47.

[144] Tienhaara 2006 (n 137) 85.

[145] See (n 44) and accompanying text.

investor-state arbitration has prompted critique among scholars and civil society.[146] It has been argued that the risk of high-value adverse awards may discourage the host States from adopting regulatory measures that might be non-compliant with IIAs.[147]

The approaches to framing the regulatory chill theory in an IIAs context vary significantly. The most influential and broadly cited definition to date has been suggested by Tienhaara, who asserted that:

> [i]n 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).[148]

Yet, the vast majority of authors have not articulated precisely the meaning of regulatory chill or provided a more Spartan definition often disconnected from previous studies. To give some examples, Bonnitcha described regulatory chill as 'any impact … [that stems from IIAs'] effect on the way in which host States exercise their regulatory powers'.[149] Matveev argued 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."'[150] Soloway described regulatory chill as a theory that lives between two extremes: on one hand, it does not connotate that policymakers would completely cease to enforce any regulatory measures and that the entire regulatory framework would be stalled as a result of IIAs; on the other hand, it does not entail that regulators should be allowed to unduly discriminate against investors.[151] The lack of a precise and uniform definition has resulted in the conceptual quagmire and a great variety of contradictory views on the issue. The fact that regulatory chill is a multi-disciplinary issue being studied in law, economics, politics, environmental, public health and other studies has further contributed to the fragmentation of knowledge on the matter. The remainder of this section will discuss those discrepancies in more detail.

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[146] Behn, Fauchald and Langford (n 39); see also Eberhardt and Olivet (n 45).
[147] See further ch 2.
[148] Tienhaara 2011 (n 58) 610.
[149] Bonnitcha 2014 (n 58) 114.
[150] Arseni Matveev, 'Investor-State Dispute Settlement: The Evolving Balance Between Investor Protection and State Sovereignty' (2015) 40 UWAL Rev 348, 358.
[151] Julie Soloway, 'NAFTA's Chapter 11 Investor Protection, Integration and the Public Interest' (2003) 9 (2) Choices 1, 18.

2.1.1. Regulatory Chill, Freeze or Snare and the Scope of State Actions

Regulatory chill is sometimes described as 'stuck in the mud',[152] 'regulatory snare'[153] or 'regulatory freeze'.[154] Is this just a different terminology describing the same phenomenon? The overview of the literature shows that even those who adopted a more traditional terminology differ on the scope of State actions that embody regulatory chill. While some authors identify that regulatory chill encompasses a reluctance to adopt legislation altogether, others propose that instances when States progress with regulatory measures, but amend them 'to such an extent that their original intent is undermined or their effectiveness is severely diminished' should also lay within the concept of regulatory chill concept.[155] Gross argues that regulatory chill occurs when the threat of potential investment claim leads States to 'forego needed environmental and social legislation that might negatively affect the value of foreign investment'.[156] Tietje and Baetens define regulatory chill as a situation in which 'a State actor will fail to enact or enforce *bona fide* regulatory measures because of a perceived or actual threat of investment arbitration'.[157] More broadly, Shram and colleagues have included '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' in the scope of the concept.[158]Ankersmit suggests that the phenomenon 'essentially comes down to an effect whereby the government delays, waters down, or otherwise negatively affects public interest decision-making out of fear of investment arbitration litigation'.[159] The prevailing view adopted by this study is that regulatory chill includes any effect opposed to progressive regulatory development including scenarios when the legislation is stalled, revoked or diluted.

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[152] Lyuba Zarsky, 'Stuck In the Mud? Nation-States, Globalization and the Environment' (Globalisation and Environment Study, OECD Economics Division, May 1997); Porter (n 128); Mabey and McNally (n 88).
[153] Usman Khan and others, 'The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health' (LSE January 2015).
[154] Lyuba Zarsky, 'From Regulatory Chill to Deepfreeze?' (2006) 6(4) Int Environ Agreem-P 395.
[155] Tienhaara 2011 (n 58) 610.
[156] Gross (n 86) [emphasis added].
[157] Tietje and Baetens (n 58) [emphasis added].
[158] Schram and others (n 53) 195 [emphasis added].
[159] Laurens Ankersmit, 'Regulatory Autonomy and Regulatory Chill in Opinion 1/17' (2020) 4(1) EWLR 21 [emphasis added].

2.1.2. Real and Perceived Risks of Investment Arbitration

What causes regulatory chill? In describing the phenomenon, some writers focused solely on a hypothetical (perceived) risk of investment claims leading to reduction in regulatory standards. Matveev describes regulatory chill as a situation when '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'.[160] Si defines it as 'the theory that states may be discouraged from enacting legislation that is in the public interest due to the risk of exposing themselves, and their taxpayers, to liability under investment treaty'.[161] Other scholars focus on the abandonment of regulatory initiatives because of a real (as opposed to perceived) risk of being dragged into arbitration proceedings. Janeba suggests that the definition of regulatory chill comprises three elements: (i) a credible threat of litigation by a multi-national company to challenge an unfavourable policy, (ii) in anticipation of a claim and possible economic liability, a government forgoes the option to choose its desired policy and (iii) the policy chosen by the government when a claim occurs is different from the one when it is not challenged.[162] The European Court of Justice (ECJ) in a recent Opinion looked at regulatory chill as 'the result of an Award, not because of the claim itself, the threat of a claim, or because a regulatory action may in the design of a measure anticipate such a claim'.[163] In other words, regulatory chill in ECJ's view is manifested when a State withdraws a regulatory measure to prevent repetitive investment claims after a tribunal found the measure to be in breach of an IIA.

The predominant view is the combined approach to include both real and potential threats of arbitration as possible drivers of regulatory chill. In this light, scholars differentiate 'specific response chill' or 'threat chill' when the threat is imminent and 'internalisation chill' when the threat is perceived.[164] Internalisation chill, in turn, can be triggered by a previous State's engagement with an investor ('precedential chill'),[165] other States' experience ('cross-border

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[160] Matveev (n 150).
[161] Jessica Si, 'Attacking ISDS Provisions for Causing Regulatory Chill: a Moving Target' (*Practical Law Arbitration Blog*, 25 May 2018) <http://arbitrationblog.practicallaw.com/attacking-isds-provisions-for-causing-regulatory-chill-a-moving-target/> accessed 13 September 2019 [emphasis added].
[162] Eckhard Janeba, 'Regulatory Chill and the Effect of Investor State Dispute Settlements' (CESifo Working Paper Series 6188 2016) 2.
[163] Ankersmit (n 159) citing ECJ in Opinion 1/17 [emphasis added].
[164] See (n 58).
[165] Tietje and Baetens (n 58).

chill'),[166] or by a mere existence of potentially conflicting investment obligations which may be enforced by arbitration.

As the above illustrates, the existing conceptualisation of regulatory chill is mainly focused on one specific trigger, i.e. national law, capital flight concern, WTO or investment treaty claims, rather than a multitude of factors. Some define regulatory chill as the outcome of multiple factors, not necessarily confined to real or perceived investment arbitration. For instance, Kelsey describes regulatory chill as: 'the reluctance of policy makers to adopt legislation or other regulation after factors external to the merits of the proposal are injected into the decision-making process with the intention of influencing the regulatory outcome'.[167] She further goes on stating that: '[t]he most common examples [of regulatory chill factors] are direct threats of, or actual, legal action or warnings that proceeding would cause undesirable economic or reputational harm'.[168] The discussion on the merits of this approach will follow.

At the opposite end of the spectrum, there are variables as opposed to triggers of regulatory chill. Unlike drivers, variables do not result in regulatory chill but may moderate its gravity. Therefore, the threats of investment arbitration (the trigger) are unlikely to translate directly into policy response but could be 'moderated by a set of political and economic factors' (the variables).[169] On a similar note, Côté argued that the regulatory chill impact could be variously diffused, mitigated and mediated by a range of international and domestic factors, including States' obligations under international and regional agreements, the relationship with other States (in particular, important trade partners), other political and economic restraints.[170]

The dominant view seems to be that 'variation in the characteristics of decision-making bodies, both within and between countries, is likely to lead to variation in the extent of regulatory chill'.[171] Thus, developing countries are generally considered to be more prone to regulatory chill as a result of its higher sensitivity to capital flows.[172] Weaker political institutions, limited expertise and comprehension of the rights bestowed on private investors and resource constraints in low-income countries could augment the risk of regulatory chill.[173] In contrast, enhanced financial and human resources in developed countries may alleviate the

[166] Tienhaara 2011 (n 58).
[167] Jane Kelsey, 'Regulatory Chill: Learning from New Zealand's Plain Packaging Tobacco Law' (2017) 17 (2) QUT Review 21, 23 [emphasis added].
[168] ibid.
[169] Schram and others (n 53) 199.
[170] Côté (n 51) 171-3.
[171] Bonnitcha 2014 (n 58) 117.
[172] Sattorova 2020 (n 55).
[173] Tienhaara 2011 (n 58) 612.

risk. Developing states' propensity to regulatory chill may also be underpinned by the diminished ability to finance expensive arbitration and adverse Arbitral Awards. In other words, policymakers in developing countries might be more concerned about avoiding liability than their colleagues in developed countries.[174]

The principal political ideology – prioritising trade and investment liberalisation over social good and the public interest – could also increase the risk of regulatory chill. In contrast, uncertainty surrounding the arbitral case law on a specific matter, which is the type of general uncertainty criticism surrounding the investor-State arbitration could increase the risk of regulatory chill.[175] In simple terms, the States are likely to be more reluctant to adopt controversial legislation if they cannot predict (to a certain degree) whether the disputed measures would be considered *bona fide* by a tribunal and whether they could recover legal fees at the end.

Scholars claim that the existing pool of cases is not sufficient to allow for control of external variables[176] or 'to reach firm conclusions about differences in behaviour between national and subnational arms of government or about differences in behaviour between developing and developed states'.[177] This highlights the need to avoid generalisations about regulatory chill in the context of different states, but at the same time, casts doubt on whether it would ever be possible or necessary to define the exhaustive list of external variables or model regulatory behaviour in various scenarios.

2.1.3. Whether Only Regulatory Measures are Susceptible to Being Chilled?

The foregoing takes me to the next question 'what kind of measures (i.e. regulatory, executive or judicial) are susceptible to being 'regulatory chilled'? As the term itself suggests, regulatory chill mainly revolves around regulatory decisions, i.e. how international investment treaties and arbitration affects the development of legislation concerning the environment, public

[174] Howard Mann, 'Investment Agreements and the Regulatory State: Can Exceptions Clauses Create a Safe Haven for Governments?' (Issues in International Investment Law, Background Papers for the Developing Country Investment Negotiator's Forum, IISD, Singapore, 2007).
[175] See s 2.3.2.
[176] Tienhaara 2011 (n 58) 609; Sattorova 2020 (n 55).
[177] Bonnitcha 2014 (n 58) 120.

health, cultural heritage and other main areas of public interest.[178]To consider further, regulatory chill is concerned with the implementation of any regulatory measures, including laws, regulations and standards in the interest of a group of individuals within the host state.[179] There is a further question: 'whether investment treaty arbitration can also 'chill' executive or judicial decisions of the host State?'

There is a common misconception that regulatory chill refers exclusively to regulatory measures.[180] Another strand in the literature suggests that the hypothesis is undermined by the fact that the vast majority (about 90% as of 2014)[181] of investment treaty claims are related to executive and not to regulatory decisions.[182] Tietje and Baetens, for instance, propose: 'the 260+ ISDS cases … concluded worldwide demonstrate that most procedures concern individual administrative treatment of investors. Legislative acts are subject to ISDS … only in exceptional cases, and these claims are hardly, if ever successful'.[183]

That said, existing studies illustrate that even administrative decisions can be subject to regulatory chill. For instance, Brown, refers to Pacific Rim's dispute with El Salvador regarding a denial to issue an extraction permit to operate an underground gold mine.[184] Even though the Government's decision had an individual character, it ultimately affected the public interest:[185] if the permit was granted, the mining operation could contaminate water, leading to environmental and public health implications.[186] Therefore, the conceptualisation of regulatory chill should also encompass executive decisions having a wider public impact.

Judicial decisions can also be affected by a threat of investment arbitration.[187] Kawharu warned that the TPP may impact on the public also as a result of psychological effects on public officials in judicial branches not wanting their judgements to be reviewed by international

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[178] Jorge Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012); Saverio Di Benedetto, *International Investment Law and the Environment* (Edward Elgar 2013); Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014); Vadi 2013 (n 42); Kate Miles (ed), Research Handbook on Environment and Investment Law (Edward Elgar 2019).

[179] Any reference to regulatory measures in this thesis shall be understood as a reference to (i) laws as a system of rules or statutes made by the government; (ii) regulations, i.e. detailed instructions on how laws are to be enforced or carried out; and (iii) standards, i.e. requirements for products, services and systems.

[180] Also observed by Bonnitcha, Poulsen and Waibel (n 7).

[181] Jeremy Caddel and Nathan M Jensen, 'Which Host Country Government Actors Are Most Involved in Disputes with Foreign Investors? (2014) 120 Columbia FDI Perspectives 1.

[182] See eg Brower and Blanchard (n 86) 752; Tietje and Baetens (n 58) 127; Alvarez and others (n 90).

[183] Tietje and Baetens (n 58) 127.

[184] Brown (n 86).

[185] ibid.

[186] Public Citizen, 'CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case' (25 May 2010) <www.citizen.org/wp-content/uploads/pacific_rim_backgrounder.pdf> accessed 13 May 2019.

[187] Kelsey (n 167).

tribunals.[188] Should those decisions be concerned with the matters directly or indirectly affecting the public interest, such an impact may very well fall within the scope of regulatory chill. To date, however, there are no reported studies involving 'judicial' regulatory chill.

The bottom line is that even though the regulatory chill thesis has been mainly focused on environmental, public health or other legislation in the public interest, the hypothesis equally applies to executive or judicial decisions which *de facto* have regulatory repercussions. Therefore, in defining what kind of measures can be susceptible to regulatory chill, the focus should not be on which branch of the government (legislative, executive or judiciary) has the responsibility to make a decision but on whether the decision in question affects the public interest. If so, the decision has a broad regulatory impact and, as such, may be prone to regulatory chill.

2.1.4. Drawing the Line Between Regulatory Chill and Preventing the Abuse of State Power

Rather confusingly, regulatory chill does not always have a negative connotation even though the review of the existing literature shows that there is an agreement that regulatory chill does not entail that regulators should be allowed to unduly discriminate against investors.[189] Nevertheless, some authors would still frame such scenarios as regulatory chill. Tietje and Baetens, for instance, argue that ISDS could equally chill 'spurious or nefarious measures' that embody the main purpose of investment treaties to protect foreign investors from such measures.[190] The political scholar, Tienhaara, suggested that the purpose of investment law is to 'chill' the adoption of measures adopted with a discriminatory or protectionist agenda in mind.[191] Bonnitcha, Poulsen and Weibel make a similar point:

> [when] a state plans to seize a foreign investor's factory without compensation, but abandons this plan when the investor threatens investment treaty arbitration … *few would consider it to be a case of regulatory chill* as … [IIAs] are designed to protect foreign investors precisely against such forms of interference.[192]

[188] Amokura Kawharu, 'WAI 2522 – Trans-Pacific Partnership Agreement Inquiry Hearing' (Held at Wellingtin, 14-18 March 2015) 649-51.
[189] See eg Soloway (n 151) 18; see also Tietje and Baetens (n 58).
[190] Tietje and Baetens (n 58) 45-46.
[191] Tienhaara 2011 (n 58) 609.
[192] Bonnitcha, Poulsen and Waibel (n 7) 240 [emphasis added].

The position in this work is that for the sake of clarity, regulatory chill should be used exclusively to describe the undesirable impact of the investment regime as opposed to the scenarios where IIL *de facto* rectifies the host State's illegitimate behaviour. This brings us to the next point, how to draw a line between regulatory chill and the abuse of State power?

It follows from the majority of definitions that only *bona fide* or 'legitimate' regulatory measures can be chilled. In other words, *non-bona fide* ('spurious or nefarious')[193] measures are outside the scope of the regulatory chill concept. Therefore, the *bona fide* or legitimate nature of regulatory measures in question is the major criteria to differentiate the instances of regulatory chill from the abuse of State power. Likewise, Schram and colleagues asserted that:

> [t]he *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.[194]

There are several schools of legal thought about how to make a distinction between legitimate (*bona fide*) and illegitimate (*non-bona fide*) regulatory measures. Bonnitcha, Poulsen and Weibel, for instance, offered a normative theory of legitimate and illegitimate interference with foreign investment based on the idea that legal rules and institutions should maximise social good.[195] Other researchers suggested measuring the constraints that IIAs place on states using normative theories derived from 'the rule of law'[196] or 'justice'.[197] The case law adopts a more specific test and defines *bona fide* regulatory measures as measures that are reasonable, proportionate and adopted in a non-discriminatory manner respecting due process.[198] Such measures are considered as falling within the states' regulatory power which is generally defined as 'the legal right exceptionally given to the host State to regulate in derogation of international commitments it has undertaken by means of an investment

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[193] Tietje and Baetens (n 58) 45-46.
[194] Schram and others (n 53).
[195] Bonnitcha, Poulsen and Waibel (n 7).
[196] See eg Stephan Schill, 'International Investment Law and Comparative Public Law – an Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010); Vandevelde (n 7).
[197] UNCTAD, 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II' (United Nations, New York and Geneva 2012); Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP 2011). Also observed by Bonnitcha, Poulsen and Waibel (n 7).
[198] See further Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar 2018).

agreement, without incurring liability or duty to compensate to investor'.[199] The position is far from being settled and the tribunal's passage in *Saluka v Czech Republic* still holds merit 'international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States'.[200]

In arbitration practice, the scope of regulatory power differs depending on the standard of investment protection in question.[201] In a recent example, in the context of expropriation claims, a tribunal has narrowed the set of circumstances that could exempt the state from its duty to compensate to (i) measures of police powers which enforce existing regulations against the investor's own wrongdoings and (ii) measures aimed at abating threats investors' activities pose to public health, environment or public order.[202] In the context of FET claims, the scope of regulatory power would depend on: (i) whether a repeated and precise commitment has been given to the investor that the regulatory framework will not change (if so, a FET violation might be recognised)[203] and (ii) whether changes to general legislation do not exceed an acceptable margin of change in pursuance of the public interest (if so, the measures do not breach investment commitments).[204]

In the light of the above, there are two major obstacles for distinguishing *bona fide* measures falling within the scope of states. (i) There is no formal doctrine of precedent in investment arbitration and the application of law may vary. Therefore, various stakeholders may have conflicting views on whether certain measures in question are or are not *bona fide*.[205] (ii) The application of the test is very case- and fact-specific. Consequently, in most circumstances, to determine whether measures are *bona fide* requires detailed scrutiny of all

[199] Mathias Audit, 'Investment Arbitration and the Regulatory Powers of States' (Latham and Watkins Paris Online Webinar, 8 July 2020). See also Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart Publishing 2014).
[200] *Saluka Investments B V v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) paras 263-264 [hereinafter, *Saluka v Czech Republic*].
[201] See eg Schram and others (n 53) 199; Tienhaara 2011 (n 58) 614-615; on uncertainty in ISDS, see eg Franck (n 108); Matveev (n 150) 379; Gross (n 86); Bagwell and Staiger (n 140); Van Harten and Scott (n 53); Zarsky 2006 (n 154).
[202] See also *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No ARB/17/27, Award (13 November 2019) para 364 and seq; also cited by Audit (n 199).
[203] See also *Hydro Energy 1 Sàrl and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020) para 676.
[204] ibid, para 676.
[205] See eg *Saluka v Czech Republic* (n 200); *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/30, Award (11 December 2019).

facts and evidence, which may only become available after conducting all procedural steps in a full-blown arbitration.

It should be noted that some experts express more positive views and highlight that arbitral tribunals' discretion to assess the States' use of regulatory powers is limited since the tribunals (i) implement public law rationales for IIAs interpretation so as to safeguard states' public interest (ii) must assess the proportionality of the measure taken by the state and the desired objective (iii) cannot substitute their own views either on the appropriateness of the measures or the assessment of the situation which prompted them.[206] The number of variables that are required establishing before one can consider whether the measures in question are or are not *bona fide* underpins the criticism of existing studies in favour of regulatory chill thesis. Before turning to discuss the literature in more detail, the section that follows will consolidate the foregoing discussion into a concept of regulatory chill and related conceptual ideas to be adopted for this research.

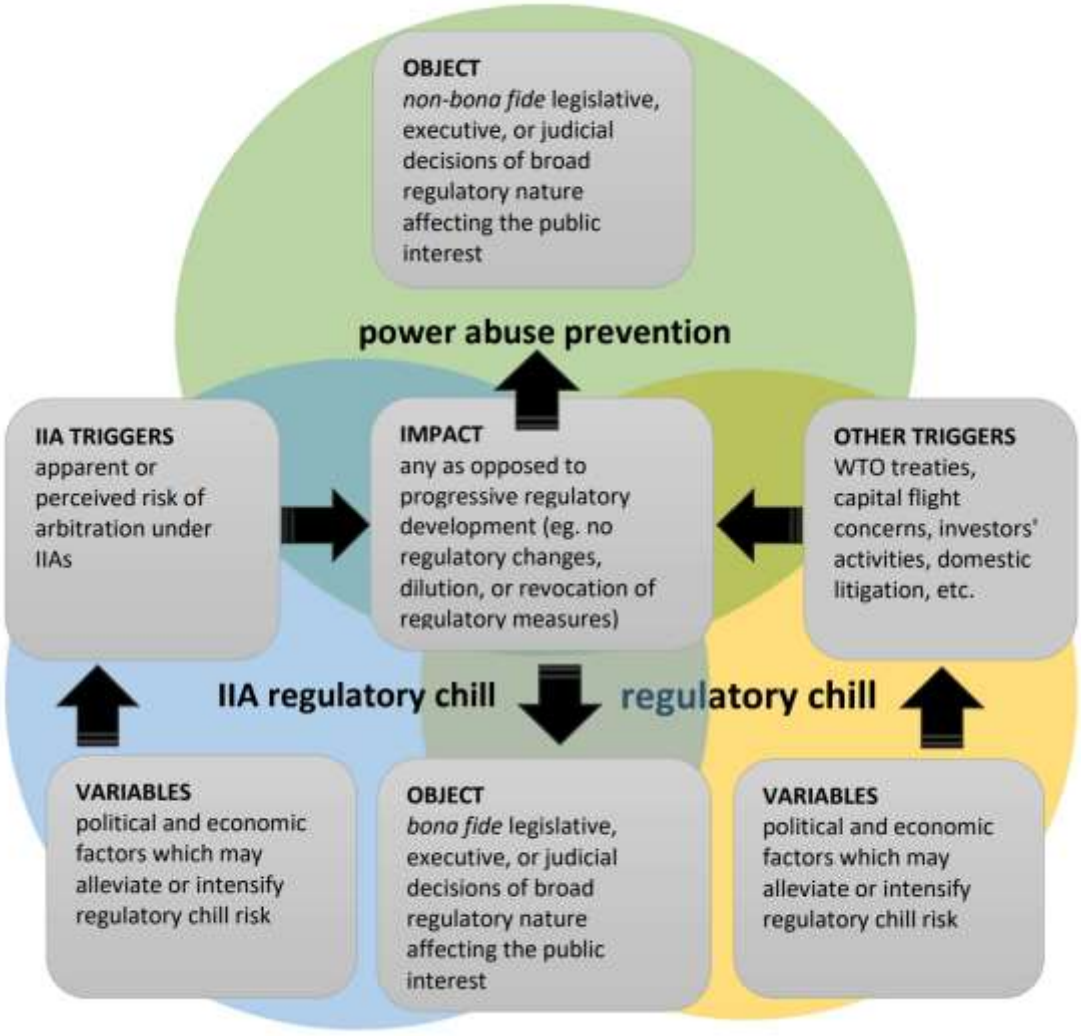
2.1.5. The Regulatory Chill Concept Moving Forward

The present Chapter has surveyed the literature on regulatory chill to set out a conceptual framework for this study. As the review illuminates, the existing knowledge of regulatory chill is rather fragmented and obscure. Attempts to study the phenomenon in various disciplines (e.g. law, politics, economics, public healthcare or environmental studies) are often disconnected not only outside the fields but also within it. With no uniform definition, the conceptualisation of the phenomenon is not sufficiently elaborated with different terminology and conflicting approaches to its use (i.e. some frame regulatory chill in the positive context as encompassing instances of the State power abuse). In the absence of clear conceptualisation, any research on regulatory chill cannot be claimed to be theoretically rigorous and analytically precise. The lack of a uniform understanding does not enable us to engage meaningfully in the ongoing debates on the issue. In the same vein, Schram and colleagues claimed 'that different stakeholders have different, often unarticulated, normative theories of what constitutes illegitimate interference with foreign investment'.[207]

[206] Audit (n 199); Noah Rubins, 'Investment Arbitration and the Regulatory Powers of States' (Latham and Watkins Paris Online Webinar, 8 July 2020).
[207] Bonnitcha, Poulsen and Waibel (n 7) 240.

In this light, the Chapter scrutinised the main criteria of regulatory chill and clarified which approach should be adopted to differentiate between investment treaty regulatory chill and related concepts (i.e. power abuse prevention and regulatory chill as a result of other triggers). As shown in Figure 1, there are four main elements in the suggested conceptual framework: object, impact, triggers and variables. Each of the related concepts shares the same impact which includes any impact as opposed to progressive regulatory development: regulations may be revoked, diluted, rolled back or otherwise amended, etc. Object, i. e. regulations being affected is the differentiating factor between regulatory chill and the abuse of State power, i.e. any scenario where IIAs, WTO agreements, capital flight concerns, national constitutions prevent protectionists, discriminatory or other illegitimate measures (marked as a green circle within this Figure). Any such an impact on *non-bona fide* legislative, executive or judicial decisions of broad regulatory nature falls outside the regulatory chill concept and will not be considered in this study. On the other side, any such an impact on *bona fide* legislative, executive or judicial decisions of broad regulatory nature falls within the concept. Regulatory chill in a broad sense can be provoked by various triggers: risk of arbitration IIAs under IIAs (marked as a blue circle) or other triggers, such as WTO treaties, capital flight concerns or investors' activities which for simplicity were combined in one group and marked as a yellow circle. Each trigger is also affected by external variables (political or economic factors) which may augment or alleviate the risk of regulatory chill.

Figure 1. Power Abuse Prevention and Regulatory Chill



This study will focus on regulatory chill as a result of apparent or perceived risk of arbitration under IIAs, and Figure 1 assists to establish the concept from the related phenomena whilst demonstrating how closely intertwined they are. Drawing upon this, it is possible to formulate the following conceptual ideas to use in this study (see Table 1).

Table 1. Conceptual Ideas

Nos	Concepts	Definitions	Notes/Examples
1.	Regulatory chill	Any impact of IIAs and their arbitration mechanisms on *bona fide* public regulatory measures – as opposed to progressive regulatory development – that is manifested when states in the result of a (i) perceived or (ii) apparent threat of investment treaty arbitration: • maintain status quo, • revoke, • delay, • dilute, or • otherwise fail to improve such measures.	See definitions for '*bona fide'* and 'public regulatory measures' below.
2.	Public regulatory measures	Legislative, executive, or judicial decisions of a broad regulatory nature affecting the public interest.	Except legislative measures, certain executive decisions such as revocation of mining or water supply permits (and/or related judicial decisions) may ultimately affect the public interest and therefore, may be susceptible to regulatory chill.
3.	*Bona fide* measures	Reasonable, proportionate and enacted in a non-discriminatory manner respecting due process.	Measures which can be 'regulatory chilled'.
4.	*Non-bona fide* measures	Any measures as opposed to *bona fide* measures.	Measures that cannot be 'regulatory chilled'.
5.	Power abuse prevention	Any impact of IIAs on the regulatory decision-making process that leads to prevention of *non-bona fide* regulatory measures.	The intended consequence of IIAs and the international investment regime.
6.	IIA triggers	Perceived or apparent risk of investor-state arbitration under IIAs resulting in IIA regulatory chill.	Perceived risk derives from a general awareness about potential liability under IIAs which also may be related to ongoing arbitrations against other states.

Nos	Concepts	Definitions	Notes/Examples
			Apparent risk is an imminent risk of arbitration under IIAs that is communicated by foreign investors to a state government.
7.	Other triggers	Non-IIA triggers that result in non-IIA regulatory chill. Unless otherwise specified, any reference to regulatory chill is a reference to IIA regulatory chill.	Includes domestic litigation, WTO treaties and disputes, risk of industrial flight, lobbying and other investors' activities.
8.	Variables	Factors that may alleviate or intensify the risk of regulatory chill.	For example, it is generally thought that developing states are more prone to regulatory chill than developed states. Strong political support of regulatory measures may alleviate the risk of regulatory chill. Conversely, the unpredictability of investor-state arbitration may intensify the risk of regulatory chill.

Having confirmed which approaches shall be adopted to differentiate between investment treaty regulatory chill and related concepts and set out those conceptual ideas, the next section will discuss the evidence presented by existing literature on the matter.

2.2. Existing Evidence in Favour and Against the Regulatory Chill Hypothesis

As alluded to in earlier sections, existing findings on the regulatory chill thesis are conflicting and debatable. Studies in favour of regulatory chill usually focus on the imminent risk of investment arbitration (commonly labelled as 'specific response chill'). This usually involves anecdotal case studies referring to specific examples when investment treaty claims are believed to influence the regulatory decision-making process. The second group of regulatory chill studies is mainly studies of regulatory chill as a result of a perceived risk of investment arbitration (known as 'internalisation chill'). This is a smaller group of studies that often try to understand the logic behind the regulatory decision-making and/or survey the development of

regulatory measures in comparison to the dynamic of investment claims. This literature usually finds no direct evidence of regulatory chill. The following sections will provide a brief overview of the literature in each of the groups whilst also highlighting the shortcomings in their approaches and results.

2.2.1. Case Studies on Regulatory Chill

Studies discussing regulatory chill arising from a real threat of investment arbitration have labelled it as either 'specific response'[208] regulatory chill and less commonly, 'threat hill',[209] 'direct chill'[210] or 'regulatory chill in a narrow context'.[211] As the argument goes, specific response regulatory chill occurs when foreign investors, potentially affected by what is considered unfavourable for the business regulatory measure, communicate to the respective governments their intentions to bring an investment claim if the measure in question is adopted. Although this group represents the majority of the studies, the literature often discusses the same anecdotal examples allegedly supporting the regulatory chill hypothesis. Some of these examples merit specific mention.

2.2.1.1. Ethyl Corporation and Canada

Earlier NAFTA Chapter 11 disputes have prompted ample discussions on how investment treaties could preclude environmental measures leading to regulatory chill.[212] Those debates, however, would often refer to the same cases. For instance, in 1996, Ethyl Corporation (Ethyl) launched a claim against Canada to challenge its environmental law prohibiting imports and the interprovincial transportation of the gasoline additive Methylcyclopentadienyl Manganese Tricarbonyl (MMT).[213] Ethyl argued that the ban was a discriminatory measure since it did not prohibit the production and sale of MMT, but only its import to Canada and any interprovincial

[208] Tienhaara 2011 (n 58).
[209] Bonnitcha 2014 (n 58) ch 3.
[210] Kelsey (n 167).
[211] Sattorova 2020 (n 55).
[212] See Neumayer 2001b (n 126) 3; Soloway (n 151); Laura Létourneau-Tremblay and Daniel F Behn, 'Judging the Misapplication of a State's Own Environmental Regulations: William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada, UNCITRAL, PCA Case No 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (Bruno Simma, Bryan Schwartz, Donald McRae) and Dissenting Opinion, 10 March 2015 (Donald McRae)' (2016) 17 (5) JWIT 823.
[213] *Ethyl Corporation v Government of Canada*, UNCITRAL, 7 ICSID Reps 12, Decision on Jurisdiction (24 June 1998) [hereinafter, *Ethyl v Canada*].

transportation.[214] Shortly after, the tribunal found it had jurisdiction to hear the claim, Canada settled arbitration and revoked the environmental regulation.[215] Thus, critics argued that the fact that Canada retracted the environmental measures evidences the regulatory chill hypothesis.[216] Referring to the case, Poulsen, Bonnitcha and Yackee suggested that the possibility of investor-State arbitration may give investors an ammunition to compel host States' governments to settle the case simply to avoid litigation costs or damage to the State's reputation as investment welcoming country.[217] They went further to observe that a significant proportion of notices of intent are eventually withdrawn or became inactive and the amount of damages may often be exaggerated to induce States to settle the case in the investor's favour.[218]

First and foremost, the causation between Ethyl's arbitration claim and the termination of the Canadian ban raises serious doubts. While the investment arbitration was pending, four Canadian provinces successfully challenged the ban before the Canadian public interprovincial tribunal. The national courts found the ban to be inconsistent with Canadian law as an illegitimate barrier to interprovincial trade that could not be justified under environmental grounds.[219] Following the national courts' findings invalidating the regulation, Canada revoked the ban and settled the investment dispute.[220] Accordingly, the revocation of the ban was rather triggered by the national courts' judgements than by the pending investment claim. What is more, given the conceptualisation of regulatory chill, this scenario falls outside the regulatory chill framework in any event because the ban was found to be in breach of Canadian national legislation, i.e. was not a *bona fide* measure.[221] It is also worth mentioning that the political and economic variables in Canada would always alleviate any potential risk of regulatory chill: it is a developed country with a strong economy, political institutions and profound expertise in IIL and arbitration which makes it less prone to regulatory chill. [222]

Other writers also questioned the validity of regulatory chill evidence in this and similar cases. Brower and Blanchard undertook a reappraisal of the Ethyl case and found no evidence

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[214] ibid.
[215] See eg Rahim Moloo and Justin Jacinto, 'Environmental and Health Regulation: Assessing Liability Under Investment Treaties' (2011) 29(1) Berkeley J Int'l L 1; but see Brower and Blanchard (n 86).
[216] See eg Public Citizen, 'NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas' (September 2001) <www.citizen.org/documents/ACF186.PDF> accessed 1 November 2018.
[217] Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, 'Transatlantic Investment Treaty Protection' (Paper No 3 in the CEPS-CTR Project on "TTIP in the Balance" and CEPS Special Report No 102, March 2015).
[218] ibid 18-19.
[219] 'Report of the Article 1704 Panel Concerning the Dispute between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act' (1998) 3 Asper Rev Int'l Bus & Trade L 347, 361.
[220] Also observed by Brower and Blanchard (n 86) 751.
[221] See s 2.1.4.
[222] See s 2.1.5.

of regulatory chill.[223]They further observed that in a similar situation, after Dow AgroSciences filed an arbitration claim because Quebec prohibited the use of chemicals for cosmetic lawn care, five other Canadian provinces adopted analogous bans.[224] This supports the above point that in, any circumstances, Canada is unlikely to be on the whole susceptible to regulatory chill and abandon public regulations because of potential economic or reputational ramifications of an investment claim. Having reviewed the arguments in Ethyl and some other cases, Bonnitcha also concluded that it is a difficult question of 'whether the abandoned measures were likely to have been permissible'.[225]

That being said, it is worth noticing that Canada has not acceded to the investment arbitration mechanism in the revised NAFTA, known as the United States-Mexico-Canada Agreement (USMCA).[226] This means that neither US nor Mexican investors will be entitled to initiate claims against Canada under USMCA, nor will Canadian investors be able to bring such claims against the US or Mexico. What is more, USMCA's substantive provisions have been also considerably narrowed down.[227] This can only mirror the States' disagreement with the former state of affair and in particular, the ability of investors to challenge public regulatory measures. On the other hand, however, the dissatisfaction with the regime does not support the regulatory chill thesis *per se*. To put it differently, the fact that the Canadian Government was not content with NAFTA-related arbitration does not confirm that they had ever dropped regulatory initiatives because of concerns over economic, reputational or other ramifications of investment claims.

2.2.1.2. Harken Energy's and Vannessa Ventures' Claims Against Costa Rica

A parallel can be drawn between Ethyl and other case studies. In her influential piece, Tienhaara cites two cases related to concession contracts between the Government of Costa Rica and mining companies Harken Energy (Harken) and Vannessa Ventures (Vannessa).[228]

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[223] Brower and Blanchard (n 86).
[224] ibid (citations omitted).
[225] Bonnitcha 2014 (n 58) 12.
[226] Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, in force 1 July 2020).
[227] See eg Calliope Sudborough, 'What is the ISDS Landscape under the "New NAFTA"?' (*Kluwer Arbitration Blog*, 9 January 2019) <http://arbitrationblog.kluwerarbitration.com/2019/01/09/what-is-the-isds-landscape-under-the-new-nafta/> accessed 19 June 2019.
[228] Tienhaara 2011 (n 58) 617-626.

Vannessa thought investor-State arbitration after the Costa Rican environmental agency persistently refused to approve a required mining permit, even though the company's licence was not affected by a mining ban. The company filed a request to arbitration seeking USD 240 million of loss of profits and USD 36 million in expenses and compound interest.[229] In parallel, Vannessa appealed the agency's decision in a national court and won the claim. After obtaining the required permits, the company dropped the proceedings.

Having labelled this case as regulatory chill, Tienhaara, however, has failed to acknowledge the fact that Vannessa had a legitimate concession contract signed with the Government and defended its right to operate in the court. With limited information about the facts and without sight of key evidence, it is not possible to consider the merits of Vannessa's investment claim but the national proceedings support Vannessa's position. Even though the USD 276 million claim could potentially put pressure on the Government and national courts, it is doubtful that such pressure would suffice to force the Government to issue permits should Vannessa's claim be manifestly unfounded. If we accept that the claim was legitimate, the case is also likely to fall outside the regulatory chill framework.[230]

The Harken case likewise does not support the regulatory chill thesis. Harken had a 20-year concession to look for and exploit offshore oil resources.[231] After Costa Rica banned open-pit mining, Harken mounted an investment arbitration claim for USD 57 million for loss of potential earnings. Later, it withdrew the arbitration claim and tried to settle the dispute with the Costa Rican Government but the Government rejected to pay any compensation to the company. Subsequently but also unsuccessfully, Harken seek an annulment of resolutions invalidating oil concessions.[232] Having observed these facts, Tienhaara argues that even though the investor dispute did not lead to regulatory chill, the case supports the proposition that it could. She further notes that:

> ... not every threat to arbitrate will result in a government capitulating to investor demands. In some instances the government will call the investor's bluff and the matter will be dropped. In others … the government will choose to defend its regulatory measures and proceed to arbitration.[233]

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[229] ibid (citations omitted).
[230] See s 2.1.5.
[231] Environmental Justice Atlas, 'Moratorium on Oil Exploration Harken Energy, Costa Rica' (16 February 2016) <https://ejatlas.org/conflict/moratorium-on-oil-exploration-harken-energy-costa-rica> accessed 10 June 2018.
[232] ibid; Oil & Gas Journal, 'Harken 'Disappointed' in Costa Rican Court Challenge' (18 September 2000) <www.ogj.com/home/article/17252722/harken-disappointed-in-costa-rican-court-challenge> accessed 10 June 2018.
[233] Tienhaara 2011 (n 58) 618.

This thesis politely disagrees. The fact that regulatory chill did not take place despite the claim being brought testimonies against the regulatory chill hypothesis and not in its favour as suggested by Tienhaara. She fails to explain in what circumstances the Government may 'call the investor's bluff' and this is not down to the poker-game skills as her statement may suggest. Even with no in-house expertise, the Government should be in the position to find external resources to assess the merits of a multi-million US Dollar claims against it. Indeed, it has been acknowledged that '[s]tates rarely appoint agents for international investment disputes. Many States, in fact, turn their investment disputes entirely over to external counsel, retaining no formal role for government lawyers'.[234]

The Harken's case arose in similar circumstances to Vannessa's and at about the same time, but led to different outcomes. Therefore, it can be argued that the Government was not considerably affected by the investment claims, but was predominantly governed by the contractual arrangements, national legislation and national judgements in the following cases.

2.2.1.3. Indonesian Mining Ban

In 1999, Indonesia also imposed a moratorium on open-pit mining.[235] By April 2002, more than 20 mining companies had threatened the Government to bring billions of US Dollars' worth of claims under IIAs.[236] Several months later, the Government had lifted the ban for some companies and subsequently, in 2004, it exempted from the ban all permits and contracts which were issued before the moratorium.[237] What is more, the Government has explicitly referred to the claims as an explanation for the rationale of the decision: '[i]f shut down, investors demand and Indonesia cannot pay'.[238] Having noted that the Government had lifted the ban to settle some potential disputes, writers debated that the Indonesian IIAs had dissuaded the Indonesian Government from maintaining the environmental policy and led to regulatory

[234] Jeremy K Sharpe, 'The Agent's Indispensable Role in International Investment Arbitration' (2018) 33(3) ICSID Review 676. This has also been recently confirmed by representatives from Ukraine and Belarus: Ivan Lischyna (Deputy Minister of Justice of Ukraine), 'Arbitration for Business or Reforms for Reforms Sake?' (VII International Arbitration Readings in Memory of Academician Igor Pobirchenko, Online, 17 November 2020); Oksana Kotel (Partner, Goretsky & Partners, Belarus), 'Eastern Europe and CIS: Recent Developments and Future Trends' (YMG World Tour, Online, 17 March 2021).
[235] Tienhaara 2006 (n 137) 88.
[236] Gross (n 86) 894; Tienhaara 2006 (n 137) 92.
[237] Tienhaara 2006 (n 137) (citations omitted).
[238] MAC: Mines and Communities, 'Nabiel Makarim Agrees with Mining in Protected Forests' (15 June 2002) <www.minesandcommunities.org/article.php?a=7737> accessed 20 November 2019.

chill.[239] However again, the two main issues with this case are of: (i) the legitimacy of the investment claims and (ii) the causation between the claims and the ban revocation.

Gross claimed that the Indonesian ban was aligned with its contractual and investment obligations and that the Government could 'likely have beaten some or all of the mining companies' claims at a jurisdictional stage and almost certainly on the merits'.[240] His own evidence, however, does not support this claim. (i) His assessment of the merits is based on limited information and evidence and, therefore, cannot be claimed to be comprehensive. Similarly, Bonnitcha argued that:

> [a]rbitral decisions concerning denial of permits to use land in a certain way do not lay down any bright line tests…This suggests that the strength of … Indonesia's defences would have depended on the scope of permission held by and the assurances made to mining companies before the changes in policy.[241]

(ii) It would be too naïve to assume that the Government did not give proper and sensible consideration to the potential claims. In fact, it has been reported that the Government received legal advice that its potential liability could reach USD 31 billion.[242] And, (iii) If the environmental ban violated the States' commitments to foreign investors, it cannot be considered *bona fide* no matter how plausible its purpose was. As such, the case study falls outside the regulatory chill framework.[243]

Furthermore, the critics generally acknowledge that the threat of investment claims was not the only factor that could influence the Indonesian Government's decision to lift the ban. Thus, Tienhaara contended that the withdrawal could also be underpinned by the Government's desire to maintain existing investments in the mineral sector and attract further ones.[244] She concludes that it is almost certain that the Government's decision was affected by the threat of investment claims but it is not clear whether the threat played the key role among other factors. Brown also highlighted the significance of the mining industry for the Indonesian economy that could be taken into account by the Government.[245] It is worth noting that since 2002, the Indonesian Government has made several further attempts to introduce mining bans but

[239] See Gross (n 86); Tienhaara 2006 (n 137); Brown (n 86).
[240] Gross (n 86) 954.
[241] Bonnitcha 2014 (n 58) 122.
[242] Tienhaara 2006 (n 137) (citations omitted).
[243] See s 2.1.5.
[244] Tienhaara 2006 (n 137) 94.
[245] Brown (n 86).

arguably prioritised its 'huge boost in revenues' and FDI.[246] What is more, Brown finds evidence suggesting that the Government officials could have been bribed by the industry to change the legislation.[247] Again, this illustrates the shortcomings of the regulatory chill argument in this case: neither author could argue that there was clear causation between the claim and the ban revocation. Therefore, it cannot be argued with certainty that the case can be framed as a regulatory chill example.[248]

2.2.1.4. Pac Rim and El Salvador

Another dispute arose between a mining company Pac Rim (now OceanaGold) and El Salvador. The company launched an arbitration claim against El Salvador after the State refused mining permits after Pac Rim spent millions of US Dollars on mineral exploration activities.[249] The claimant though, was up to USD 300 million for loss of profit, which was almost twice the USD 158 million in international aid that El Salvador received in 2014.[250] Nevertheless, El Salvador decided to defend the claim and maintain its legislation.

Thus, Karunananthan argued that the claim had put on hold the regulatory agenda to protect local people and the environment and that proposals for 'bold initiatives addressing the country's environmental challenges, including a more robust water policy and a permanent ban on metal mining … have been stalled under the threat of this lawsuit.[251] Concerned with a potential regulatory chill, Brown was also varied about the State's ability to maintain the environmental measures.[252] There has been further reports that the Government considered settling the dispute with Pac Rim pointing at the merits of the claim.[253] These assertions, however, were not supported by any comprehensive evidence and after seven years of legal

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[246] See eg Eve Warburton, 'The Life and Death of Indonesia's Mineral Export Ban' (*Inside Indonesia*, 19 October 2017) <www.insideindonesia.org/the-life-and-death-of-indonesia-s-mineral-export-ban-3> accessed 15 December 2020.
[247] Brown (n 86).
[248] See ch 2.1.5.
[249] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Award (14 October 2016) [hereinafter, *Pac Rim v El Salvador*].
[250] Meera Karunananthan, a water campaigner for the Council of Canadians, cited in Claire Provost and Matt Kennard, 'World Bank Tribunal Dismisses Mining Firm's $250m Claim Against El Salvador' (*The Guardian*, 14 October 2016) <www.theguardian.com/global-development/2016/oct/14/el-salvador-world-bank-tribunal-dismisses-oceanagold-mining-firm-250m-claim > accessed 1 December 2017.
[251] ibid.
[252] Brown (n 86)17-18.
[253] 'New Environment Ministry Moves To Ban Mining, Sends "Anti-Development" Signals' (2011) <https://web.archive.org/web/20120523155233/http://www.cablegatesearch.net/cable.php?id=09SANSALVADOR637> accessed 12 September 2019.

proceedings, the claim was ultimately dismissed with the claimant ordered to compensate the majority of the State's legal costs.[254]

The case of El Salvador ultimately testifies against the regulatory chill thesis; despite the significant value of the claim, the State did not roll back its decision to settle the dispute. Instead, the Government vehemently defended the claim, won on the merits and recovered the majority of its legal costs.

2.2.1.5. Philip Morris' Claims Against Australia and Uruguay

Subsequent diversification of investment disputes has expanded regulatory chill hypothesis to a broader set of concerns beyond environmental policy.[255] In 2010-2011, claims brought by PMI against Australia and Uruguay to challenge their tobacco control legislation, have led to global discussions on the impact of investment treaties public health and future NCD policies.[256] The saga started in 2009 with Uruguay under the lead of its Former President (and Oncologist) Tabaré Vázquez, who introduced (unprecedented at the time) tobacco measures, including: (i) a prohibition to sell more than one sort of cigarette under a single brand name; and (ii) a requirement that graphic health warnings should cover 80% of each side of the product packaging.[257] PMI argued that the measures 'go far beyond any legitimate public health goal' and dilute the commercial value of their trademark.[258] In 2010, Australia announced decision to implement a similar policy requiring graphics and logos to be removed from cigarette packs.[259] PMI thought to contest the measure under the Hong Kong-Australia BIT,[260] arguing that the tobacco policy had infringed its investment, whereas no credible evidence existed that the policy would reduce tobacco-related mortality.[261] This time, the claim was accompanied by trade disputes under the WTO treaties initiated by Ukraine, Cuba, Dominican

[254] *Pac Rim v El Salvador* (n 249).
[255] See eg Sattorova 2020 (n 55).
[256] *PMI v Uruguay* (n 36); *PMI v Australia* (n 36).
[257] Oriental Republic of Uruguay, Public Ordinance No 514, Montevideo, Uruguay: Ministry of Public Health of 18 August 2008; Oriental Republic of Uruguay, Executive Decree of 15 June 2009, No 287, Montevideo, Uruguay: Office of the President.
[258] *PMI v Australia* (n 36).
[259] Alberto Alemanno and Enrico Bonadio, 'The Case of Plain Packaging of Cigarettes' (2010) Eur J Risk Regul 268.
[260] *PMI v Australia* (n 36); Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (signed 15 September 1993, entered into force 15 October1993) [hereafter: Hong Kong-Australia BIT]; Australian Government, Tobacco Plain Packaging Act 2011 No 148 of 1 December 2011, Received Royal Assent on 1 December 2011.
[261] *PMI v Australia* (n 36).

Republic, Honduras and Indonesia,[262] whilst the tobacco industry has been reported to be behind the disputes and even funded them.[263] Both investment disputes also involved extensive litigation proceedings in domestic fora in Australia and Uruguay.[264] After the arbitration was initiated, Uruguay was reported to be on the verge of watering down its tobacco policies and settling the dispute.[265] Ultimately, the Bloomberg Foundation (Bloomberg Philanthropies) and its 'Campaign for Tobacco-Free Kids' offered *pro bono* funding for Uruguay and it proceeded with defending the claim.[266] In addition, other countries, including: Paraguay, New Zealand and Costa Rica were reported to put on hold similar tobacco-control measures whilst awaiting the outcome of the disputes.[267]

The argument has been raised that IIAs and their arbitration mechanisms may deter the adoption of more stringent tobacco regulations leading to regulatory chill.[268] Counsel Brillembourg, who represented Uruguay in the dispute, argued that: 'the threatening letter from tobacco [company] … can have pretty compelling effects on the government who have no familiarity … with the jurisprudence and the principles that apply in investment arbitration'.[269] She went on to say that PMI used the case as a 'PR campaign' to demonstrate to small countries considering similar measures what kind of ramifications they could face.[270] This was allegedly supported by the relatively insignificant amount of PMI's claim (USD 22.30 million) compared to usual investment arbitration and PMI's revenue amounting to USD 80.2 billion in 2013.[271]

Along the same lines, Tobin argued that: 'tobacco packaging laws in several countries have been delayed or reduced as a result of fears of potential arbitration among the government and

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[262] See eg WTO, *Australia: Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the establishment of a Panel by Ukraine* (17 August 2012) WT/DS434/11.
[263] *See* eg Amy Corderoy, 'Mystery Over Ukraine Tobacco Law Challenge' (*Sydney Morning Herald*, 26 March 2012). See further s 4.2.
[264] *PMI v Australia* (n 36); *PMI v Uruguay* (n 36).
[265] Carroll (n 67); Luke Eric Peterson, 'Uruguay Hints at Compromise in Arbitration with Philip Morris' (*Kluwer Arbitration Blog*, 28 July 2010).
[266] Kelly Henning, 'Supporting Uruguay in their Fight against Big Tobacco' (*Bloomberg Philanthropies*, 18 July 2013) <www.bloomberg.org/blog/supporting-uruguay-in-their-fight-against-big-tobacco/> accessed 20 June 2018.
[267] Boot (n 68); Jennifer L Tobin, 'The Social Cost of International Investment Agreements: the Case of Cigarette Packaging' (2018) 32(2) Ethics Int Aff 153, 162.
[268] See Valentina Vadi, 'Reconciling Public Health and Investor Rights: The Case of Tobacco' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 482–3; Jarrod Hepburn and Luke R Nottage, 'A Procedural Win for Public Health Measures' (2017) 18(2) JWIT Trade 307.
[269] Clara Brillembourg, 'The Tobacco Industry's First Global Challenge against a Country's Tobacco Control' (*Global Tobacco Control YouTube*, 29 February 2016) <https://youtu.be/Mt6bz_Wc1Mk> accessed 18 July 2017.
[270] ibid; referring to the relatively insignificant amount of PMI's claim – USD 22.30 million.
[271] ibid.

legislation'.[272] Drawing upon a statistical analysis of the 1973-2016 data from 95 countries, Moehlecke collaborated this statement: 'anti-smoking policies challenged by international lawsuits diffused at slower speeds relative to comparable undisputed policies, while cases where ongoing'.[273] She claimed that '[i]nterviews with key actors involved with the PMI case show that Uruguay's intentions to tackle smoking rates in the country were temporarily chilled by international arbitration'.[274] Moehlecke further relied on parliamentary discussions, in-depth interviews and other secondary sources to argue that the lack of sufficient information about the tobacco disputes has also delayed tobacco measures in other countries.[275] According to her, after the information was released, developed countries accepted the risks and proceeded with the policies but developing countries were still hesitant.[276]

The range of evidence seems at first look convincing but is not without doubt. First, both Uruguay and Australia have refused to roll back the measures and progressed to defending them in arbitration. Both claims had been ultimately dismissed.[277] Alvarez and colleagues surmised the fact that the PMI's cases had not chilled legislative acts 'let alone unduly chilled – further invalidates the 'regulatory chill' claim'.[278] After the claims failed, Lavranos said that: 'the "regulatory chill" argument simply remains unconvincing and failed yet again' noting that '[t]he myth [of regulatory chill] blown up to proportions equal only to ancient Greek myths'.[279]

With other countries that were thought to delay the measures whilst awaiting the outcome of the claims, the findings also raise doubts. Moehlecke's statistical analysis showing the diffusion of tobacco policies is inconclusive as the information provided by NGOs is likely to be incomplete.[280] Furthermore, the delay could also be attributed to other concurrent factors. Kelsey, for example, argues that New Zealand's plain packaging policy was delayed due to 'mutually reinforcing factors:' perceived risk of litigation, associated arguments by the industry lobbyists and an existing trade regime that 'favours minimal intervention and empowers the

[272] Tobin (n 267).
[273] Carolina Moehlecke, 'Information and Risk: How Investor-State Disputes Affect Global Policy Diffusion' (MA thesis, University of Texas 2017).
[274] ibid.
[275] ibid.
[276] ibid.
[277] The claim against Australia was dismissed on jurisdiction, the claim against Uruguay was dismissed on merits. See *PMI v Australia* (n 36); *PMI vUruguay* (n 36). For further analysis, see Tania Voon and Andrew Mitchell, 'Implications of International Investment Law for Plain Packaging: Lessons from the Hong Kong-Australia BIT' in Tania Voon and others (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar 2012); Voon (n 75).
[278] Alvarez and others (n 90).
[279] Lavranos (n 69).
[280] Moehlecke (n 273).

tobacco industry'.[281] In particular, she emphasised the significance of the WTO claims and domestic litigation:

> [t]he six tobacco companies … re-litigated the plain packaging law itself and urged government not to act until the WTO resolved the dispute against Australia … [t]he regulations were adopted in late May 2017, after it became known informally that Australia has won the panel stage of the WTO dispute.[282]

This is of interest from the timeline perspective. By 8 July 2016, both investment arbitration claims had been dismissed but the Government did not proceed with the regulatory measures until May 2017, [283] i.e. when the WTO claims were resolved.[284]

The official Government statement explaining the reasons to postpone the introduction of the tobacco measure referred to either both the WTO and investment claims, or the investment disputes only.[285] In the light of the timeline though, it is implausible that the threat of investment claims has had a dominant role in the delay. Therefore, the regulatory delay in New Zealand is unlikely to be considered as regulatory chill for this study. Furthermore, it has also been suspected that public officials may use arbitration claims merely as a public excuse not to put forward the genuine reasons for regulatory delay.[286] Another reason to argue against the alleged regulatory chill in New Zealand is that the State's strong political and economic environment makes it generally less susceptible to regulatory chill.[287]

The circumstances would be different in other jurisdictions.[288] However, to identify regulatory chill, one must be able to eliminate other causes that could lead to regulatory delay.[289] For example, the policies could also be diffused or delayed by the industry's lobbying, capital flight concerns or ongoing litigation in national courts. [290] With the divergent views on the matter, it is fair to argue that more thorough and systematic case studies in specific jurisdictions are required to confirm the causality and to avoid unsubstantiated conclusions.

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[281] Kelsey (n 167).
[282] ibid 30-31.
[283] *PMI v Australia* (n 36); *PMI v Uruguay* (n 36).
[284] See (n 262).
[285] Tariana Turia, 'Government Moves Forward with Plain Packaging of Tobacco Products' (*Beehive.govt.nz*, 2013) < www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products > accessed 2 June 2020.
[286] Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009) 263.
[287] See s 2.1.5.
[288] See eg Moehlecke's empirical evidence (n 273).
[289] Also noted by Bonnitcha 2014 (n 58) 115.
[290] See Eva Napoulos, ''Repackaging' Plain Packaging in Europe: Strategic Litigation and Public Interest Considerations' (2016) 19(1) J Int Economic Law 175.

To conclude, even though the PMI's case has been so far the most convincing evidence of regulatory chill, it still raises many questions. That being said, it is too early to put regulatory chill thesis to rest.[291]

2.2.2. Other Studies on Regulatory Chill

The second cluster of the literature is predominantly represented by studies on internalisation (or anticipatory) regulatory chill.[292] This type of regulatory chill is thought to be manifested when policymakers internalise the risk of an investor-State dispute arising even before a dispute crystallises and fails to adopt an effective regulatory policy. In this scenario, foreign investors have no active role in the process and no imminent threat of arbitration dispute exists. The threat is perceived by policymakers based on the State's investment treaty commitments and potentially, similar arbitral disputes against this or other States. The studies can be generally categorised by the method used in the following categories: (i) doctrinal analysis of IIAs and Awards (ii) interviews with policymakers and (iii) statistical analysis on the correlation between IIAs/ISDS and policy developments. The results are conflicting and on the whole, do not support the regulatory chill hypothesis. The sections that follow will briefly discuss the available literature under each of the rubrics.

2.2.2.1. Analysis of IIAs and Awards

To test whether IIAs are capable of chilling public policies, writers considered the language of IIAs in light of available case law and evaluated its potential impact on governmental initiatives. Amid discussions about regional trade agreements, Tietje and Baetens addressed concerns on the inclusion of ISDS in the TTIP.[293] Having examined the existing case studies and noting that most known arbitration cases 'concern individual administrative treatment of investors' whilst '[l]egislative acts are subject to ISDS procedures only in exceptional cases, and these claims are hardly, if ever successful,' they conclude that '[t]here is no conclusive empirical evidence for "regulatory chill" due to the existence of an investment treaty providing

[291] See ch 1.
[292] Tienhaara 2011 (n 58) 607; Tietje and Baetens (n 58); Sattorova 2020 (n 55); Kelsey (n 167) defining it as 'systematic chill'.
[293] Tietje and Baetens (n 58).

for ISDS'.[294] Alvarez and colleagues similarly argue that '[t]he fact that regulatory chill cannot be measured …should nullify the regulatory chill theory, as does the fact that the vast majority of ISDS cases are not brought on the basis of regulatory chill acts, but rather due to executive acts'.[295]

Nonetheless, these arguments suffer some serious deficiencies. (i) The difficulties in studying the hypothesis does not discard its validity. (ii) This thesis has already argued that regulatory chill encompasses executive and judicial decisions and not only the legislative ones.[296] And, (iii) While these statements rely on general rules of treaty interpretations, they encounter the same limitations and do not take into account the existence of different schools of thought on how to interpret and apply various investment treaty standards – as evident by the inconsistent awards in the case law. [297] This unsettled environment is underpinned by the absence of the doctrine of precedent in investor-State arbitration.[298] Even though it can be argued that the majority of investment awards follows previous cases, the law does not require them to do so.[299] The different approaches to investment treaty interpretation and uncertainty of the case law will be considered in more detail later on.

Having examined known investment arbitration awards, Schill concludes that 'investment treaties neither obstruct nor chill state regulation that aims at reducing greenhouse gas emissions'.[300] Nonetheless, his wide-ranging analysis does not take into account particular state obligations to international investors in each specific jurisdiction. In this way, his findings should be treated as preliminary and cannot ensure that greenhouse gas regulations will not be 'chilled'. Schill downplays the above-mentioned inconsistent views on the treaty interpretation which may lead to the opposite result.[301] Most importantly, Schill's analysis does not take into account the issues of due process and rule of law which have become a stumbling stone for environmental policies in several cases. Létourneau-Tremblay and Behn, who analysed the

[294] ibid 127.
[295] Alvarez and others (n 90).
[296] See s 2.1.3.
[297] See Yas Banifatemi, 'Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy, Proceedings of the World Trade Forum 2011* (CUP 2013); Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration: A Preliminary Ruling System for ICSID Arbitration* (Brill Nijhoff 2017).
[298] ibid.
[299] Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008).
[300] Stephan Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24(5) J Int Arbitr 469.
[301] Franck (n 108); UNCTAD, 'Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims' (IIA Issues Note No 2, December 2010).

implications of the Award in *Bilcon v Canada*[302] for potential regulatory chill, found that: 'the violation of the treaty … does not relate to the substantive content … 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 … regulations'.[303] Ultimately, and in contrast to Schill's findings, they conclude that the Award could cause regulatory chill.[304]

Another strand of literature considers historic changes in investment treaty language. Broude, Haftel and Thompson produce a series of studies examining renegotiated treaties[305] based on the hypothesis that: '[i]f states are unhappy with BITs and with arbitration … we could expect to see this manifested in efforts to renegotiate ISDS provisions, reducing exposure to compliance and adverse rulings restrictive of … [regulatory space]'. [306] In their earlier work, they demonstrate that most renegotiations produce BITs with less scope of regulatory space, as reflected in ISDS provisions.[307] This contradicts the regulatory chill thesis. However, their analysis was limited to ISDS provisions and thus was lopsided – as the authors themselves acknowledged: 'without investigating the parallel changes in the substance of investment protection rules, this may only reflect comparatively robust support for ISDS, not a lack of concern for … [regulatory space]'.[308] In their subsequent paper, where they included other provisions in the analysis, they argued that:

> exposure to investment claims leads either to the renegotiation of IIAs in the direction of greater… [regulatory space], or to their termination. This effect varies, however, with the nature of involvement in ISDS and with respect to different types of treaty provisions.[309]

These findings are aligned with other studies revealing the general trend of preserving regulatory space, in particular, through the inclusion of regulatory exceptions in more recent IIAs.[310]

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[302] *Bilcon of Delaware and others v Government of Canada*, PCA Case No 2009-04, Award on Damages (10 January 2019) [hereinafter, *Bilcon v Canada*].
[303] Létourneau-Tremblay and Behn (n 212) 823-824.
[304] ibid.
[305] See (n 109).
[306] Thompson, Broude and Haftel 2018a (n 109).
[307] ibid.
[308] ibid 530.
[309] Thompson, Broude and Haftel 2018b (n 109).
[310] Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13(4) J Int Econ Law 1037; but see UNCTAD, 'Investor–State Dispute Settlement and Impact on Investment Rule-Making' (2007) UNCTAD/ITE/IIA/2007/3, 88 arguing that '[t]he use of the negative list

Even though the analysis reveals preferences and intentions of policymakers that are not always discernible, the findings do not necessarily support the regulatory chill hypothesis. Treaty negotiators might simply follow the UNCTAD Guidelines where preserving regulatory space is an important dimension for new generation BITs.[311] To put it differently, governments might consider that securing more regulatory space in a re-negotiated or a more recent BIT is the right thing to do based on general views and not because they internalise their concerns on potential investment claims by abandoning regulatory innovations.

There are other similar studies but they suffer the same criticism discussed in this section.[312] In a nutshell, the existing doctrinal analysis produces diverse and conflicting conclusions and neither support nor refute the regulatory chill hypothesis. From a methodological point of view, the doctrinal analysis of IIAs and Arbitral Awards may shed some light on circumstances that give rise to investment disputes, on the dynamic of investment-treaty negotiation practice and on whether and in what circumstances regulatory measures are considered to be *bona fide*. Nevertheless, as discussed further below, the black letter analysis alone cannot deal with what is essentially an empirical question about the concept of regulatory chill.[313]

2.2.2.2. Interviews and Surveys

A famous critique by Coe and Rubins argues that the regulatory chill hypothesis '[a]ssumes that regulators are aware of international law, but are they?'[314] A number of scholarly work aims to understand if and to what extent policymakers are aware of the intricacies of international investment treaties. A notable study under this rubric by Van Harten and Scott, presents the results of 52 in-depth interviews conducted with government officials in Canada.[315] The scholars found evidence to support the conclusion that the regulatory development in Canada was affected by considerations of the State's trade and investment

approach …shows that signatories to new generation IIAs have not experienced any regulatory "chilling effect" resulting from the increase in investment disputes over the last decade'.

[311] See UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime (2018 edition)' (24 October 2018) <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf>; UNCTAD, 'International Investment Agreements Reform Accelerator' (2020) UNCTAD/DIAE/PCB/INF/2020/8 <https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf> both accessed 2 December 2020 [hereinafter, UNCTAD (Reform)].

[312] See eg Schill 2007 (n 300).

[313] See ch 3.

[314] Jack Coe and Noah Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases From ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

[315] Van Harten and Scott (n 53).

obligations.[316] The study reveals that the concerns about investment arbitration increased after Canada had been dragged into investor-State disputes and that some policy proposal had been changed as a result.[317]

This study can be contrasted with an empirical study by Côté.[318] She took in-depth interviews and an extensive survey of 114 policymakers from Canada, Australasia, Europe, Latin America, the Caribbean, Africa and the Middle East.[319] Her findings reveal that the level of awareness among government officials regarding investment treaty obligations varies but, in general, is rather limited.[320] The analysis has shown that Canadian regulators were not focused on avoiding investment disputes when developing regulatory measures.[321] Rather, the WTO commitments were more likely to influence the government's decisions.[322] In conclusion, she argues 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'.[323]

This aligns with the findings by Sattorova and Vytiaganets.[324] The study included small-scale in-depth interviews with government officials in developing countries, including: Armenia, Azerbaijan, Belarus, Georgia, Ukraine and Uzbekistan. The interviews revealed that the majority of respondents showed no awareness of investment treaty law and investor-state arbitration.[325] The policymakers shared the view that investment treaties alone are unlikely to discourage governments from adopting public regulations, in particular, when there is a strong political will, acute social demand or pressure from international donors.[326]

This shows that whilst interviews could be a helpful tool to learn the rationale for the regulatory process, one should not over-rely on their outcomes. Having interviewed Canadian policymakers, Van Harten, Scott and Côté arrived at different conclusions about regulatory chill in Canada. Van Harten and Scott found evidence of regulatory chill arguing that

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[316] ibid.
[317] ibid.
[318] Côté (n 51).
[319] ibid.
[320] ibid.
[321] ibid.
[322] ibid.
[323] ibid 187.
[324] Mavluda Sattorova and Oleksandra Vytiaganets, 'Learning from Investment Treaty Law and Arbitration: Developing States and Power Inequalities' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds) *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP forthcoming); Vytiaganets (n 28); Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018).
[325] ibid.
[326] ibid.

'[o]fficials referred occasionally to specific situations where trade or ISDS concerns were considered, and in some cases, where they led to changes to a proposal'.[327] Côté finds no evidence of regulatory chill arguing that '[t]he majority of regulators felt that NAFTA Chapter 11 on investment and the investment provisions of the WTO (TRIMS) had no, or very limited impact on the regulatory development process'.[328]

This illustrates the inadequacy of interviews and surveys alone to research internalisation regulatory chill. This insufficiency is determined by several factors. Public officials might feel the need to present things as they should be – rather than as they are – because of their political mandate.[329] And more importantly, the practicality of empirical enquiries about investment treaty awareness is likely to fade with time. Due to the growing amount of investment treaty arbitrations, the increasing involvement of states in the process, increasing number of professional courses and other educational initiatives, the landscape of the investment regime is bound to change and policymakers will become increasingly familiar with potential pitfalls of investment treaties.

2.2.2.3. Statistical Analysis, Qualitative Coding, Econometric and Economic Models

Another approach to study regulatory chill is based on statistical analysis. In the second part of her 2014 study, Côté uses statistical analysis and qualitative coding to examine regulatory changes in Canada in the areas of health, safety and environment in the period between 1998 and 2013, which coincides with the rise NAFTA claims targeting those respective areas.[330] The analysis exposes a growing trend in the rigour and comprehensiveness of those regulations which argues against regulatory chill hypothesis.[331] Similarly, Soloway claims that the increasing volume of environmental regulations in Canada can dispel concerns about regulatory chill related to NAFTA Chapter 11 claims.[332]

The limitation of this method is that it predominantly deals with the quantity as opposed to the quality of regulations. Tollefson argues that: 'drawing conclusions about the Chapter's impact on, or irrelevance to, the appetite of governments to engage in policy innovation based

[327] Van Harten and Scott (n 53).
[328] Côté (n 51) 153.
[329] Also observed by Sattorova 2020 (n 55) and Tienhaara 2011 (n 58).
[330] Côté (n 51).
[331] ibid.
[332] Soloway (n 151) 19.

on the volume, as opposed to the content, of regulatory measures is hazardous'.[333] The increasing stringency of regulations established by Côté does not dismiss the possibility that those regulations were not watered down and respectively that regulatory chill did not take place.[334] To argue that regulatory chill did not occur one should present evidence that the regulations adequately addressed public health, safety and environmental needs. [335] This is a challenging task given the fact that this assessment needs to be made on a case-by-case basis drawing upon a thorough analysis of the issue at stake. As Tienhaara observes, 'it is hard to imagine how one could develop a baseline of 'normal' regulatory activity (in terms of both content and rate of development) against which to measure variation.[336]

The absence of clear requirements to introduce certain measures (such as the FCTC) could be an obstacle in researching regulatory chill based on purely statistical analysis. And finally, statistical analysis correlates legislation with investment claims but not with other potential triggers and variables.[337] Consequently, any findings of regulatory delay could not be uncritically attributed to investor-state arbitration and further research would be necessary to establish the causation.

An econometric analysis is presented by Shoaf.[338] She uses the Environmental Performance Index (EPI) 2000-2011 data to cross-reference environmental regulatory development in 89 countries with several variables, including:

- BITs;
- a country's level of economic development;
- governance structure;
- human capital; and
- the level of international integration.[339]

The study yields inconsistent and contradictory results regarding regulatory chill: the regulatory chill thesis was upheld under one econometric model but was not shown in the other one.[340] This further confirms the above remarks concerning deficiencies of statistical methods for regulatory chill research.

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[333] Chris Tollefson, 'NAFTA's Chapter 11: The Case for Feform' (2003) 9 (2) Choices 48, 49.
[334] See s 2.1.5.
[335] ibid.
[336] Tienhaara 2011 (n 58) 608.
[337] See s 2.1.5.
[338] Jena Shoaf, 'A Bit of Regulatory Chill? Assessing the effect of Bilateral Investment Treaties on the Enactment of Environmental Regulations' (MPP thesis, Georgetown University 2013).
[339] ibid.
[340] ibid 38.

Janeba develops an economic model to analyse regulatory chill from the perspective of economics.[341] He argues that the key factor in the analysis of regulatory chill is the 'loss from regulatory mismatch', which he defines as 'loss in welfare for the host government when an inappropriate regulation is in place'.[342] He concludes that regulatory chill occurs 'when losses from regulatory mismatch are intermediate rather than very high'.[343] From a legal perspective, this analysis is lopsided, in particular, because it does not reflect on the distinction between regulatory chill and the abuse of state power. Further, Janeba's economic model does not reflect on the complexity of the regulatory chill phenomenon, its drivers and variables. Again, this shows that the method – at least taken in isolation – is unsuitable for research on regulatory chill.

This brief overview demonstrates how none of the existing studies provide undisputable results to support or refute the regulatory chill thesis. The results are mixed at best – also in studies using the same method in the same jurisdictions. With this in mind, the following sections will capture the existing level of knowledge about regulatory chill and highlight the conceptual gaps and deficienies in the state of the field.

2.3. Key Issues with the Regulatory Chill Hypothesis

There are three key issues with the regulatory chill hypothesis best labelled as: Feelings, Fragmentation and No Findings. The remaining of this chapter will touch upon these issues in more detail and provide a way forward for these studies. This section will attempt to unpack the existing issues and limitation with the conceptualisation of the hypothesis that would further assist in tracing regulatory chill in the post-Soviet space.

2.3.1. Feelings, Fragmentation and No Findings

Feelings. The regulatory chill thesis itself assumes feelings. It argues that states might fear investment claims and under-regulate certain areas of public interest. Rather ironically, it seem the thesis has been driven by fears of those fearing that states would fear! On the one hand, its concerns over regulatory chill are understandable: environment, public and animal health and

[341] Janeba (n 162).
[342] ibid.
[343] ibid i.

other vital areas could be threatened. Investment arbitration claims may involve legal battles between wealthy MNCs and less powerful developing states findings themselves in a quite vulnerable position. On the other hand, populistic and unsubstantiated arguments have inflated the regulatory chill thesis out of proportion to its evidentiary base. Brower and Blanchard, for instance, compare regulatory chill to a meme that has been accepted by many as a fact.[344]

Indeed, the review of existing literature shows that the evidence about regulatory chill argument is often uncompelling. It is likely that the crux of the issue lies in the criticism about IIAs/ISDS – that give private parties the right to challenge decisions of a sovereign state. This is a discussion that is outside the scope of this thesis and yet, one observation needs to be made at this point. ISDS is not imposed on states by force and when states agree to exercise regulatory power in a certain way and consent to arbitration, they should observe the agreement. Such a 'power abdication' does not *per se* constitute the abandonment of sovereignty in general. Nor does it suggest that the sovereignty has been eroded or evaded as a result of international treaty obligations. [345]

Investment treaties never directly prohibit states to regulate but prescribe compensations to be paid if certain regulatory decisions violate the investment guarantees. In fact, arbitral tribunals have repeatedly recognised the states' regulatory powers: to justify a claim for a breach, investors must show that 'the host state's conduct was … grossly unfair or unreasonable, was arbitrary or discriminatory, [and/or prove the] denial of justice in national proceedings in the host state'.[346]

Further, states are masters of their treaties and could revise or terminate investors' rights under the treaties if they so wish.[347] Audit also observed that 'investor-state dispute resolution system is not imposed by force upon states'.[348] This means that firstly, investment tribunals adjudicatory powers derive from the states' choice; and secondly, the states are not at the mercy of arbitral interpretations of IIAs.[349] What is more, states can effectively manage the regulatory

[344] Brower and Blanchard (n 86) 749.
[345] See *SS 'Wimbledon', United Kingdom and others v Germany*, PCIJ Series A No 1, ICGJ 235 (PCIJ 1923), Judgment (17 August 1923) para 35.
[346] Born (n 3) citing *Sun Reserve Luxco Holdings SRL v Italy*, SCC Case No 132/2016, Award (25 March 2020) [hereinafter, *Sun Reserve v Italy*].
[347]. ibid, citing 2012 US Model Bilateral Investment Treaty (2012) <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 1 March 2021 Annex B 4(b) and CETA (n 51) art 8.9.
[348] Audit (n 199).
[349] ibid.

scope in IIAs by modifying national legislation, which is also applicable for considering such issues as legality or illegality of investments.[350]

It is worth remembering why we have the international investment regime in the first place. As Born observed, the world has already known an avid mistrust for arbitration after the rise of the National Socialists in the 1930s.[351] Thus, the 1933 'Guidelines of the Reich Regarding Arbitral Tribunals' curtailed the use of arbitration in state contracts as this was seen as a threat to the governmental authority and 'the State itself'.[352] When reforming the existing investment arbitration system, we need to make sure that this history is not repeated.[353] The regime has a value in preventing inter-state conflicts, protecting and arguably attracting foreign investment. States often utilise IIAs themselves and state enterprises act as claimants in ISDS to defend their FDI.[354] At the same time, FDI is the main source to fund the sustainable development of States and the investment regime may have a vital role in this. Therefore, the studies should be based not on one's feelings but robust and substantiated research. Regulatory chill is a matter of law and facts and not moral views.

Fragmentation and No Findings. Despite the significance of regulatory chill in current debates about the investment regime, the knowledge on the issue is fragmented and of no assistance for states considering the investment treaty reform. The studies on it are disjointed with writers using various and occasionally contrasting conceptual ideas and arriving at opposing conclusions. At one end of the spectrum, critics contend that regulatory chill is a purely theoretical hypothesis, not supported by any reliable evidence. At the other end of the spectrum, the proponents argue that 'those commentators who assert that regulatory chill does not exist are themselves often guilty of failing to substantiate adequately their arguments',[355] and that the dismissal of the theory is both 'premature and lacking analytical rigour'.[356] Others adopt a middle-ground view and accept some evidence in support of regulatory chill. Even so, the magnitude of the phenomenon is uncertain and thus it cannot be argued that regulatory chill is a systematic problem.

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[350] Evgenyia Rubinina, 'Renewed Role of States in Arbitration' (6th EFILA Annual Conference, Online, 14 January 2021).
[351] Born (n 3).
[352] ibid.
[353] ibid.
[354] Rubinina (n 350) referring *inter alia* to *OAO Tatneft v Ukraine*, PCA Case No 2008-8; Award on the Merits (29 July 2014); *Ukrenergo v Russian Federation*, UNCITRAL, Claimant Press Release (28 August 2019); NJSC Naftogaz of *Ukraine and others v the Russian Federation*, UNCITRAL, Claimants' Press Release on the Commencement of Arbitration (17 October 2016) and *Vattenfall v Germany* (n 36).
[355] Tienhaara 2011 (n 58) 616.
[356] ibid 627.

The bottom line is there are no clear findings on how perilous regulatory chill is. However, we might question whether this is a systematic problem averting States from exercising their duty to protect public health and the environment? If this is not a systematic problem, but rather some anecdotal 'side effects', how hazardous and common are they? Would the States be better off with investment treaties? These are the questions that require an immediate answers but to date, regulatory chill remains an undeveloped theory, suffering from under-conceptualisation and methodological limitations. The next sections will endeavour to defragment existing knowledge and provide a way forward to study regulatory chill from the IIL perspective.

2.3.2. Defragmentation (i) Specific Response Chill

Specific response regulatory chill is thought to occur when investors threaten the government with illegitimate claim to challenge *bona fide* regulatory policy and the government drops or dilutes the policy to avoid arbitration.[357] This would involve the government going through most of the stages of the regulatory process but rolling back the proposal because of a threat of investment claim. As previously discussed, legitimate claims fall outside of the regulatory chill concept.[358] Therefore, the claim should have no legitimate grounds and would have failed if it went to arbitration. At the same time, regulatory chill occurs before the Award is rendered. Illegitimate claims that were dismissed in arbitration fall outside the conceptual framework even if the government does not recover (in full) its legal fees and could be more cautious to engage in arbitration again.[359] This leaves us with four potential scenarios when regulatory chill may happen:

(i) the claim is manifestly unfounded and investors do not intend to proceed with arbitration but merely threaten the government; the government responds to the threats by changing its regulatory decision,

(ii) the claim is manifestly unfounded and investors proceed with arbitration to put pressure on the government; investors drop the proceedings before arbitration is concluded because the government changes its regulatory decision to settle the dispute,

(iii) the claim has arguable merits but investors do not intend to proceed with arbitration but merely threaten the government; the government responds to the threats by changing its regulatory decision, and

[357] See s 2.3.2
[358] ibid.
[359] ibid.

(iv) the claim has arguable merits, investors proceed with the claim but drop the proceedings before arbitration is concluded because the government changes its regulatory decision to settle the dispute.

Let us consider each of these scenarios in turn. In the case of scenarios (i)-(ii), regulatory chill may occur if the government could not make a basic assessment of the merits.[360] However, it would be a misunderstanding of the regulatory decision-making process. Even though some governments may lack expertise in investment treaty arbitration, they would seek professional advice and/or involve external counsels for advice. This statement has been confirmed by State representatives and counsels in different jurisdictions, including former Soviet space.[361] Therefore, it is unlikely that governments may be intimidated by manifestly spurious claims. Equally, none of the discussed case studies provides such an example.[362] We, therefore, may assume that there is a very low probability of the scenarios (i)-(ii) happening in reality and rule them out.

This leaves us with two more realistic possibilities of regulatory chill – scenarios (iii) and (iv). Existing case studies generally describe these two scenarios. Thus, Indonesian and Guatemalan mining bans illustrate scenario (iii) whilst PMI's claims against Australia and Uruguay demonstrate scenario (iv).[363] At this juncture, the uncertainty in the outcome of the claims is the crucial criterion that needs to be addressed more thoroughly.

The *uncertainty* about the implications of investment treaty protections has been broadly cited as the feature of modern IIL.[364] The uncertainty is underpinned by contrasting views on the scope of investment protections[365] and inconsistent Awards in the case law. [366] From the States' perspective, uncertainty involves risks associated with investment claims and incentives to settle disputes where possible. It can be argued that uncertainty about the outcome of the disputes could increase the risk of regulatory chill because policymakers may choose to err on the side of caution and do not adopt measures that would be permissible.

This view is shared by Labonté, Schram and Ruckert, which examined the potential implications of the TPP on public health measures.[367] Having noted the high cost of defending

[360] Bonnitcha 2014 (n 58) 117 et seq.
[361] See (n 234).
[362] See s 2.2.1.
[363] See s 2.2.1.5.
[364] See Mann (n 174); Jeff Waincymer, 'Human Rights in International Investment Law and Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (2009).
[365] See (n 297) and accompanying text.
[366] ibid.
[367] Labonté, Schram and Ruckert (n 51).

potential investment claims and 'the difficulty in knowing how a tribunal will rule in a case', the authors conclude that inclusion of ISDS in the treaty will 'continue to leave signatory states vulnerable to expensive litigation and potential regulatory chill'.[368] Along the same lines, Van Harten notes that the absence of the doctrine of precedent in investment arbitration creates 'high-stakes uncertainty in the evaluation of policy space and litigation risk'.[369]

On the other hand, some scholars urge that the 'uncertainty argument' in international investment arbitration is generally overstated. Bonnitcha, for instance, argued that the uncertainty argument in the context of regulatory chill 'is only conceptually coherent if one accepts the basic uncertainty argument'.[370] The fact that 'tribunals have awarded costs against unsuccessful investor-claimants, and such costs Awards are more likely if it is clear from the outset that the claim has no arguable basis' is the evidence against the uncertainty argument.[371] In this light, it would be fair to suggest that (at least in some cases) the governments should be on a solid ground and able to predict that the measures in question would not give rise to liability under IIAs and that they would have a strong chance of recovering legal costs from the investor for pursuing a bogus claim.[372] Furthermore, from the investors' perspective, uncertainty also brings risks associated with the claim, which also motivates them to settle a dispute or drop the claim if chances of success are not substantial. From this point of view, uncertainty decreases the risks of regulatory chill.

There is a different angle to consider however. Some scholars draw attention to the fact that regulatory chill is still possible even if measures are formally compliant with investment treaties because tribunals could disagree not with the measure *per se* but with the *due process* of its adoption. Létourneau-Tremblay and Behn analysed the implications of the Award in *Bilcon v Canada* and arrived at this conclusion.[373] Along the same lines, in her discussion of the Award in *Metalclad v Mexico*, Clapp argues that the Award will discourage Mexico from improving regulatory standards for hazardous waste management.[374]

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[368] ibid.
[369] Gus Van Harten, 'Thinking Twice about a Gold Rush: Pacific Rim v El Salvador' (2010) 23 Columbia FDI Perspectives.
[370] Bonnitcha 2014 (n 58) 117.
[371] ibid citing *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) paras 5, 10. For arbitral practice on costs, see eg *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) para. 326 and Dissent Regarding Costs (2 October 2009) para 4.
[372] Also observed by Bonnitcha 2014 (n 58) 117.
[373] See Létourneau-Tremblay and Behn (n 212) and accompanying text.
[374] Clapp 2002a (n128).

The uncertainty of the dispute outcome may pave the way to (or intensify the risk of) regulatory chill but it would turn on specific facts. In some cases, the dispute outcome could be more predictable and the government should have little (if any) concerns about going ahead and defending regulatory measures in a full-blown arbitration. In other cases, the dispute outcome is less predictable which can also be underpinned by the fact that a tribunal might disapprove not a regulatory measure *per se*, but the procedural steps for its adoption. If the outcome of the dispute is uncertain, it is likely to be uncertain for both sides which, on one hand, increase the chances of regulatory chill, but on the other hand, may dissuade the investor from bringing the claim.

Another point is that, if the outcome of the claim is uncertain for both sides – which may often be the case – an important and provocative question arises: whether a scenario when a claim has some merits but the outcome of which is uncertain and which leads to the regulatory delay should lie within the regulatory chill concept? First, scholars are principally in agreement that legitimate claims to protect investors' interest are outside the scope of the regulatory chill concept even if they lead to regulatory delay.[375] It has been further established that manifestly unfounded claims are unlikely to lead to regulatory chill but only claims which have some merits (when the outcome of which is uncertain). If investors bring a claim which has some merits but ultimately fails, can it be considered a legitimate claim? Should we agree that if a claim has merits and an unknown outcome shall be considered a legitimate claim, we arguably should exclude it from the regulatory chill umbrella irrespective of its outcome and whether or not it leads to regulatory delay.

In many cases, establishing whether or not measures adopted are *bona fide* and/or an investors' claim is legitimate, may be a demanding exercise which would often entail going through a thorough process of dispute adjudication, considering both sides' arguments and evidence in the case.[376] It is not always black and white. Claimants could justifiably believe that their claim has merits – and indeed some may have – but the respondent's argument prevails. This has never been considered an abuse of the arbitration system. If the government chooses to delay a regulatory initiative as a result of such a claim – can we frame it as regulatory chill?

Alternatively, it can be argued that only instances when investors bring a claim with a mere purpose to derail regulations can be considered regulatory chill. Thus, when PMI brought

[375] See s 2.1.4.
[376] ibid.

claims against Uruguay, Brillembourg urged that the company used it as a 'PR campaign' to demonstrate to small countries (considering similar measures) what the consequences would be.[377] At this point, there are three further questions to address. First, this is not captured by existing regulatory chill conceptualisation, i.e. there are no requirements for claims to be brought with the only purpose to obstruct the regulatory development. Second, even if we conceptualise regulatory chill in this way, how would one prove the investors' true intentions? Brillembourg, for example, argued that her assumptions about Philip Morris; were supported by the insignificant amount of the claim (USD 22.3 million), which was 'pennies' in the world of investment arbitration and equally not a big loss in terms of the investors' revenue, which amounted to USD 80.2 billion in 2013.[378] Even though her reasoning may be compelling, it cannot be considered as direct proof of the investor's intentions. At the end of the day, USD 22.3 million is still a substantial amount of money. And third, such an intention would not necessarily mean that the claim is illegitimate, which brings us to the starting point that legitimate claims are outside the scope of the concept.

Finally, if one can establish an illegitimate claim and that the delay of a regulatory decision, which could be associated with the claim, the question of causation would still need to be addressed. As shown in the review of existing case studies, causation is one of the main critiques of existing literature in support of the hypothesis. Very often, several concurrent factors could potentially result in the delay, but establishing which factor was the most determinative could be a challenging task. As discussed earlier, in the textbook example of PMI's claims against Australia and Uruguay, the investment claims arguably were not the major cause of the regulatory delay in New Zealand.[379]

Drawing upon the above, it is exceedingly difficult if not impossible to provide credible and uncontestable evidence of specific response regulatory chill. It shows that the current conceptualisation of regulatory chill does not address the legitimacy of the claim and does not capture all the mechanics of the regulatory decision-making process. It shows the flaws in the theory but not necessarily defeats them.

2.3.3. Defragmentation (ii) Internalisation Regulatory Chill

[377] Brillembourg (n 269).
[378] ibid.
[379] See s 2.2.1.5.

At the other end of the spectrum, internalisation regulatory chill is thought to occur as the result of the mere availability of the IIA framework providing for arbitration and the existence of foreign investors, which enjoy the investment protections and may instigate arbitral proceedings.[380] The regulatory chill thesis argues that public officials could be reluctant to improve regulations in the public interest because of their awareness of potentially conflicting obligations under investment treaties. Investors' role in this scenario is a passive one and only requires them to:

(i) be present, qualify as investors and have qualifying investment in the State,

(ii) be potentially affected by the legislation in question, and

(iii) enjoy the protection under an international investment treaty(ies), containing an arbitration clause(s).

Providing that the legal framework and investment are established, the hypothesis requires:

(i) public decision-makers' awareness of investment treaty obligations,

(ii) their concern that such obligations restrict regulatory freedom, and

(iii) as a result, a decision not to proceed with the initiative.[381]

It is common ground 'if evidence showed that most government decision-makers are unaware of investment treaties at the time of making regulatory decisions … it would suggest that investment treaty protections have a minor impact on government decision-making'.[382] In addition, the authors agree that should decision-makers be aware of a prospective claim, they are likely to have some concern about it.[383] There are two main points, though, on which the opinions collide:

(i) what is the level of awareness of decision-makers about the intricacies of IIL, and

(ii) when and in what circumstances the knowledge and concern about a potential investment dispute could lead to regulatory chill?

Taking each of these points in turn, it has long been argued that public officials who do not have direct or regular dealings with foreign investors are unlikely to be aware of the investment treaty restrictions.[384] The empirical studies show that the level of awareness varies between different agencies and States generally support this assertion.[385] Thus, even though the level of

[380] See eg Tienhaara 2011 (n 58).
[381] Also observed by Bonnitcha 2014 (n 58) 117; Coe and Rubins (n 314); Tienhaara 2009 (n 286).
[382] Bonnitcha 2014 (n 58) 115.
[383] Mann (n 174).
[384] Coe and Rubins (n 314) 599.
[385] See Vytiaganets (n 28); Côté (n 51); Sattorova 2018 (n 324) 61-70, but see Van Harten and Scott (n 53); Bonnitcha 2014 (n 58) 121.

awareness is a dynamic factor that should be considered in the context of specific circumstances, it can be asserted that most of the policymakers are not aware of investment treaties and do not internalise their restrictions when making regulatory decisions. A common counter-argument to this is that investors would alert policymakers about the existence of investment treaty restrictions.[386] Nonetheless, this would cease to be a perceived threat scenario – it assumes actions from investors and would turn into specific response chill (discussed above). That being said, with the growing number of investment disputes, this trend is changing and most of the policymakers would have some knowledge on the matter in the future. In turn, this will increase the likelihood of internalisation regulatory chill.

Moving on to the second point, the regulatory chill hypothesis does not suggest that the awareness and concern about potential arbitration dispute *always* lead to regulatory chill. When and in what circumstances the knowledge and concern about a potential investment dispute could lead to regulatory chill remains unclear, save for the general variables which can modify the intensity of regulatory chill.[387] The research of these circumstances is challenging and entails either interviews or surveys with their limitations or alternative methods, such as statistical analysis, where issues of causation still need to be established.[388]

This shows difficulties and deficiencies associated with studies on internalisation regulatory chill. Existing evidence on this issue is mixed at best and in many circumstances, the issues of causation would be difficult to establish. Again, this demonstrates the flaws in the theory but not necessarily defeats it.

2.4. Conclusion

Despite the importance of the regulatory chill thesis in current debates around the international investment regime and the prominence of this matter for nations' sustainable development, the scholarship on the matter is fragmented which is also caused by the variety of disciplinary perspectives employed in its study. Existing studies have made few attempts to conceptualise the phenomenon, establish its triggers and disentangle similar but distinct concepts. The interdisciplinary understanding of regulatory chill is not cohesive and whilst studies from politics, economics, public health or environmental disciplines shed light on certain aspects of

[386] Tienhaara 2011 (n 58) 611.
[387] See s 2.1.5.
[388] See s 2.2.2.

the interaction between the international and national legal orders, they fail to understand and analyse – in-depth – the law as the core theme of regulatory chill.

The conceptual quagmire that has grown as a result leads to the virtual impossibility to research or find any common ground on the regulatory chill issue. Authors adopt various triggers which can lead to regulatory chill; some believe that regulatory chill can be triggered only by IIAs, others also include non-IIA triggers, such as the threat of industrial flight or WTO claims. Some writers contend that regulatory chill is concerned exclusively with measures adopted by the legislative branch of the government, whilst others also consider executive and judicial decisions to be the object of regulatory chill. Whilst regulatory chill generally has a negative connotation, some literature also frames regulatory chill to include scenarios where IIAs prevent the abuse of State power, i.e. serve their purpose. Those discrepancies ultimately underpin the contrasting conclusions on whether the evidence supports the regulatory chill hypothesis.

This thesis has fully engaged with existing literature on the matter and assessed the evidence to support its existence. It has found no uncontested evidence to argue that IIL and its arbitration mechanism has impeded the development of national regulations in the public interest and argued that even textbook examples of regulatory chill raise serious doubts. The question of causation is crucial; even in studies where regulatory development was arguably delayed there were also other concurrent factors that could lead to the regulatory delay. Most of the cases where regulatory measures were not adopted as a result of arbitration claims have not provided uncontested evidence that the measures in question were *bona fide*, i. e. did not violate the international investment guarantees. Everything turns upon careful examination of the treaty provisions, the facts and the case evidence from both parties, some of which will not be available until a full-blown arbitration takes place. This renders regulatory chill nearly impossible to prove and the existing evidence debatable. The limitations of other methodological approaches (such as interviews, surveys or legal analysis) also prevented rendering credible evidence to either support or refute the hypothesis.

It is argued that regulatory chill thesis has been largely driven by feelings of those concerned with the public interest and not by robust studies. This mirrors some common general critique against the regime and arguably contributed to the backlash – but not necessarily for the better. Also, the review of existing studies has shown that often, writers do not differentiate between *bona fide* measures and measures beneficial for public health, the environment or other key areas of public interest. Thus, scenarios when the host States decided not to proceed with a *non-bona fide* (even though beneficial) measure, to avoid paying

compensation to foreign investors, would often be framed as regulatory chill mainly because writers consider the measure plausible and necessary for the purpose. This is a misplaced argument on whether State regulatory decisions could be a subject of arbitral review more broadly based on international legal order, international relations, politics or morality rather than an argument about the application of legal tests to the dispute. Further, it contradicts the prevailing conceptual ideas about regulatory chill.

Given the role of the regime in de-politicising investment disputes, its significance for investment protection and promotion, the reliance of developing countries on foreign investment and the solemnity of FDI for the sustainable development of nations, scholarship needs to equip the States with the knowledge to make informed and not impulsive decisions concerning investment treaties and arbitration. For this reason, this thesis has set out clear conceptual ideas of regulatory chill and will use those ideas to test the hypothesis in the context of tobacco control regulatory measures and the post-Soviet States.

3. The Research Design

3.1. Introduction

In the existent literature on regulatory chill, scholars from different disciplines utilise their respective methodologies, including traditional doctrinal analysis, qualitative coding, statistical analysis, economic modelling, interviews, surveys and case studies.[389] To quote Boom, Desmet and Mascini, 'the different methodologies are complementary, since each methodology can render visible important, particular elements of juridical reality while being less conclusive about other elements'.[390] At the same time, empirical methods are of paramount significance in IIL scholarship as writers acknowledge its social aspect underpinned by the fact that the law is the product of a human interaction where knowledge, personal views and individual circumstances play a major role.[391] Indeed, regarding doctrinal research, there is a long-standing suspicion that 'it consciously or unconsciously mashes together a positive analysis of law as it stands with a normative stance on what the law should be'.[392] Doctrinal study may therefore neglect important aspects of human behaviour by portraying individuals

[389] See s 2.2.
[390] Willem H van Boom, Pieter Desmet and Peter Mascini, 'Empirical Legal Research: Charting the Terrain' in Willem H van Boom, Pieter Desmet, and Peter Mascini (eds), *Empirical Legal Research in Action : Reflections on Methods and Their Applications* (Edward Elgar 2018) 4.
[391] On the importance of empirical legal research in IIL, see Behn, Fauchald and Langford (n 39).
[392] Boom, Desmet and Mascini (n 390) 5.

as well-informed, rational actors.[393] Empirical legal studies demonstrate that this is not always the case.

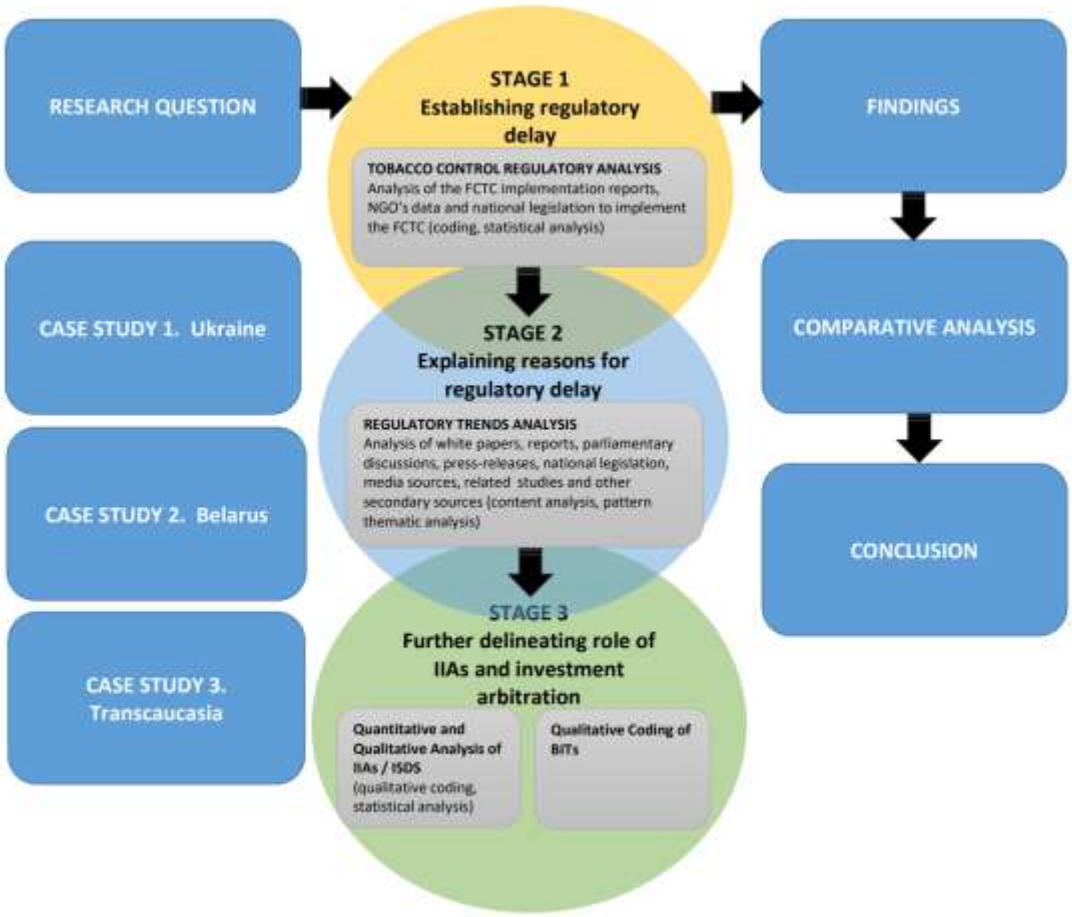
Turning to the issue at the heart of this study, regulatory chill is predominantly determined by the behaviour of legal actors. As such, it concerns the law in action; a reflection of how the investment treaty regime can potentially impact policy choices and society. To explore it means to comprehend and explain whether policy-makers can internalise the real or potential risk of international investment arbitration by delaying or amending legislation in the public interest. The ultimate aim of this research on regulatory chill has been to deconstruct the regulatory chill hypothesis and contribute to the debate on whether it has a positive or negative impact on the investment regime and if it is possible to alleviate the potential risks of compromising the public interest. Again, only empirical study is able to 'provide a more realistic view on what the law is, what it does and how it can be improved'.[394] The remainder of this chapter will set out the research design adopted for this study.

3.2. Methodological Approach

This thesis aims to deconstruct the concept of regulatory chill and to this end, it will utilise qualitative and quantitative tools to conduct a comparative case study analysis. These include statistical analysis, qualitative coding and qualitative analysis of government information (regulatory databases, white papers, policy discussions, etc). Figure 2 below illustrates the methodology and the triangulation of qualitative and quantitative data.

[393] Peter Mascini, 'Law and Behavioral Sciences: Why We Need Less Purity Rather Than More' (Eleven International Publishing, The Hague, 2016).
[394] Boom, Desmet and Mascini (n 390) 2.

Figure 2. Methodological Approach



Regarding the decision to use case studies, to quote Webley, '[t]he case study examines phenomena in context, where context and findings cannot be separated'; it encompasses various research methods to generate an array of data 'to draw robust, reliable, valid inferences about the law in the real world'.[395] It is the most appropriate method when '(i) the main research questions are "how" or "why" … ; (ii) a researcher has little or no control over behavioural events; and (iii) the focus of the study is a contemporary … phenomenon'.[396] Taking point (i), the case study approach is therefore the best fit for the research question 'to what extent, if any, do IIAs affect tobacco regulations and lead to regulatory chill in the post-Soviet States?' To break this down further, the research question asks 'why' there has been a delay in the implementation

[395] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' (2016) LaM 1.
[396] Robert K Yin, *Case Study Research Design and Methods* (5th edn, Sage Publications 2014), 12-14.

of the FCTC and 'how' (if at all) this is related to IIAs. The research design selected is also justified under Webley's tests (ii) and (iii): regulatory chill is a contemporary phenomenon that is believed to occur as a result of policy-makers' decisions, i.e. behavioural events over which this thesis has no control.

As mentioned earlier, an empirically informed approach enables an examination of 'law in the real world' and focuses on the practicalities of law rather than its doctrines. The appropriateness of empirical methodology is also underlined by the fact that *prima facie* regulatory chill is the product of a human interaction where knowledge, personal views and individual circumstances play a major role.[397] It is not coincidental that empirical methodology, and in particular the case study approach, has been the most commonly utilised methodology in regulatory chill research in the IIL literature (e.g. Van Harten, Sattorova, Vadi, Brower and Blanchard), as well as in political (e.g. Tienhaara, Côté, Moehlecke), environmental (e.g. Neumayer, Zarsky, Cooper and McClenaghan) and other studies (e.g. Kelsey, Voon, Mitchell, Crosbie and Thompson).

This trend reflects the appeal for more empirical research in IIL more generally.[398] A key reason for this is that, unlike the doctrinal approach, empirical methodology facilitates an exploration of the law in context. This is particularly salient for a thesis on regulatory chill which seeks to explore its manifestation as a reaction of policy-makers to IIL restrictions and prospective or imminent threats of investment arbitration claims. At the same time, an empirical study 'goes beyond empirical fact-checking, as it enables a deeper understanding of not just the blunt facts, but also the underlying mechanisms of legal interaction'.[399]

The legal analysis of primary documentation is also useful for regulatory chill research, as demonstrated by existing studies (e.g. Schill, Broude, Haftel and Thompson, Tietje and Baetens). This is because the concept argues that one legal order (IIL) detrimentally affects another legal order (i.e. national tobacco legislation) in this study. On the one hand, this intersection is underpinned by certain investment protection standards enforceable by ISDS provisions. On the other hand, it leads to certain patterns of tobacco control regulatory development. It follows, therefore, that establishing causation between the two requires an analysis of both international investment treaties and national tobacco legislation.

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[397] For a comprehensive overview of existing empirical studies, see Behn, Fauchald and Langford (n 39).
[398] ibid, Boom, Desmet and Mascini (n 390).
[399] Boom, Desmet and Mascini (n 390)

Broude, Haftel and Thompson suggest that mere analysis of the patterns of investment treaty terminations, conclusions and renegotiations could point to the existence or absence of regulatory chill.[400] In particular, they argue that if governments have any concern about the implications of IIAs on national regulatory sovereignty, it is likely to be observable in the treaty negotiation policies and treaty texts more specifically.[401] Thus, if governments are concerned with their ability to regulate in the public health interest, they are likely to terminate or renegotiate their IIAs and include public health carve-outs and exceptions to the renegotiated treaties.

Notwithstanding the above point, pure legal analysis is not appropriate for this project. As Behn, Fauchald and Langford point out, 'doctrinal methods suffer from various disadvantages. Their breadth is limited – in terms of description, generalisation and information; as is their depth in terms of explanatory and predictive power'.[402] These limitations will not permit the establishment of any causation between the existence of IIA restrictions and inadequate tobacco control standards. Thus, analysis of the existing literature shows that the development of national regulations in the public interest may also be impinged by other factors, such as resistance and adverse actions by the industry, government concerns over capital flight or the economic implications of their decisions, etc. In particular, capital flight is an alternative theory that prevailed long before the focus of criticism shifted to the international investment regime.[403] At the same time, the issue of causation emerged as the main critique of the existing literature on regulatory chill.

To address the causation, this project adopts an applied approach that takes insights and approaches from politics and public health studies and uses them when investigating the legal issue.[404] This applied approach reflects the complexity of the hypothesis entailing a complex set of normative, legal and empirical questions.[405] It further mirrors the inter-disciplinary nature of the regulatory chill hypothesis, which is inseparable from politics and, in the case of this research, public health studies on tobacco control and the implementation of the FCTC. Instead of considering regulatory chill as a self-contained entity, the research design enables it to be considered in the

[400] Thompson, Broude and Haftel 2018a (n 109) 529.
[401] ibid.
[402] Behn, Fauchald and Langford (n 39) 15.
[403] See s 2.1
[404] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, EUP 2007).
[405] Bonnitcha, Poulsen and Waibel (n 7) 239.

context of the various aspects of social and legal interaction and addresses the issue of causation.

Furthermore, the research is designed as a combination of both theoretical and practical approaches. Thus, in addition to testing the expectation of regulatory chill, this thesis aims to explain and deconstruct the concept in light of the findings. The case study approach therefore ensures that the research has a practical grounding. The research aims to contribute to the bodies of IIL and public health literature and provide policy suggestions for both disciplines: (i) in light of the regulatory chill hypothesis and more broadly the legitimacy crisis in IIL on one hand, and (ii) the FCTC movement and the prevention of tobacco-related illnesses on the other.

To develop the policy proposals, the research is designed as a small-N comparison and involves three separate case studies in Ukraine, Belarus and Transcaucasia. The same methods are applied in each case and the results compared to establish similar patterns. First and foremost, a small-N comparison allows for the control of external factors that could be responsible for the regulatory delay. As alluded to above, there are multiple alternative theories or factors that could explain inadequate regulatory development. Tobacco control regulatory delay may also be caused by other 'triggers', such as capital flight concerns, economic implications and tobacco lobby opposition.[406] 'Variables' such as political and economic factors could further alleviate or increase the risk of regulatory chill. A small-N comparison within the case study approach will thus enable a rigorous inquiry into the manifold variables and processes affecting tobacco regulatory development. To quote Etienne,

> [t]he case study method – and small-N comparisons … enable intensive inquiry into the multiple variables and processes shaping social outcomes. As such, the method is better aligned with the ontology that predominates among many social scientists than, say, statistical methods in large-N studies.[407]

Control of the external factors, if achieved, will ensure that 'an observed variation on the dependent variable is due to a variation on the independent variable and not to

[406] See s 2.1.5.

[407] Julien Etienne, 'Case Studies in Administrative Law: the Example of Self-Reporting Rules in the Regulation of Business Activities' in Willem H van Boom, Pieter Desmet, and Peter Mascini (eds), *Empirical Legal Research in Action: Reflections on Methods and Their Applications* (Edward Elgar 2018) (citations omitted).

any other contributing variable, such as an underlying or external unobserved variable'.[408] To this end, the research firstly explores why regulatory delay occurs more generally and then considers whether IIAs and investment arbitration play any role in it.[409] Accordingly, the research design is tailored towards two research goals: description and explanation.[410] First of all, the research question implies scrutinising the international investment framework in the post-Soviet States and describing 'how' these States regulate tobacco and implement the FCTC.[411] At the same time, the case studies go beyond description and analyse both 'why' an observed pattern exists (i.e. why the FCTC has not been implemented) and 'what' this indicates (i.e. where we take it from there).[412]

The small-N comparison will enable us to provide more collaborative results and policy suggestions. An analysis of one jurisdiction that lacks any comparison to others has only limited value and would not allow us to identify common threads of development or patterns in the legal responses to social issues. At the same time, this thesis has a broader ambition – it seeks to discuss regulatory chill and tobacco control regulatory development in the context of investment treaty reform and the implementation of the FCTC.

As a final point, to answer the research question, this thesis utilises both quantitative and qualitative tools.[413] Quantitative approaches enable broader description, the documentation of patterns and testing for correlation through probabilistic logic.[414] However, quantitative methods are limited by their reliance on a numeric simplification of complex phenomena and their inability to control multiple causal influences.[415] They are therefore complemented by qualitative approaches to facilitate deeper analysis of the context and explanation of the regulatory chill phenomenon.[416] The qualitative methods chosen, including qualitative coding, content analysis and pattern thematic analysis, permit the use of a broad range of data to test the regulatory chill hypothesis

[408] Boom, Desmet and Mascini (n 390) 11.
[409] Côté (n 51) makes a similar observation.
[410] Earl R Babbie, *The Practice of Social Research* (10th edn, Thomson Wadsworth 2004) 87–90.
[411] Boom, Desmet and Mascini (n 390) 10 stating that description goals are typically found in case studies seeking to answer questions of 'what', 'where', 'when' and 'how'.
[412] ibid.
[413] See Figure 2.
[414] James Mahoney and Gary Goertz, 'A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research' (2006) 14(3) Political Analysis 227.
[415] ibid.
[416] ibid.

and contribute to theory and hypothesis development. With this in mind, the next section will explain the rationale for selecting the case studies and the specific steps taken in each one.

3.2.1. The Case Study Selection

The choice of case studies is important to ensure representativeness and naturalness.[417] Overly broad studies may not provide sufficient depth for every jurisdiction and/or sector to enable a well-founded argument.[418] An excessively narrow case study, in contrast, may not be sufficiently representative and could lead to issues of generalisability and external validity.[419] The results may not provide adequate insights to enable consistent patterns to be grasped and for the theory to be contested more systematically while also potentially lacking the ability to extrapolate the findings to other jurisdictions and sectors. Naturalness, in turn, requires the case study to observe 'real' social entities carrying out their normal activities in a natural setting.[420] Based on these considerations, this study has focused on five jurisdictions – Armenia, Azerbaijan, Belarus, Georgia and Ukraine – and tobacco control legislation in the post-FCTC ratification period (2004–2006).

As mentioned previously, the reasons for focusing on tobacco legislation are multifold and underpinned by both the pertinence of the area and practical considerations. As argued earlier, the implementation of tobacco legislation is one of the most salient issues for the public interest. Further, tobacco legislation is a special focus of the existing IIL and public health literature, which enables us to draw upon the data and results of existent studies. Finally, all of the post-Soviet states are parties to the FCTC and have the same obligations to enact tobacco control measures. These measures are widely acknowledged to be necessary and proportionate and thus are more likely to be aligned with investment treaty obligations. In other words, tobacco control measures, which are compulsory under the FCTC, are more likely to be regarded as *bona fide* by a tribunal and could thus hypothetically be subject to regulatory chill.[421]

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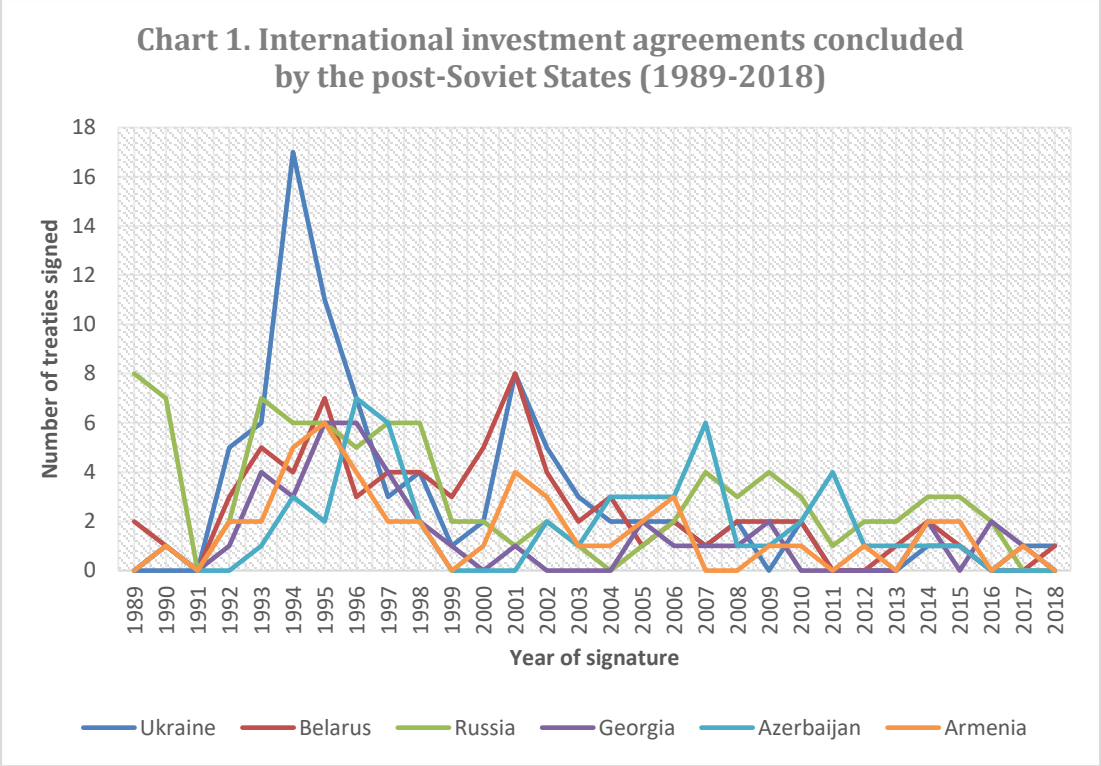
[417] Control, representativeness and naturalness are three important criteria to assess the adequacy of a particular methodology, see Boom, Desmet and Mascini (n 390) 10 (citations omitted).
[418] Applicable to Côté (n 51).
[419] Boom, Desmet and Mascini (n 390) 11.
[420] Patricia M Golden, *The Research Experience* (9th edn, FE Peacock Publishers 1976) 15.
[421] See s 2.1.5.

Therefore, the FCTC provides a clear benchmark for analysing and comparing the level of tobacco control legislation between the states. It is a much more problematic exercise to undertake analysis of legislation in areas that do not have specific obligations at the international level and where it is a matter of state sovereign decision. Analysis of the regulatory trends over the past 14 to 16 years based on primary and secondary data will ensure the naturalness of the case studies, reflecting the way in which the focus of this study is the complex, ongoing patterns brought about by policy-makers performing their normal activities in a natural setting.

The post-Soviet States were selected since, as a region, they have the highest levels of tobacco smoking and tobacco-related illnesses in the world.[422] According to the WHO, NCDs are the leading cause of death, illnesses and disability in the WHO European Region, accounting for almost 86% of deaths and 77% of the disease burden.[423] Therefore, one would expect the relevant governments to intensify their efforts to address the tobacco crisis and implement the tobacco control measures as stipulated by the FCTC.

At the same time, however, the post-Soviet States are susceptible to regulatory chill for two main reasons. Firstly, after the dissolution of the Soviet Union, every post-Soviet State accepted FDI in the tobacco industry.[424] And secondly, reduced levels of foreign aid, rising levels of debt and competition for FDI among the States resulted in a rapid proliferation of IIAs (see Chart 1 below).[425]

[422] WHO (Roadmap) (n 105).
[423] World Health Organisation, 'Action Plan for the Prevention and Control of Noncommunicable Diseases in the WHO European Region 2016–2025'(WHO Regional Office for Europe, Copenhagen 2016).
[424] Gilmore and McKee (n 26); Vytiaganets (n 28).
[425] Vandevelde (n 7), Miles (n 5) 90; Newcombe and Paradell (n 5).



Source: UNCTAD[426]

Most of the available BITs were signed between 1991 and 2007 and the preliminary analysis shows that all BITs include ISDS provisions. With respect to substantial guarantees, the treaties commonly accord most-favoured-nation treatment and national treatment to foreign investment, IIL standards of FET, the right to compensation in case of expropriation, and the free transfer of funds associated with the investment. As such, foreign tobacco corporations may seek to invoke these treaty provisions to oppose tobacco legislation, which could lead to regulatory chill.

The post-Soviet States are developing countries in a transitional period, which increases the likelihood of regulatory chill. As argued earlier, developing states may have only a low level of institutional capacity with which to assess the strengths of potential investment claims and 'bulletproof' their regulatory initiatives from potential legal challenges, as well as limited financial resources to defend themselves from potential investment claims. Further, they may be more vulnerable to potential reputational damage due to their need to attract FDI. Therefore, if the regulatory chill hypothesis is valid, it is likely to be manifested in the post-Soviet States.

[426] UNCTAD (IIA) (n 20).

Additionally, the post-Soviet States share a common Soviet legacy, in particular in terms of legal sources and political processes. They also embrace liberal policies for the purpose of investment promotion and protection, including the conclusion of IIAs. This enables comparative research that could establish regulatory trends in the region and provide comprehensive evidence for IIA reform. Finally, only very few IIL studies have been conducted in the region to date,[427] for the following reasons: the Soviet Union and its academia remained behind the Iron Curtain until 1991; English is still not widely spoken as a language in former Soviet countries, which inhibits academic communication; IIL is rarely taught at local universities; and local scholars generally have limited expertise in the field.[428] At the same time, the region has tremendous significance for IIL: circa 20% of the existing IIAs were signed between the post-Soviet States[429] and the region has been involved in 147 out of 1,061 ISDS reported to date.[430] A portrayal of the realities of IIL in the region constitutes a step forward in rendering international law more international and equipping experts with data for future IIA reform guidelines.[431]

All things considered, the suggested case studies are expected to be sufficiently broad and deep to secure reliable results whilst also being feasible within the limits of a PhD project. The following sections explain the methods of the data analysis deployed in three stages.

3.2.2. Stage 1: Tobacco Control Regulatory Analysis

This thesis argues that regulatory chill, if it exists, should be traceable via various primary and secondary sources. The qualitative analysis of regulatory data is therefore conducted in two stages. Stage 1, comprising tobacco control regulatory analysis, aims to establish the existence of a regulatory delay based on the following expectation:

[427] Some exceptions include Sattorova 2018 (n 324); Sattorova and Vytiaganets (n 324); Yarik Kryvoi and Kaj Hober, 'Characteristics and Trends of Law and Practice of International Arbitration in CIS Region' in Kaj Hober and Yarik Kryvoi, *Law and Practice of International Arbitration in the CIS Region* (Wolters Kluwer 2017).
[428] In relation to Ukraine, also confirmed by Lischyna (n 234).
[429] See n (20) and accompanying text.
[430] UNCTAD (ISDS) (n 34).
[431] UNCTAD (Reform) (n 311).

> The regulatory chill hypothesis necessitates a regulatory delay in a particular sector. Therefore, regulatory chill may occur in the post-Soviet states only if a regulatory delay occurs in the implementation of the FCTC.

It should be acknowledged at the outset that not all of the FCTC articles contain specific deadlines for policy implementation.[432] Nonetheless, given that it has been over 15 years since the treaty was ratified and accepted by all the post-Soviet States, any current delay to its implementation could be seen as attributable to regulatory chill. It is therefore argued that the extent to which the FCTC is implemented in national regulations is the *prima facie* indicator for considering whether IIAs have led to a regulatory chill effect on tobacco regulations. In other words, it would hardly be possible to argue that regulatory chill was present if the progressive measures under the FCTC had been fully implemented.

Given the wide scope of the FCTC requirements, the thesis will analyse the treaty implementation under three main rubrics: (i) Smoke Free Status of Indoor Public Places, Workplaces, and Public Transport / Duties and Penalties (Article 8); (ii) Regulated Forms of Advertising, Promotion and Sponsorships (Article 13); (iii) Packaging and Labelling: Health Warnings/Messages Features (Article 11).

Data will be drawn from the states' implementation reports submitted as part of the institutional oversight of the treaty implementation, the databases of tobacco NGOs and national legislation websites to provide a thorough analysis on whether and how the States have implemented the mentioned articles. Having established the existence of a delay, the thesis proceeds with Stage 2.

3.2.3. Stage 2: Regulatory Trends Analysis

Stage 2 consists of content analysis and pattern thematic analysis of various national sources aimed at shedding light on the reasons behind the regulatory delay based on the following expectation:

> We would expect that reasons for regulatory delay should be discovered in various national sources, including green and white papers, government speeches, press releases, media reports, national law restrictions and academic literature.

[432] Article 11 requires the measures to be implemented within three years of their entry into force; for Article 13, it is five years; some Articles, however, do not have any specific deadlines, see FCTC (n 91).

This is a broad-brush approach to explore any possible available sources that have open access on the internet, including government resources, academic and practitioners' databases and physical libraries. This is the first level in the analysis to consider whether IIAs affect tobacco legislation leading to regulatory chill in the post-Soviet States. At the same time, it enables us to establish the role of other drivers that could lead to regulatory delay, e.g. conflicting provisions of national legislation.[433]

Distinguishing separate patterns and themes in the data analysis and drawing from various theories to interpret the observations will provide structure to the case study explanations.[434] Furthermore, it will explicitly present the analytic assumptions, normative biases and causal propositions and will facilitate empirical validations.[435] In summary, the Stage 2 analysis will provide empirical insights into the regulatory behaviour in each of the selected jurisdictions. To provide additional evidence and improve the reliability of the results, this analysis will be followed by Stage 3, which will aim to establish further the role of IIAs in regulatory choices.

3.2.4. Stage 3: Further Delineating the Role of IIAs and Investment Arbitration

Stage 3 will include quantitative and qualitative analysis of the States' investment treaty frameworks and the awards rendered against them. The statistical analysis first highlights the patterns of the investment treaty negotiations undertaken by the States and their engagement in ISDS based on the following expectations:

Expectation 1

If the governments are concerned with regulatory chill/their ability to adopt tobacco control policies, they would adapt their treaty negotiation policy and would: (i) not negotiate further IIAs; and/or (ii) terminate existing IIAs; and/or (iii) renegotiate existing IIAs to narrow investment protections and broaden the regulatory space.

Expectation 2

[433] Also suggested by Bonnitcha, Poulsen and Waibel (n 7).
[434] Etienne (n 407).
[435] Jack S Levy, 'Case Studies: Types, Designs, and Logics of Inference' (2008) 25 Conf Manag Peace Sci 1.

> The governments' intense engagement in ISDS could increase the risks of regulatory chill, particularly if such disputes were brought to challenge tobacco control regulatory policy.

This is followed by qualitative coding of the available investment awards to explore whether the States' (tobacco) regulatory policies have ever been the subject of investment awards and to identify the outcome of such awards. The aim is to trace the states' specific responses to regulatory chill. Further, qualitative coding of the IIAs is conducted to explore any public health regulatory wording within the treaties.

This is further complemented by bespoke qualitative coding to analyse the public health regulatory space within the BITs signed by the post-Soviet States. The analysis is limited to BITs based on two considerations. First, it is designed to compare treaties and BITs since these are more comparable: unlike PTAs, BITs are concerned exclusively with investment protection, have a similar structure and include similar treaty clauses. Second, the coding is designed to compare (i) renegotiated treaties with their predecessors; and (ii) more recent treaties with older treaties. BITs are used since the pool of available PTAs is insufficient to conduct this exercise.

The qualitative coding builds on the coding method by Broude, Haftel and Thompson but broadens and targets the analysis based on the UNCTAD mapping tool to mark both procedural and substantial provisions, which are primarily responsible for public health regulatory space in the treaties.[436] Data will be collected using the UNCTAD database[437] and the official websites of national regulatory bodies.[438] The qualitative analysis of IIAs and the coding of the BITs is based on the following expectation:

> If the governments are concerned with regulatory chill / their ability to adopt tobacco control policies, they would change their treaty negotiation policy by either renegotiating existing BITs and/or negotiating more recent

[436] See also Thompson, Broude and Haftel 2018a (n 109) 529; UNCTAD, 'UNCTAD IIA Mapping Project' <https://investmentpolicy.unctad.org/uploaded-files/document/Mapping%20Project%20Description%20and%20Methodology.pdf > accessed 1 March 2021 [hereinafter, UNCTAD (Mapping)].

[437] UNCTAD (IIA) (n 20).

[438] 'Verkhovna Rada of Ukraine: the Legislation of Ukraine' < http://zakon.rada.gov.ua>; 'National Legal Internet Portal of the Republic of Belarus: Legal Information' <http://pravo.by>; 'Legal Information System of Armenia: Local Government Acts' <www.arlis.am>; 'Ministry of Justice of the Republic of Azerbaijan: Unified Electronic Database of Legal Acts' <www.e-qanun.az/>; 'The Legislative Herald' <https://matsne.gov.ge> all accessed 1 March 2021.

> BITs to include broader regulatory leeway, i.e. by including safeguards and/or carve-outs for the State regulatory power, and/or narrower procedural or substantive rights for investors.[439]

In other words, this thesis examines the evolution of treaty drafting in order to trace internalisation chill; here, the presence of greater scope for regulatory space in renegotiated and more recent BITs may suggest the existence of internalisation regulatory chill. However, it is first necessary to consider a method for use in measuring the scope of regulatory space. As the UNCTAD investment reform tools suggest, it may be possible to alleviate the potential risks associated with investment treaty restrictions on the state regulatory space by limiting the definition of investment/investor; excluding tobacco regulations from the scope of the treaty protection; including general exceptions for tobacco or public health regulations and/or exceptions for regulatory expropriation; restricting FET and MFN standards; limiting the scope of ISDS or excluding it altogether, etc.[440] Therefore, the coding design focuses on the variation among these provisions.

In respect of the qualitative coding design for the BITs, the treaty provisions affecting the scope of regulatory leeway are grouped into 20 categories. Each indicator within the categories is assigned a value between 0 and 10 depending on its likely effect on the scope of state regulatory freedom. The total value of all the indicators is then divided by 20 to give a public health sovereignty (PHS)[441] coefficient, thus providing a common denominator with which to compare the regulatory space within the various BITs (see Table 2).

[439] Thompson, Broude and Haftel 2018a (n 109).
[440] UNCTAD (Reform) (n 311).
[441] PHS shall be understood as regulatory space to implement public health regulatory measures. On regulatory space, see Titi (n 199); Lorenzo Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (2014) 9 Questions Int'l L 19.

Table 2. Qualitative Coding of BITs

Category	*Type / Effect Description*	*Indicator*	*Value*
1. Preamble	Cumulative: important role for interpretation of investment treaty, improves PHS via possibility to include public health agenda into IIAs	Reference to right to regulate	0.33
		Reference to sustainable development	0.33
		Reference to public health	0.33
2. Limitation to covered investment	Cumulative: limits jurisdiction of potential ISDS, therefore, enhances PHS	Excludes portfolio investment/ other specific assets	0.25
		Lists required characteristics of investment	0.25
		Contains "in accordance with host State laws" requirement	0.25
		Sets out closed (exhaustive) list of covered assets	0.25
3. Definition of covered investors	Cumulative: limits jurisdiction of potential ISDS, therefore, enhances PHS	Excludes dual nationals	0.33
		Includes requirement of substantial business activity	0.33
		Defines ownership and control of legal entities	0.33
4. Denial of Benefits ('DoB') clause	Cumulative: limits jurisdiction of potential ISDS, therefore, enhances PHS	"Substantive business operations" criterion	0.5
		Applies to investors from States with no diplomatic relations or under economic/trade restrictions	0.5
5. Scope of the treaty	Ordinal limits jurisdiction of potential ISDS, therefore, enhances PHS	Excludes public health/tobacco regulation	10
6. National treatment (NT) clause	Ordinal: limits jurisdiction of potential ISDS, therefore, enhances PHS	Pre-establishment only	0.5
		Post-establishment	0.25
		Reference to "like circumstances" (or similar	0.25
		No NT clause	1

7. Most-favored-nation (MFN) clause	Cumulative: limits jurisdiction of potential ISDS, therefore, enhances PHS	Pre-establishment only	0.5
		Post-establishment	0.25
		Economic integration agreements exception	0.25
		Procedural issues (ISDS)	0.5
		No MFN	1
8. Fair and equitable treatment (FET) clause	Ordinal: limits jurisdiction of potential ISDS, therefore, enhances PHS	FET qualified	1
		No FET	5
9. Refining indirect expropriation	Cumulative: improves - improves PHS via excluding public health measures outside the scope of the clause	Definition provided	0.5
		Carve-out for general public health or tobacco regulatory measures	2.5
10. Umbrella clause	Ordinal: limits jurisdiction of potential ISDS, therefore, enhances PHS	Not included	1
11. Exceptions	Ordinal: improves PHS via excluding public health measures outside the scope of the treaty	General public health exception	5
12. Alternatives to arbitration	Ordinal: such as conciliation or mediation provides greater opportunities for the states to resolve disputes without recourse to arbitration, at the same time voluntary and mandatory ADR bear different qualitative value	Voluntary recourse to alternatives	0.25
		Mandatory recourse to alternatives	0.75
		No ISDS	15
13. Scope of claims	Ordinal: broader jurisdiction (any dispute) is considered as more restrictive to PHS as a limited to treaty claims	Listing specific basis of claim beyond treaty	0.33
		Limited to treaty claims	0.66
14. Limitation on provisions subject to ISDS	Ordinal: limiting provisions that might be subject to ISDS provides is potentially less restrictive to PHS. Variable (assessment depends on the scope of limitation)	Limitation of Provisions subject to ISDS	1-9

15. Limitation on scope of ISDS	Ordinal: exclusion of public health policies from the scope of ISDS is more favourable for PHS	Exclusion of public health policy from ISDS	10
16. Type of consent to arbitration	Ordinal: case by case consent provides more space for states to settle the dispute amicably	Case-by-case consent or no ISDS	10
17. Forum selection: domestic courts	Ordinal: compulsory recourse to domestic courts as a pre-condition of ISDS provides more opportunities for states to remedy their wrong and settle the dispute	Domestic court a pre-condition for ISDS	1
18. Particular features of ISDS	Cumulative: where the claims are restricted in time through a type of statute limitations, PHS is less restricted	Limitation period	0.5
		Limited remedies	0.5
19. Interpretation	Cumulative: each of the opportunity of the parties to provide their interpretation of IIAs improves PHS, delimits chances of different interpretations	Binding interpretation	5
		Renvoi	1
		Rights of non-disputing contracting party	1
20. Transparency in arbitral proceedings	Cumulative: transparent ISDS is considered to improve PHS because of chance of public resonance	Making documents publicly available	0.33
		Making hearings publicly available	0.33
		Amicus curie	0.33

It is important to highlight that the coding values are not necessarily a quantitative tool with which to measure PHS. The scope of regulatory power in each particular case would depend on its facts as well as a subjective interpretation of the treaty provisions.[442] Therefore, the values of the different categories are the normative position of this author's valuation based on a similar approach by Broude, Haftel and Thompson.[443] While those authors amended their approach in subsequent versions of

[442] For a more sceptical approach, see Tarald Berge and Wolfgang Alschner, 'Reforming Investment Treaties: Does Treaty Design Matter?' (*Investment Treaty News*, 17 October 2018) <www.iisd.org/itn/2018/10/17/reforming-investment-treaties-does-treaty-design-matter-tarald-laudal-berge-wolfgang-alschner/> accessed 1 May 2019.
[443] Thompson, Broude and Haftel 2018a (n 109).

their paper, the measure of their coding is always an estimate of which categories indicate more or less regulatory space.[444]

However, unlike their approach, this quantitative valuation is designed to assess the degree of regulatory sovereignty to implement tobacco control measures. It therefore does not consider regulatory provisions in a general sense but public health and tobacco control exceptions and carve-outs specifically. It broadens the analysis to 20 categories that are believed to directly or indirectly affect the scope of PHS. Further, it does not limit the value to '1' but rather enables a progressive accumulation of values; this includes the value of '15' if ISDS is excluded, the value of '10' if ISDS is available only on case-by-case consent basis or public health policy may not be a subject to ISDS; and ranges from '1' to '9' if access to ISDS is limited to certain provisions, subject again to a case-by-case assessment. It further broadens the number of categories for assessment on the premise that other factors could result in a wider scope of regulatory power. References to public health, sustainable development and the right to regulate in the treaty preamble could arguably mean that the treaty is interpreted in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[445] Also, publicity surrounding a hearing, its submissions and awards could bring further attention to the dispute and tip the balance towards a more public international law perspective, recognising the inherent sovereign power to regulate – in contrast to the more literal and isolated interpretation of treaties.[446] A brief rationale for other evaluations is included in Table 1 (see 'Type / Effect Description').

Again, even though the coding entails that each treaty provision is accorded a normative value, the use of these values is more mathematical and does not measure regulatory space as such. The coding is a device for comparison: it is designed to compare different treaties with each other using the same tool to understand whether one treaty includes stronger provisions to protect regulatory space compared to another. In turn, this enables the delineation of certain trends in investment treaty-making and reveals the expectation that if governments are concerned with regulatory chill they

[444] See (n 109).
[445] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) United Nations, Treaty Series, vol 1155, 331.
[446] See Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) EJIL 121; Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper no 09-46, September 2009).

would either renegotiate existing BITs or, in the case of more recent BITs, negotiate the inclusion of wider regulatory space.

3.2.5. Comparative Analysis

This thesis has been designed as a small-N comparison involving a limited number of cases that have been chosen and compared with one another in a controlled fashion, to achieve a level of hypothesis validation in spite of the limited variation across the cases.[447] Having conducted three separate case studies, this thesis will try to establish common patterns and differences in those case studies to confirm or refute the regulatory chill hypothesis in the context of tobacco control regulation and the post-Soviet States. This approach will generate more reliable results which could then be further extrapolated to other jurisdictions and sectors to establish common trends within the region and the development of more robust policy proposals. It will also facilitate the provision of well-founded policy recommendations and equip the relevant governments with practical proposals practicalities for making informed policy choices when in the midst of investment treaty reform.

3.3. Methodological Limitations

The success of this research is based on access to information. There were nevertheless challenges linked to the effective utilisation of this methodology due to the confidential classification of certain potential investor-state disputes (including full-blown arbitration and pre-arbitration negotiations). As Behn, Fauchald and Langford observe, '[a]ll forms of empirical research on ISDS have historically been hampered by the international investment regime's default provisions on confidentiality and decentralisation'.[448] It is therefore not possible for this research to account for potential unknown arbitration claims against the post-Soviet States.

From the jurisdictional perspective, the case studies are also limited by the amount of information available in open access sources and the fact that information is largely restricted to the Russian and Ukrainian languages. This was specifically challenging

[447] Etienne (n 407).
[448] Behn, Fauchald and Langford (n 39) 14.

with respect to the Transcaucasian states, each of which has its own alphabet (different from Cyrillic and Latin) and language (different from the Slavic languages). In limited instances, this thesis relies on machine translation, which does not enable comprehensive legal analysis. The language limitations particularly affected access to the Transcaucasian official legislation databases and other types of materials for the purpose of understanding the motivations, background and contextual factors of regulatory decision-making.

Further, there is an inherent limitation applicable to most comparative studies in that the comparators may not match in all respects, which is underpinned by normative and political differences of the selected jurisdictions. Also, this research does not examine the experience of regulatory chill in other countries and has limitations regarding the factors that play a role in regulatory development. It is not possible to assume that the findings are identical and that they would hold more generally outside the post-Soviet space. As the thesis argues, the findings can be extrapolated, to some extent, to other sectors and jurisdictions, but further analysis would be required to confirm this. The thesis calls upon further studies, based on the presented multi-tier methodology, to investigate the impact of IIAs on tobacco and other public legislation in terms of contesting the causality of various drivers, including lobbying, capital flight, domestic legislation and other legal orders such as the WTO. This project would be improved if subsequent authors were able to broaden it to examine more jurisdictions and, in particular, non-English speaking parts of the world.

Finally, whilst this research endeavours to address regulatory chill, it does not engage with all criticism and deficiencies of the existent international investment regime. Thus, it by no means suggests that a revision of the existing system is unnecessary. Instead, it calls for further comprehensive studies to underpin the ongoing reform efforts. Despite these limitations, this undertaking serves as a unique and comprehensive conceptual and methodological tool for examining the extent to which IIL affects the regulatory development of the host States. It also establishes tobacco regulatory trends in the region and provides some evidence and a foundation for discussion of the ongoing reform of IIAs.

4. Regulatory Chill Case Study on Ukraine

As badly as the air we need the increase of foreign direct investment…[449]

The political and economic crisis in the Soviet Union led to the emergence of informal national political and social organisations and countrywide miners' strikes in the Ukrainian Soviet Socialist Republic (SSR) during the period from the late 1980s to the early 1990s and culminated in an independence movement by the State.[450] On 16 July 1990, the Verkhovna Rada (the Parliament) of the Ukrainian SSR adopted the Declaration of State Sovereignty of Ukraine that laid down the principles of its future statehood.[451] This was followed by the Act of Proclamation of Independence of Ukraine, which was adopted by the Parliament on 24 August 1991 and further approved by 92.32% of votes in the all-Ukrainian referendum held on 1 December 1991.[452] This

[449] Petro Poroshenko, President of Ukraine, Statement at the National Council on Reforms No 26 (12 September 2017).
[450] Natalia V Makovska, 'Declaration of State Sovereignty of Ukraine' (1990) UDC 930.253: 94 (477) Unique Document 167, 167-169 <https://archives.gov.ua/wp-content/uploads/15-33.pdf> accessed 2 July 2020.
[451] Declaration of State Sovereignty of Ukraine of 16 July 1990, Vidomosti of the Verkhovna Rada of Ukraine (VVR), 1990, No 31, 429.
[452] Makovska (n 450) 179.

concluded the emergence of the newly independent State and marked the beginning of a political and economic transition as part of a process that continues to this day.

The transition to a market based economy was central to this process: evolving market competition was a new beast to the State, whose economy was formally planned and centrally run by the government. It was during this period that the post-Soviet states became some of the most attractive investment destinations for the global producers of tobacco products.[453] Among the post-Soviet states, Ukraine received the greatest share of FDI due to it having the largest population but also due to its swiftness in engaging with the market privatisation process.[454] As of 2017, foreign MNCs held an approximately 92% share of the tobacco market in Ukraine: PMI (28%), BAT (24%), JTI (22%) and Imperial Tobacco (18%).[455]

This increasing foreign presence in the tobacco sector coincided with a surge in both tobacco use and tobacco-related diseases. As mentioned earlier, Ukraine has the highest demand for tobacco among the lowest-income countries,[456] which is directly linked to it also having the highest level of tobacco-related mortality in the world.[457] In Ukraine, around 85 thousand deaths per year are associated with tobacco-related diseases.[458] At the same time, the burden of tobacco-related illnesses on the economy is believed to exceed USD 3 billion per year.[459]

In light of these facts, one would expect Ukraine to take urgent action to tackle the problem and, as a minimum, implement the FCTC, which it ratified on 6 June 2006.[460] Nevertheless, progress towards full implementation of the FCTC has been slow; recently, Ukraine was reported to have implemented less than 50% of the required measures.[461] This raises the questions of i) why the 13 years that have ensued since the

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[453] Gilmore and McKee (n 26); Gilmore (n 27) Table 2-6. See also Vytiaganets (n 28).
[454] ibid, Tables 2-1, 2-2.
[455] 'Euromonitor International: Tobacco in Ukraine' (July 2019) <www.euromonitor.com/ukraine> accessed 22 March 2020.
[456] WHO (Roadmap) (n 105).
[457] See (n 104).
[458] See eg Vyacheslav Hnatyuk, 'Tobacco Industry Kills 85,000 Addicted Ukrainians Annually' (*Kyiv Post*, 18 October 2019) <www.kyivpost.com/business/tobacco-industry-kills-85000-addicted-ukrainians.html> both accessed 22 March 2020.
[459] Economic Truth, 'Ukraine's Annual Smoking Damages Are Total to 3 Billion Dollars' (20 January 2017) <www.epravda.com.ua/news/2017/01/20/618214/> accessed 1 February 2020.
[460] 'United Nations Treaty Collection: STATUS AS AT : 02-10-2020 05:00:48 EDT: Chapter IX: Health: 4 WHO Framework Convention on Tobacco Control' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en> accessed 2 October 2020 [hereinafter, UNTC].
[461] See annx 2 and 5; see also (n 96) and accompanying text.

implementation of the tobacco treaty have not been sufficient to adopt the required legislation, and ii) whether the inadequacy of tobacco regulatory standards can be attributed to investment treaty regulatory chill.

This chapter engages with the ongoing debate on regulatory chill and presents the first case study in the context of tobacco control regulations in Ukraine. It will attempt to establish the extent to which, if at all, IIAs have affected tobacco regulations and led to regulatory chill in Ukraine. The chapter will proceed as follows. Section 5.1 will revisit the extent of the FCTC implementation and will argue that since Ukraine has yet to implement the treaty, this confirms the essential prerequisite of the regulatory chill hypothesis along with the possibility that the regulatory delay may be attributable to regulatory chill. Having established this, Section 5.2 will look at the reasons behind the inadequate level of tobacco control regulations – as manifested in various primary and secondary sources. It will advance the notion that the strength of industry lobbying within the Ukrainian Government has effectively impeded the adoption of tobacco control innovations since 2012. There is no evidence to confirm that the government's reluctance to support the legislative innovations is related to IIAs and ISDS. Instead, the government's main concern has been the economic implications of stricter tobacco policies for businesses and the State budget inflow. Section 5.3 will then discuss the State's constitutional order and the status of IIL. It will argue that IIL is more than capable of shaping national legislation, which ought not to contradict international law provisions. To date, however, there has been only limited application of international investment treaties in Ukraine; therefore, IIL has not had a significant impact on domestic legislation through the national judiciary. Further, Section 5.4 will examine the State's national laws on investment protection to argue that national legislation has the potential to further obstruct tobacco regulatory initiatives. However, the scarcity of available case law does not allow for a conclusive analysis of the impact of national law. Finally, Section 5.5 will turn to discern the role of IIAs in the regulatory delay. It will argue that the dynamics of investment treaty negotiation do not provide comprehensive evidence from which to conclude that national regulators have been concerned with regulatory space to regulate tobacco. Section 5.6 will then consider known investor-State disputes and empirical data from other studies to argue that there is no evidence to suggest that any real or perceived threats of investment claims have ever been internalised by government officials as considerations when adopting tobacco legislation. Section 5.7 will conclude that no consistent, observable evidence has been

found to support the hypothesis that IIAs and their arbitration mechanisms have affected tobacco regulations and led to regulatory chill in Ukraine. Consequently, the hypothesis in the context of Ukrainian tobacco is unfounded.

4.1. Smoking Prevalence and Tobacco Control Legislation

Ukraine has the highest demand for tobacco and the highest tobacco-related mortality in the world. It is believed that tobacco is responsible for around 85 thousand deaths in Ukraine every year.[462] According to official data, the number of smokers has fallen by 6% since the State began implementing the FCTC.[463] The most effective measure is reported to have been a 20-fold increase in excise tax between 2007 and 2017.[464] In 2017, the government embarked on a further seven-year plan, under which the excise rate on cigarettes was raised by an additional 20% on 1 January 2021.[465]

As a result of the COVID-19 pandemic, Ukraine did not submit the implementation report due in 2020.[466] Nonetheless, even a cursory overview of the national legislation demonstrates that it is yet to fully implement several articles of the FCTC: a ban on smoking in all indoor workplaces, public places and public transport facilities (Article 8); a ban on the sale of tobacco products via the internet (Article 13); and the introduction of regulatory measures for electronic cigarettes (Article 13).[467] For instance, whilst the law generally prohibits smoking in certain specified indoor workplaces, including restaurants, educational and health care facilities, it also permits designated smoking rooms in various other workplaces, including hotels, dormitories, airports and train stations.[468] This is in contrast to Article 8 of the FCTC, which requires

[462] Hnatyuk (n 458).
[463] See annx 2.
[464] Alan Fuchs and Francisco Meneses, 'Regressive or Progressive? : The Effect of Tobacco Taxes in Ukraine' (World Bank 2017) <https://openknowledge.worldbank.org/handle/10986/28575>; 'Story of Success: Tobacco Taxation in Ukraine' (*YouTube*, 5 March 2018) <www.youtube.com/watch?v=V8o_mBzudQE> both accessed 22 March 2020.
[465] 'FCTC WHO Framework Convention on Tobacco Control Secretariat: Ukraine: New Tobacco Tax Measures Enter into Force' <https://untobaccocontrol.org/impldb/ukraine-new-tobacco-tax-measures-enter-into-force/> accessed 22 March 2020.
[466] 'FCTC WHO Framework Convention on Tobacco Control Secretariat: Home: Reports: Parties' <https://untobaccocontrol.org/impldb> accessed 22 March 2020 [hereinafter, FCTC Reports].
[467] See annx 2 and 5.
[468] ibid.

a total ban on smoking in all indoor workplaces and indoor public places.[469] Ukraine's tobacco law covering the sale of tobacco over the internet does not comply with the requirements of Article 13 FCTC.[470] Whilst advertising is supposed to be restricted to websites for adults, there is no mandatory checking of the age of internet users.[471] Further, the law does not prohibit the display of tobacco products at the point of sale.[472] This does not comply with the requirements of Article 13 FCTC stipulating that the law should prohibit the display of tobacco products, including visible tobacco products, at the point of sale.[473]

Notably, since 2012, with the exception of tax measures, the Ukrainian Parliament has not adopted any tobacco control innovations.[474] Therefore, no further FCTC measures have been adopted and the level of FCTC implementation remains minimal to moderate.[475] Taking into account the country's high level of tobacco-related mortality, it is clear that the level of tobacco control regulations in Ukraine is not adequate. To express this differently, there has been a distinct regulatory delay in the country that could potentially be attributed to regulatory chill. With this in mind, the next section will attempt to illuminate the reasons for the delay in tobacco regulatory development in Ukraine.

4.2. The Industry's Tactics, State Budget Revenues, FDI and Job Security Concerns

Four main themes emerged when considering the reasons for tobacco control regulatory delay in Ukraine, none of which relates to regulatory chill. The first concerns the tobacco industry itself. It is hardly surprising that the industry would try to stymie attempts to regulate tobacco. There has long been a suspicion within the regulatory chill literature that the industry would lobby against, intimidate or even bribe government

[469] FCTC (n 91).
[470] See annx 2 and 5.
[471] ibid.
[472] ibid.
[473] FCTC (n 91).
[474] See annx 2 and 5.
[475] See annx 3 and 4.

officials to oppose more stringent tobacco control measures.[476] In Ukraine, however, such tactics have been particularly prevalent. Second, the economic and social ramifications of potential tobacco legislation, entailing the loss of FDI, budget revenues and jobs, have prevailed as a consideration against regulatory development. Again, whilst it is expected that the government would be concerned with potential social insecurity and reduced budget incomes, in Ukraine this concern has prevailed over the significant public health issue. The remainder of this section will deal with each of the reasons in turn.[477]

4.2.1. The Industry's Tactics

The guidelines on the implementation of the FCTC (Principle No 1), which refer to 'fundamental and irreconcilable conflict' between the interests of the tobacco business, require the State parties to protect the policy from the influence of the tobacco industry.[478] Yet the industry has a track record of undermining tobacco control innovations in the former Soviet space.[479] The industry has also set a negative example in Ukraine and even persuaded the government to initiate a notorious dispute against Australia at the WTO despite there being no formal trade relationships between the states, save for minor single shipments in early 2000.[480] It is striking that Ukraine was the first to bring a trade claim against Australian plain packaging regulations that *de facto* blocked their enforcement in Australia.[481]

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[476] See Brown (n 86); Gabriel Siles-Brügge and Nicolette Butler, 'Regulatory Chill? Why TTIP Could Inhibit Governments from Regulating in the Public Interest' (*London School of Economics Policy Blog*, 9 June 2015) <http://bit.ly/1JBOXpg> accessed 1 February 2020.

[477] This section also draws on this author's previous studies on the matter, see Vytiaganets (n 28).

[478] World Health Organisation, 'Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the Protection of Public Health Policies with Respect to Tobacco Control from Commercial and Other Vested Interests of the Tobacco Industry' <www.who.int/fctc/guidelines/article_5_3.pdf?ua=1> accessed 29 March 2020 [hereinafter, Guidelines for Article 5.3 FCTC].

[479] See eg Anna B Gilmore, Jeff Collin and Martin McKee, 'British American Tobacco's Erosion of Health Legislation in Uzbekistan' (2006) 332(7537) BMJ 355.

[480] See eg Corderoy (n 263); Linda Kaucher 'Cigarette Packaging and International Trade – a Warning' (*Open Democracy*, 31 July 2013) <www.opendemocracy.net/en/opendemocracyuk/cigarette-packaging-and-international-trade-warning/>; Alena Omelchenko, 'Health is More Important than Trade: the Historic WTO Decision' *European Truth* (Kyiv, 23 July 2018) <www.eurointegration.com.ua/rus/experts/2018/07/23/7084690/> both accessed 22 March 2020.

[481] DeloUa, 'The Ministry of Economy Will Be Awarded International Anti-Bonus Marlboro Man on the World Tobacco Day' (31 May 2012) <https://delo.ua/business/antipremiju-marlboro-man-vruchat-minekonomiki-vo-vsemirnyj-den-be-178643/> accessed 22 March 2020.

The media reported that the government initiative to bring the claim was based on appeals from the associations 'Ukrtyutyun', 'Union of Wholesalers and Producers of Alcohol and Tobacco', 'Ukrvodka', ACC in Ukraine and the Ukrainian Trade and Industrial Confederation.[482] It was also reported that during international visits, representatives of the EU, Canada and Australia repeatedly expressed concerns that Ukraine, with no economic interest of its own, was lobbying in the interests of tobacco companies in other countries.[483] An interview conducted by Sattorova and Vytiaganets with a former high-ranked government official confirmed that many public servants in the Ministry of Economics were puzzled as to the grounds for the dispute and subsequently withdrew the claim following communication on the matter with the Australian Government.[484]

The only rational explanation for the incident seems to be that the industry thought to leverage its influence on the Ukrainian Government to hamper the unfavourable piece of legislation in Australia. In WTO practice, countries that bring claims to protect the economic interests of third parties are unofficially called 'surrogate countries'.[485] On 31 May 2012 (World Tobacco Day), the Network for Accountability of Tobacco Transnationals (NATT) awarded the Government of Ukraine an international anti-bonus 'Marlboro Man' as a means of condemning these actions.[486] NATT called for the authorities to bring an end to the shameful practice of officials being manipulated by the tobacco industry.[487]

Since 2012, the parliament has not adopted any progressive tobacco policies, with the exception of tax measures.[488] Various sources point to the disruption of tobacco initiatives in parliament and the industry's involvement in the legislative process.[489] This is clearly illustrated by recent experience with two law initiatives: Draft Law 2820

[482] Omelchenko (n 480).
[483] ibid.
[484] Vytiaganets (n 28).
[485] Omelchenko (n 480).
[486] Ukrainian Centre for Tobacco Control, 'Resisting the TI Intervention' (2016) <http://tobaccocontrol.org.ua/strategy/protidiia-vtruchanniu-ti> accessed 1 February 2020.
[487] ibid.
[488] See annx 5.
[489] 'Our Money (no 129): Nasir's Tobacco and a Forest for Beetroots' (*YouTube*, 11 July 2011) <www.youtube.com/watch?v=LRJcbfB_Egw>; Oleg Lystopad, 'L. Olefir: "Tobacco Industry Blocks the Adoption of Laws to Prevent Child Smoking"' (*Public Space*, 15 March 2019) <www.prostir.ua/?news=liliya-olefir-tyutyunova-industriya-vpravno-blokuje-4-roky-pryjnyattya-vr-zakoniv-kotri-dopomohly-b-poperedyty-dytyache-kurinnya> both accessed 20 May 2020.

of 13 May 2015[490] and Draft Law 4030a of 19 July 2016.[491] These draft laws were indented to bring tobacco legislation in line with Articles 8, 11 and 13 of the FCTC introducing solemn legislative changes. Draft (i) 2820 stipulated the introduction of graphic warnings (to cover 65% of the packaging surface); the prohibition of flavoured cigarettes and the sale of electronic cigarettes to children; the removal of tobacco advertising from the internet; and the requirement to publish the content of tobacco products.[492] Draft No 4030a thought to ban the display of cigarettes in shop windows; improve smoke-free policies; and introduce effective mechanisms for monitoring compliance with anti-tobacco legislation.[493] In this respect, it is notable that a similar ban on the shop-window display of tobacco products had already entered force in neighbouring Belarus and Russia.[494] Both drafts were introduced in parliament in 2015 and 2016 respectively but have never been enacted. Despite the election of a new government in May 2019, policy-makers have yet to make any substantial progress with the tobacco control measures.

The WHO, the Ministry of Health of Ukraine and civil society organisations all strongly encouraged parliament to adopt the tobacco control initiatives.[495] While the drafts were under consideration by the parliament, the Centre of Public Health and several other NGOs and politicians even organised public demonstrations in support of the drafts.[496] Several MPs signed an open letter to the Speaker of the Parliament to include Draft Law 4030a in the session agenda, citing the State's obligations under Article 13 FCTC.[497] Following three to four years of consideration, however, the drafts had failed to progress beyond even the first hearing as just one of the initial stages of

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[490] Draft Law 'On Amendments to Certain Laws of Ukraine on the Protection of Public Health from Harmful Tobacco Impact' of 13 May 2015 No 2820 [hereinafter, Draft Law 2820].
[491] Draft Law 'On Amendments to Certain Laws of Ukraine (on Public Health Protection from Tobacco Smoke)' of 19 July 2016 No 4030a [hereinafter, Draft Law 4030a].
[492] Draft Law 2820 (n 490).
[493] Draft Law 4030a (n 491).
[494] Taras Shevchenko, 'What You Didn't Know About the Fight Against Tobacco Smoking in the World' (*Centre for Democracy and Rule of Law*, 17 August 2018) <https://cedem.org.ua/articles/shho-vy-ne-znaly-pro-borotbu-z-tyutyunopalinnyam-u-sviti/ > accessed 1 March 2021.
[495] See eg Dmytro Kupira, 'The WHO Calls on Andriy Parubiy and MPs to Adopt the Anti-Tobacco Bill No 4030a' (*Public Space*, 4 December 2018) <www.prostir.ua/?news=vooz-zaklykaje-andriya-parubiya-ta-deputativ-pryjnyaty-antytyutyunovyj-zakonoproekt-4030a>; Centre of Public Health, 'The Centre of Public Health Calls on MPs to Support the Draft Law 4030a!' (20 September 2018) <https://phc.org.ua/news/centr-gromadskogo-zdorovya-zaklikae-deputativ-pidtrimati-zakonoproekt-no-4030a> both accessed 20 May 2020.
[496] ibid.
[497] Oksana Totovytska, 'Faction Leaders Call on Parubiy to Consider the Anti-Tobacco Draft Law No 4030a' (*Ukrainian Centre of Tobacco Control*, 6 May 2019) <http://tobaccocontrol.org.ua/news/golovi-fraktsii-zaklikaiut-parubiia-rozghlianuti-antitiutiunovii-zakonoproiekt-4030a> accessed 20 May 2020.

the legislative process. In other circumstances, the government may only take a few months to discuss, adopt and publish new legislation.[498] Ultimately, in May 2019, both drafts were withdrawn from the parliament.[499]

Civil society and certain politicians who supported the draft thought to blame the tobacco industry for parliament's failure to adopt the tobacco measures.[500] A plethora of evidence revealed closely intertwined relations between parliamentarians and the industry. In 2017, Transparency International Ukraine published the names of public officials, including eight MPs, who lobbied on behalf of the industry within the government.[501] One MP was also a founder of a corporate entity that was related to a monopoly distributor of cigarettes in the Ukrainian market.[502] A family member of another MP worked as a manager on corporate and regulatory matters at JTI.[503] An assistant advisor of another MP was Head of the Ukrainian Association of Tobacco Producers.[504] Civil societies also blamed other Ukrainian MPs, mainly those representing the Tax Committee of the Parliament, for 'blocking' Draft Law 2820.[505] Some MPs, despite publicly supporting the drafts, ultimately did not vote for them.[506] The tobacco innovations were also opposed by the International Centre for Policy Studies NGO, which received USD 350 thousand in grants from PMI during the period 2014–2016.[507]

This demonstrates the extensive influence of the industry on the State's policy-making process.[508] In 2019, the Global Tobacco Industry Interference Index ranked

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[498] See Draft 1580 (n 520) infra.
[499] Draft Law 2820 (n 490); Draft Law 4030a (n 491); see also Ukrinform, 'The Rada Has Failed the Anti-Tobacco Draft Law' (14 May 2019) < www.ukrinform.ua/rubric-society/2699759-rada-provalila-antitutunovij-zakonoproekt.html> accessed 20 May 2020.
[500] Our Money (n 489); Lystopad (n 489).
[501] Transparency International Ukraine, 'Tobacco Companies' "Lobbyists": What Do We Know?' (2017) <https://ti-ukraine.org/wp-content/uploads/ti-project-lobists/index.html> accessed 1 February 2020.
[502] ibid.
[503] ibid.
[504] ibid.
[505] See Totovytska (n 497); Petro Korol, 'Tobacco Lobbying in the Parliament: Where is the Limit?' (*Centre for Democracy and Rule of Law,* 18 October 2016) <https://cedem.org.ua/articles/tyutyunovyj-lobizm-u-parlamenti-de-mezha/> both accessed 20 May 2020.
[506]. See Valentyna Romanenko, 'The Rada Refused to Strengthen Smoking Bans' *Ukrainian Truth* (Kyiv, 14 May 2019) <www.pravda.com.ua/rus/news/2019/05/14/7214984/> reporting the Speaker's statement regarding the Draft 4030a; Word and Action, 'Promised Policy: Rudyk Promised to Support a Draft Law to Protect Public Health from the Harmful Effects of Tobacco Smoke' (7 November 2017) <www.slovoidilo.ua/promise/45258.html> both accessed 20 May 2020.
[507] ibid.
[508] See also Andriy Skipalsky, 'The Golden Braid, or Who Lobbies the Interests of Tobacco Growers' *Economic Truth* (Kyiv, 25 May 2016) <www.epravda.com.ua/columns/2016/05/25/593880/> accessed 20 May 2020.

Ukraine 13th out of 33 states with the highest level of industry interference in tobacco policy development.[509] It should be noted that Ukrainian law does not regulate lobbying, which means there are no requirements for politicians to be transparent and record their contacts with industry lobbyists. This favours the industry, which has continued to grow its business and power in the State. At the same time, it is clear that the industry itself has been one of the major reasons for tobacco regulatory delay.

4.2.2. The Impact on Business and State Budget Revenues

Turning to other reasons for the regulatory delay, it would be beneficial to briefly return to the adoption of Draft Law 4030a (banning the display of tobacco in shop windows and improving compliance with tobacco policies). Among others, the Ministry of Economic Development and Trade opposed this draft because, in their view, the proposed changes would lead to unfair market redistribution, an increase in illegal trade and a UAH 4 billion loss of State budget revenues.[510] Several aspects of this statement are interesting. First, its content is an accurate replication of the position advocated by the National Organisation of Retail Trade (NORT), whose president used to work for PMI.[511] This further supports the previous point concerning the impact of the industry on the national government. Second, the reasons listed highlight how the loss of budget revenue was one of the most important considerations for the government that ultimately swayed the decision to delay the implementation of the FCTC. Finally, the reasons demonstrate that the Ministry was unlikely to give due consideration to the regulatory proposals. It is unclear how banning the display of tobacco in shop windows would lead to unfair market redistribution, for example. Further, it is believed that the tobacco burden on the economy amounted to circa UAH 80 billion per year, 20 times greater than the loss that was expected to have arisen had the draft been introduced.[512]

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[509] Hnatyuk (n 458).
[510] RBC Ukraine, 'More than 7 Thousand Trade Enterprises May Be Closed Because of the Draft Law No 4030A' (Kyiv, 11 October 2017) <www.rbc.ua/ukr/news/7-tys-predpriyatiy-torgovli-mogut-zakrytsya-1507708343.html> accessed 1 February 2020.
[511] ibid. For NORT's statement on the proposed legislation, see Umut Inceoglu, 'NORT Made a Statement on the Draft Law 4030a' (*National Platform of Small and Medium Business*, 2 November 2018) <https://platforma-msb.org/gs-nort-zrobyv-zayavu-shhodo-zakonoproektu-4030a/> accessed 20 May 2020.
[512] See in Economic Truth (n 459). The currency converted at the official rate of the National Bank of Ukraine as of 11 October 2017.

It is likely that in the long run, the tobacco legislation would have benefited not only public health but also the economy.

This is not the only example of where a potential impact on businesses leading to a loss of State budget revenue hindered regulatory development in the public health interest. In May 2017, the Ministry of Health circulated for public consultation the Draft Law 'On Amendments to the Law of Ukraine "On Basic Principles and Requirements for the Safety and Quality of Food Products" (regarding the restriction of the content of trans fatty acids in food)'.[513] The initiative was aligned with the WHO's Global Action Plan for the Prevention and Control of NCDs 2013–2020, which aimed to prevent cardiovascular diseases and certain forms of cancer that might be caused by the consumption of trans fatty acids.[514] After a short period of consultation, the Ministry withdrew the draft, which it explained by citing 'the reaction of industry associations, in particular, the confectionery industry' and the need to 'amend the Draft and prepare a regulatory impact analysis, including calculations of the financial burden for large, medium and small businesses'.[515]

With respect to revenues, the economic interests of states and businesses are generally aligned and that business stagnation might lead to economic stagnation at the macro-level, while increased profits would, under normal circumstances, lead to a rise in State budget incomes. The State's interests are broader and also include public health, which the State is obliged to protect. Therefore, when making regulatory decisions, governments have to balance economic interests and the public health interest. It is clear that the Ukrainian Government has thus far prioritised the former despite the significance of the public health matters at stake. This has clearly influenced the regulatory development in the country.

4.2.3. FDI Loss and Job Security Concerns

For the sake of completeness, two further related concerns should be mentioned: the loss of FDI and job security. While both reasons are closely intertwined with the

[513] 'The Ministry of Health of Ukraine: Discussing a Draft Law Designed to Limit the Consumption of Trans Fats' (17 May 2017) <http://moz.gov.ua/article/news/obgovorjuemo-zakonoproekt-poklikanij-obmezhiti-spozhivannja-transzhiriv> accessed 22 March 2020.
[514] ibid.
[515] Ministry of Health of Ukraine, Letter No 05.1-14-17/550/3ПІ-18/110-75 of 2 May 2018 (on file with author).

previous two, they are also distinct in the sense that they have been expressly put forward as arguments in favour of maintaining the status quo and even relaxing existing regulatory standards. Ukraine's ongoing economic crisis and military conflict with Russia have led to a strong dependency on FDI by the State. The Government Strategy 2020 considers FDI to be 'a matter of national security for Ukraine'.[516] Even foreign aid to the State has been provided on the condition that it improves the business climate for the purpose of attracting FDI. A striking aspect is that some of the regulatory improvements have occurred at the expense of the public health interest.

In April 2014, the International Monetary Fund (IMF) lent Ukraine USD 17 billion under a two-year stand-by arrangement.[517] This arrangement included a requirement for the government to conduct a range of economic reforms to 'improve the business climate and … to achieve high and sustainable growth'.[518] The former was also pursued to 'restore confidence among private investors' in the State.[519] In December 2014, as part of the required reforms and in order to obtain a further tranche of the loan from the IMF, the Cabinet of Ministers initiated Draft Law 1580 'On Amendments to Certain Legislative Acts of Ukraine on Facilitation of Business Conditions (Deregulation)'.[520] This draft purported to abolish the certification/licensing of various business activities, including the importation of medicine;[521] the importation of active pharmaceutical ingredients;[522]activities concerned with umbilical cord blood banks, other tissues and human cells;[523] activities concerned with potable and packaged potable water;[524] and the certification of and activities concerning pesticides and agrochemicals.[525]

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[516] UkraineInvest, 'Quarterly Report to March 31, 2017' (31 March 2017) <www.usubc.org/files/UkraineInvest_1st_Quarterly_Report%20_2017.pdf> accessed 22 March 2020.
[517] Vitaliy Neborak, 'Ukraine and the IMF: A Chronology of 21-Year Relationships' (*UNIAN*, 12 March 2015) <https://economics.unian.ua/finance/1054685-ukrajina-i-mvf-hronologiya-vidnosin-dovjinoyu-21-rik.html> accessed 1 February 2020.
[518] 'International Monetary Fund: IMF Survey: Ukraine Unveils Reform Programme with IMF Support' (2014) < www.imf.org/en/News/Articles/2015/09/28/04/53/sonew043014a > accessed 1 February 2020.
[519] ibid.
[520] Draft Law 'On Amendments to Certain Legislative Acts of Ukraine on Simplifying Business Conditions (Deregulation)' of 22 December 2014 No 1580 [hereinafter, Draft 1580].
[521] ibid, art 2 (amending art 17 of the Law of Ukraine 'On Medicines' of 4 April 1996 No 123.
[522] ibid, art 59 (amending the Law of Ukraine 'On Amendments to Some Laws of Ukraine Regarding the Licensing of Import of Medicinal Products and the Definition of the Term "Active Pharmaceutical Ingredients"' of 04 July 2012 No 5038-VI.
[523] ibid, ii final provisions (amending art 9 of the Law of Ukraine 'On Licensing of Certain Types of Economic Activity' of 1 June 2000 No 1775-III.
[524] ibid, art 37 (amending the Law of Ukraine 'On Potable Water and Potable Water Supply' of 10 January 2002 No 2918-III).
[525] ibid, art 18 (amending the Law of Ukraine 'On Pesticides and Agrochemicals' of 2 March 1995 No 86/95-BP).

Given the urgency of the matter, the draft received priority status. Despite prescribing significant changes to 63 Ukrainian laws, the draft was reviewed by 19 relevant committees of the Ukrainian Parliament on the day immediately after its registration.[526] The Committee on Public Health, Committee on Industrial Policy and Entrepreneurship and the Central Scientific Experts Office considered that the draft should not progress to the parliamentary hearing but instead be returned for revision. Nonetheless, three days after the registration of the draft, the parliament adopted it at first reading and in less than two months, the law entered into force.[527] Shortly after the deregulation was adopted, Ukraine agreed on further loan tranches from the IMF and signed a 'money in return of reforms' memorandum that required the State to 'concentrate on deregulation'.[528]

There are several observations to be made at this point. Firstly, on the one hand, the rapid turnaround time for completing the adoption of the legal changes, when the relevant committees had advised against adoption, shows that the government did not have a choice. In normal circumstances, such 'efficiency' would not be considered reasonable as it can lead to hasty and ill-considered decisions. This is also evident in the number of amendments to the law that were required after its adoption.[529] On the other hand, it illustrates the extent of Parliament's unreasonableness in delaying the consideration of Draft Law 2820 and Draft Law 4030a discussed earlier. Had Parliament considered these initiatives to be a priority, they could have been adopted years earlier.

Secondly, the significance of FDI is revealed by the fact that it was considered to be a matter of national security for the government. Finally, the situation illustrates that investment protection was prioritised over the national health interest. Parallels can be drawn with the legal initiatives discussed in the previous section since the root of the concern is the same – the government needed to feed the State budget in order to get the economy moving. Therefore, investment in the tobacco sector was also likely to

[526] ibid.
[527] Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Simplifying Business Conditions (Deregulation)' of 12 February 2015 No 191-VIII [hereinafter, Law 191-VIII].
[528] Ukrainian Truth, 'Reformometr' (Kyiv, 17 June 2015) <www.pravda.com.ua/cdn/cd1/2015year/reform/> accessed 1 February 2020; International Monetary Fund, 'Ukraine Request For Extended Arrangement Under The Extended Fund Facility And Cancellation Of Stand-By Arrangement' (IMF Country Report no 15/69 2015).
[529] See Law 191-VIII (n 527).

receive preferential treatment when the government needed to consider tobacco regulatory measures.

A more recent case illustrates that capital flight concerns might also be linked to job security concerns. In autumn 2019, the Ukrainian Government considered introducing anti-cartel legislation for the tobacco industry, setting fixed margins for the wholesalers and retailers of tobacco products.[530] In response to the proposal, international tobacco manufacturers threatened to close their factories in Ukraine and BAT even temporarily shut down its factory in Priluky, leaving around 500 workers and thousands of people who were dependent on the business with no income.[531]

The Ministry of Economics accused the tobacco firms of 'blackmailing' the government[532] but a few months later, the legal initiative was vetoed by the president of Ukraine.[533] Civil society condemned the decision as 'a bad omen for future tobacco policy' noting that the 'decision was made under the pressure of tobacco corporations … [i]t is an explicit example of tobacco lobbying in Ukraine'.[534] Eventually, the proposed anti-cartel legislation was adopted, albeit with suggestions from the president that effectively negated its purpose.

Again, it is apparent that the loss of FDI, budget revenues and jobs was pivotal in the government's decision to revoke the law. This can also be confirmed by a statement from the general director of BAT Ukraine:

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[530] Nataliya Sofienko, 'British American Tobacco on Tobacco Scandal: Ukraine Reverts to the Manual Management of the Economy' (*Business*, 22 October 2019) <https://business.ua/business/7003-u-british-american-tobacco-rozpovili-za-yakikh-umov-vidnovlyat-robotu-fabriki-u-prilukakh>; DeloUA, 'Global Tobacco Giants May Close Factories in Ukraine Due to a New Law (UPDATED)' (Kyiv, 9 October 2019) <https://delo.ua/business/mirovye-tabachnye-giganty-mogut-zakryt-zavody-v-359044/> both accessed 1 February 2020.

[531] ibid. In 2011, BAT also opposed a tobacco advertising ban arguing that it would make 'it impossible for tobacco companies to communicate …with their consumers, own business partners and media…' 'British American Tobacco Ukraine is a Corporate Citizen of Pryluky' (14 April 2011) <www.bat.ua/group/sites/BAT_84VDXZ.nsf/vwPagesWebLive/DO8FWBR4?opendocument> accessed 20 May 2020.

[532] Business, 'The Details of Goncharuk's Meeting with Tobacco Manufacturers Became Known' (Kyiv, 24 October 2019) <https://business.ua/news/7043-stali-vidomi-detali-zustrichi-goncharuka-iz-tyutyunovirobnikami?fbclid=IwAR17vCVYKmw9nJmSUxMT69R5I6dK6ahWXK6du5Q8ONAYiPXk6c7DwVBhaHE> accessed 1 February 2020.

[533] Draft Law 'On Amendments to Certain Laws of Ukraine Concerning the Introduction of a Single Account for the Payment of Taxes and Duties, a Single Contribution to the Mandatory State Social Insurance' of 29 August 2019 No 1049.

[534] Alexander Query, 'Zelensky Vetoes Law Increasing Cigarette Prices' *Kyiv Post* (Kyiv, 19 February 2020) <www.kyivpost.com/business/president-zelensky-vetoes-law-increasing-cigarette-prices.html> accessed 22 March 2020.

> [y]esterday I met with the Prime Minister ... I want to thank the government for … the deep understanding of the market situation and the sincere desire to solve the problem that could *harm the largest taxpayers and the economy as a whole*.[535]

Therefore, it is likely that the president's veto *does* represent 'a bad omen' for future tobacco policies in Ukraine. The industry's rhetoric and the campaign focused on 'closing' factories demonstrate that industrial flight and associated concerns (i.e. loss of investment, budget revenues, jobs etc.) are likely to be the main factor acting to deter the development of national tobacco control legislation in Ukraine. Put differently, it is likely that the capital flight argument would firstly be invoked by international tobacco corporations as part of an effort to oppose tobacco regulatory decisions.

4.2.4. Explaining the Regulatory Delay: Capital Flight and Race to the Bottom Theories

Much of the conventional wisdom on the political economy of tobacco investment suggests that developing states may be loath to adopt new tobacco legislation due to pressing economic demands.[536] Capital flight theory should also be considered as a potential cause of regulatory delay.[537] The theory suggests that states may refrain from enacting stricter policies that go beyond the status quo based on a belief that this may trigger capital flight.[538] From the political economy perspective, the normative implications of FDI have also not been investigated empirically in systematic ways.[539] Drope and others, for instance, observe that '[w]hile the scholarly literature … has focused … on countries' efforts to attract investment, there has been only limited inquiry into what happens after investment: how these flows of capital might be affecting … policymaking and/or regulation'.[540]

However, there are some anecdotal studies of occasions when the tobacco industry has resisted proposed legislation by playing the capital flight card. In the early 1990s,

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[535] See Business (n 532) [emphasis added].
[536] Jeffrey Drope and others, 'The Political Economy of Foreign Direct Investment – Evidence from the Philippines' (2014) 33 Policy Soc 39.
[537] See s 2.1.
[538] See (n 128) on the industrial flight concern.
[539] Drope and others (n 536).
[540] ibid 40; see also Korbinian Nagel, Dierk Herzer and Peter Nunnenkamp, 'How Does FDI Affect Health?' (2015) 29 (4) Int Econ J 655, highlight the gap in research on the matter.

BAT thought to halt the adoption of a ban on tobacco advertising in another post-Soviet state, namely Uzbekistan.[541] The company opposed the measure by depicting it as jeopardising foreign investment in the country and arguing that it would lead to 'the immediate demise of the domestic cigarette industry'.[542] The strategy proved successful and the intended ban was eventually scaled back and replaced by a law drafted by the industry.[543]

The government's arguments with respect to both Draft Law 2820 and Draft Law No 4030a, as well as the anti-cartel law, neatly reflect the capital flight theory. All the government's concerns around the loss of budget revenues, investment and job security can ultimately be amalgamated under one common umbrella – capital flight. In Ukraine, the government considers FDI to be a 'matter of national security'. It is therefore the State's sensitivity to FDI that makes it susceptible to any threats of capital flight and requires it to prioritise the need to preserve and attract FDI over the national health interest.

Further, there is a related 'race to the bottom' narrative which claims that states may dismantle regulations across various policy areas, including public health, to attract FDI.[544] The argument is that developing states are generally more prone to relaxing regulatory standards for the purpose of attracting FDI to fund their development programmes.[545] By abolishing the certification of potable water, the government *de facto* entered a 'race to the bottom' to attract FDI.[546] Any deregulation in the context of public health raises concerns; however, it is outside the scope of this study to assess the validity of this measure. In addition, the deregulation scenario is very implausible in relation to the FCTC-compliant tobacco control regulations. Unlike the above-mentioned licensing and certifications, tobacco control standards are set by the international treaty, hence it would be hard to argue that such standards are unnecessarily cumbersome for businesses and need to be abolished in order to improve the investment climate.

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[541] Gilmore, Collin and McKee (n 479).
[542] ibid.
[543] ibid.
[544] Yuqing Xing and Charles Kolstad, 'Do Lax Environmental Regulations Attract Foreign Investment?' (2002) 22(1) Environ Resour Econ 1; Ozay Mehmet and Akbar Tavakoli, 'Does Foreign Direct Investment Cause a Race to the Bottom?' (2003) 8(2) JAPE 133.
[545] Rudra (n 128) ch 2; Miles (n 5); UNCTAD, 'World Investment Report 2014: Investing in the SDGs: An Action Plan' (United Nations 2014).
[546] See (n 524) and accompanying text.

In light of the evidence presented in this case study, the tobacco regulatory delay in Ukraine could be better explained by capital flight theory as opposed to concerns over regulatory chill concerns such as imminent or perceived threat of investor-state claims. In other words, the level of tobacco control regulation in the State would be inadequate even if Ukraine had no IIAs in force. Therefore, up to now, this thesis finds very limited support for regulatory chill in the context of tobacco control laws in Ukraine. The remainder of this chapter will proceed with a more detailed analysis of national and international frameworks on investment protection to consider whether these could also affect the tobacco regulatory development process.

4.3. The Constitutional Order and the Status of International Law

After it emerged as a new state in 1991, Ukraine inherited most of the Soviet legislation in existence at that time. The Constitution of Ukraine[547] was adopted five years later defining the general principles of statehood – the main civil rights, freedoms and duties of citizens – and laying down the provisions for the main State bodies.[548] The Constitution declares that the principle of the rule of law should be recognised and effective in Ukraine.[549] Justice is administered solely by courts and[550] Article 129 of the Constitution stipulates that in the administration of justice, judges are independent and only subject to the rule of law.[551] The national system of justice includes courts of general jurisdiction, specialised courts and the Constitutional Court of Ukraine.[552] The latter provides opinions on the conformity of international treaties and national legislation with the Constitution of Ukraine and provides the official interpretation of the Constitution's articles.[553]

[547] Constitution of Ukraine of 28 June 1996, Vidomosti of the Verkhovna Rada of Ukraine (VVR), 1996, No 30, 141.
[548] ibid.
[549] ibid, art 8.
[550] ibid, art 137.
[551] ibid.
[552] ibid, ch 8.
[553] ibid, art 151, ch 12.

The main sources of law in Ukraine comprise the Constitution, national legislation, subordinated normative acts and private contracts.[554] Following the civil law tradition, the State does not formally recognise legal precedent as a source of law.[555] The only exception to this general rule is the Law of Ukraine 'On the Enforcement of Judgements and Application of the Case-law of the European Court of Human Rights', which explicitly provides for the application of case law of the European Court of Human Rights (ECtHR) as a source of law.[556] Furthermore, the Supreme Court of Ukraine considers case law and issues directions on specific substantial or procedural matters of law which are commonly followed by the courts.[557]

The status of international law is *prima facie* determined by Article X of the Declaration of State Sovereignty proclaiming the priority of 'universally recognised norms of international law' over the norms of domestic law.[558] Further, Article 9 of the Constitution proclaims that '[i]nternational treaties that are in force agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine'.[559] Besides, the Law of Ukraine 'On International Agreements of Ukraine' confirms the prevalence of international treaties over national legislation.[560] The law provides that if an international treaty, which entered into force in the prescribed manner, establishes rules other than those provided for in the relevant piece of national legislation, the rules of the international agreement should be applied.[561] Paragraph 14 of the Resolution of the Plenum of the Highest Specialised Court of Ukraine 'On Application of International Treaties of Ukraine by Courts in the Administration of Justice' states that 'the courts in the administration of justice may apply the rules of international treaties directly as part of the legislation of Ukraine, if taking appropriate measures is within the competence of the court or if they are formulated in an international agreement as norms of direct effect… Inter alia, the courts shall apply as norms of direct effect

[554] See generally, Marko V Tsvik, Volodymyr D Tkachenko and Oleksandra V Petryshyn (eds), *General Theory of State and Law* (Pravo 2009) ch 20.
[555] Constitution (n 547).
[556] Law of Ukraine 'On the Enforcement of Judgements and Application of the Case-law of the European Court of Human Rights' of 23 February 2006 No 3477-IV; Order of the Eastern Commercial Court of Appeal of 9 July 2020, Case No 905/44/20.
[557] Law of Ukraine 'On the Judiciary and the Status of Judges' of 2 June 2016 No 31, 545, art 36.
[558] Declaration (n 451).
[559] Constitution (n 547).
[560] Law of Ukraine 'On International Agreements of Ukraine' of 29 June 2004 No 50.
[561] ibid, Article 19 (2).

international treaties of Ukraine, which enshrine human rights and fundamental freedoms'.[562]

It follows that IIAs ratified by the Ukrainian Parliament can also directly shape the legal relationships in the State. Being a part of the national law and norms of direct effect, IIAs may be applied directly by the national courts in disputes with foreign investors. Further, in the event of conflict between national law provisions and the norms of IIAs, the latter would prevail. While not common practice, recently, the Supreme Court of Ukraine invoked the FET provisions of the Switzerland–Ukraine BIT to override contradictory provisions within the national tax law.[563] The Supreme Court's Resolution was concerned with a tax dispute between Zaporizhia Automobile Building Plant (ZAZ), a company with Swiss investments, and the Tax Authority of Ukraine. ZAZ had brought a claim against the tax authority to annul tax charges imposed under the express provisions of Ukrainian tax law cancelling previously existing tax exemptions. The Supreme Court revoked the cassation judgement in favour of ZAZ, applying the FET standard under the investment treaty over the contradictory provisions of the domestic tax law.[564]

Should the Constitutional Court decide that a piece of legislation contradicts IIAs ratified by the parliament, the Court has the power to terminate the incompatible national law. Again, there is only one example of such a scenario as far as this thesis is concerned. In 2002, the Constitutional Court considered the compliance of the Law of Ukraine 'On Eliminating Discrimination in Taxation of Business Entities Created with the Use of Property and Funds of Domestic Origin' with the State's international investment obligations.[565] The legislation aimed to abolish tax preferences accorded to foreign investors which *de facto* put them in a more advantageous positionrelative to national businesses. The Court found that the legislation in question was compliant with MFN and NT provisions under IIAs signed by Ukraine:

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[562] Resolution of the Plenum of the Highest Specialised Court of Ukraine for Civil and Criminal Cases 'On Application of International Treaties of Ukraine by Courts in the Administration of Justice' of 19 December 2014 No 13.
[563] Resolution of the Supreme Court of Ukraine of 8 September 2009, Case No 21-982во09.
[564] Resolution (n 563).
[565] Decision of the Constitutional Court of Ukraine in the Case of the Constitutional Submission of the Cabinet of Ministers of Ukraine Regarding the Official Interpretation of the Provisions of Part One of Article 5 of the Law of Ukraine "On Eliminating Discrimination in Taxation of Business Entities Created with the Use of Property and Funds of Domestic Origin" and Part One of Article 19 of the Law of Ukraine "On Investment Activity" (Case of Taxation of Enterprises with Foreign Investment) of 29 January 2002 no 1-17/2002, para 3 [hereinafter, Decision 1-17/2002].

> … international treaties on reciprocal protection of investments signed by Ukraine during 1994-2001 ... require the host states to create a regime for foreign investors not less favourable than that of its citizens or enterprises or citizens or enterprises of third States… Therefore, the application to corporations with foreign investments of the national regime of currency regulation and tax and duties (compulsory payments) collection is aligned with the mentioned international obligations of Ukraine.[566]

If the Court had found the opposite, this would have effectively terminated the law. Whilst the direct application of international investment treaties is predetermined by Ukrainian law, the actual ability of national courts to interpret and apply investment law concepts remains somewhat uncertain. Ukrainian justices are unlikely to possess the required expertise to interpret and apply IIL provisions.[567] Even the above-cited judgement by the Constitutional Court is disputable.[568] Whilst the Court decided – correctly – that NT and MFN did not require the State to create a regime more favourable than it accords to its nationals or investors from any third country, it did not consider whether reneging on the State's promises contradicted the FET standard, which is commonly included in Ukrainian BITs.[569] At the same time, a violation of FET is likely to be the main claim in such situations.[570] In contrast and also more recently, the Supreme Court of Ukraine decided that a revocation of tax benefits contradicted the FET accorded in the Switzerland–Ukraine BIT.[571]

The lack of general knowledge and expertise regarding the intricacies of international investment treaties can also explain why, to date, the national courts have only applied IIAs very sparingly. As an alternative explanation, foreign investors may prefer to rely on national law and not the protection of IIAs in their claims against the State agencies. In any case, this suggests that the effect of IIAs on legal relationships in the State is not substantial. While in theory IIAs can be directly applied and override conflicting national law provisions, in practice this does not occur often.

This raises the question of how significant this is for the discussion on regulatory chill. It shows that technically speaking, IIAs could create regulatory chill even in the

[566] ibid.
[567] Also observed by Ukrainian lawyers (author's personal communication with ETLS in January 2020).
[568] See Decision 1-17/2002 (n 565) and accompanying text.
[569] ibid.
[570] See eg *PMI v Australia* (n 36); *PMI v Uruguay* (n 36).
[571] Resolution (n 563).

absence of ISDS because the treaties can also be enforced in the national courts. Nonetheless, this thesis has been able to identify only two instances when the national courts directly applied IIAs and neither of these would fall within the scope of regulatory chill even if the latter included claims to national courts as one of the potential triggers. The decisions of the Constitutional Court did not affect but only confirmed the validity of the adopted legislation. The decision of the Supreme Court found the tax measure to be *non-bona fide*, that is, it fell outside the scope of regulatory chill.[572] At the same time, we cannot completely rule out the possibility that IIAs may cause regulatory chill as a result of the national law provisions. On this note, the next section will proceed with delineating further the potential effect of national law limitations on tobacco control innovations.

4.4. Tobacco Control and National Law Limitations

The development of national legislation on foreign investment in Ukraine began in 1991–1993 with a strong framework on investment promotion offering wide benefits and guarantees to foreign investors and their investments.[573] While certain benefits were later curtailed by subsequent governments, many of the policies remain to the present day. Also, the government has continued to offer further protections and incentives to attract FDI, such as the Business Ombudsman and the so-called 'investment nanny' institutions that assist foreign investors in dealing with the State agencies.[574]

[572] See s 2.1.4.

[573] See Law of Ukraine 'On Protection of Foreign Investments in Ukraine' of 10 September 1991 No 1540a-XII [hereinafter, Law 1540a-XII]; Law of Ukraine 'On Investment Activity' of 18 September 1991 No 1560-XII; Law of Ukraine 'On Foreign Investment' of 13 March 1992 No 2198-XII (no longer in force); Law of Ukraine 'On the State Programme for the Promotion of Foreign Investments in Ukraine' of 19 March 1993 No 93/96-BP (no longer in force) [hereinafter, Law No 93/96]; Decree of the Cabinet of Ministers of Ukraine of 20 June 1993 No 55-93; Law of Ukraine 'On the Regime of Foreign Investments' of 19 March 1996 No 94/96-BP (as amended) [hereinafter, Law 94/96-BP]; Law of Ukraine 'On the State Programme for the Promotion of Foreign Investment in Ukraine' of 25 April 1996 No 3744-XII (no longer in force).

[574] See eg Natalia Sofienko, 'Investment Nannies from Zelensky: Rada Adopted a Law on Investor Support' *LigaBusiness* (Kyiv, 17 December 2020) <https://biz.liga.net/all/all/novosti/investitsionnye-nyani-rada-odobrila-zakonoproekt-zelenskogo-o-gospodderjke-investorov> accessed 1 March 2021.

The overview of Ukrainian national law on investment protection suggests that many investment treaty guarantees are also contained within national law provisions. To illustrate this, the Law of Ukraine 'On Protection of Foreign Investments in Ukraine', which sets out basic principles of investment protection,[575] contains guarantees pertaining to the legal protection of investment and investment returns;[576] the free transfer of capital obtained as a result of investment activity;[577] and the prohibition of expropriation.[578] Law of Ukraine 'On Foreign Investment' and the Cabinet of Ministers' Decree No 55-93 furthered this investment protection and provided guarantees for a stable and predictable regulatory environment for foreign investment (also part of the FET provisions in IIAs[579]). This raises the question of whether this means that national law restriction may also (hypothetically) thwart tobacco control innovations. The remainder of this section will discuss these limitations in a bid to answer the question.

The main national law limitation to consider in the context of regulatory changes is the obligation of regulatory stability. Thus, the law 'On the Regime of Foreign Investments' stipulates that '… in case of any legislation changes … the state guarantees of foreign investment protection, indicated in this Law shall be exercised within *ten years* of entering of such legislation into force'.[580]

Could this inhibit the State's ability to introduce more stringent tobacco control measures? Could foreign tobacco investors claim that a law providing for more onerous tobacco regulatory requirements should not apply to them for the next 10 years? This scenario is possible and, given that foreign MNCs hold a circa 92% share of the tobacco market in Ukraine, it could effectively delay a regulatory measure for at least 10 years.[581] Nonetheless, the validity of such claims in respect of *bona fide* FCTC-compliant tobacco control measures would be arguable as they are unlikely to violate general guarantees for investment protection. Further, the review of the national case law has not yielded any results suggesting that foreign tobacco corporations have ever brought these types of claims for the purpose of resisting tobacco legislation.

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[575] Law 1540a-XII (n 573).
[576] ibid, art 1.
[577] ibid, art 4-5.
[578] ibid, art 2.
[579] See (n 573).
[580] Law 94/96-BP (n 573) art 8.
[581] Euromonitor International (n 455).

Ukraine has not always adhered to the 'stabilisation provision' in any case. In March 1996, the State made a U-turn in its investment policy and the 1993 State Programme offering profuse tax benefits for foreign investors was curtailed.[582] These regulatory changes have resulted in damages for the majority of companies that received foreign investment.[583] For instance, due to the introduction of a 20% customs duty, 35% excise duty and 28% VAT for machine-building businesses, which had formerly been exempt from such payments under the previous regime, the price of cars sold by Mazda Motors Ukraine rose by 107%, leading to severe financial losses for the company.[584]

History subsequently repeated itself four years later when the State adopted the law 'On Eliminating Discrimination in Taxation of Business Entities Created with the Use of Property and Funds of Domestic Origin' revoking – also retrospectively – all existing tax benefits for foreign investors.[585] This created a chaotic situation as the national courts adjudicated on numerous claims brought by foreign investors.[586] Some courts considered that the 10-year stability guarantee should be honoured and allowed the claims while others dismissed them on the basis of the new legislation.[587] Ultimately, the Constitutional Court of Ukraine decided that the legislation change constituted valid grounds for the termination of the preferential tax treatment for companies with foreign investments, regardless of when the investment was made.[588] This contrasts with more recent national judgements where the courts sided with foreign investors and allowed for the retrospective application of foreign investors' benefits.[589]

It is necessary to examine the significance of the stabilisation provision. The national law itself does not prevent a change to national legislation; however, it does stipulate that if the law changes, then existing investment guarantees shall be retrospectively applied to foreign investors for the next 10 years. Should a tobacco

[582] Law 93/96-BP (n 573).
[583] Genefa Shvidanenko (ed), *Justification of Investment Projects in The Process of Transformation of Ownership* (KNEU 1998) ch 5.3; Alla V Cherep and others, *Theoretical and Methodical Basics of Investment as a Small and Midsize Business's Development Tool* (London 2019).
[584] ibid.
[585] Law of Ukraine 'On Eliminating Discrimination in Taxation of Business Entities Created with the Use of Property and Funds of Domestic Origin' of 17 February 2020 No 1457-III, art 4-5.
[586] See Decision 1-17/2002 (n 565) and accompanying text.
[587] See eg Decree of the Commercial Chamber of the Supreme Court of Ukraine of 9 November 2004, Case No 11/111.
[588] See Decision 1-17/2002 (n 565) and accompanying text.
[589] See eg Order of the Supreme Administration Court of Ukraine of 21 April 2006, Case No K-11860; Decree of the Kyiv Administration Court of Appeal of 8 February 2016, Case No 826/7925/15.

initiative be caught under this provision, its effect may be delayed for the next 10 years, although this would have nothing to do with regulatory chill associated with IIAs. However, since only a small number of cases have involved the stabilisation provision, this does not permit us to establish the kinds of tobacco control measures that may have been delayed as a result of it. At the same time, the fact that the State has not always honoured the stabilisation provision in practice suggests that progressive tobacco legislation is unlikely to be threatened by national law restrictions.

In essence the national law provisions in many respects mirror the State's international obligations on investment protection. Drawing on this, one could argue that the national law limitations may equally obstruct regulatory development in the public health interest if IIAs are also believed to do so. Counter-arguments to this would be that (i) this thesis finds no evidence that national law has ever prevented the adoption of national tobacco legislation; and (ii) the State does not always observe its commitments to foreign investors, which, on several occasions, have also been backed by the national courts. Therefore, in light of the limited case law, the position on whether national law limitations could prevent the State's tobacco regulatory development is still to be ascertained.

4.5. The Proliferation of Investment Treaties and the Regulatory Chill Hypothesis

Competition for FDI among the former Soviet states led to a rapid proliferation of BITs and PTAs in the region.[590] Since its independence, Ukraine has ratified 79 BITs[591] and become a party to 8 PTAs, including trade and investment cooperation agreements with the European Union and former Soviet trade partners.[592] Ukrainian BITs commonly consist of 12 to 14 articles and include a preamble, definitions, a set of standards of investment protection, provisions on subrogation, dispute resolution, provisions on treaty interpretation, entry into force, amending and termination. All existing BITs also include ISDS provisions.[593] Only four BITs include public health considerations as part

[590] Vandevelde (n 7).
[591] See annx 9; UNCTAD (IIA) (n 20).
[592] See annx 7.
[593] See annx 6.

of investment protection policy: the 1994 Canada–Ukraine BIT, which contains a general regulatory exception for measures 'necessary to protect human, animal or plant life or health;'[594] the 2004 Finland–Ukraine BIT, declaring that the treaty objectives 'can be achieved without relaxing health … measures of general application;'[595] the 2015 Japan–Ukraine BIT, which contains a prohibition on lowering public health standards to attract foreign investment;[596] and more recently, the 2017 Ukraine–Turkey BIT, which includes a general exception relating to the adoption or maintenance of 'any non-discriminatory regulatory measures concerning: … [t]he adoption and implementation of measures on protection of … health,' and excludes health from the scope of indirect expropriation.[597]

The wide network of Ukrainian investment treaties with ISDS provisions therefore exposes the State to potential investment claims that may arise as a result of tobacco control legislation.[598] This means that international tobacco companies, which hold a combined 92% share of the Ukrainian tobacco market, may invoke the investment guarantees to oppose the State's tobacco legislation.[599] This possibility could lead to regulatory chill and thus stall the adoption of tobacco control legislation.

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[594] Agreement between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments (signed 24 October 1994, entered into force 24 July 1995) art 17.

[595] Agreement between the Government of the Republic of Finland and the Government of Ukraine on the Promotion and Protection of Investments (signed 7 October 2004, entered into force 7 December 2005) art 4.

[596] Agreement between Japan and Ukraine for the Promotion and Protection of Investment (signed 5 February 2015, entered into force 26 November 2015) [hereinafter, 2015 Japan–Ukraine BIT] art 25.

[597] Agreement between the Government of the Republic of Turkey and the Government of Ukraine for the Promotion and Protection of Investments (signed 9 October 2017, entered into force 6 September 2018) art 5, 6 (2) [hereinafter, 2017 Turkey—Ukraine BIT].

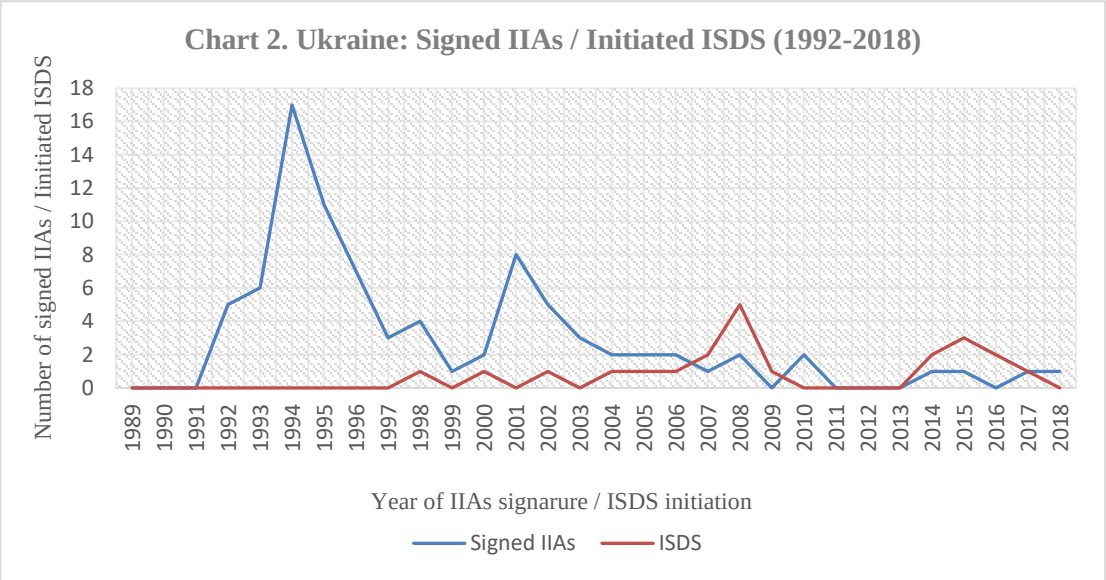
[598] See eg Voon (n 75) 330; Sattorova 2020 (n 55). See contra – Hepburn and Nottage (n 268).

[599] Eg, PMI is a Swiss-domiciled company headquartered in the US, qualifies as an investor at least under the 1994 Ukraine – US BIT and the 1995 Switzerland – Ukraine BIT. See 'Philip Morris International: Who We Are' <www.pmi.com/who-we-are/overview> accessed 22 March 2020; Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (signed 4 March 1994, entered into force 16 November 1996) [hereinafter, 1994 Ukraine – US BIT]; Agreement between the Swiss Confederation and Ukraine on the Promotion and Reciprocal Protection of Investments (signed 20 April 1995, entered into force 21 January 1997) [hereinafter, 1995 Switzerland – Ukraine BIT]. Two UK companies, BAT and Imperial Tobacco, qualify as investors at least under the 1993 Ukraine – UK BIT. See 'British American Tobacco: About Us' <www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO52AD6H> accessed 22 March 2020; 'Imperial Tobacco: Who We Are' < www.imperialbrandsplc.com/about-us/who-we-are.html> accessed 22 March 2020; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments (signed and entered into force 10 February 1993) [hereinafter, 1993 Ukraine – UK BIT].
Japan Tobacco, headquartered in Japan, and Japan Tobacco International, headquartered in Switzerland, qualify as investors under the 1995 Switzerland – Ukraine BIT (supra) and the 2015 Japan – Ukraine BIT (n 596). See 'Japan Tobacco International: About Us' <www.jti.com/about-us> accessed 22 March 2020.

The analysis above demonstrates that tobacco regulatory delay in Ukraine has been mainly underpinned by the tactics employed by the industry and State concern over budget revenues, industrial flight and job security for employees of the industry. This begs the question of whether IIAs played any role, or, put differently, whether tobacco regulatory delay in Ukraine could also (partially) be the result of regulatory chill. The remainder of this chapter will further establish the role of IIAs in tobacco regulatory development in Ukraine.

4.5.1. Tracing Internalisation Chill in Investment Treaties

Both statistical analysis and qualitative coding may provide evidence for the purpose of 'tracing' internalisation regulatory chill. Statistical analysis of Ukrainian IIAs shows that notwithstanding a decline in the number of negotiated treaties, the State has continued to negotiate investment treaties and trade agreements (see Chart 2 below).[600]



This comes despite the fact that Ukraine has been involved in 26 arbitration disputes as a respondent state, thereby placing it among the top nine respondent states for investor-State arbitrations.[601] Over the past ten years, Ukraine has signed only six IIAs (compared to 17 IIAs signed in 1994 alone).[602] However, it can be argued that with the

[600] See annx 6–7.
[601] UNCTAD (ISDS) (n 34). See also annx 8.
[602] ibid.

increase in the number of investment claims initiated, the government may have become more cautious with regard to negotiating new international investment treaties. This would provide evidence in favour of internalisation regulatory chill. On the other hand, the trend may also be explained by the fact that by 2004–2006, Ukraine had already signed investment treaties with the majority of its trade and investment partners; therefore, there may have been a 'natural' decline in the treaty negotiation process. The latter scenario is also supported by the fact that Ukraine has not systematically terminated or embarked on the renegotiation of any of its existing BITs.

Indeed, it has long been acknowledged that a state's dissatisfaction with IIAs and investment arbitration can be manifested in either offensive or defensive responses.[603] By way of example, Indonesia, South Africa, Venezuela, Ecuador and Bolivia opted to disengage with the system altogether and cancel some of their investment treaties.[604] Other states meanwhile have thought to recalibrate their treaty provisions.[605] India, for instance, terminated BITs with 58 countries and announced that it would renegotiate the treaties based on its 2015 Model BIT, to include a detailed clarification of investment protection standards and several regulatory 'safety valves'.[606]

Having studied the renegotiation of BITs at the global level, Thompson, Broude and Haftel concluded that '… exposure to investment claims leads either to the renegotiation of IIAs in the direction of greater… [regulatory space], or to their termination'.[607] For this reason, the termination or renegotiation of investment treaties may be seen as the manifestation of regulatory chill.[608]

In the event that policy-makers in Ukraine deemed that IIAs and investment arbitration would lead to the imposition of undesirable restrictions on their regulatory decisions on tobacco control, they would seek to (i) terminate, or (ii) renegotiate, and/or at least (iii) include fewer restrictions in more recent IIAs. This brings us to the

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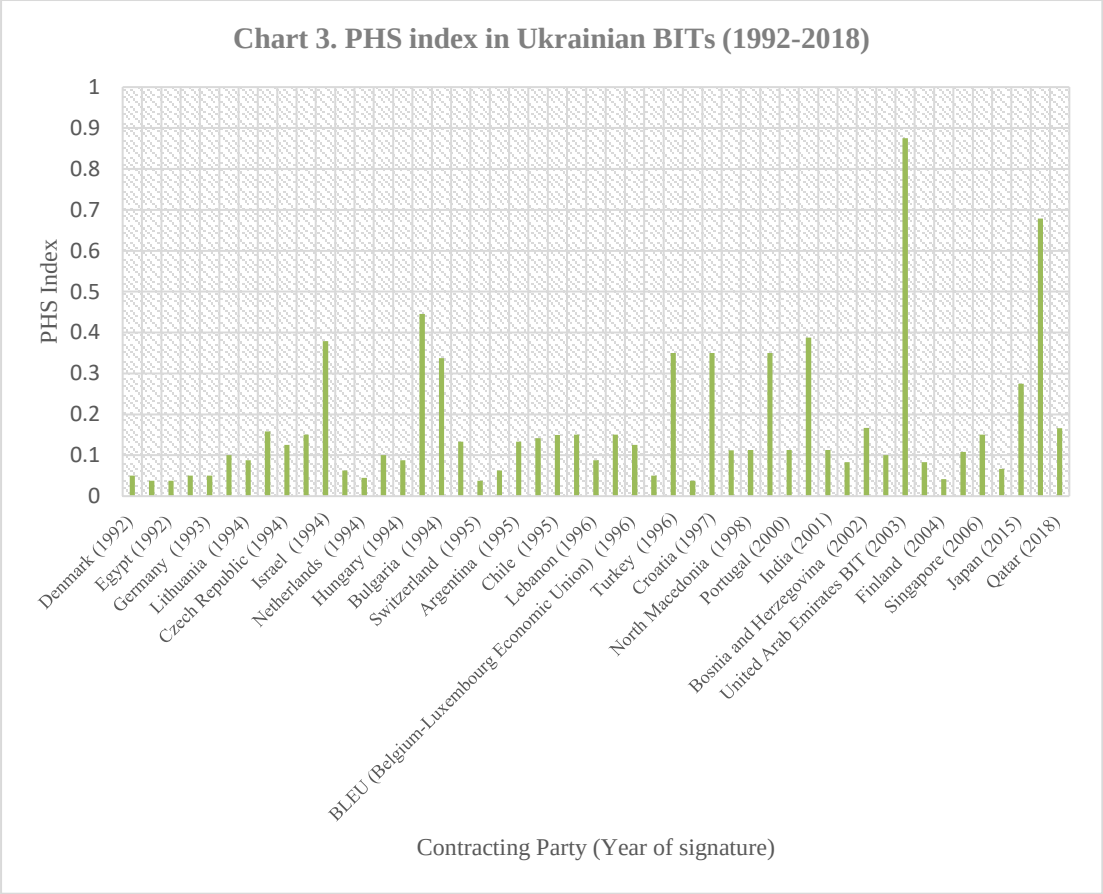
[603] See further Caron and Shirlow (n 108); Caddel and Jensen (n 181).
[604] International Institute for Sustainable Development, 'Investment Treaty News: Ecuador Denounces its Remaining 16 BITs and Publishes CAITISA Audit Report' (12 June 2017) <www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/> accessed 20 May 2020.
[605] Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality' (2017) 42 (1) YJIL; Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perception and Reality* (Kluwer 2010).
[606] Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Lok Sabha, 'Unstarred Question No 169 to Be Answered on Monday, the 17th July, 2017: Bilateral Investment Treaties' < https://dipp.gov.in/sites/default/files/lu169_0.pdf> accessed 22 April 2020.
[607] ibid.
[608] See Sattorova 2018 (n 324) 87.

qualitative coding analysis of BITs based on the unique methodology developed in the Broude, Haftel and Thompson model as discussed earlier.[609]

Analysis of the UNCTAD database in conjunction with the government law portal led to the identification of only three renegotiated BITs: with Turkey, Israel and Slovakia.[610] A further 43 BITs signed between 1992 and 2018 were then randomly selected for analysis. These included the three most recently negotiated BITs – the 2015 Japan–Ukraine BIT, 2017 Turkey–Ukraine BIT and the 2018 Ukraine–Qatar BIT.[611] The findings are presented in Chart 3.[612]



As shown in Chart 3, Ukraine has not always negotiated extra PHS in its renegotiated and more recent treaties. As an example, the 2006 Israel–Ukraine BIT, which replaced the 1994 Israel–Ukraine BIT, provided less scope for public health

[609] See s 3.2.4.
[610] UNCTAD (n 601); Verkhovna Rada of Ukraine (n 438).
[611] 2015 Japan–Ukraine BIT (n 596); Ukraine–Qatar BIT (signed 20 March 2018, not in force) [the text and full name are not available].
[612] See annx 9.

regulatory space than its predecessor.[613] At the same time, the 2015 Japan–Ukraine BIT, which was signed more than 10 years after the 1994 Israel–Ukraine BIT, provides only a small improvement in PHS compared to its previous version.[614]

More generally, the vast majority of the signed BITs had a very low PHS index, ranging from 0.04 to 0.17. This is because most Ukrainian BITs provide wide guarantees for investment protection (including unqualified FET), and no general carve-outs or exceptions for tobacco control or public health measures. Such broad guarantees are enforceable via investment arbitration, which is provided for in 100% of the analysed treaties. The arbitration provisions do not usually stipulate any limitation periods and/or transparency rules (including publishing awards or access to an amicus curiae), do not limit the discretion of the tribunal in interpreting the treaties (e.g. via binding interpretation rules) and cover any disputes related to investment. On this basis, the tobacco industry has very broad grounds for initiating investment arbitration disputes against the State.

Only 10 out of 43 analysed BITs (i.e. fewer than 25%) had a PHS score greater than 0.27 PHS. The higher PHS index scores for the BITs with Israel, Canada and Bulgaria – all signed in 1994, Turkey (signed in 1996 and 2017), Croatia (1997), Russia (1998), Gambia (2001), UAE (2003) and Japan (2015) can be attributed to the limitation of their scope, general exceptions and other provisions for public health regulatory measures.[615] For example, the 1994 Ukraine–USA BIT was the first BIT to highlight that 'the development of economic and business ties can contribute to the well-being of workers',[616] while the 1994 Canada–Ukraine BIT provides a general regulatory exception for measures 'necessary to protect human, animal or plant life or health'.[617]

Four analysed treaties – the 1994 Israel–Ukraine BIT, 1996 Turkey–Ukraine BIT, 1997 Croatia–Ukraine BIT and the 1998 Russia–Ukraine BIT – do not contain an FET clause, which has proven to be the most insidious provision for defending tobacco control regulations.[618] Indeed, the violation of FET provisions was the only point of

[613] Agreement between the Government of the State of Israel and the Government of Ukraine for the Reciprocal Promotion and Protection of Investments (signed 16 June 1994, entered into force 18 February 1997) [hereinafter, 1994 Israel–Ukraine BIT].
[614] 2015 Japan–Ukraine BIT (n 596).
[615] See annx 9.
[616] 1994 Ukraine – US BIT (n 599).
[617] Agreement between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments (signed 24 October 1994, entered into force 24 July 1995) (Canada-Ukraine BIT) art 17.
[618] See eg Voon (n 75) 330 and Sattorova 2020 (n 55).

dissent between the arbitrators of the tribunal in the *PMI v Uruguay* case, which considered the legitimacy of tobacco control legislation according to the 1988 Switzerland–Uruguay BIT.[619] The exclusion of the FET standard – due to a broader lack of consensus as to the precise content of the standard – yielded broader regulatory freedom and, respectively, a higher score on the PHS index.

The 1994 Bulgaria–Ukraine BIT contains a limited expropriation clause – 'disputes about the amount, terms and the process of payment of compensation under Articles 4 and 5 [expropriation and conflict-related losses] of the Agreement, and also the process of conduction transfers under Article 6 of the Agreement' – which may be subject to investment arbitration under UNCITRAL rules, while all other disputes should be considered in courts or arbitrations of the Contracting Parties. The clause resembles the old Soviet BIT model (starting with the 1989 Soviet Union–Finland BIT) that included an ISDS clause of limited scope stipulating that disputes relating to the 'amount or mode of payment of compensation for expropriation' could be resolved through investment arbitration.[620] An alternative view suggests that any expropriation claims are covered by such a clause.[621]

Among the treaties analysed, the 2003 Ukraine–UAE BIT is the sole example that requires case-by-case consent from the respective states to resolve a dispute with foreign investors in arbitration.[622] *De facto,* such an arbitration virtually obviates the likelihood of regulatory chill since the recourse to arbitration is not possible without State consent; thus, the threat of any potential arbitration claim in the absence of consent will not have any weight. This helped the treaty to achieve a score of 0.89 on the PHS index – the best among the analysed treaties and thus representing the broadest scope of regulatory leeway for tobacco control measures.

Not far behind, Ukraine's most recent treaty with Turkey, signed in 2017, had a PHS index score of 0.7.[623] It provides unprecedented flexibility for public health

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[619] *PMI v Uruguay* (n 36).
[620] Finland and Union of Soviet Socialist Republics Agreement for the Promotion and Reciprocal Protection of Investments (signed 08 February1989, entered into force 15 August 1991) [hereinafter, 1989 Soviet Union—Finland BIT].
[621] See further Noah Rubins and Azizjon Nazarov, 'Investment Treaties and the Russian Federation: Baiting the Bear?' (2008) 9 Bus Law Int 2, 100 and *Berschader v Russian Federation*, SCC Case No 080/2004, Award (21 April 2006) paras 151–158.
[622] Agreement between the Government of the United Arab Emirates and the Government of Ukraine on the Promotion and Protection of Investments (signed 21 January 2003, entered into force 28 February 2004) [hereinafter, 2003 Ukraine—UAE BIT] art 9(3).
[623] 2017 Turkey—Ukraine BIT (n 597).

regulatory innovation and the treaty's preamble states that the parties acknowledge that the purpose of the treaty can be reached without harming public health.[624] In addition to a general exception (Article 5) for 'any non-discriminatory regulatory measures concerning: … health',[625] the treaty carves out public health regulatory measures from the scope of the indirect expropriation clause (Article 6): '[i]ndirect expropriation does not include non-discriminatory legal measures that are adopted and maintained for … public health … '.[626] There are also other provisions limiting the scope of the treaty, including the denial of benefits and qualified fair and equitable treatment clauses, which further improve the State's capacity to introduce tobacco regulations.

To summarise, the scope of public health regulatory freedom in Ukrainian BITs varies from 0.04 PHS to 0.89 PHS. Only a few treaties have incorporated public health considerations as statements in their preambles or general exceptions. And while the pace of treaty negotiation has slowed with the rise in the number of investment treaty claims, it is unlikely that this can be considered as an attempt to preserve regulatory space because the content (quality) of the treaties has not improved. No conclusive evidence can be observed within the renegotiated or more recent BITs with respect to improving regulatory space. Hence, it is more likely than not that the relevant treaty provisions were suggested by Ukraine's counterparties and not the state government.

Consequently, it is implausible that the government is concerned about its ability to regulate tobacco and other public health matters. In addition, the government has not stopped concluding IIAs; indeed, it has terminated or renegotiated most of the existent BITs and has not systematically improved regulatory space to enact tobacco control regulations in its more recent or renegotiated BITs. This neither supports the regulatory chill hypothesis nor confirms more generally that the investment regime is perceived as negative or undesirable by policy-makers.

4.5.2. Further Findings on the Policy-makers' Perception of ISDS

[624] ibid, preamble.
[625] ibid, art 5.
[626] ibid, art 6(2).

The lack of internalisation regulatory chill in Ukraine is further supported by two sets of evidence. First, national law provisions increasingly provide for ISDS. Thus, the Law of Ukraine 'On Concessions', which was adopted in October 2019, stipulates that parties to a concession contract are free to opt for commercial or investment arbitration as a mode of dispute resolution.[627] Further, the Law of Ukraine 'On Alternative Energy Sources' provides for ICC arbitration as the default dispute resolution position under its model contracts for the sale of electricity.[628] This further confirms that the government neither seeks to avoid nor is afraid of investment arbitration. In fact, on several occasions, Ukraine has benefited from IIAs when bringing ISDS claims on behalf of state-owned entities aimed at protecting their investment abroad.[629]

Second, interviews conducted by Sattorova and Vytiaganets with Ukrainian public officials demonstrate a general lack of awareness concerning IIAs and investor-State disputes.[630] Only five out of twenty-two policy-makers were aware of Ukraine's investment treaty commitments or its involvement in investor-State arbitration.[631] This included two interviewees who worked in an agency representing the State's interests in investment arbitration.[632] Indeed, they were the only ones with a deep understanding of the issues. The remainder of the respondents reported no real awareness of IIAs and their dispute resolution mechanism. This is evidence to counter the assumption that policy-makers internalise concerns about potential investment arbitration claims when designing tobacco control legislation: policy-makers cannot internalise concerns of which they are not aware.

These findings align with other studies. For example, interviews conducted by Sattorova with government officials from Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kenya, Kyrgyzstan, Lebanon, Mongolia, Russia, Sri Lanka, Tajikistan, Turkey, Jordan and Uzbekistan concluded that an overwhelming number of respondents showed no awareness regarding investment treaty law and investment arbitration.[633] This is also aligned with the findings of an earlier study by Côté.[634] Her in-depth

[627] Law of Ukraine 'On Concessions' no 155-IX of 3 October 2019 (as amended on 1 February 2020).
[628] Law of Ukraine 'On Alternative Energy Sources' no 555-IV of 20 February 2003 (as amended on 25 April 2019).
[629] See (n 354) and accompanying text.
[630] Vytiaganets (n 28).
[631] ibid; Sattorova 2018 (n 324); Sattorova and Vytiaganets (n 324).
[632] ibid, interview J29HDRIS.
[633] See Sattorova 2018 (n 324) 61-70.
[634] Côté (n 51) but see Van Harten and Scott (n 53) for the opposite results in Canada.

interviews and surveys of 114 national regulators from Canada, Europe, Australasia, Latin America, the Caribbean, Africa and the Middle East revealed a limited level of awareness among government officials about IIAs and the risk of arbitration.[635]

But does this mean that the regulatory chill hypothesis can be dismissed entirely? Undoubtedly, the limited knowledge government officials have of the intricacies of IIL does not prevent tobacco corporations from using the threat of investment arbitration to apply pressure on the government to withdraw or water down a specific regulatory proposal.[636] Indeed, they could be the parties that explain the potential implications of such a proposal in the context of investment treaty law to the government. It is thus axiomatic that policy-makers' level of awareness concerning international investment obligations is irrelevant in this case.[637] As a result, 'specific response' regulatory chill in relation to tobacco legislation could have occurred; that is, tobacco regulatory measures could have been contemplated but later withdrawn by the government because of a threat by foreign investors to bring an investment claim.[638] This leads us to the second branch of the hypothesis which suggests that regulatory chill may be manifested when international investors threaten the government with the prospect of an investment claim when opposing a specific regulatory initiative. The following subchapter will analyse this 'specific response' regulatory chill and will test Expectation 2 (Stage 3) in the context of Ukraine's tobacco control regulations.[639]

4.5.3. International Investment Arbitration and Specific Response Chill

As of May 2021, Ukraine had been involved in 26 arbitration disputes as a respondent state, placing it among the top nine respondent states in investor-state arbitrations.[640] It successfully defended or settled the first five claims. The nature of the disputes was diverse and concerned, *inter alia*, alleged interference with the realisation of a construction project; alleged punitive actions by the Government in response to publication by Ukrainian media business "Taki spravy" concerning a Ukrainian

[635] ibid.
[636] Tienhaara 2011 (n 58) 610-611.
[637] ibid.
[638] Tietje and Baetens (n 58) 41; Tienhaara 2011 (n 58).
[639] See s 3.2.4.
[640] See annx 8; UNCTAD (ISDS) (n 34).

opposition politician; and alleged denial to enforce an arbitral award.[641] In 2010, Ukraine lost its first investor-state dispute. The case was initiated by Alpha Projektholding involving alleged expropriation of the investor's hotel by transferring the business' assets to a state company without compensation.[642] During 2011–2017, five further cases were decided in favour of foreign investors.[643] The causes of the disputes varied and included enforcement of a judgment regarding against a state enterprise "Energoatom," the alleged expropriation of shares in Ukrainian oil refinery "Ukrtatnafta" followed by its physical seizure; and regulatory changes to increase royalties on gas production from 28 to 55 per cent.[644] The total amount that Ukraine paid in damages and costs to the winning investors has yet to be verified, but the figure certainly exceeds USD 143.7 million.[645] The remainder of the claims were still pending at the time of writing and Ukraine's current annual expenditure on legal costs for investment disputes may exceed USD 10 million per year.[646]

The State's extensive experience with investor-state disputes is noteworthy for various reasons. First, the financial burden associated with defending the claims arguably provides additional leverage for foreign investors willing to challenge regulatory proposals. The government would likely try to avoid full-blown arbitration where possible, which increases the likelihood of regulatory chill. Second, the regulatory and legislative changes of 2014 have also been subject to investment disputes involving the State; however, the State maintained the measures and paid the awarded compensation.[647] This is an example of where regulatory chill did not occur and acts as evidence against the regulatory chill theory. And third, the measures involved in the implementation of the FCTC have never been subject to ISDS or disputes with foreign investors. Again, this does not support the regulatory chill hypothesis.

Foreign tobacco investors are reported to have considered investment claims against Ukraine on several occasions, although they were concerned with fiscal and

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[641] ibid.
[642] *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award (8 November 2010).
[643] See annx 8; see also Serhiy A Voitovych (ed), *International Investment Arbitration: Some Trends and Experience of Ukraine* (Yustinian 2012).
[644] ibid.
[645] Ministry of Justice of Ukraine, Letter No 15321/ПІ-ЮР-1068/16 of 21 April 2017 (on file with author); annx 9; UNCTAD (IIA) (n 20).
[646] ibid.
[647] See eg *JKX Oil & Gas plc, Poltava Gas BV and Poltava Petroleum Company JV v Ukraine*, Award (6 February 2017).

competition measures as opposed to tobacco control policies *per se*. As an example, in 2018, the government reportedly settled a potential investment claim with PMI concerning tax penalties.[648] The settlement allowed for the cancellation of tax notices by the State Fiscal Service (tax authority) for a total of UAH 635 million issued as a result of PMI's alleged failure to pay the required tax and duties.[649] In the government's view, the settlement was to 'prevent the international investment arbitration claim against Ukraine, avoid significant expenditures from the State budget … and demonstrate … the Government's commitment to promoting foreign investment'.[650]

More recently, international tobacco companies threatened the government with ISDS claims as a result of the imposition of penalties by the State Competition Authority for alleged anticompetitive concerted actions.[651] Nonetheless, without knowing the details of the disputes and potential treaty violations, it is not possible to ascertain whether these settlements represent examples of regulatory chill. As discussed earlier, the theory of regulatory chill suggests that only *bona fide* regulatory decisions may be affected by regulatory chill; therefore, if investors' claims are justified, they fall outside the scope of the concept.[652]

The current dynamics of investment dispute resolution illustrate that tobacco corporations have invoked international investment guarantees and their arbitration mechanisms as a convincing argument in disputes with the government. The government, for its part, has been inclined to avoid investment arbitration, and public health regulatory decisions are not immune from such an influence. Without a doubt, the State's experience with investment arbitration and the exorbitant legal costs involved in defending investment claims may remove the government's enthusiasm when progressing regulatory decisions. This thesis, however, finds no evidence to support the assumption that a threat of investment arbitration has ever resulted in regulatory chill in respect of FCTC-compliant tobacco control legislation,

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648 NV, 'The Cabinet of Ministers Agreed on a Settlement with Tobacco Giant' (Kyiv, 5 December 2018) <https://nv.ua/ukr/biz/markets/kabmin-pishov-na-mirovu-z-tyutyunovim-gigantom-2511475.html> accessed 22 March 2020.
649 ibid.
650 ibid.
651 Interfax-Ukraine, 'International Tobacco Companies Intend to Defend Their Rights in the Case of the AMCU Fine in International Arbitration' (6 August 2020) <https://interfax.com.ua/news/investments/679387.html> accessed 1 March 2021.
652 See s 2.1.4.

thereby leaving the findings on 'hypothetical' regulatory chill in the domain of academic theory.

4.6. Discussion

The preceding analysis foreshadows the main foundational critique of the regulatory chill hypothesis as being a purely academic theory that is not supported by any conclusive studies but merely anecdotal evidence.[653] The analysis of IIAs and further evidence demonstrates that it is implausible that tobacco regulations have been hampered because of a perceived threat of investor-State dispute. In particular, there is no evidence that the government attempted to disengage with the international investment regime, systematically reconsider the scope of its investment obligations or avoid ISDS. In fact, Ukraine has recently included ISDS provisions in its national legislation and invoked IIAs to protect State investments abroad.

The review of known investor-State disputes also provides no confirmation that tobacco regulatory innovations have at any point been rolled back because of a threat of investment claims. Foreign tobacco investors have used ISDS to confront the government in respect of tax and competition regulatory policies. However, in the absence of more detail on the disputes, it is not possible to ascertain whether they fall within the concept of regulatory chill. Despite the fact that it costs the State around USD 10 million every year to defend investment claims, there have been instances when Ukraine has opted to maintain the challenged regulatory measures and pay off aggrieved investors. Therefore, the present inquiry finds no evidence to confirm the regulatory chill hypothesis. These findings are qualified by this study's limitations.

It is apparent however that the impact of the tobacco industry on Ukrainian policy-making has not been confined to potential manipulation using international investment treaties. The decisive factor impeding tobacco legislation in Ukraine has been the powerful influence of the tobacco industry within the state government. The industry even managed to quash a draft law banning the display of cigarettes in shop windows, even after a similar measure had already entered into force in neighbouring Russia and

[653] See s 1.1; Brower and Blanchard (n 86); James D Fry, 'International Investment Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 (1) DJCIL 77.

Belarus.[654] This is in contrast to other legislative initiatives where the regulatory environment in neighbouring states has been an important factor of consideration for policymakers in pursuing a legislative measure. Despite the election of a new government in May 2019, parliamentarians have yet to adopt the required tobacco control measures. This suggests that the industry has also found ways to exert influence within the new government and that it will not give up such positions lightly.

The second factor is the unwillingness of policy-makers to restrict the industry and enact stricter tobacco control legislation. This usually boils down to the sole question of which is more important, foreign investment or public health? In an FDI-sensitive Ukraine, where an increase in foreign investment is needed 'as badly as the air',[655] the former outweighs public health concerns. It is possible that foreign investment in this context acts as the means with which to secure higher budget revenues and achieve broader social goals such as job security and sustainable development. At the same time, the government's considerations in this respect appear to be rather short-term, given the USD 3 billion loss that the tobacco industry costs the State every year.[656]

We could therefore argue that several concurrent factors have been responsible for the regulatory delay in Ukraine. Parallels can be drawn with regulatory chill studies looking at New Zealand's experience with plain tobacco packaging legislation, which took seven years to adopt.[657] It is important therefore to weed out each factor and extricate its respective impact on policy-making. This is germane to the question of causality, namely which of the concurrent factors affecting tobacco regulatory development in Ukraine have been the most influential and led to regulatory delay? To put it differently, can we conclude that in the present circumstances in Ukraine, IIAs prevented the development of progressive tobacco control regulations and led to regulatory chill? In light of the above, this scenario appears highly improbable, even after taking into account the limitations of the present analysis and accepting that some instances of regulatory chill may have gone unreported. It is apparent that IIAs and potential investment claims on tobacco regulatory development currently play a minimal, if any, role in Ukraine.

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[654] Draft Law 4030a (n 491).
[655] Poroshenko (n 449).
[656] Economic Truth (n 459).
[657] See s 2.2.1.5 above, Kelsey (n 167); Eric Crosbie and George Thomson, 'Regulatory Chills: Tobacco Industry Legal Threats and the Politics of Tobacco Standardised Packaging in New Zealand' (2019) N Z Med J 8.

Is it therefore possible to rule out the hypothesis entirely? One could argue that the threat of investment claims still has the potential to become a decisive argument against the adoption of tobacco legislation in the future. As Poulsen, Bonnitcha and Yackee noted, the possibility of investor-State arbitration may give investors ammunition to compel host State governments to settle cases simply as a way of avoiding litigation costs and/or potential reputational damages.[658] In support of this assertion, they observe that (i) a significant proportion of notices of intent are eventually withdrawn or became inactive,[659] and (ii) the amount of damages claimed may often be exaggerated to induce a State to settle the case.[660] Both assertions are found to be true with respect to the Ukrainian case study: (i) tobacco corporations have used the threat of ISDS on several occasions but all disputes were ultimately settled; and (ii) in cases decided in favour of foreign investors, the amount of damages claimed has often been exaggerated. Thus, the amount of damages awarded in the claim challenging regulatory measures was more than 20 times lower than the amount claimed (USD 11.8 million awarded vs USD 270 million claimed).[661] Further, national legislation and the direct application of international treaties in national courts could pose an additional threat to prospective tobacco regulations; however, due to the scarcity of available case law, such an effect is yet to be ascertained. This therefore creates a pre-condition for regulatory chill. Nevertheless, until the hypothesis is supported by any conclusive evidence, it will remain a purely theoretical concern.

4.7. Conclusion

Subject to the methodological limitations, this thesis finds no consistent evidence to support the hypothesis that IIAs and their associated arbitration mechanisms have impeded tobacco regulations and led to regulatory chill in Ukraine (some evidence however may not be available in the public domain). The analysis of IIAs and further evidence demonstrates that it is implausible that tobacco regulations have been hampered because of the perceived threat of investor-State dispute. In particular, there is no evidence that the government attempted to disengage with the international

[658] Poulsen, Bonnitcha and Yackee (n 217).
[659] ibid.
[660] ibid.
[661] See (n 647) and accompanying text.

investment regime, systematically reconsider the scope of its investment obligations or avoid ISDS. Similarly, the review of known investor-State disputes does not confirm that tobacco regulatory innovations have been rolled back at any point due to an actual threat of investment claims. Foreign tobacco investors have used ISDS to confront the government in respect of tax and competition regulatory policies. However, in the absence of further detail pertaining to the disputes in question, it is not possible to ascertain whether these disputes fall within the concept of regulatory chill.

Instead, the study revealed that the delay in implementation has been driven mainly by capital flight and economic concerns, as well as by the magnitude and range of the industry's influence on the policy-making process. International tobacco corporations have exploited the State's dependency on FDI and their strong influence on government agencies to impede tobacco legislation, sometimes from as early as its inception. As the debates over prospective tobacco regulations exemplify, foreign investors have a tangible influence on the progress of national regulation, potentially affecting activity. All governmental concerns about the loss of budget revenues, investment and job security can ultimately be amalgamated under one common umbrella – capital flight. In Ukraine, the government considers FDI as a 'matter of national security'. It is therefore the State's sensitivity to FDI that makes it susceptible to any threats of capital flight and leads it to prioritise the preservation and attraction of FDI over the national health interest. Further, national legislation and the direct application of international treaties in national courts could pose an additional threat to prospective tobacco regulations; however, due to the scarcity of available case law, this is yet to be ascertained.

Based on the above, it can be argued that Ukraine would more likely than not have the same level of tobacco regulation in place if the State did not have IIAs in force. Thus, in response to the research question, IIAs and their arbitration mechanisms do not affect tobacco regulatory development in Ukraine and do not lead to regulatory chill. Therefore, the regulatory chill hypothesis in the context of tobacco control legislation in Ukraine is unfounded.

5. Regulatory Chill Case Study on Belarus

[d]espite all the negative effects of tobacco and alcohol, they earn a lot of money for the State budget, this is why there should be no sweeping changes …[662]

On 27 July 1990, the Parliament of the Byelorussian SSR proclaimed the sovereignty of the State,[663] and a month later, on 25 August 1991, Belarus declared its independence and detached from the Soviet Union.[664] This marked the start of a transformation of the State and its legal system to accommodate the new political and economic realities. In a similar vein to other post-Soviet States, Belarus signed investment treaties and accepted foreign investment in the tobacco sector. That said, Belarus is the only post-Soviet State to have maintained state ownership for the majority of its enterprises. This includes the tobacco sector where the state-owned tobacco manufacturer Grodno Tobacco Factory (GTF) Neman holds a 72% market share.[665] As will be explained later

[662] 'President of the Republic of Belarus: Session to Discuss Ways to Bolster Performance of Tobacco Industry' (10 December 2019) <http://president.gov.by/en/news_en/view/session-to-discuss-ways-to-bolster-performance-of-tobacco-industry-22555/> accessed 30 August 2020 [emphasis added].
[663] Declaration of the Supreme Council of the Republic of Belarus 'On the State Sovereignty of the Republic of Belarus' of 27 July 1990 No 193-XII.
[664] Law of the BSRR 'On Granting the Status of a Constitutional Law to the Declaration on State Sovereignty of the BSSR' of 25 August 1991.
[665] 'Grodno Tobacco Factory 'Neman:' About Company' <www.tabak.by/en/> accessed 1 August 2020.

on, this determines the dynamics of Belarus' regulatory development and while it also reduces the risks of regulatory chill, it does not entirely preclude it.

At the same time, the level of tobacco-related illnesses in Belarus has adopted an upward trajectory. It is believed that two million Belarusian are smokers while 40 deaths every day (14% of total deaths or every fifth death among the population over 35) are caused by tobacco smoking.[666] In 2017 alone, 69,648 Belarusians died from smoking-related illnesses.[667] In the same year, the STEPwise approach to Surveillance (STEPS) report acknowledged that 'NCDs remain the main cause of morbidity, disability and premature mortality in Belarus, accounting for 86% of deaths and 77% of overall morbidity'.[668] Belarus has thought to combat its high level of smoking prevalence and is a member of the FCTC.[669] Public health has always been a key strand within the political agenda of President Lukashenko, who considered a healthy lifestyle to be a 'trademark' of the State.[670] As a result, Belarus is more advanced in terms of its level of FCTC implementation compared to other post-Soviet states; however, the process is yet to be fully completed.[671] A pertinent question arises: to what extent (if any) do IIAs affect tobacco control regulations and lead to regulatory chill in Belarus?

This chapter will attempt to answer this question and will proceed as follows. Section 5.1 will discuss the level of FCTC implementation and smoking prevalence in Belarus to argue that is yet to complete the implementation of the treaty and could hypothetically be associated with regulatory chill. Section 5.2 will seek to discern the reasons for the regulatory delay as evidenced by the government's discussions, press releases, media reports and other sources. Section 5.3 will reflect on the significance of the stake held by the State in the tobacco industry and argue that State economic and

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[666] Lyudmila E Makarina-Kibak, 'Tobacco Stays Apart' *House of Representatives of the National Assembly of the Republic of Belarus* (8 February 2019) <www.house.gov.by/ru/interview-ru/view/tabachok-vroz-5143/>; TUT.BY, 'Every Day in Belarus About 40 People Die from Smoking-Related Diseases' (29 May 2019) <https://news.tut.by/society/639507.html > both accessed 22 March 2020.

[667] Olga Bartman and Natalia Zhukova, '2018 - Core Questionnaire of the Reporting Instrument of WHO FCTC' (9 April 2018) B33 <https://untobaccocontrol.org/impldb/wp-content/uploads/Belarus_2018_report.pdf > accessed 2 August 2020 [hereinafter, Belarus' 2018 Report].

[668] World Health Organisation, 'Prevalence of Noncommunicable Disease Risk Factors in Belarus: STEPS 2016' *The Regional Office for Europe of the World Health Organization* <www.euro.who.int/__data/assets/pdf_file/0007/386008/steps-belarus-eng.pdf> accessed 11 March 2020 [hereinafter, STEPS 2016].

[669] Belarus ratified FCTC on 8 September 2005, UNTC (n 460).

[670] See Stolitsa Television STV, 'Alexander Lukashenko: Healthy Lifestyle Should Become a Visiting Card of Belarus' (21 October 2015) <www.ctv.by/novosti-minska-i-minskoy-oblasti/aleksandr-lukashenko-zdorovyy-obraz-zhizni-dolzhen-stat-vizitnoy> accessed 12 March 2020.

[671] See annx 2 and 10.

other considerations are likely to be behind the inadequate tobacco policies in Belarus. Section 5.4 will then examine the State's institutional and constitutional foundations as a potential environment from which regulatory chill could emerge. It will argue that the State's constitutional order *per se* alleviates regulatory chill concerns. Further, Section 5.5 will shed light on the existing national guarantees of investment protection in Belarus and argue that its domestic policy choices are unlikely to lead to regulatory delay. This will be followed by Section 5.6 which aims to further establish the role of IIAs and ISDS in the inadequate level of FCTC implementation. It will argue that the study finds no direct evidence of regulatory chill. Section 5.7 will then summarise the significance of the findings in light of the regulatory chill hypothesis. Finally, Section 5.8 concludes that IIAs are unlikely to be the reason for the inadequate level of tobacco control legislation, affect tobacco regulatory development and lead to regulatory chill in Belarus.

5.1. Tobacco Control Policies

In 2005, Belarus ratified the FCTC.[672] Upon ratification of the treaty, the Ministry of Health was assigned to ensure the State was compliant with the WHO FCTC obligations.[673] The analysis of national tobacco legislation illustrates that Belarus has made persistent and more advanced progress in implementing the treaty – in terms of the range of various instruments adopted – compared to the other post-Soviet states.[674] For example, Belarus prohibits the sale of tobacco products on the internet and via vending machines, the display of tobacco products at the point of sale and brand marking on physical structures (Article 13 FCTC), which as measures have not been implemented by all post-Soviet states.[675] This aligns the findings of a 2018 study by Glahn and colleagues who found that Belarus had fully implemented seven articles (compared to one in Armenia; zero in Azerbaijan; one in Georgia; and two in Ukraine).[676]

[672] UNTC (n 460).
[673] Law of the Republic of Belarus 'On Ratification of the WHO Framework Convention on Tobacco Control' of 14 June 2005 No 26-3 [hereinafter, Law 26-3].
[674] See annx 10.
[675] See annx 2.
[676] Glahn and others (n 96).

Nonetheless, several FCTC articles have yet to be implemented.[677] One can certainly point to examples under Article 8 FCTC, which prohibits (not merely restricts) smoking in all indoor workplaces, indoor public places, public transport, hospitals and primary and secondary schools.[678] The country's weak level of smoke-free policies was also noted in the 2019 WHO Report on the Global Tobacco Epidemic.[679] In addition, there is no complete policy in place relating to advertising bans, taxation, monitoring and cessation programmes according to Article 13 of the FCTC.[680] Belarus is yet to comply with Article 5.3 on tobacco industry interference and Article 13 concerning illicit trade.[681]

That said, the regulatory efforts undertaken are reported to have led to a decline in smoking frequency as a result of 'the ongoing implementation of smoking restrictions and legislation by the Ministry of Health'.[682] Belarus' 2018 report on FCTC implementation shows that as of 2017, smoking prevalence among male adults in Belarus stood at 23.2%, while the total prevalence of daily smokers was 20.5%.[683] The 2018 report further states that in 2017, smoking prevalence among the population over 16 had fallen by 1.2% compared to 2015 (including a fall of 1.9% among adult males and 0.9% among adult females).[684] These results can be compared to those contained in Belarus' previous official reports and factsheets (see Table 3).[685]

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[677] See annx 2; Convention Secretariat, 'Needs Assessment for Implementation of the WHO Framework Convention on Tobacco Control in the Republic of Belarus' (September 2005) <www.who.int/fctc/implementation/needs/Belarus_needs_assessment_report.pdf?ua=1.%EF%BB%BF > accessed 1 March 2021.

[678] Ministry of Health of the Republic of Belarus Ruling 'On Entering Additions and Amendments to Some Sanitation Norms, Rules, and Hygienic Standards' of 3 November 2011 No 111. See also annx 2.

[679]World Health Organisation, 'WHO Report on the Global Tobacco Epidemic, 2019: Country Profile: Belarus' < www.who.int/tobacco/surveillance/policy/country_profile/blr.pdf > accessed 1 March 2021.

[680] ibid, annx 2.

[681] ibid.

[682]. Euromonitor International, 'Tobacco in Belarus: Tobacco in Belarus, July 2020' <www.euromonitor.com/tobacco-in-belarus/report > accessed 20 August 2020.

[683] Belarus' 2018 Report (n 667) B11A.

[684] ibid B115.

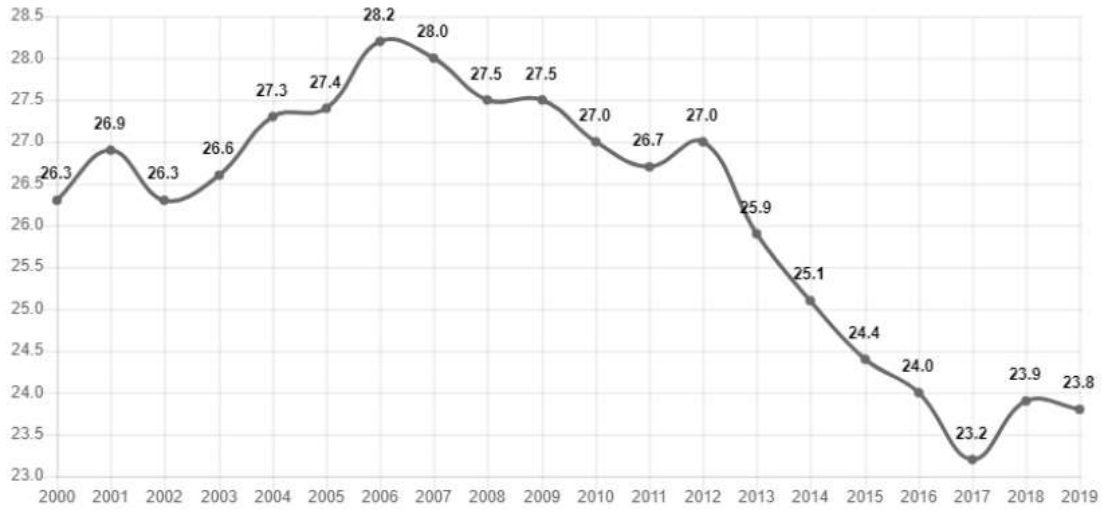
[685] Yuriy Ye Fedorov, 'Stage 2 (Questionnaire of Group 2) of the Reporting Instrument of WHO Framework Convention of Tobacco Control' (7 December 2020) <https://untobaccocontrol.org/impldb/wp-content/uploads/reports/belarus_5y_report.pdf > [hereinafter, Belarus' 2010 Report]; Olga V Bartman and Yury Fedotov. 'Reporting Instrument of WHO Framework Convention of Tobacco Control' (30 April 2012) <https://untobaccocontrol.org/impldb/wp-content/uploads/reports/belarus_2012_report_final_en.pdf > [hereinafter, Belarus' 2012 Report]; Olga V Bartman and Igor V Gayevskiy. 'Reporting Instrument of WHO Framework Convention of Tobacco Control' (14 April 2012) <https://untobaccocontrol.org/impldb/wp-content/uploads/reports/belarus_2012_report_final_en.pdf > [hereinafter, Belarus' 2014 Report]; 'WHO Framework Convention on Tobacco Control Secretariat: Belarus: WHO FCTC Factsheet: Reported 2020' <https://untobaccocontrol.org/impldb/belarus/ > [hereinafter, 2020 Factsheet] all accessed 9 September 2020.

Table 3. Belarus' Reports on the FCTC implementation (2010 – 2018)

Reporting Instrument	Current smokers TOTAL, %	Current smokers MALE, %	Current smokers FEMALE, %	Daily smokers TOTAL, %
2010 Report	27.0	51.1	9.8	23.7
2012 Report	27.0	50.4	10.2	24.1
2014 Report	25.9	48.6	9.7	23.0
2018 Report	23.2	43.9	8.8	20.5
2020 Factsheet	N/A	N/A	N/A	21.1

As Table 3 illustrates, Belarus' reported smoking prevalence fell by 3.8% during the period between the 2010 and 2018 reports. This is also confirmed by the National Statistical Committee of the Republic of Belarus, which monitored smoking prevalence among the population aged over 16 for the period 2001–2011 (see Chart 4).[686]

Chart 4. Belarus: Smoking prevalence among the population over 16 (2000 – 2019)



As shown in Chart 4, smoking prevalence fluctuated continually throughout the period 2005–2019 but ultimately fell by 3.6%.[687]

[686] National Statistical Committee of the Republic of Belarus, '3.a.1.1 Smoking Prevalence Among Population Over 16 (Percentage)' <http://sdgplatform.belstat.gov.by/sites/belstatfront/index-info.html?indicator=3.a.1.1> accessed 10 September 2020.
[687] ibid.

At the same time, however, the accuracy of the reported data has not been ascertained. The data conflicts with other sources. Thus, between 10 October 2016 and 23 February 2017, the WTO supported the conducting of a national STEPS survey on the prevalence of major NCD risk.[688] At that time, 29.6% of the overall respondents smoked (48.4% of men and 12.6% of women), and 27.1% smoked daily.[689] This contrasted with national reports and statistics reporting rates of 23.2% for total smokers and 20.5% for daily smokers.[690] Other reports on the matter also convey divergent results.[691] Krasovsky explains that this is caused by the different methodologies used by the respective agencies;[692] however, it also illustrates that inaccuracies are likely within the data on smoking prevalence in Belarus.

The most important point is that Belarus' existent tobacco policies are likely to be inefficient. For instance, in Ukraine, smoking prevalence among current smokers for the much shorter reporting period of 2010–2020 fell by 6% and by 4.4% among daily smokers.[693] Some NGOs estimate that a 20-fold rise in excise tax on tobacco in Ukraine between 2007 and 2017 led to a 20% fall in smoking rates (unofficial data).[694] Additionally, this took place in a context where Ukraine had yet to introduce many of the FCTC regulations that were already in place in Belarus. Perhaps somewhat counter-intuitively, it could thus be concluded that the existing regime of tobacco control in Ukraine is more effective than that in Belarus. But what could explain this?

One apparent answer lies on the surface. Scholars have long acknowledged the varying effectiveness of different tobacco control measures and that tobacco price and smoke-free policies are considered to be the most effective tools in reducing tobacco smoking.[695] Along the same lines, the guidelines for the implementation of Article 6 FCTC confirm that '[t]ax and price policies are widely recognised to be one of the most effective means of influencing the demand for and thereby the consumption of tobacco

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[688] STEPS 2016 (n 668).
[689] ibid 14.
[690] See Table 3 supra.
[691] Konstantin Krasovsky, 'Dynamics of Smoking Prevalence and Tobacco Products Market in Belarus' (2012) 2(1) Tobacco Control and Public Health in Eastern Europe 9.
[692] ibid.
[693] See annx 1.
[694] See (n 464).
[695] Luk Joossens and Martin Raw, 'The Tobacco Control Scale: a New Scale to Measure Country Activity' (2006) 15(3) Tob Control 247; Narine K Movsisyan and Gregory N Connolly, 'Measuring Armenia's Progress on the Tobacco Control Scale: an Evaluation of Tobacco Control in an Economy in Transition, 2005–2009' (2014) 4(2) BMJ Open.

products'.[696] In Belarus, the weakest tobacco regulations are its smoke-free and tax and pricing policies.[697] Thus, despite the reported 49% upsurge in tobacco prices in 2005–2010, even this was insufficient to offset the 79% rate of inflation recorded over the same period.[698] The trend continued in 2019 and Belarus was reported to produce the cheapest cigarettes in Europe.[699] This was in contrast to the situation in Ukraine, which dramatically increased tobacco taxes over the preceding years.[700] It can thus be inferred that Belarus' ineffective tax and pricing policies have diluted the impact of its comparatively advanced tobacco control legislation.

In light of its rate of tobacco-related illnesses and mortality, the current level of tobacco control regulation in Belarus cannot be considered adequate. At the same time, there can be little doubt that stricter tobacco regulatory measures would offer a viable means for coping with the tobacco epidemic: the WHO has projected that full implementation of the FCTC policies could in 15 years reduce smoking prevalence by 6.3%–27.8% (depending on individual policy).[701] Along the same lines, Levy, Levy and Mauer-Stender found that smoking prevalence in Belarus could be reduced by 39% in under 15 years if the FCTC were to be implemented in full.[702] The question, therefore, is what has prevented the government from implementing all FCTC requirements? The next section will attempt to answer this question.

5.2. Reasons for the Regulatory Delay

As a starting point when analysing the reasons for the regulatory delay in implementing the FCTC fully, it would be sensible to examine official reports on the FCTC implementation. The 2018 Belarusian report states that FCTC implementation in the

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[696] World Health Organisation, 'Guidelines for Implementation of Article 6 of the WHO FCTC' <www.who.int/fctc/guidelines/adopted/Guidelines_article_6.pdf > accessed 30 August 2020.
[697] See annx 2 and 10.
[698] See (n 685); Krasovsky (n 691).
[699] Nikolai Vitovt, 'Belarus Has Become One of the Main Sources of Illegal Cigarette Import into the EU' (*Zavtra Tvoei Strani*, 30 June 2020) < https://zautra.by/news/belarus-stala-odnim-iz-osnovnykh-istochnikov-nelegalnogo-vvoza-sigaret-v-es > accessed 30 August 2020.
[700] See ch 4.
[701] 'World Health Organisation: Tobacco Control Fact Sheet: Belarus: Health Impact of Tobacco Control Policies in Line with the WHO Framework Convention on Tobacco Control (WHO FCTC)' (2017) <www.euro.who.int/en/countries/belarus/publications/fact-sheet-tobacco-control-belarus> accessed 30 August 2020.
[702] David Levy, Jeffrey Levy and Kristina Mauer-Stender, 'Potential Impact of Strong Tobacco-Control Policies in 11 Newly Independent States' (2019) 27(2) Cent Eur J Public Health 115.

country has been hindered by '[t]he opposition of the tobacco industry – the desire of representatives of tobacco companies to postpone the introduction of legislative documents, and repeated administrative appeals to protect their interests'.[703] The second step would be to find evidence of the above and determine whether it was the sole and genuine reason for the regulatory delay. For the purposes of this research, it would also be necessary to scrutinise whether or not the above actions led to regulatory chill. The remainder of this section will deal with the latter two enquiries.

A preliminary analysis of the tobacco legislative process in Belarus shows no evidence of regulatory chill or substantial industry activity aimed at frustrating attempts to regulate tobacco. This is in contrast to the preceding case study, where unprecedently vigorous political contestation ensued over the tobacco drafts within the Ukrainian Government.[704] This difference could potentially be explained by the difference in the market composition between the two countries. Ukraine's tobacco sector is 100% in private ownership, with foreign MNCs holding a 92% market share.[705] In contrast, the tobacco sector in Belarus is largely represented by state-owned manufacturer GTF Neman, which has a 72% market share.[706] The remaining 28% of the market is split between Belarusian company Tabak-Invest LLC (20% share)[707] and two multinational companies, JTI and BAT (the remaining 8%).[708] It therefore follows that the major player in the market is the state-owned enterprise, which as an entity is unlikely to be the instigator of any administrative appeals. Even if the remaining businesses objected to the regulatory development (no evidence of which has been found), their voice would be less powerful because it is the State that effectively controls the market.

The dominant presence of the State in the tobacco sector can also be approached from a self-interest point of view. The industry and its prosperity are likely to be of paramount interest for the State, as evidenced by several facts. First of all, tobacco companies generate considerable revenues for the State budget. For example, Neman

[703] Belarus' 2018 Report (n 667) E4.
[704] See s 4.2.
[705] Euromonitor International (n 455).
[706] Grodno Tobacco Factory 'Neman' (n 665).
[707] ibid; Euromonitor International, 'Cigarettes in Belarus' (July 2019) <www.euromonitor.com/cigarettes-in-belarus/report> accessed 15 March 2020.
[708] 'Sandler Research: Cigarettes in Belarus, 2019' (2019) <www.sandlerresearch.org/cigarettes-in-belarus-2019.html> accessed 15 March 2020.

is estimated to have paid more than USD 500 million in tax in 2018.[709] Second, the industry is one of the country's largest employers. Neman alone employs 1,100 professionals.[710] Third, the industry brings FDI to the State that is generally beneficial for the sector. In fact, it was Neman's collaboration with BAT and the latter's investment in the player's factory that saved Neman from potential bankruptcy. Prior to this, outdated machinery and equipment prevented the Neman factory from keeping pace with industry trends and consumer demand.[711]

The significance of the tobacco industry for the State is further confirmed by governmental support for the industry's growth. In 2018, President Lukashenko allocated approximately 1.48 hectares of what was formerly the territory of Minsk to build a new tobacco factory based on Belarusian company Inter Tobacco LLC.[712] More recently, Inter Tobacco LLC secured exclusive rights to import tobacco commodities and establish further tobacco production in the country.[713] In addition, in 2018, affiliated company Energo-Oil JCJSC received permission from the government to build a unified retail chain of tobacco kiosks[714] that has since continued to expand despite ongoing public disapproval.[715] Around the same time, Energo-Oil JCJSC secured the right to distribute PMI's brands.[716] As a corollary to this, sales of tobacco products have risen[717] and the industry will likely continue to thrive.

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[709] Tatiana Demidova, 'Only Ash Can Remain from the Tobacco Market in Belarus' (*The Diary*, 13 February 2019) <https://ej.by/news/economy/2019/02/13/ot-tabachnogo-belarusi-mozhet-ostatsya-lish-pepel.html> accessed 29 March 2020.

[710] ibid.

[711] The Diary, 'Is Tobacco's Take Over Coming in Belarus' (9 October 2013) <https://ej.by/news/economy/2013/10/09/v_belarusi_gryadet_tabachnyy_peredel.html> accessed 20 March 2020.

[712] BELSAT, 'Lukashenka Reduces Minsk Territory for Tobacco Industry Development' (13 July 2018) <https://belsat.eu/en/news/lukashenka-reduces-minsk-territory-for-tobacco-industry-development/> accessed 13 March 2020.

[713] PrimePress, 'The Company "Inter Tobacco" Has Received the Exclusive Right of the State to Import Raw Tobacco' (9 August 2019) <https://primepress.by/news/kompanii/kompaniya_inter_tobakko_poluchila_isklyuchitelnoe_pravo_gosudarstva_na_import_tabachnogo_syrya-12585/> accessed 30 August 2020.

[714] Euromonitor (n 707).

[715] Stanislav Korshunov and others, '"Snuffboxes" on the Streets. How the Country Meets Stalls with Cigarettes Soon to Fill Belarus' (*TutBy*, 26 February 2019) <https://news.tut.by/society/627688.html > accessed 30 August 2020.

[716] Euromonitor (n 707). JTI has reported to have 7 offices and about 200 people of staff in Belarus, see Japan Tobacco International (n 599).

[717] In 2013, tobacco sales soared to BYR 25,927 million (compare to BYR 16,062 million in 2005). National Statistics Committee of the Republic of Belarus. 'Public Health in the Republic of Belarus 2009-2013: Statistical Compilation', No 26/485-p of 22 July 2014 < https://belstat.gov.by/ofitsialnaya-statistika/solialnaya-sfera/zdravoohranenie_2/publikatsii_3/index_522/> accessed 10 September 2020.

In light of this, the State's self-interest – in particular, its budget revenues, need for FDI and employment – is likely to be the main factor preventing tobacco regulatory development in Belarus. Recently, the government has also expressed a need to prevent tobacco price growth in order to maintain the State's budget revenues from the industry. To put this into context, Belarus' membership of the EAEU means that it is obliged to adopt a unified tobacco policy, including tobacco tax and pricing measures, with other EAEU member states by 2024.[718] Belarus has faced political pressure from Russia and other EAEU member states to increase tobacco taxation and level up prices. Despite this, however, the president, at a conference held on 10 December 2019 (discussing potential ways to bolster the performance of the tobacco industry), stressed the need to prevent a rise in tobacco prices in Belarus since '[i]t would be unacceptable for citizens of Belarus'.[719] The president went on to argue that:

> [d]espite all the negative effects of tobacco and alcohol, *they earn a lot of money for the State budget, this is why there should be no sweeping changes* … In the past, we remodelled our market production and sales. This sphere is severely regulated in Belarus. *We have an investor, who undertook to sell tobacco products of our enterprises in the past and vowed to raise state budget revenues*. This is why we had a deal with him.[720]

This statement has significant theoretical implications that resonate within the broader theory of the political economy of FDI. First, it confirms that the paramount reason for the tobacco regulatory delay is the government's economic considerations, namely its budget revenues. The references to 'an investor' and 'money for the State budget'[721] are markers of capital flight theory.[722] It has been widely acknowledged that the economic stakes of tax policy reform are immense and can be measured in the hundreds of millions of US dollars.[723] Second, the Belarusian case demonstrates that the ramifications of capital flight concerns are more nuanced and largely depend on the political regime and the government's notion of where it should strike the balance between public health and investment protection. This can be contrasted with the

[718] Eurasian Economic Commission, 'Implementation Report on the Main Directions of Integration within the Eurasian Economic Union: 2018' (Moscow, 2018).
[719] President of the Republic of Belarus (n 662).
[720] ibid.
[721] ibid.
[722] See n (924) and accompanying text.
[723] See eg Staff Writer, 'Tax Structure Hits TTM' (*Tobacco Reporter*, 5 March 2018) < https://tobaccoreporter.com/2018/03/05/tax-structure-hits-ttm/ > accessed 18 September 2020.

experience of other developing states where the level of tobacco-related illnesses also requires immediate regulation. In Ukraine, an increase in excise tax has been the only tobacco control legislation adopted by the government since 2012.[724] Likewise, the Government of the Philippines recently adopted excise tax reform that resulted in one of the largest tax increases.[725] Despite strong resistance from the tobacco industry, which effectively blocked other regulatory innovations,[726] both states had the political will to implement taxation measures.[727]

Third, as some sort of *obiter dictum* in his decision, before 'an investor, who undertook to sell tobacco products … and vowed to raise state budget revenues', the president referred to some commitments.[728] Again, this shows that the rationale behind the regulatory delay lies rather within the domain of the political economy of FDI as opposed to in IIL and its regulatory chill theory. This corroborates arguments put forward within the tobacco control literature that FDI leads to ineffective public health regulations.[729]

Drawing upon this, it can be inferred that there is no causal linkage between the regulatory delay and Belarusian IIAs. The level of tobacco control in the State would likely be the same if Belarus had no IIAs in force. That said, the fact that a state-owned enterprise dominates the Belarusian tobacco market is also peculiar, from the perspective of both the regulatory chill hypothesis and tobacco regulation. For the sake of completeness, let us dwell here for a moment and consider this important nuance.

5.3. State-Owned Tobacco Sector, Regulatory Chill and Tobacco Regulatory Development in Belarus

It is pertinent to consider the significance of the state-owned share in the tobacco industry for the regulatory chill argument and tobacco control regulatory development

[724] See s 4.1.
[725] Drope and others (n 536).
[726] ibid and ch 4.
[727] Drope and others (n 536) also observed that the tax reform was supported by influential politicians and NGOs.
[728] President of the Republic of Belarus (n 662).
[729] See eg Anna Gilmore, Jeff Collin and Joy Townsend, 'Transnational Tobacco Company Influence on Tax Policy During Privatization of a State Monopoly: British American Tobacco and Uzbekistan' (2007) 97(11) AJPH 2001; Gilmore (n 27); Anna B Gilmore, Gary Fooks and Martin McKee, 'A Review of the Impacts of Tobacco Industry Privatisation: Implications for Policy' (2011) 6(6) Glob Public Health 621.

in Belarus. On the one hand, the risk of regulatory chill might be reduced by the fact that there is less FDI and fewer foreign investors that could potentially be affected by regulatory innovations and bring investment claims as a result. In fact, if the industry had no foreign investment at all, the regulatory chill hypothesis could be ruled out completely.[730] A (predominantly) state-owned tobacco sector could be regulated more easily and there would be no (or fewer) private parties to object to regulatory innovations. Gilmore and colleagues argued that the privatisation of the tobacco industry weakens tobacco control because private owners engage in lobbying against progressive tobacco policies in their quest for profits.[731] This aligns with the findings of this thesis indicating that the tobacco lobby in Ukraine is one of the principal reasons behind its inadequate tobacco regulatory framework.[732]

On the other hand, when the State holds a stake in the sector, it faces its own conflict of interest when regulating tobacco, although this issue is not unique to Belarus. The potential difficulties for tobacco regulatory development in such circumstances are also acknowledged in the Guidelines for implementation of Article 5.3 of the FCTC.[733] The guidelines suggest that a state-owned part of the tobacco industry should be treated in the same way as any other part in respect of setting and implementing tobacco control policy[734] and also that the tobacco regulation process should be separate from oversight or management of the industry.[735] This highlights that states need to overcome as a result of state ownership and the need for severability between the sector and regulatory policies.

The challenges and opportunities presented by state participation in the tobacco sector have long been questioned by critics.[736] The prevailing view is that state ownership in the tobacco sector has been regarded as a major hindrance to tobacco regulatory development.[737] Somewhat counter-intuitively, however, developed economies have also been prone to downward regulatory trends due to their interest in the tobacco sector. Murphy and Crossley, for instance, argued that the greatest

[730] See ch 2.
[731] Gilmore, Fooks and McKee (n 729).
[732] See s 4.2.1.
[733] Guidelines for Article 5.3 FCTC (n 478).
[734] ibid, para 8.
[735] ibid.
[736] See eg Scott Hogg, Sarah Hill, Jeff Collin, 'State-ownership of Tobacco Industry: a 'Fundamental Conflict of Interest' or a 'Tremendous Opportunity' for Tobacco Control?' (2016) 25 Tob Control 367.
[737] ibid.

challenges facing China and Japan in reducing tobacco-related illnesses are state ownership of the largest tobacco corporations.[738] Similarly, Mackay concluded that '[t]he state-owned tobacco industry remains a major obstacle to tobacco control' in China.[739]

Given the circumstances, the presence of the State also has a twofold effect on the Belarusian tobacco market. On the one hand, tobacco regulatory standards in Belarus (except excise tax) are much higher than in many other post-Soviet States.[740] It is likely that this can be ascribed to the State's control of the industry and both the political will and wide regulatory powers of the president.[741] Furthermore, there is no obvious evidence of regulatory chill and no evidence that the industry has ever challenged prospective tobacco legislation. Yet, on the other hand, the State is not interested in the demise of an industry that makes a substantial contribution to its budget and serves its short-term pressing demands. Thus, in the present context (as illustrated above), the president refuses to introduce any 'sweeping changes' to tobacco control legislation.[742]

One may argue that on balance, state ownership of the industry in Belarus is more beneficial than detrimental in terms of its impact on the development of tobacco control legislation. While the government is sensitive towards the adoption of tobacco policies that could yield negative economic consequences, it can also exert greater control over its policies and regulatory development. This begs the question of whether the renationalisation of tobacco companies may constitute a better answer to the public health challenges presented by tobacco.

The idea of renationalising tobacco companies was also advanced by Callard, Thompson and Collishaw.[743] This option, however, is unlikely to be feasible for the post-Soviet space: around 60,000 state-owned tobacco enterprises were privatised in the 1990s and it would be a huge challenge to reverse the process.[744] An alternative, as proposed by Hogg, Hill and Collin, would be a legislative separation of tobacco control

[738] Flynn Murphy and Gabriel Crossley, 'Smoking Cessation: State Owned Tobacco Companies in China and Japan are at Odds with their Countries' Commitments' (2019) BMI 365.
[739] Judith Mackay, 'China: the Tipping Point in Tobacco Control' (2016) 120 Br Med Bull 15.
[740] See annx 2.
[741] See s 5.4 infra.
[742] President of the Republic of Belarus (n 662).
[743] Cynthia Callard, Deborah Thompson and Neil Collishaw, 'Transforming the Tobacco Market: Why the Supply of Cigarettes Should Be Transferred from For-Profit Corporations to Non-Profit Enterprises with a Public Health Mandate' (2005) 14 Tob Control 278.
[744] Judith Mackay and Michael Eriksen, 'The Tobacco Atlas' (World Health Organization 2002) <https://tobaccoatlas.org/wp-content/uploads/2018/03/TobaccoAtlas_6thEdition_LoRes_Rev0318.pdf> accessed 30 August 2020.

from the oversight of state-owned tobacco companies and a realignment of goals for reducing tobacco consumption that 'could make an important contribution to end game strategies'.[745] This is generally aligned with the FCTC guidelines but – as this study shows – does not always reflect the realities on the ground. To cite Cohen, regardless of whether tobacco companies are state or privately owned, the main challenge is to achieve 'comprehensive regulation that makes public health and not economic interest the top priority – something that many countries, regardless of ownership have yet to do'.[746]

Indeed, when comparing both case studies (Ukraine and Belarus), it looks like renationalising tobacco companies is unlikely to constitute a more optimal response to the public health challenges presented by tobacco. Despite there being some benefits of state control over the industry (as evidenced by the progressive tobacco legislation in Belarus), the problem of tobacco regulatory development ultimately boils down to the question of state economic interest: neither country has adopted the required policies because they are concerned about the impact of proposed legislation on budget revenues along with other economic ramifications. From the perspective of regulatory chill theory, the state ownership of tobacco companies in Belarus reduces the risk faced by the State but does not remove it completely. This thesis will continue to test the hypothesis and will now turn to define the role that both national and international regulatory frameworks play in the realisation of progressive tobacco legislation.

5.4. The Constitutional Order and the Status of International Law

The starting point from which to discuss a state's regulatory framework is its constitution, that is, the main law underpinning the whole national legal system and the status of international law within it. The Constitution of Belarus was adopted on 15 March 1994.[747] It proclaims that the Republic of Belarus is a unitary democratic social state with the rule of law, which exercises supreme control and absolute authority over

[745] Hogg, Hill and Collin (n 736).
[746] Joanna Cohen, 'State Versus Private Ownership of Tobacco Companies' (2019) BMJ 365.
[747] Constitution of the Republic of Belarus of 30 March1994 (Adopted at the Republican Referendums on 24 November 1996 and on 17 October 2004) [hereinafter, Constitution of Belarus].

the whole of its territory and implements an independent domestic and foreign policy.[748] State power is exercised based on its division into legislative, executive and judicial branches.[749]

The legislative branch is represented by a bicameral parliament – the National Assembly.[750] It comprises a lower chamber, the House of Representatives, and an upper chamber, the Council of the Republic.[751] The government (the Council of Ministers) is the executive power in the Republic of Belarus.[752] The judicial system of the Republic of Belarus encompasses the Constitutional Court, general courts and economic courts.[753] Similar to Ukraine, the Constitutional Court in Belarus considers issues pertaining to the conformity of the national legislation, international agreements and other obligations of Belarus, with the Constitution and international treaties ratified by the State.[754]

State power is effectively concentrated in the hands of the president, who is the head of state.[755] Alexander Lukashenko has served as the state's first president since 1994. During his presidency, amendments to the Constitution have provided for arguably the widest presidential powers in the world, transforming the state into a super-presidential republic.[756] The president has broad executive powers,[757] exercises a significant influence on the judiciary[758] and also has extensive legislative powers.[759] The president issues decrees (which have the force of the law), orders and instructions that are obligatory for the State.[760]

All in all, the constitutional order provides for a very significant role of the president in exercising the sovereign power of the State, whether this concerns the conclusion of a new BIT, the acceptance of FDI or enactments of tobacco legislation – all are affected by the president's decisions and political will. Consequently, the president is the main decision-maker when it comes to balancing public health and FDI promotion.

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[748] ibid, art 1.
[749] ibid, art 25.
[750] ibid, ch 4.
[751] ibid, art 91.
[752] ibid, ch 5.
[753] Constitution of Belarus (n 747) ch 6.
[754] ibid (n 747) art 116.
[755] ibid, ch 3.
[756] Tatyana Khodosevich, Nadia Shalygina and Darya Sarbay, 'UPDATE: Legal Research in Belarus' (*Global Lex*, March 2019) <www.nyulawglobal.org/globalex/Belarus1.html> accessed 1 August 2020.
[757] Constitution of Belarus (n 747) art 84.
[758] ibid.
[759] ibid, art 85.
[760] ibid.

Therefore, if regulatory chill exists in Belarus, the president would be a crucial link in the chain in terms of either considering the risks in the event of an apparent threat of investment arbitration or internalising his concerns regarding potential arbitration claims when making such decisions.

Turning to the legal framework, the basic sources of law in Belarus are the Constitution, Codes, decrees and orders of the president, laws of the parliament and decisions of the government.[761] Judicial precedents or case law are not formally recognised as a source of the law.[762] Nonetheless, official explanations on the application of the legislation adopted by Plenums of the Supreme Court and the Supreme Economic Court are obligatory for all state bodies and courts.[763] Further, the rulings of the Constitutional Court are *de facto* treated as judicial precedents.[764] The role of legal precedents, therefore, is very similar to the position in Ukraine.

However, the status of international law in Belarus is more nuanced compared to Ukraine. The Constitution provides that Belarus recognises the supremacy of generally recognised principles of international law and ensures the compliance of laws therewith.[765] Neither the Constitution nor other republican legislation, however, explicitly provide for the supremacy of international law above national legislation. This is an unusual position among the post-Soviet States, most of which generally recognise the supremacy of international law over domestic law in their constitutions.[766]

The issue of the hierarchy of international law in Belarus is a matter on which scholars diverge. Danilevich, for example, supports the view that international treaties prevail over national legislation by observing that Article 116 of the Constitution accords to the Constitutional Court power to execute control 'on the compliance of laws … to the Constitution and international legal acts ratified by the Republic of Belarus'.[767] The other school of legal thought argues that the hierarchical relationship between international agreements and national regulation in Belarus is rather uncertain and in practice, the national law prevails over international law 'as a result of the internal discrepancies and shortcomings of the provisions of the Constitution and other national

[761] Khodosevich, Shalygina, and Sarbay (n 756).
[762] ibid.
[763] ibid.
[764] ibid.
[765] Constitution of Belarus (n 747) art 8.
[766] Kryvoi and Hober (n 427).
[767] Aliaksandr Danilevich, 'Belarus' in Kaj Hober and Yarik Kryvoi, *Law and Practice of International Arbitration in the CIS Region* (Wolters Kluwer 2017).

legislation'.[768] Saleev notes that regardless of the purported direct application of international treaties, such application may be refused in national courts if a treaty contradicts national law.[769] Similarly, Pavlova and Vasilyevich observe that national courts barely apply provisions of international agreements in practice due to the absence of constitutional power for this to occur.[770] This sits in contrast to the Ukrainian experience where international treaties form part of the domestic national system and national courts directly apply international treaties (including IIAs) when adjudicating in disputes.[771]

While the hierarchy of legal sources in the State is a matter of controversy, in practice, national courts and bodies do not apply foreign legal acts in order to override conflicting national legislation. It therefore follows that IIAs are unlikely to affect national tobacco regulatory development via their application by national courts. Although the Constitutional Court has the power to annul national legislation that contradicts international law provisions, this thesis is not aware of any precedent in this regard. The corollary of this is that the national law system in Belarus is not prone to 'regulatory chill' as a result of the direct application of international treaties by State courts and bodies. The next section will explore any potential obstacles to tobacco regulatory development arising as a result of national law.

5.5. Tobacco Control and National Law Limitations

There are two reasons for considering the limitations of national law when examining the regulatory chill hypothesis. Firstly, national law could also lead to regulatory delay.[772] The main concern for tobacco regulatory development could be constitutional economic rights. And secondly, national law could serve as a tool to restrict or narrow the obligations under IIAs; therefore, it may provide some evidence in favour of the

[768] Ivan Saleev, 'Relationship of International Treaties and Internal Legislation of the Republic of Belarus' (2000) 3 Belarusian Journal of International Law and International Relations <http://evolutio.info/ru/journal-menu/2000-3/2000-3-saleev> accessed 12 August 2020.
[769] Danilevich (n 767).
[770] Lyudmila Pavlova, 'International Law in State Legal Systems' (1999) 3 Belarusian Journal of International Law and International Relations 7; Grigory Vasilevich, *Normative Legal Acts of State Bodies of the Republic of Belarus* (Law and Economics 1999) 88.
[771] See s 4.3.
[772] See s 2.1.

hypothesis if the government attempts to secure tobacco regulatory space in this way. This chapter will examine each of these reasons in turn.

5.5.1. Clashing Constitutional Rights and Tobacco Control

National constitutional regimes include a set of rights that are inherently in conflict and by their own nature may restrict each other. Pertinent to this study, the Constitution of Belarus provides for two conflicting rights: (i) the right to health care under Article 45[773] and (ii) the right to entrepreneurial and other types of economic activities that are not prohibited by law under Article 13.[774] The Constitution proclaims that the State shall guarantee the rights and freedoms of citizens that are enshrined in the Constitution and the laws as well as those that are specified by the State's international obligations.[775] At the same time, the Constitution acknowledges that those rights are not absolute: Article 23 of the Constitution stipulates that the limitation of individual rights and freedoms is permitted only 'in cases stipulated by law, in the interests of … public health'.[776] As such, this is the test for considering whether any potential tobacco regulations contradict Article 13 of the Constitution.

The central role of the State is to balance the clashing rights and, in Belarus, the Constitutional Court plays a major role in this process.[777] One decision of the Constitutional Court merits special attention. In June 2015, the government thought the Constitutional Court's opinion on the conformity of the Law 'On Introducing Changes and Amendments to the Law of the Republic of Belarus "On advertising"' with the Constitution of Belarus and in particular, the freedom of entrepreneurial activity enshrined by the Constitution.[778] The Law was to implement Article 13 of the FCTC, thus expanding an existing ban on tobacco advertising.[779] The Court's decision is interesting from the regulatory chill perspective.

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[773] Constitution of Belarus (n 747) art 45.
[774] ibid, art 13.
[775] ibid, art 21.
[776] ibid, art 23.
[777] See s 5.4.
[778] Decision of the Constitutional Court of the Republic of Belarus of 30 June 2015 No P-986/2015 'On the Conformity of the Law of the Republic of Belarus 'On Introducing Changes and Amendments to the Law of the Republic of Belarus "On Advertising" with the Constitution of the Republic of Belarus'. [hereinafter, 2015 Constitutional Court Decision].
[779] Law of the Republic of Belarus 'On Introducing Changes and Amendments to the Law of the Republic of Belarus "On Advertising"' of 10 July 2015 No 285-3.

Having noted that Article 45 of the Constitution guarantees the right to health care, the Constitutional Court went on to aver that 'the Law defines measures to protect existing and future generations from the devastating effects on human health … and economic consequences of the consumption of … tobacco and exposure to tobacco smoke'.[780] It ultimately found that the restrictions on tobacco advertising were legitimate under Article 23 of the Constitution because they: (i) were provided by the law; (ii) were socially justified in aiming to accord constitutional rights to public health; (iii) were proportionate to the objective pursued; and (iv) did not distort the essence of the constitutional rights and guarantees for doing business in the field of advertising.[781] The Court further observed that the advertising ban was in line with the State's international treaties, including the FCTC, requiring regulatory restriction on tobacco advertising.[782] In addition, the Court emphasised the State's role in regulating business activities in the public interest – to ensure the direction of business activities for social purposes under Article 13 of the Constitution.[783]

The test under Article 23 of the Constitution requires only that the limitation of individual rights and freedoms is (i) stipulated by law and (ii) relevant to one of the listed purposes including the public health interest.[784] At the same time, the Court went further and also discussed issues of (iii) proportionality and (iv) reasonableness. The Court's *ratio decidendi de facto* reflects the international approach to the right to regulate as it is propounded in IIL and arbitration.[785] In other words, in a similar vein to the tribunal in *Philip Morris v Uruguay*, the Constitutional Court confirmed the State's power to adopt *bona fide,* non-discriminatory and proportionate legislation to protect public health.[786] The initial test under the Constitution is narrower. Also, the Belarusian legal system recognises neither the right to regulate nor the police powers doctrine. Two important questions arise at this point: (i) has the Constitutional Court tried to pre-empt potential investment claims as a result of the tobacco advertising restriction? If so, it could be argued that the government is mindful of investment claims when adopting tobacco regulatory innovations (which is one of the pre-conditions of

[780] 2015 Constitutional Court Decision (n 778).
[781] ibid.
[782] ibid.
[783] ibid.
[784] Constitution of Belarus (n 747) art 23.
[785] See *PMI v Uruguay* (n 36) paras 216—307; *Saluka v Czech Republic* (n 200) paras 255, 260, 262.
[786] *PMI v Uruguay* (n 36) para 305.

internalisation regulatory chill). And (ii), what was the main purpose of the government's application in the first place?

While it is generally difficult to second-guess the motivations of the government, it may be argued in this case that the Court and government were likely to have been targeting the claims of potential foreign investors. First of all, the highly publicised PMI claim against Uruguay was still ongoing at the time, which could have raised the government's awareness of IIAs and potential investment claims. This may explain why the government wished to back up its regulatory decision with the Constitutional Court opinion also addressing the international standards. It may also explain why the test adopted by the Court was much wider than that required under the Constitution and for this reason, it is unlikely that the Constitutional Court thought to pre-empt the claims in the national courts. It can thus be inferred that the government's application to the Constitutional Court was *de facto* aimed at addressing potential investment disputes in arbitration tribunals. While this may reveal the government's awareness of potential claims under IIAs that could lead to internalisation regulatory chill, it still does not provide any evidence of the latter. Put differently, the government's awareness of the State obligations under IIAs has not affected the progressive tobacco legislation and or led to regulatory chill in Belarus. Yet again, the regulatory chill hypothesis is not confirmed.

5.5.2. Investment Guarantees under National Law and Regulatory Chill

Turning to investment guarantees under national law, the national guarantees do not provide any evidence of regulatory chill. National law investment guarantees to a large extent mirror IIAs. National law increasingly provides for investor-State arbitration as an enforcement mechanism for national guarantees of investment protection. All of this works counter to the regulatory chill theory by indicating that the government is unlikely to have concerns about IIAs and their arbitration mechanisms and is unlikely to internalise any such concerns when adopting tobacco legislation. To illustrate this, the remainder of this chapter will focus on the role of the 2013 Law 'On Investments'

and the 2013 Law 'On Concessions' in prescribing the general legal framework for making investments in the State.[787]

The Law 'On Investments' echoes some of the investment guarantees found in many Belarusian investment treaties. It prescribes the free transfer of profit and other funds outside Belarus; the right to protect property against nationalisation and requisition (unless for a public purpose and under the condition of timely and full compensation); the right to benefits and preferences when making investments in priority sectors of the economy, etc.[788] More importantly, the law provides that disputes with foreign investors 'which are not within the exclusive jurisdiction of the [national] courts'[789] could be considered, at the option of the investor, at: (i) an ad hoc tribunal under the UNCITRAL Arbitration Rules (unless the parties agree otherwise); or (ii) an ICSID Tribunal.[790] The Law 'On Concessions' regulating concession activities and contracts confers similar provisions for dispute resolution, thereby also enabling parties to concession contracts to opt for investment arbitration.[791] In the absence of any data that tobacco control legislation has ever been challenged under national ISDS provisions, this scenario does not generally support the regulatory chill hypothesis. Rather, it demonstrates that the government is unlikely to be concerned about the possibility of such claims.

The arbitration provisions under the national law could also lead to tobacco regulatory delay via the imposition of further restrictions on progressive regulatory development. Nonetheless, the Law 'On Investments' stipulates that if an international treaty and/or a contract concluded between an investor and the State provides otherwise concerning the resolution of disputes between an investor and the State on investments, then the provisions of the international agreements and/or the investment contract prevail.[792] This suggests that the arbitration provisions under the national law mainly benefit those investors whose home states have not concluded IIAs with Belarus, whilst all current foreign investors in the tobacco sector already enjoy international protection

[787] Law of the Republic of Belarus 'On Investments' of 12 July 2013 No 53-3 [hereinafter, Law 53-3]; Law of the Republic of Belarus 'On Concessions' of 12 July 2013 No 63-3 [hereinafter, Law 63-3]. See further National Legal Internet Portal of the Republic of Belarus (n 438).
[788] Law 53-3 (n 787) art 11-12.
[789] Article 51 of the Economic Procedural Code of the Republic of Belarus of 15 December 1998 No 219-Z clarifies which disputes are subject to a state's exclusive jurisdiction.
[790] Law 53-3 (n 787) art 13.
[791] Law 63-3 (n 787) art 35. See also 2015 Constitutional Court Decision (n 778).
[792] Law 53-3 (n 787).

under IIAs and thus would primarily rely on their arbitration mechanisms.[793] In the circumstances, therefore, the arbitration provisions have a neutral effect on tobacco regulatory development in Belarus.

Under the existing national law limitations, claims challenging tobacco regulatory initiatives would be difficult to pursue. Thus, Article 6 of the Law 'On Investments' specifically stipulates that investment activities may be subject to limitations imposed by law 'in the interests of … public health, rights and freedoms of individuals'.[794] Article 5 of the Law 'On Investments' provides a justification on the same basis for 'intervention in internal matters' that is otherwise prohibited. In this light, tobacco control regulatory measures would be justified based on public health exceptions and would hardly give rise to a valid claim.[795]

At the time of writing, a Draft Law 'On the amendment of Law of the Republic of Belarus "On Investments"' had been registered with the parliament to narrow down the regulatory exceptions under Article 6 to the grounds of 'existing threat to national security'.[796] According to the Justification Note, the amendment was initiated to 'ensure conformity with the Treaty on Eurasian Economic Union (TEAU)'.[797] As explained by the draft, reference to national security would be sufficient to protect other interests as a result of the wide interpretation of national security under the Belarusian National Security Concept.[798] Further, the suggested amendment was supposed to facilitate negotiations on Belarus' accession to the WTO.[799]

The Belarusian National Security Concept indeed defines national security broadly as 'the state of protection of life, health and welfare … from internal and external threats'.[800] That said, the exclusion of the public health exception, allegedly to align the national law with the TEAU and the WTO, is puzzling because both regimes provide

[793] See s 5.2.
[794] Law 53-3 (n 787) art 6.
[795] ibid, art 5.
[796] Draft Law 'On the Amendment of Law of the Republic of Belarus "On Investments"' <http://forumpravo.by/files/Proekt_Zakona_ob_investicijah.pdf> accessed 20 May 2020.
[797] Justification of the Need to Adopt the Draft Law of the Republic of Belarus "On Amendment of the Law of the Republic of Belarus "On Investments"' <http://forumpravo.by/files/Obosnovanie_proekta_Zakona_ob_investicijah.pdf> accessed 20 May 2020.
[798] Decree of the President of the Republic of Belarus 'On Approval of the Concept of National Security of the Republic of Belarus' of 9 November 2010 No 575.
[799] ibid.
[800] ibid, para 4.

for public health as a general exception for investment/trade restrictions.[801] At the same time, the draft (if adopted) may affect the position on regulatory changes in tobacco or public health legislation should the national security concept be amended in the future to eliminate public health and welfare. At this stage, however, changes to public health regulations are still carved out from the national investment guarantees and there is no direct evidence to state that the amendment was intended to undermine this position.

In a nutshell, the national law provisions are unlikely to be the reason for the regulatory delay in the context of tobacco legislation and the implementation of the FCTC. Furthermore, analysis of the national law on investment protections does not indicate that the government attempts to avoid investor-State arbitration or limit existing investment guarantees under IIAs. Even though the Constitutional Court judgement could be seen as an attempt to pre-empt potential investment disputes, there is no evidence to suggest that IIAs have affected the regulatory initiative in question. Therefore, the preceding analysis provides no evidence of regulatory chill in Belarus.

5.6. The Proliferation of Investment Treaties and the Regulatory Chill Argument

During the collapse of the Soviet Union, Belarus and other successor republics considered preserving the trade relationships and other links that existed between the Soviet states.[802] To this end, Belarus signed several trade agreements with former Soviet republics. These included agreements on trade and investment cooperation between Belarus, Russia and Kazakhstan that culminated in the creation of the EAEU;[803] these states were subsequently joined by Armenia and Kyrgyzstan.[804] It is noteworthy that in addition to a full suite of investment protection guarantees and an investment arbitration mechanism,[805] the EAEU Treaty sets out a framework for the harmonisation of tobacco control legislation while EAEU tobacco regulations are directly applicable across all member states.[806]

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[801] Eg, Treaty on the Eurasian Economic Union (signed 29 May 2014, entered into force 1 January 2015). [hereinafter, Treaty on the EAEU]. GATT 1994 (n 142) art XX.
[802] Kryvoi and Hober (n 427) para 1.02 [A].
[803] Treaty (n 801).
[804] 'EAEU Member-States' <www.eaeunion.org/?lang=en#about-countries> accessed 5 August 2020.
[805] Treaty (n 801).
[806] ibid, see also annx 12.

With a view to attracting foreign investment to support the recovery of its economy,[807] Belarus also thought to conclude BITs with both former Soviet partners and third countries. At the time of writing, it had concluded 70 BITs.[808] Similar to the Ukrainian treaties, Belarusian BITs routinely confer the guarantee of fair and equitable treatment, non-discrimination compared to national investors or any third State nations, the prohibition of expropriations, guarantees in case of strife and free transfer of capital, etc.[809] Most BITs do not include exceptions or other clauses to protect public health.[810] At the same time, all BITs provide for investor-State arbitration.[811]

It is worth noting that the significance of the Belarusian IIAs framework for the protection of foreign investment may be paramount. This is because neither ECtHR nor WTO has any adjudicative power over State decisions, meaning there is no other 'external' mechanism to remedy potential discriminatory or protectionist measures or seek compensation in case of expropriation.[812] Conversely, however, the wide network of IIAs containing arbitration provisions opens the State to potential claims from foreign investors and creates pre-conditions for tobacco control legislation to be 'regulatorily chilled'.

Indeed, despite the prevalence of State ownership in the tobacco sector, tobacco MNCs have a substantial interest in the national industry[813] and enjoy the protections accorded by Belarusian BITs.[814] Tabak-Invest LLC has worked in partnership with JTI since 1998.[815] In 2005, BAT invested over USD 5 million to update Neman's machinery and equipment on the condition that the factory produced BAT's branded products.[816] In October 2010, JTI also provided EUR 2.7 million of 'gratuitous financial support' to

[807] Kryvoi and Hober (n 427) para 1.03 [A]. s
[808] See annx 13-14.
[809] See annx 11 and 14.
[810] ibid.
[811] ibid.
[812] Belarus is the only post-Soviet country which is not a member of the Council of Europe and the WTO.
[813] See s 5.2.
[814] PMI (n 599) qualifies as investor under the Agreement between the Swiss Confederation and the Republic of Belarus on the Promotion and Reciprocal Protection of Investments (signed 28 May 1993, entered into force 13 July 1994) [hereinafter, 1993 Belarus-Switzerland BIT]. BAT (n 599) qualifies as investor under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Belarus for the Promotion and Reciprocal Protection of Investments (signed 1 March 1994, entered into force 28 December 1994) [hereinafter, 1994 Belarus–UK BIT]. Japan Tobacco International (n 599) qualifies as investor under the 1994 Belarus-Switzerland BIT.
[815] Japan Tobacco International (n 599).
[816] The Diary (n 711).

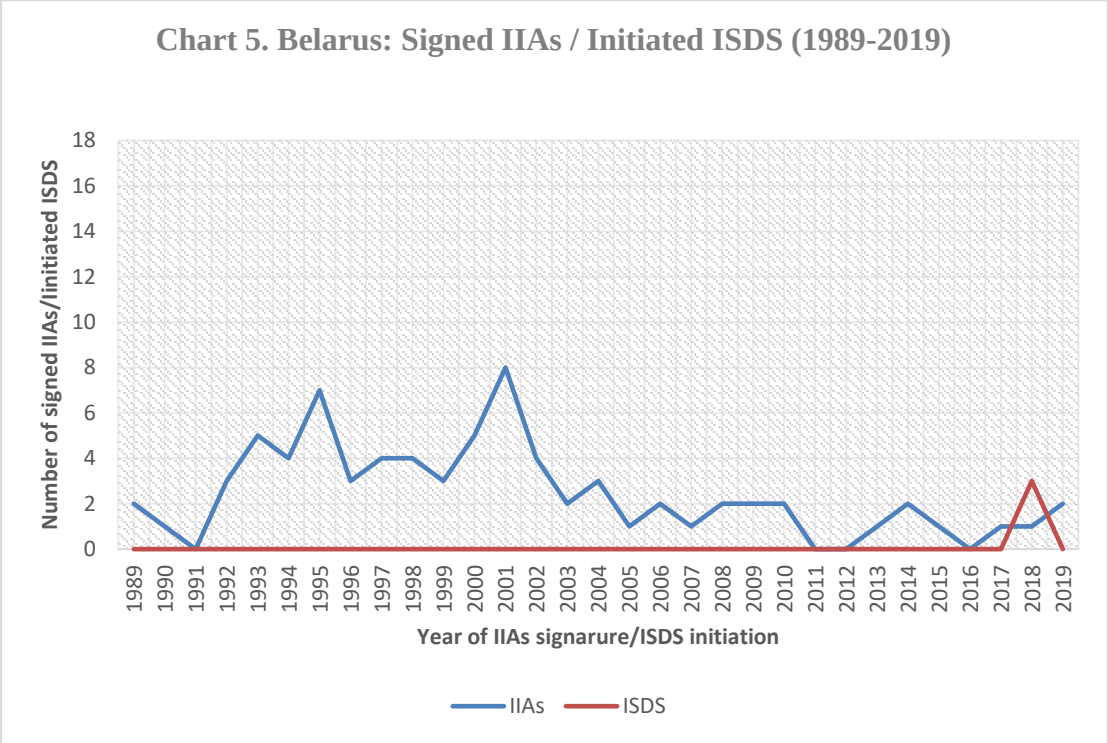
Neman to begin production of JTI's brands at the factory.[817] This rendered the government susceptible to a potential threat of investment arbitration should the tobacco regulatory measures be challenged by foreign investors.

In this light, the chapter will now proceed with establishing further the role of IIAs and investor-State arbitration in tobacco regulatory development in Belarus. It will seek to understand the trends in investment treaty negotiation in an attempt to 'trace' internalisation chill. It will ascertain whether international investors, namely tobacco companies, have ever confronted the government to oppose the adoption of tobacco control legislation. Finally, it will encapsulate the findings to answer the question of whether IIAs have affected tobacco legislation and led to regulatory delay in Belarus.

5.6.1. Tracing Internalisation Regulatory Chill in Investment Treaties

As of May 2021, Belarus had concluded 70 BITs and 9 PTAs,[818] which, to cite Krivoi and Hober, became 'a core element of the CIS states' policy to encourage investor confidence and certainty as to the business environment'.[819] The peak of investment treaty negotiation occurred between 1993 and 2002 (see Chart 5).

[817] Investment Company 'YUNITER' CJSC, 'Tobacco Market' (March 2015) <https://investinbelarus.by/docs/Tabak.pdf> accessed 15 March 2020.
[818] See annx 11-12.
[819] Kryvoi and Hober (n 427) para 1.03 [A] (citations omitted).



Belarus continued to conclude investment treaties even after the first three arbitration claims were mounted in 2018.[820] This sits in contrast to the assertion put forward in some previous studies that developing countries usually become less willing to conclude BITs once they have been party to an investment dispute.[821] At first glance, Belarus has not embarked on any systematic renegotiation or termination of its existing IIAs. This is *prima facie* evidence against the regulatory chill hypothesis and suggests that Belarus is unlikely to have concerns about potential arbitration claims or its regulatory spaces as a result of the limitations of IIAs. Alternatively, the Belarusian Government prioritises the promotion of foreign investments over its concerns (if any) about the regulatory freedom to enact tobacco control regulations.

Qualitative analysis of the treaties uncovers more nuanced findings. Until the 2000s, Belarusian BITs had never included any public health language.[822] Over the past 20 years, however, public health wording can be consistently observed in the investment treaties. The five latest BITs (the 2017 Belarus–Georgia BIT, 2018 Belarus–Turkey

[820] Chart 5 supra, see also annx 11-13.
[821] Lauge N Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65(2) World Politics 273.
[822] See annx 11 and 14.

BIT, 2018 Belarus–India BIT, 2019 Belarus–Hungary BIT, and the 2019 Belarus–Uzbekistan BIT) include general exceptions for public health regulatory measures.[823] The four former BITs, along with the 2013 Belarus–Lao People's Democratic Republic BIT, also carve out public health measures from the scope of indirect expropriation.[824] Uncommonly, the 2000 United Arab Emirates–Belarus BIT contains a carve-out for public health regulations in national and MFN treatment standards: '[m]easures that have to be taken for reasons of … public health … shall not be deemed "treatment less favourable" within the meaning of this Article'.[825]

Further, the 2006 Belarus–Finland BIT, the 2018 Belarus–Turkey BIT and the 2019 Belarus–Hungary BIT also refer to public health in their preambles.[826] For instance, the preamble of the 2006 Finland–Belarus BIT states that the parties agreed that the objectives of the treaty 'can be achieved without relaxing health, safety and environmental measures of general application'.[827] Similarly, the 2019 Belarus–Hungary BIT provides that the contracting states 'shall not encourage investment by lowering domestic … occupational health'.[828] Therefore, unlike Ukrainian BITs, recent Belarusian BITs show a more consistent pattern of public health considerations. The systematic inclusion of wording aimed at securing public health regulatory space demonstrates the plausibility of Belarus having a clear State policy agenda to factor in public health when negotiating investment treaties.

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[823] Agreement between the Government of the Republic of Belarus and The Government of Georgia on the Promotion and Reciprocal Protection of Investments (signed 1 March 2017, entered into force 1 December 2017) [hereinafter, 2017 Belarus—Georgia BIT]; Agreement between the Government of the Republic of Belarus and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (signed 14 February 2018) [hereinafter, 2018 Belarus—Turkey BIT]; Treaty between the Government of the Republic of Belarus and the Republic of India Concerning Investments (signed 24 September 2018) [hereinafter, 2018 Belarus—India BIT]; Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (signed 14 January 2019, entered into force 28 September 2019) [hereinafter, 2019 Belarus—Hungary BIT]; Agreement between the Government of the Republic of Belarus and the Government of the Republic of Uzbekistan Concerning the Reciprocal Promotion and Protection of Investments (signed 1 August 2019) [hereinafter, 2019 Belarus—Uzbekistan BIT].

[824] Agreement between the Government of the Republic of Belarus and the Government of the Republic of Lao People's Democratic Republic Concerning the Reciprocal Promotion and Protection of Investments (signed 1 July 2013, entered into force 20 March 2014) [hereinafter, 2013 Belarus-Lao People's Democratic Republic BIT].

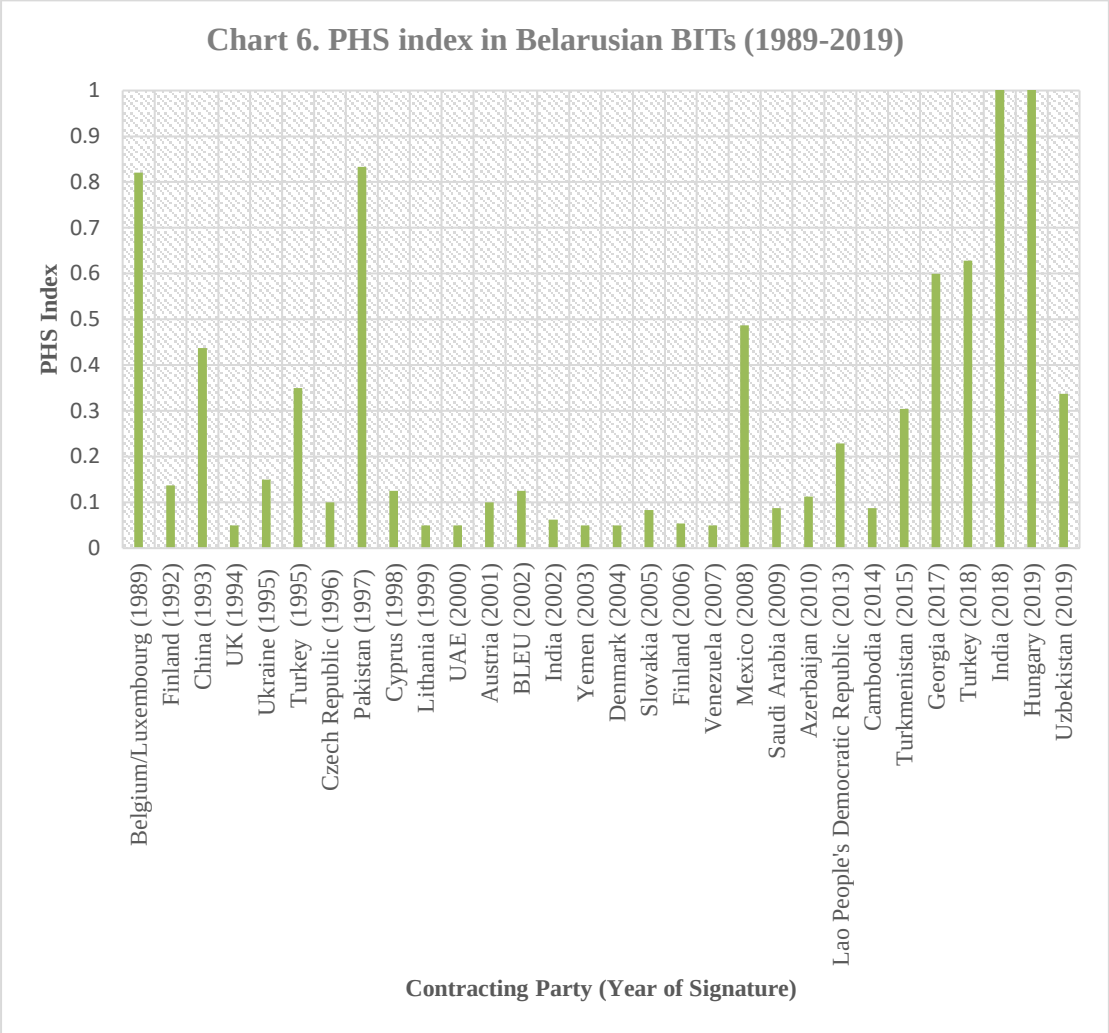
[825] Agreement between the Government of the United Arab Emirates and Government of the Republic of Belarus on the Promotion and the Reciprocal Protection of Investments (signed 27 March 2000, entered into force 16 February 2001) [hereinafter, 2000 UAE—Belarus BIT].

[826] Agreement between the Government of the Republic of Finland and the Government of the Republic of Belarus on the Promotion and Protection of Investments (signed 8 June 2006, entered into force 10 April 2008) [hereinafter, 2006 Finland—Belarus BIT].

[827]. ibid, preamble.

[828] 2019 Belarus—Hungary BIT (n 823) art 7.

The coding analysis of the existing BITs further supports this. For the coding analysis,[829] this thesis selected four renegotiated BITs, with Belgium/Luxembourg, Finland, Turkey and India,[830] a further 13 random BITs concluded between 1992 and 2010, and nine treaties signed since 2010. The results of the coding analysis on the scope of public health regulatory freedom (PHS index) are represented in Chart 6 below.



As illustrated by Chart 6, the treaties signed between the late 1980s and early 1990s and renegotiated before 2010 provide less scope for public health regulatory freedom than their predecessors: the 1989 Belarus–Belgium/Luxembourg BIT had a high PHS index of 0.82 compared to a PHS of 0.13 for the 2002 BLEU–Belarus BIT; while the 1992 and 2006 Finland–Belarus BITs had PHS index scores of 0.14 and 0.05

[829] For methodology, see s 3.2.4.
[830] See annx 14.

respectively. This suggests that the government was unlikely to have been concerned about its public health regulatory space until at least 2010.

In fact, the 1989 Belarus–Belgium/Luxembourg BIT is a traditional Soviet BIT with a restrictive limited ISDS clause stating that only a dispute 'related to the amount and a mode of payments due according to Article 5 of the Agreement [expropriation clause]' can be subject to investment arbitration.[831] A similar restrictive arbitration clause is contained in the 1993 Belarus–China BIT, which has a PHS of 0.44.[832] As discussed earlier, such a limitation restricts the arbitration clause only to expropriation claims or, alternatively, the amount of expropriation.[833] This, in turn, creates greater regulatory leeway for the government and hence, a higher PHS.

There are also further pre-2010 treaties with a comparatively broad scope of PHS. The high PHS index score (0.83) in the 1997 Pakistan–Belarus BIT reflects the case-by-case consent for investment arbitration claims stipulated by the treaty.[834] This type of consent in BITs effectively enables a State to take any possible measures required without fear of being sued (without its consent) under investment treaties. The 2008 Mexico–Belarus BIT has a high PHS index (0.49) due to its narrow definitions of investment and investors, limited scope for ISDS, the limitation period applicable to investor-State disputes and treaty interpretation provisions.[835]

At the other end of the spectrum, two treaties renegotiated in 2018 provide for a substantial improvement in public health regulatory leeway: the 2018 Belarus–Turkey BIT with a PHS score of 0.63 compared to a PHS of 0.35 in the 1995 Belarus–Turkey BIT; and the 2018 Belarus–India BIT with a PHS score of 1.44 compared to a PHS of 0.06 in the 2002 India–Belarus BIT. Both Turkey and India are known for their specific

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[831] Agreement between the Government of the Union of the Soviet Social Republics and the Governments of the Kingdom of Belgium and the Great Duchy of Luxembourg on Mutual Promotion and Mutual Protection of Investment (signed 9 February 1989, entered into force 2 August 1991) [hereinafter, 1989 Belarus—Belgium/Luxembourg BIT] art 10.

[832] Agreement between the Government of the Republic of Belarus and the Government of the People's Republic of China Concerning the Promotion and the Reciprocal Protection of Investments (signed 11 January 1993, entered into force 11 December 1994) art 9 [hereinafter, 1993 Belarus–China BIT] providing that '[a] dispute between one Contracting Party and an investor of the other Contracting Party regarding the amount of compensation in the event of expropriation may be referred to an arbitration court'.

[833] See (n 621) and accompanying text.

[834] Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Republic of Belarus for the Promotion and Reciprocal Protection of Investments (signed 22 January 1997) [hereinafter, 1997 Pakistan—Belarus BIT].

[835] Agreement between the Government of the United Mexican States and the Government of the Republic of Belarus on the Promotion and Reciprocal Protection of Investments (signed 4 September 2008, entered into force 27 August 2009) [hereinafter, 2008 Mexico—Belarus].

policy commitments to renegotiating investment treaties on terms that secure the right to regulate in the public health interest. In 2017, Turkey also renegotiated its BIT with Ukraine and secured a similar scope for public health regulatory space (compare the 2017 Ukraine–Turkey BIT with a PHS of 0.68 to the 2018 Belarus–Turkey BIT that has a PHS of 0.63).

The 2018 Belarus–India BIT is a truly exceptional treaty that has the highest level of PHS (1.436). It emerged following an unprecedented decision by the Indian Government to terminate its existing BITs with 57 countries in 2018.[836] The treaty contains 38 articles (compared to 12 articles in most Belarusian BITs) that provide highly detailed provisions for international investment guarantees and their restrictions.[837] In terms of public health regulatory freedom, the treaty stipulates general public health exceptions,[838] a carve-out for '[n]on-discriminatory regulatory measures … designed to protect … public health' from the scope of the expropriation clause,[839] and *amicus curiae* interventions in international investment arbitration involving public health issues.[840] Nonetheless, the treaty's high PHS index score is mostly underpinned by its restrictive scope and narrow and more precise provisions, which effectively provides more scope for state regulatory freedom.[841]

Even though the contents of the BITs with India and Turkey are more likely to be attributed to the respective counterparties, this may not be the case for recent BITs signed in 2015–2019 with Turkmenistan (0.63 PHS), Georgia (0.6 PHS), Hungary (1.03 PHS) and Uzbekistan (0.34 PHS), whose governments are not known for any specific renegotiation strategies.[842] As alluded to above, there is a clear pattern whereby all of the treaties signed since 2015 include public health considerations, which has led to a consistently high level of PHS in all post-2015 treaties. In this light, it can be inferred that the Government of Belarus (at least since 2015) has been concerned with its regulatory freedom to regulate in the public health interest and/or enact the required tobacco control regulations.

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[836] See eg Alison Ross, 'India's Termination of BITs to Begin' (*Global Arbitration Review*. 22 March 2017) <https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin> both accessed 29 March 2020.
[837] Treaty between the Government of the Republic of Belarus and the Republic of India Concerning Investments (signed 24 September 2018).
[838] ibid, art 32.
[839] ibid, art 5.
[840] ibid, art 25.
[841] ibid, art 11.
[842] See annx 14.

It is less plain whether this agenda has been prompted by the State's concerns over its ability to regulate tobacco and other public health matters. The inclusion of public health wording in the investment treaties could also be the manifestation of the State's desire to follow 'good practice guidelines' as set out by UNCTAD.[843] Alternatively, it could be a pre-emptive measure – the government may have reason to be more cautious with its investment protection promises having realised that investment may impinge on its public health regulatory freedom. Alternatively, it could also be a defensive measure by the State because of a clear or potential threat of regulatory chill. This leads to the next question: whether tobacco companies have ever invoked investment treaties and their arbitration provisions to challenge State tobacco regulatory decisions. The next section will deal with this question.

5.6.2. International Investment Arbitration and State Immunity

Belarus did not become a respondent in (known) investor-State disputes until 2018. During that year, however, the first three investment arbitration claims were filed to ICSID and PCA.[844] Whilst little in the way of information is available concerning the progress of the disputes, it is known that the states recruited external counsels to act on the matters.[845] None of the known claims was concerned with tobacco control legislation or foreign tobacco investors. Instead, the claims emanated from a commercial construction project,[846] a railcar manufacturing venture project[847] and the revocation of a bank's operating licence by the Central Bank of Belarus.[848] It is noteworthy that each dispute was ultimately associated with foreign investors from former Soviet republics: two of the disputes were brought by Russia and one was initiated by a Dutch company ultimately owned by a Ukrainian individual, Mykola Lagun.[849]

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[843] UNCTAD (Reform) (n 311).
[844] See annx 13; UNCTAD (ISDS) (n 34).
[845] Kotel (n 234).
[846] *OOO Manolium Processing v The Republic of Belarus,* PCA Case no 2018-06.
[847] *Grand Express Non-Public Joint Stock Company v Republic of Belarus,* ICSID Case no ARB(AF)/18/1.
[848] *Delta Belarus Holding BV v Republic of Belarus*, ICSID Case No ARB/18/9.
[849] Interfax-Ukraine, 'Belarusian Bank of Ukrainian Banker Declared Bankrupt' *KyivPost* (25 August 2015) <www.kyivpost.com/article/content/ukraine-politics/belarusian-bank-of-ukrainian-banker-declared-bankrupt-396487.html > accessed 10 August 2020.
[849] See eg Maria Akulova, 'Belarus: Conflict With Large Investors' (*Havary Praŭdu*, 2012) <https://zapraudu.info/by/belarus-konflikt-s-krupnymi-investorami/>; Belarus Today, '"Krinitsa"and

Therefore, there is no evidence to confirm that foreign tobacco investors have ever specifically threatened the government intending to limit attempts to regulate tobacco. That said, the media point to other conflicts with foreign investors that have not reached investment tribunals.[850] One such case involves BAT.[851] The dispute here arose in 2010 when the Committee of State Control questioned the arrangements in place between state enterprise Neman and BAT.[852] More specifically, State controllers were dissatisfied with the low level of processing fees paid by BAT to Neman for the production of BAT's brands.[853] In the Committee's view, the licensed production of BAT's products was a more economically justifiable option for Neman.[854] BAT's management vehemently resisted amending the terms of the cooperation arrangements,[855] while BAT contemplated exiting the market altogether.[856] It is not clear whether or not BAT considered bringing an investment claim against the State but ultimately, the dispute was settled and as a compromise, BAT agreed to increase the processing rates payable to Neman.[857] Despite this, however, such a threat is unlikely to have fallen within the regulatory chill framework[858] and would not be relevant to any tobacco control legislation as such. Therefore, for the purposes of this thesis, this case may be disregarded.

Before concluding this chapter, it is worth pondering whether specific response regulatory chill would generally be a potential outcome in Belarus in the first place. In fact, some writers have questioned the viability of the protection afforded by IIAs because Belarus may not agree to waive its state immunity in case of adverse investment awards. Considered from a different angle, such a position could also alleviate the risk of regulatory chill because Belarus is unlikely to be threatened by investment claims if it considers that the enforcement of investment treaties is subject to the State agreeing to waive its immunity (as opposed to the immunity being waived

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"Baltika" Settled the Dispute'(7 July 2005) <www.sb.by/articles/quot-krinitsa-quot-i-quot-baltika-quot-razoshlis-mirom.html> both accessed 19 April 2019.

[850] See Maria Akulova, 'Belarus: Conflict With Large Investors' (*Havary Praŭdu*, 2012) <https://zapraudu.info/by/belarus-konflikt-s-krupnymi-investorami/>; Belarus Today, '"Krinitsa"and "Baltika" Settled the Dispute'(7 July 2005) <www.sb.by/articles/quot-krinitsa-quot-i-quot-baltika-quot-razoshlis-mirom.html> both accessed 19 April 2019.

[851] The Diary (n 711).

[852] ibid.

[853] ibid.

[854] ibid.

[855] ibid.

[856] ibid.

[857] ibid.

[858] See s 2.1.4.

as a result of the treaty). Because the current arbitration practice against the State is limited and none of the known disputes to date has resulted in awards against the State, we may only speculate as to whether or not Belarus would agree to waive its immunity to enforce potential adverse awards.

In a closely related work, Kryvoi and Hober argue that 'CIS countries, such as … Belarus … still follow the doctrine of absolute immunity, allowing the execution of foreign judgements and arbitral awards against a state only with the consent of that state'.[859] Danilevich also shared this view: 'Belarus does not legally presume the inclusion of the waiver of the State immunity in any investment agreement'.[860] The review of Belarusian BITs confirms that some treaties specifically include a waiver of state immunity. By way of example, Article 8(5) of the 2015 Belarus–Turkmenistan BIT stipulates that '[a] disputing Party shall not invoke as a defence in arbitration proceedings or due course of enforcement of an arbitration award its sovereignty …'.[861] Some national law provisions also suggest that a waiver of state immunity in arbitration provisions is not implied from the State's perspective. Thus, Article 36 of the Law 'On Concessions' states that a concession agreement *may* contain a waiver of state immunity for the execution of an arbitral award.[862] It thus follows that if a waiver of state immunity is not opted-in to a concession contract, then the State could refuse to enforce an arbitration award on the grounds of state immunity.

Thus, the Belarusian Government could argue that state immunity was not waived by default in IIAs, which are silent on this matter, and refuse to pay arbitral awards on this basis. Even though states *must* recognise and enforce arbitration awards under either the ICSID Convention or the New York Convention (both of which have been ratified by Belarus[863]), national law relating to sovereign immunity from execution

[859] Kryvoi and Hober (n 427) 45.
[860] Danilevich (n 767) 130.
[861] Agreement between the Government of the Republic of Belarus and the Government of Turkmenistan on Mutual Encouragement and Protection of Investments (signed 10 December 2015, entered into force 18 October 2016).
[862] Law 63-3 (n 787).
[863] 'International Centre for Settlement of Investment Disputes: List of Member States - ICSID/3' (2020) <https://icsid.worldbank.org/resources/lists/list-of-member-states-ICSID-3>; 'New York Arbitration Convention: Contracting States' (2020) <www.newyorkconvention.org/countries > all accessed 15 August 2020.

continues to apply.[864] In practice, countries in which national law provides for absolute immunity may adopt various strategies for not executing investment awards.[865]

On the other hand, the State's refusal to enforce awards would not necessarily prevent enforcement in other jurisdictions against the State's assets.[866] In addition, this would inevitably lead to reputational damage for the State as a safe and friendly environment for investment. It would therefore be undesirable for Belarus to take this course of action. In light of the State's willingness to attract FDI by providing international guarantees to foreign investors, it is more likely than not that Belarus would comply with any adverse arbitral decisions.

To conclude, specific response regulatory chill in Belarus cannot be completely ruled out due to the issue of state immunity. Nonetheless, to date, there is no evidence to suggest that foreign tobacco investors have ever contemplated bringing ISDS claims to challenge FCTC-compliant initiatives. Thus, in the absence of any evidence to the contrary, the existence of specific response regulatory chill in Belarus cannot be confirmed. This reinforces the position that tobacco regulatory delay in Belarus has not been prompted by IIAs and their regulatory restrictions.

5.7. Discussion

What does the preceding analysis mean for the regulatory chill argument? A starting point would be the existence of a clear regulatory delay in the context of tobacco control legislation in Belarus. It has been reported that 14% of total deaths in Belarus, or every fifth death among the population over 35, occurs because of tobacco.[867] The true scale may actually be much higher because of inaccurate data on smoking prevalence. At the same time, more than 15 years since the FCTC's ratification, Belarus is yet to implement the required policies. Further still, the measures implemented have not been particularly effective at tackling the country's tobacco epidemic. Indeed, ineffective tax and pricing policies have likely thwarted the impact of Belarus' comparatively

[864] Kryvoi and Hober (n 427) 44.
[865] Anastasia Bessonova, 'The Doctrine of State Immunity as a Way to Protect State Property from Execution of the Decisions of International Investment Arbitrations' (*Branches of Law,* 19 May 2016) <http://отрасли-права.рф/article/17308> accessed 1 May 2019.
[866] ibid.
[867] Makarina-Kibak (n 666).

advanced tobacco control legislation. Could this be explained by the regulatory chill hypothesis?

The case study shows no evidence of regulatory chill in Belarus (which is qualified by this study's limitations). The analysis reveals that the delay in implementing the FCTC (and primarily, the required taxation policies) is mainly due to the State's economic self-interest in the tobacco industry. Similar to the Ukrainian Government, the Belarusian Government has been deeply concerned with the budget revenues generated by tobacco companies. In Belarus, this interest is further augmented by the fact that the State owns the largest tobacco company and effectively controls more than 70% of the market. Interestingly, the tension that may exist in the case of the state-owned tobacco sector was anticipated by the guidelines on the implementation of the FCTC (Principle No 1).[868] The guidelines stipulate that states should not set up state-owned tobacco companies, while if such companies already exist, governments should ensure that this does not preclude them from implementing the FCTC.[869] Nonetheless, this has proved difficult for even developed countries such as Japan to achieve, before we begin to consider developing economies like Belarus.

The loss of jobs and other associated concerns could also be pertinent in this case – as mentioned, Neman and JTI alone employ around 1,300 people.[870] However, the government has never specifically referred to this in their statements. It is further apparent that the government supports the industry's growth and that this may also involve personal guarantees from the president not to increase tobacco taxation.[871] Again, this line of reasoning reflects the State's dependency on both the tobacco industry and FDI and suggests that the regulatory delay in Belarus may be better explained from the standpoint of the political economy of FDI and the State's direct interest in the industry, as opposed to by the regulatory chill theory.

The State's constitutional order *per se* alleviates the regulatory chill concerns. The concentration of State power in the hands of President Lukashenko connotes that the president's role in balancing investment protection and public health legislation is both essential and more prominent compared to the situation in other post-Soviet states. The president has a determinative role in the course taken by the State on the

[868] Guidelines for Article 5.3 FCTC (n 478).
[869] ibid.
[870] See s 5.2.
[871] See s 5.3.

implementation of the FCTC and the promotion of FDI. The legislative acts that he prescribed have led to arguably the most important changes to tobacco control regulations and also have a pertinent role for the national legal system generally.[872] In contrast to Ukraine, this thesis finds no evidence of any disruptive involvement of the industry lobby in the FCTC implementation. Despite the priority of IIAs over national law, the national courts and agencies do not apply the treaties to override conflicting national law provisions. This further lessens any potential regulatory chill concerns.

The fact that neither WTO nor ECtHR could review the State's tobacco legislation excludes any potential risks as a result and any suggestions that the existing delay could be prompted by the said institutions. Again, this is essential for the question of causation.[873] Thus, for example, Kelsey, Crosbie and Thomson, in their regulatory chill studies on tobacco regulatory development in New Zealand, showed that WTO claims had been one of the 'mutually reinforcing factors' responsible for the delay in the introduction of tobacco policies.[874] At the same time, it was not until the WTO claims had been resolved that New Zealand adopted the legislation in question.

This thesis has also reviewed national law provisions to exclude the possibility that the national law limits the power of the State to implement the FCTC and establish the possibility of regulatory chill as a result of the direct effect of IIAs on the legal relationships in the State (as opposed to their enforcement via ISDS). It has also found no evidence of regulatory chill. It has further found that investment guarantees under national law may impose additional restrictions on regulatory actions, yet it has found no evidence that the national law restrictions have affected tobacco control regulatory development.

Further, the thesis has found no indication that the Belarusian Government has ever relaxed tobacco regulations in order to attract FDI. However, it is yet to be ascertained whether or not the legislation to exclude public health from the list of regulatory exceptions under Article 6 of the Law 'On Investments' can be considered as such.[875] On the other hand, we can argue that the status quo on tobacco taxation policy and the ability to produce the cheapest cigarettes in Europe has already enabled Belarus to secure a competitive advantage compared to other post-Soviet states seeking to attract

[872] See annx 10.
[873] See s 2.1.4.
[874] Kelsey (n 167); Crosbie and Thomson (n 657).
[875] See (n 796) and accompanying text.

FDI. At the same time, there is no evidence to suggest that the State has improved its regulatory scope in IIAs by modifying national legislation, including such issues as the legality of investment.[876]

The emerging arbitration provisions under the national law confirm that the government is unlikely to be concerned with investor-State arbitration or its regulatory space to introduce tobacco legislation. This is also confirmed by the review of the national IIA framework, which shows that Belarus has not systematically terminated or reviewed its existing BITs, all of which contain ISDS provisions. In fact, the Belarusian Government is still concluding BITs. Again, this is *prima facie* evidence against the regulatory chill theory. The fact that the State may not assume a waiver of state immunity under IIAs may further alleviate the risks of regulatory chill but is unlikely to rule it out completely.

Although there is no data on the government's awareness of the intricacies of IIL and arbitration, some inferences can be made based on the available facts. First, since Belarus is new to investment arbitration claims, the State may have no acute expertise in IIL and arbitration. This is also confirmed by the fact that the government recruited external counsels to deal with the first four ISDS brought against the State. At the same time, it also restricts any potential risks of 'specific response' regulatory chill as it shows that the government is likely to seek professional advice to assess the viability of investment claims before making any decisions. Second, the Constitutional Court's judgement on the conformity of tobacco legislation with the Constitution *de facto* by applying the IIL test to the matter may suggest that the government is aware of the potential implications of its actions under IIAs. However, even if it is correct, regulatory chill did not occur in that specific case and there is no evidence to indicate that it did in any other cases.

That being said, it is implausible that IIAs affected tobacco regulatory development and led to regulatory chill to Belarus. In other words, the same level of FCTC implementation is likely to have been reached in Belarus even if the State had no IIAs in place. As in the case of Ukraine, the findings indicate that regulatory chill is an academic theory and a merely hypothetical possibility, unconfirmed by any evidence, in situations where foreign investors enjoy protections under IIAs and arbitration mechanisms. Again, the findings are in line with the leading critique of the regulatory

[876] Also observed by Rubinina (n 350).

chill hypothesis, which is that it is based on 'hypothetical situations and weak counterfactual reasoning'[877] and 'supported by little more than endless repetition'.[878]

5.8. Conclusion

Subject to the methodological limitations, the case study finds no evidence of regulatory chill in Belarus (some evidence however may not be available in the public domain). In particular, there is no evidence to suggest that IIAs have affected the implementation of the FCTC measures/tobacco control regulatory development in Belarus. The results demonstrate that the government's position concerning non-monetary tobacco control regulation has been very supportive and resulted in more advanced tobacco policies compared to those in other post-Soviet States. At the same time, the approach to tax and pricing measures has been unjustifiably lenient: Belarus has produced the cheapest cigarettes in Europe while a historic tax increase was insufficient even to offset the rate of inflation. In addition, the president has explicitly opposed the idea of increasing tobacco prices (or any other radical changes to tobacco legislation) because of the importance of the sector for the State's budget revenues and its commitments before investors. Consequently, the overriding reason for tobacco control regulatory delay in Belarus has been the State's economic interest and the capital flight concern, which has also been advanced as a reason by the proponents of capital flight theory. It therefore follows that Belarus' regulatory delay can be better explained from the standpoint of the political economy of FDI and the State's direct interest in the industry rather than the regulatory chill theory.

The implication of the State's ownership of the tobacco sector is twofold. On the one hand, Belarus has retained control over the sector, which has prevented hostile interventions by the industry in the regulatory process (something that was clearly observed in Ukraine). This may potentially explain the country's relatively advanced (in terms of range and scope) tobacco control policies. On a similar note, the development of tobacco policy has also benefited from the concentration of power within one institutional mandate, that of the president, who has firmly advanced the public health political agenda for many years. On the other hand, the need for FDI in

[877] Fry (n 653).
[878] Brower and Blanchard (n 86).

order to update tobacco manufacturing facilities, along with the tobacco sector's sizeable contribution to State revenues, has made Belarus increasingly reliant on the industry. Consequently, the economic well-being and growth of the tobacco industry have become strategically important for the State. The government has therefore been reluctant to adopt a more effective taxation policy that could have an enormous economic impact on both the industry and public well-being.

More abstractly, the level of tobacco control regulatory policy in Belarus reflects the balance that the government must strike between the need to protect both public health and the State economic interests – underpinned by the political economy of FDI and its economic self-interest – and has no relevance to IIAs and their arbitration mechanisms. Thus, the Belarusian case study also does not confirm the regulatory chill hypothesis.

6. Regulatory Chill Case Study on Transcaucasia

> *[f]or nations that have high smoking rates, growing social democracies and struggling economies, tobacco control must compete with many other priorities that high-income nations have already addressed.*[879]

Transcaucasia (also known as the South Caucasus) is an area in the vicinity of the southern Caucasus Mountains on the border between Eastern Europe and Western Asia, occupied by modern Armenia, Azerbaijan and Georgia. This chapter focuses on this area as a region as opposed to one specific jurisdiction, for several reasons. First, Armenia, Azerbaijan and Georgia are relatively small countries that can be distinguished from the other post-Soviet republics by their geographical position and common historical, cultural and religious roots. Indeed, the South Caucasus has twice been unified into a single political entity: firstly, after the fall of the Russian Empire in 1918, it was united as the Transcaucasian Democratic Federative Republic that existed between 9 April 1918 and 26 May 1918; and again, as the Transcaucasian Socialist Federative Soviet Republic (SFSR), under Soviet rule, from 12 March 1922 to 5 December 1936.

[879] Movsisyan and Connolly (n 695).

Second, while these states are now independent, they have a shared regional economy.[880] Unsurprisingly, JTI and other global corporations regard them as a single market.[881] Finally, the findings of this thesis on regulatory chill in each Transcaucasian state are generally similar to those for the previous case studies (Ukraine and Belarus); hence, instead of discussing each in detail, the chapter will provide more of a 'snapshot' analysis to showcase the nearly analogous patterns in the case studies and demonstrate that the findings could also be extrapolated to other states in a transitional period.

Like Ukraine and Belarus, the South Caucasian states are in the process of transitioning from the Soviet centrally planned system to a market economy. To support this process, Armenia, Azerbaijan and Georgia have thought to attract FDI and engage with international investment treaties allowing for investor-State arbitration. The Transcaucasian states accept foreign investment in the tobacco sector while also having some of the world's highest rates of smoking prevalence and tobacco-related illnesses in proportion to their populations.[882] Thus, in Azerbaijan, the largest South Caucasian state, with a population of 9.7 million, the total number of tobacco-related deaths stands at circa 44.5 thousand per year; in Armenia, which has a population of around 3 million, circa 29% of male deaths and 8% of female deaths annually are tobacco-related[883] (circa 10% of all deaths per year);[884] while in Georgia, with a population of 3.9 million, tobacco-related deaths stand at 11.4 thousand per year.[885]

All three of the Transcaucasian states have joined the FCTC; in fact, Armenia was the first former Soviet Union republic to accede to the FCTC in 2004.[886] It was followed by Azerbaijan, which accepted the treaty on 1 November 2005, and Georgia, which ratified it on 14 February 2006.[887] However, more than 15 years later, the states have

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[880] See Thomas de Waal, *The Caucasus: An Introduction* (OUP 2018).
[881] In 2011, JTI Caucasus was established in Tbilisi to serve as a regional hub for Armenia, Azerbaijan and Georgia. 'JTI in Georgia' < www.jti.com/europe/georgia> accessed 25 September 2020.
[882] See annx 1.
[883] The Tobacco Atlas, 'Armenia' <https://tobaccoatlas.org/country/armenia/> accessed 1 October 2020.
[884] 'The Union: Armenian Parliament Approves New Tobacco Control Law' (25 February 2020) <https://theunion.org/news/armenian-parliament-approves-new-tobacco-control-law> accessed 1 October 2020.
[885] FCTC Reports (n 466); Public Defender (Ombudsman) of Georgia, 'Special Report on Situation in the Fields of Tobacco Control' (2017) < https://sites.google.com/view/geoombudsman2/reports/special-reports> accessed 4 October 2020.; see also UNDP, 'The Case for Investing in WHO FCTC Implementation in Georgia' (Report by the National Center for Disease Control & Public Health of Georgia United Nations Development Programme, RTI International, WHO FCTC Secretariat World Health Organization 2018).
[886] UNTC (n 460).
[887] ibid.

yet to fully implement the treaty, which brings us to the central question for this chapter: to what extent (if any) do IIAs affect tobacco control regulations and lead to regulatory chill in Armenia, Azerbaijan and Georgia? The remainder of the chapter will attempt to answer this question and will proceed as follows. Section 6.1 will consider the states' smoking prevalence and tobacco control legislation. It will argue that while the South Caucasian states are yet to implement the FCTC policies, their smoke-free and taxation measures are arguably the weakest areas and require further strict regulation. At the same time, smoking prevalence in the states is increasing, which is *prima facie* testimony of the limited effectiveness of tobacco regulatory policies and apparent regulatory delay. Section 6.2 will then seek to find an explanation for the regulatory delay by considering the reasons articulated by public officials when implementing tobacco policies. It will argue that the respective governments have been supportive of the tobacco sector and again, similar to Ukraine and Belarus, economic considerations are the most plausible reason for the non-adoption of more progressive tobacco legislation. Section 6.3 will introduce the legal layer of the analysis by setting out the states' constitutional foundations and the status of IIL in South Caucasia. It will argue that the constitutional provisions generally mean that IIAs can have a direct impact; however, there is no evidence of the direct application of IIAs by the states' bodies and judiciaries. Section 6.4 will scrutinise the national law provisions for investment protection as potential limitations for the states' regulatory space. It will argue that although the national laws in general mirror broad investment protections, they are unlikely to restrict the implementation of the FCTC. And finally, Section 6.5 will examine whether the existent international investment regime impedes tobacco control regulations and leads to regulatory chill. It will argue that neither analysis of the language used in investment treaties nor investigations of known disputes with foreign investors provide any evidence of regulatory chill. Section 6.6 will discuss the significance of the findings in light of the regulatory chill hypothesis. Section 6.7 will conclude that IIAs are unlikely to be the reason for the inadequate level of tobacco control legislation and are also unlikely to lead to regulatory chill in Armenia, Azerbaijan and Georgia. Therefore, the regulatory chill hypothesis is unfounded.

6.1. Smoking Prevalence and National Tobacco Legislation

As the background to our analysis, this chapter will illustrate the existence of regulatory delay in the context of the Transcaucasian region and tobacco control. There are three major factors to discuss. Transcaucasia has some of the highest rates of smoking prevalence in the world and even the official data suggests that smoking rates are also increasing. The real rates of smoking and tobacco-related mortality are likely to be even higher than those stated in officials reports. And the level of FCTC implementation in the region is slow and arguably inadequate. The remainder of this chapter will discuss each point in turn.

According to the states' official data, Georgia has the highest rates of current and daily smokers (31.1% and 29.4% respectively), having been on an upward trend since 2012.[888] Armenia reported decreasing rates in 2014; however, since then, the rate of daily smokers has risen by 3.9%.[889] Official smoking rates in Azerbaijan have also fluctuated: the number of current smokers was reported to have increased by 1.1% after 2012 but then fallen by 2% by 2018 (see Table 4).

Table 4. Transcaucasia States' Reports on the FCTC implementation (2010 – 2018)

Reporting Instrument	**Armenia**		**Azerbaijan**		**Georgia**	
	Current smokers, %	Daily smokers, %	Current smokers, %	Daily smokers, %	Current smokers, %	Daily smokers,%
2010 Report	28.3	26.00	17.1	N/A		
2012 Report	28.3	26.00	17.1	N/A	30.3	27.7
2014 Report	25.4	23.0			30.3	27.7
2016 Report			18.2	N/A	30.3	27.7
2018 Report	N/A	N/A	16.2	23.2	31.1	28
2020 Factsheet	N/A	26.9	N/A	23.2	N/A	29.4

The review of the data in Table 4 shows that the reported rates are unlikely to be fully reliable. The data is often incomplete or likely to be outdated. Georgia, for example, reported the same rates of smoking prevalence in three consecutive reports: for 2012, 2014 and 2016. The official rates may be underestimated and not reveal the

[888] See annx 1, FCTC Reports (n 466).
[889] ibid.

true state of affairs.[890] As a clear example, in 2018, Azerbaijan reported a current smokers rate of 16.2% while the media estimated that around 47% of the population smoked tobacco over the same period.[891] There are reasonable grounds to believe that the tobacco epidemic in the region is more severe than the data reported by the governments would suggest.

The progress of the FCTC implementation has been slow; to date, Armenia, Azerbaijan and Georgia are yet to adopt crucial tobacco policies aimed at tackling the issue. The level of FCTC implementation varies and therefore needs to be considered separately in respect of each of the states.

6.1.1. Armenia

The Armenian experience of the tobacco control process can be described across three separate periods. First, there was an initial period of progress with the implementation that lasted for the first five years following the adoption of the treaty. Movsisyan and Connoly acknowledge that the measures adopted by Armenia in the first five years after the FCTC adoption 'considerably improved [the level of tobacco control] … mostly due to larger health warnings, an advertising ban and increased public spending on tobacco control'.[892] Yet other measures, such as smoke-free policies, were not effective due to the lack of enforcement mechanisms.[893]

This was followed by a period of stagnation from 2009 to 2020 when none of the remaining policies was implemented. By way of example, smoking in many public places remains restricted but not prohibited despite the latter being obligatory under Article 8 of the FCTC.[894] Instead of banning all tobacco advertising as required by Article 13 of the FCTC, Armenian law only prohibits tobacco advertising on the front

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[890] Also observed by Patricio Marquez and others, 'Azerbaijan: Overview of Tobacco Use, Tobacco Control Legislation, and Taxation (English)' (WBG Global Tobacco Control Programme. Washington, DC, World Bank Group 2019).
[891] Amina Nazarli, 'Expert Believes Azerbaijan's Tobacco Can Enter New Markets' (*Azernews*, 15 October 2020) <www.azernews.az/business/120660.html> accessed 17 October 2020.
[892] Movsisyan and Connolly (n 695). See also Narine K Movsisyan and Varduhi Petrosyan, 'Analytical Review of the Tobacco Control Policy in Armenia 2005–2007' (American University of Armenia, Yerevan 2008).
[893] Karine Manukyan, 'Armenia's National Tobacco Control Programme' (*Center for Communications, Health and The Environment*, 23 September 2013) <www.ceche.org/communications/armenia/armenia.html > accessed 16 October 2020.
[894] See annx 2 and 15.

and last pages of newspapers and magazines.[895] The government attempted to regulate tobacco in 2017 but the regulatory measures never actually entered into force.[896] During this time, the level of tobacco regulatory policies actually in place was the weakest in the Transcaucasian region. The Union argued that: 'Armenia has been an unfortunate anomaly in the South Caucasus region, failing to garner significant political support for and enforcement of tobacco control, even when neighbouring countries were effective in both'.[897] Due to its high smoking rates and weak smoke-free policies, Armenia has been referred to as an 'ashtray'.[898]

Finally, there was a break-through period (2020–present), prompted by Armenia joining Belarus and the other member states in the EAEU. As mentioned earlier, the EAEU provides for convergence on tobacco regulatory policies, including taxation measures. As a result, in February 2020, Armenia adopted the Law 'On the Reduction and Prevention of Harm to Health By the Use of Tobacco Products and their Substitutes' providing for a staged introduction of progressive tobacco policies.[899] For instance, from 15 March 2022, smoking will be prohibited in public catering facilities, including open-air canteens, restaurants, cafés, bars and buffets.[900] The measures will culminate in the introduction of a single packaging requirement for cigarette packs on 1 January 2024.[901] Once home to the lowest tobacco taxes in Europe and Central Asia, by 2024, Armenia is also set to raise tobacco excise tax to the level required by the EAEU.[902]

The new legislation has been revolutionary for Armenia.[903] Nevertheless, experts urge us to approach these regulatory ambitions with caution: 'history has shown us that there is no time to be complacent … Armenia has taken an important step, but tobacco control advocates must remain vigilant, monitoring corporate interference that could derail progress'.[904] Although the tobacco regulatory environment is changing, the most

[895] ibid.
[896] The Union (n 884).
[897] ibid.
[898] ibid.
[899] Law of the Republic of Armenia 'On the Reduction and Prevention of Harm to Health By the Use of Tobacco Products and their Substitutes' of 13 February 2020 AL-92-N. See annx 2 and 15.
[900] ibid.
[901] ibid.
[902] See eg Iryna Postolovska and others, 'Estimating the Distributional Impact of Increasing Taxes on Tobacco Products in Armenia: Results from an Extended Cost-Effectiveness Analysis' (Tobacco Taxation, World Bank Group, Washington, DC 2017).
[903] The Union (n 884).
[904] ibid.

radical changes are yet to be implemented and hence, it is too early to acknowledge the improvement of the regulatory framework. Existent regulatory measures are both inadequate and ineffective in light of the increasing tobacco smoking rates and disproportionately high tobacco burden. This hints at evidence of regulatory delay that could also be explained by regulatory chill.

6.1.2. Azerbaijan

Azerbaijan has made the least progress among the South Caucasian states with respect to implementing the FCTC. Six years after Azerbaijan became a party to the FCTC, it adopted the Law 'On Tobacco and Tobacco Products'.[905] The law did not come close to reflecting the need to tackle the growing rates of smoking prevalence in the country and its 44.5 thousand tobacco-related deaths every year.[906] It aimed at strengthening the industry's positions as its 'main declared aims were … cultivation of valuable and high-quality tobacco products to increase exports of tobacco and tobacco products, [and] protection of the domestic tobacco market'. [907]

The tobacco regulatory framework in Azerbaijan remains the weakest among the post-Soviet states. To illustrate this, Azerbaijan is yet to introduce rotating health warnings covering at least 50% of tobacco packs as well as warnings in the form of pictures and pictograms in order to align its policy with FCTC Article 11.[908] It also acts contrary to the stipulations on the sale of tobacco products via the internet and the display of tobacco products at the point of sale.[909] As a small victory, in 2017, the State adopted the Law 'On Restrictions on Use of Tobacco Products', which introduced a broad list of smoke-free public places and a ban on tobacco advertising, promotion and sponsorship.[910] To align the existent regime with FCTC Article 8, the law should not merely restrict but actually prohibit smoking in all areas of all indoor workplaces and indoor public places, as well as public transport facilities.[911] In summary, it is evident

[905] Law of the Republic of Azerbaijan 'On Tobacco and Tobacco Products' of 8 June 2001 No 138-IIG. See annx 12.
[906] See n (885) and accompanying text.
[907] World Bank Group, 'Azerbaijan: Overview of Tobacco Use, Tobacco Control Legislation and Taxation' (World Bank Group: Global Tobacco Control Programme: Country Brief 2019) 18.
[908] ibid.
[909] ibid.
[910] Law of the Republic of Azerbaijan 'On Restriction of Tobacco Products Use' of 30 December 2017 No 887-VQ.
[911] See annx 2 and 15.

that the existing tobacco regulatory regime is not proportionate to the needs of public health in Azerbaijan, thus highlighting the presence of regulatory delay.

6.1.3. Georgia

Georgia has also made sluggish progress towards implementing the FCTC.[912] In 2013, the Government of Georgia adopted its first national tobacco control strategy and an action plan for the period 2013–2018; however, it has been a long time since any substantial measures were adopted, 'except [an] insufficient tax increase in September 2013 and in January 2015 (by 0.07 cents)'.[913] The strategy has been largely left unimplemented. Shortly after introducing plain packaging measures, the government voted to amend the Law 'On Tobacco Control' and delay the implementation of the measures.[914] Thus, no substantial tobacco regulations were implemented until 2018, with the exception of the aforementioned 0.07-cent increase in excise tax.[915]

In 2018, Georgia introduced a truly ground-breaking law banning smoking in indoor public spaces and implementing a requirement for plain packaging.[916] Yet many of the FCTC requirements have still only been partially implemented or remain unimplemented. For example, smoking continues to be allowed on open verandas or terraces in bars and restaurants, in casinos, penitentiary institutions and pre-trial detention isolators, along with some other indoor public places, which does not align with the requirements of FCTC Article 8.[917] The law also does not completely prohibit smoking in public transport facilities.[918] Likewise, against the requirements of FCTC Article 13, the law does not prohibit the display of tobacco products at points of sale and tobacco industry sponsorship of events, activities, individuals, organisations or governments. In 2019, the government rolled back smoking bans in the open grounds of universities, medical and pharmaceutical institutions as well as reducing the fines for

[912] ibid.
[913] George Bakhturidze, 'Tobacco Control and Cessation Challenges in Georgia' (2016) 2(31) Tob Prev Cessation.
[914] Law of Georgia of 26 July 2017 No 1278-RS 'On Amendments to Law No 4059-RS "On Tobacco Control"', see annx 15.
[915] Bakhturidze (n 913).
[916]. Nina Akhmeteli, 'You Can Still Smoke Almost Everywhere in Georgia. But Soon It Will Be Banned' (*BBC News*, 27 May 2017) < www.bbc.com/russian/features-40069829 > accessed 2 October 2020.
[917] ibid.
[918] See annx 2 and 15.

drivers of public transport.[919] The reasons for the regulatory change remain unclear and therefore no conclusion can be drawn on whether the amendment constitutes a race to the bottom.

Again, in this context, where smoking rates are continuously increasing, it is clear that the level of tobacco control regulations is not adequate and proportionate to address the country's tobacco epidemic.[920]

6.1.4. Conclusion

To conclude this section, each of the states in Transcaucasia has failed to fully implement the FCTC as a means of addressing a tobacco public health crisis. Azerbaijan has the most lenient tobacco regulatory strategy in the region. Georgia has made some progress although this should be treated with caution since the State historically has rolled backed its tobacco policies on at least two occasions. Armenia, due to its membership of the EAEU, has scheduled substantial tobacco regulatory measures, although these are yet to enter into force. They do not reflect the current regulatory regime and, again, should be treated with caution because history shows they could be derailed at a later point and may not always be observed due to a lack of enforcement mechanisms.[921] Even the tobacco control measures that have been implemented are unlikely to be effective due to the region's growing smoking prevalence. It is apparent therefore that the level of tobacco control regulations is not adequate and proportionate to address the tobacco epidemic in the states, which in turn points to regulatory delay. The question is whether this can be attributed to regulatory chill. The next section will turn to discussing the reasons for the regulatory delay in Transcaucasia.

6.2. The Tobacco Industry and Regulatory Delay

Both of the previous case studies on Belarus and Ukraine demonstrated that capital flight considerations were an influential factor with respect to the governments'

[919] Law of Georgia 'On Amendments to Law "On Tobacco Control"' of 17 May 2017 No 859-II.
[920] See n (885) and accompanying text.
[921] See also Hassan Mir and others, 'Analysing Compliance of Cigarette Packaging with the FCTC and National Legislation in Eight Former Soviet Countries' (2013) 22(4) Tob Control 231.

regulatory choices. The South Caucasia case study does not differ substantially from these preceding cases. In all of the South Caucasian states, the tobacco industry has historically been supported by the respective governments. The states have themselves grown and produced tobacco for hundreds of years.[922] Each has accepted, and continues to accept, foreign investment in the industry to boost its development. And in line with findings for Belarus and Ukraine, the Transcaucasian states are also loath to adopt new tobacco legislation because of pressing economic demands[923] and the belief that it might lead to capital flight.[924] This chapter will proceed by discussing the reasons for the regulatory delay in the context of each country.

6.2.1. Armenia

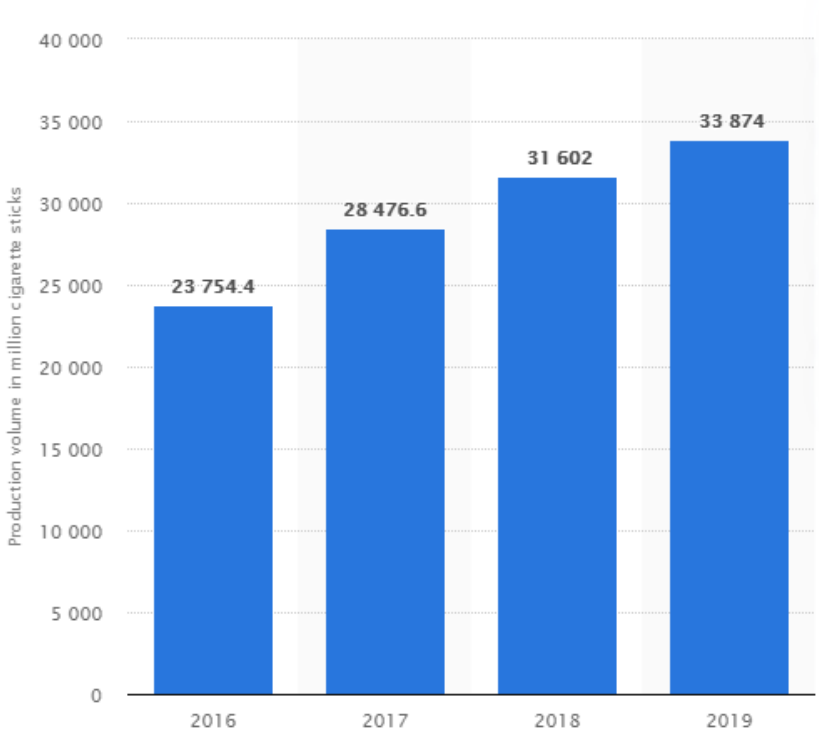
During Soviet times, Armenian cigarettes were produced and distributed all over the Soviet Union.[925] After the collapse of the Soviet Union, the industry lost its market and many local tobacco factories also collapsed after they were unable to adjust to market economy conditions.[926] This and the ensuing market liberalisation created momentum for foreign tobacco corporations to take their positions in the market.[927] The only tobacco producer in Armenia – state-owned ArmTabak – was privatised in 1995.[928] Based on its former facilities, Grand Tobacco, a company with Canadian foreign investment, was set up in 1997.[929] Between 1998 and 2001 alone, it received USD 30.14 million in FDI.[930] After the privatisation, the number of tobacco companies increased dramatically.[931] This coincided with a surge in the number of tobacco growers as farmers began to enjoy the advantage of prepayment for their product.[932]

Tobacco production has also become substantially more efficient, with new technologies and greater labour productivity.[933] New high-quality cigarette brands with

[922] International Center for Human Development, 'Privatization of State-Owned Tobacco Enterprises in Armenia' (2001) 8 <http://pdc.ceu.hu/archive/00002526/> accessed 11 October 2020.
[923] Drope and others (n 536).
[924] See s 2.1.
[925] International Center for Human Development (n 922) 8.
[926] ibid.
[927] ibid.
[928] ibid.
[929] ibid.
[930] ibid, 24.
[931] 'Business1: Tobacco Companies in Armenia' <www.business1.com/tobacco-companies/armenia> accessed 20 October 2020.
[932] International Center for Human Development (n 922) 30.
[933] ibid.

attractive packaging have made smoking desirable and available for the majority of the population.[934] In turn, this has led to an upsurge in both tobacco sales and consumption. Cigarette consumption has also grown as a result of aggressive marketing strategies in response to the tight competition in the market.[935] Cigarette production rose by more than 40% in volume terms between 2016 and 2019 (see Table 5).

Table 5. Annual cigarette production in Armenia (million cigarette sticks)[936]



The increased production and sale of tobacco have made the State sensitive to any fluctuations in the market: any decline in tobacco production could have significant budgetary ramifications. In 2000 alone, the budget revenues that the State earned from tobacco stood at 9% of overall revenues and this is likely to have increased further in recent years.[937] Therefore, the ineffectiveness of Armenia's tobacco regulatory policies

[934] ibid.
[935] ibid, 28–30.
[936] Statista, 'Annual Cigarette Production Volume in Armenia from 2016 to 2019' (2020) <www.statista.com/statistics/1092009/armenia-cigarette-production/> accessed 1 October 2020.
[937] International Center for Human Development (n 922) 23.

could partly be explained by the State's economic self-interest. In a similar vein, a 2001 report from the International Centre for Human Development highlights the 'high rate of market liberalisation' and that 'the government does not interfere in tobacco affairs and its role is limited to regulating the taxation rules for tobacco products'.[938]

The report also notes that a further increase in tobacco taxation had been initiated with the 'main purpose … to support *budget revenues*',[939] meaning the State did not generally consider it to be a tobacco regulatory policy *per se*. At the same time, there is no clear evidence that the government has ever considered the long-term economic implications of tobacco on the national economy or weighted these against the alleged economic benefits for the State budget.

Media outlets report that certain government officials benefited from the weak tobacco legislation.[940] For years Armenia has been involved in illicit trade with Russia, with Armenian government officials suspected of being involved.[941] This only began to change after Armenia joined the EAEU, the supra-national legislation of which aimed to address the issue by introducing a common excise tax policy on tobacco and alcohol.[942]

The growing presence of private companies and foreign investors in the sector has resulted in a strong presence for the tobacco lobby in the legislative government, with the potential to disrupt tobacco regulatory initiatives. Movsisyan and Connolly argue that this 'could interfere with the political commitment to comply with the FCTC obligations and lead to passage of weak laws with no enforcement mechanisms'.[943] This aligns with the findings of this study with respect to Ukraine, where the industry has successfully delayed tobacco legislation for years due to the support of 'agents' within the government. Ineffective governance may also explain the ineffective tobacco regulatory development in Armenia. As Movsisyan and Connolly note: '[t]ransition to social democracy and effective public governance has been slow in many postsoviet countries and this could partly explain the ineffective

[938] ibid, 24.
[939] ibid, 25 [emphasis added].
[940] Sputnik, '"Tobacco smoke" from Armenia: Who Owns 40 Tons of Cigarettes Detained in Krasnodar' (Sputnik, 30 April 2020) <https://ru.armeniasputnik.am/economy/20200430/22900010/Tabachnyy-dym-iz-Armenii-komu-prinadlezhat-40-tonn-sigaret-zaderzhannykh-v-Krasnodare.html> accessed 1 October 2020.
[941] ibid.
[942] See s 6.1.1.
[943] Movsisyan and Connolly (n 695).

implementation of the tobacco control measures in Armenia'.[944] Looking at the lobbying from this angle, in circumstances where the industry deeply penetrates government institutions in Armenia and Ukraine to advance its interest, the governments could not be considered truly democratic, effective and representative of the public interest.

The Armenian case largely echoes the Ukrainian case, where economic self-interest, capital flight concerns and powerful tobacco lobbying have been the main reasons for the regulatory delay.

6.2.2. Azerbaijan

Mirroring the situation in Armenia, Azerbaijan has also been very protective of its tobacco sector and tobacco-growing capabilities. Tobacco companies have used investment in the area, work with farmers and the creation of additional workplaces as a means of entering the market and gaining the government's support.[945] The government has traditionally supported farmers and even offered subsidised loans and leasing services to stimulate the production of raw tobacco in the country.[946] In 2018 alone, the government allocated subsidies worth AZN 22.505 million (circa USD 13.24 million) to the producers of tobacco, cotton and sugar beet.[947] A year later, it allocated around USD 800,000 for tobacco producers when tobacco crops were damaged by hail, leading to a loss of production.[948]

The government has also supported the industry's growth in other ways. Because of political unrest, the tobacco industry in Azerbaijan began its transition later than in other South Caucasian republics, although it was still undertaken with the State's self-interest in mind. For example, the government's announcement that 30% of national

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[944] ibid.
[945] The Business Year, 'Prime Harvest' (2015) <www.thebusinessyear.com/azerbaijan-2015/free-float/interview> accessed 16 October 2020.
[946] From 2016, the Government has also subsidised local tobacco growers, see AzerNews, 'Tobacco Production in Azerbaijan May Increase by Late 2018' (30 July 2018) <www.azernews.az/business/135517.html> accessed 16 October 2020; Marquez and others (n 890).
[947] Anvar Mammadov, 'Azerbaijan Allocates Subsidies Worth Over 22M Manats to Farmers' (*MENAFN*, 27 February 2018) <https://menafn.com/qn_news_story_s.aspx?storyid=1096525034&title=Azerbaijan-allocates-subsidies-worth-over-22M-manats-to-farmers&src=RSS > accessed 15 October 2020.
[948] Mena Report, 'Azerbaijan: Minister Taneva: Over BGN 1.3 mln Have Been Paid to "De Minimis" Tobacco Producers' (21 May 2019).

tobacco company Zaqatala-Tutun was to be privatised specifically referred to an investment programme that was due to contain 'proposals for using new technology, improving the quality of production, expanding the production range and restoring jobs'.[949] In other words, the government thought privatisation as a means of boosting the industry's growth and increasing job security.

On the other hand, foreign tobacco investors have also regarded Azerbaijan as an attractive investment opportunity.[950] In 1999, Azerbaijan received its first FDI in the tobacco sector.[951] The present market is diverse and includes both national and foreign investors (including Intertobacco,[952] European Tobacco Baku[953] and JTI).[954] More recently, in 2018, President Ilham Aliyev attended the opening of a tobacco factory owned by Tabaterra CJSC at the Sumgayit Chemical Industrial Park.[955] The factory has a projected production capacity of 11 billion cigarettes annually and employs around 200 people.[956]

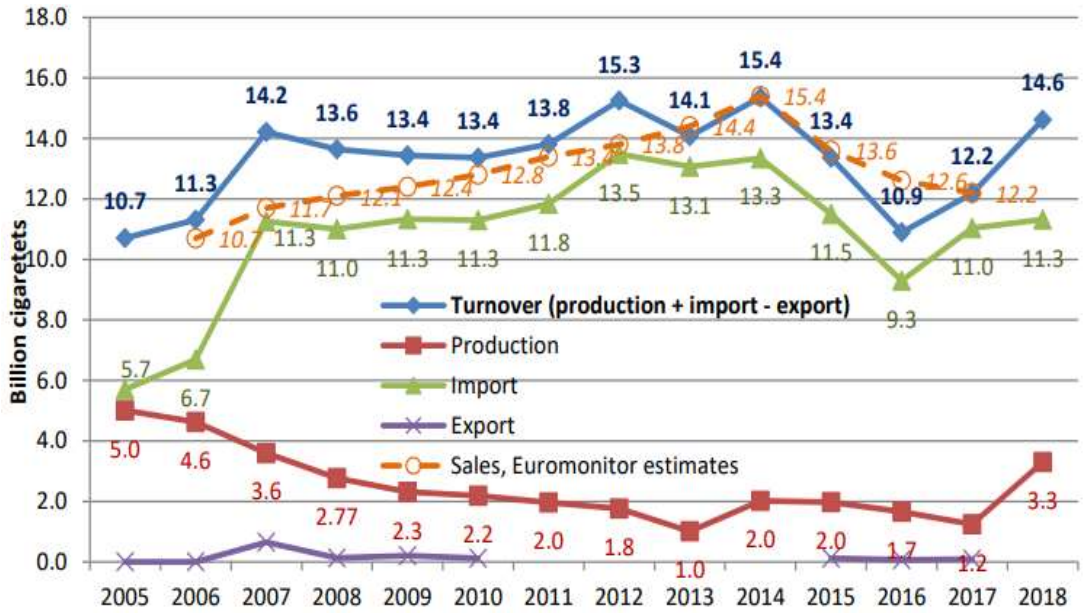
Notably, after the value of cigarette imports grew to USD 150 million in 2017, the government decided to increase domestic tobacco production.[957] The Azerbaijani president signed an order approving a state programme for the development of the tobacco industry during the period 2017–2021.[958] According to the order, the Ministry of Economy was to implement measures to conduct a feasibility study 'for building a world-class tobacco plant in the country'.[959] It was planned to increase the capacity of existing factories and establish new ones.[960] The five-year plan aimed at increasing the

[949] Emin Aliyev, 'Tobacco Factory Put up For Investment Tender in Azerbaijan' (*Trend*, 19 November 2013) <https://en.trend.az/business/economy/2212325.html> accessed 16 October 2020.
[950] See eg Rufiz Hafizoglu, 'Turkish Deputy PM Talks Investments in Azerbaijan (Exclusive)' (*Trend*, 19 July 2017) <https://en.trend.az/business/economy/2778828.html> accessed 15 October 2020.
[951] Anna B Gilmore and Martin McKee, 'Tobacco and Transition: an Overview of Industry Investments, Impact and Influence in the Former Soviet Union' (2004) 13 Tob Control 136.
[952] The Business Year (n 945).
[953] As of 2003, the company employed c. 5,000 people. IPR Strategic Business Information Database, 'Azerbaijan: European Tobacco Baku Employs 5,000 Azerbaijanis' (8 January 2003).
[954] See 'JTI in Azerbaijan' <www.jti.com/europe/azerbaijan> accessed 15 October 2020.
[955] AzerTAC, 'President Ilham Aliyev Launched Tobacco Factory in Sumgayit Chemical Industrial Park VIDEO' (16 November 2018) <https://azertag.az/en/xeber/President_Ilham_Aliyev_launched_tobacco_factory_in_Sumgayit_Chemical_Industrial_Park_VIDEO-1215299> accessed 25 October 2020.
[956] ibid.
[957] Nazarli (n 891).
[958] Trend News Agency, 'Ilham Aliyev Approves State Programme for Development of Tobacco Industry' (11 August 2017) <https://en.trend.az/azerbaijan/politics/2785853.html> accessed 16 October 2020.
[959] ibid.
[960] Nazarli (n 891).

production of cigarettes to satisfy up to 70% of domestic demand.[961] The government planned to double production from 3,200 to 6,000 hectares by 2021.[962]

As a result of the government's support, cigarette production in Azerbaijan has increased by 2.7 billion cigarettes since 2017 (see Table 6).[963]

Table 6. Cigarette sales in Azerbaijan[964]



The most recent dynamics in the tobacco industry suggest that Azerbaijan is likely to continue increasing tobacco production. In September 2020, Japan International Development Company pledged to invest USD 40 million in tobacco growing in the country.[965] At the same time, there is no evidence to indicate that the Azerbaijani Government has ever considered the long-term economic implications of the tobacco sector on the national economy or weighted these against the purported economic benefits for the State budget.

The Azerbaijani Government has a clear economic interest in the development and growth of the tobacco industry. A broad spectrum of evidence confirms this – from

[961] ibid.
[962] ibid.
[963] Marquez and others (n 890); see also State Statistical Committees, 'Industrial Output in 2018' (16 January 2019) <www.stat.gov.az/news/index.php?id=4092> accessed 16 October 2020.
[964] ibid.
[965] Ayya Lmahamad, 'Japan to Invest $40m in Tobacco Growing in Azerbaijan' (*Azernews*, 9 September 2020) < www.azernews.az/business/168798.html > accessed 11 November 2020.

subsidies to tobacco growers, to State programmes and multi-million projects to expand domestic tobacco production. However, the government has failed to factor in the negative implications of the industry for the economy. Subsidies to tobacco growers mean that public money is used to make raw tobacco cheaper and reduce cigarette prices, which ultimately encourages tobacco consumption. Such a policy contradicts the State's FCTC obligations, in particular Articles 5.3, 17 and 18 of the FCTC.[966] And finally, the industry benefits from the weak tobacco policies. Interestingly, various critiques have suggested that intensified tobacco control in Europe and the global reduction in tobacco growing can be seen as an opportunity to boost the industry in Azerbaijan.[967] It is unclear whether the Azerbaijani Government shares this view but on the face of it, it clearly supports the industry's growth. The State's economic self-interest in the tobacco sector is the most sensible explanation for the government's reluctance to progress with the FCTC implementation. Indeed, the reduction in smoking prevalence generally runs contrary to the government's agenda to increase tobacco sales.

6.2.3. Georgia

During Soviet times, Georgia was an important source of tobacco leaves and manufactured cigarettes for the whole of the Soviet Union.[968] The national tobacco industry collapsed with the fall of the Soviet Union and the domestic market was subsequently flooded with international brands.[969] The privatisation process began in 1998[970] and since then dozens of local producers and tobacco importers have become established in the Georgian tobacco sector.[971]

The tobacco industry plays a vital role in the economy and the Georgian Government is both reliant on it and supportive of its prosperity. In 2017, tobacco sales

[966] See FCTC, 'Policy Options and Recommendations on Economically Sustainable Alternatives to Tobacco Growing (in Relation to Articles 17 and 18)' (Adopted by the Conference of the Parties at its Sixth Session, Decision FCTC/COP6(11)).
[967] Nazarli (n 891).
[968] Alexander Shalutashvili and others, 'Tobacco Economic Study in Georgia since the Fall of the Soviet Union' (FCTC Implementation and Monitoring Center in Georgia, Tbilisi 2007).
[969] Megan Little and others, 'Illicit Tobacco Trade in Georgia: Prevalence and Perceptions (2020) 29 (4) Tob Control 227.
[970] Gilmor and McKee (n 26).
[971] As of 2006, there were 13 local producers and 24 tobacco importers in Georgia, including BAT and JTI. Shalutashvili and others (n 968) 6 (citations omitted).

reached USD 411.5 million, USD 144 million of which were paid to the State budget.[972] The tobacco industry is a major employer, providing more than 52,000 jobs, which generate an estimated USD 2 billion in compensation.[973] The government's support for the industry arguably exceeds its support for tobacco control. For instance, in 2015, local tobacco manufacturers received around EUR 1.5 million in support from the State budget, [974] while in the same year, the government spent only EUR 20,000 on tobacco control. It is therefore hardly surprising that the industry's business and economic interest has been a priority for the State's regulatory choices. It can be inferred that the tobacco regulatory delay in Georgia is mainly attributable to the State's economic self-interest, namely concerns about FDI and potential industrial flight.

This is supported by the government's discussions over the 2017 Law no 1278-RS ('Law no 1278-RS') which introduced, *inter alia*, plain packaging measures and a ban on tobacco smoking indoors.[975] For example, an MP who opposed Law no 1278-RS blamed its 'poor elaboration'.[976] In his view, the requirement for tobacco manufacturers and importers to place pictograms on tobacco packs would lead to a loss of interest in Georgia as a country of sale due to insufficient demand for tobacco.[977] The ICC's Secretary-General also expressed concerns that some tobacco producers might exit the Georgian market when compelled to invest in expensive production lines for the new packaging.[978] Another MP regarded the suggested plain packaging as a potential threat to the State budget.[979] There is no evidence that the Georgian Government has ever considered the long-term economic implications of the tobacco sector on the national economy or weighted these against the purported economic benefits for the State budget.

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[972] Compare to USD 28 million allocated by the government to combat tobacco-related illnesses. Novost.ge, 'In Georgia, a Ban on Smoking in All Buildings, Except for Residential Buildings, Will Be Introduced from 1 May 2018' (8 May 2017) <https://novost.ge/2017/05/08/%D0%B2-%D0%B3%D1%80%D1%83%D0%B7%D0%B8%D0%B8-%D0%B7%D0%B0%D0%BF%D1%80%D0%B5%D1%82-%D0%BD%D0%B0-%D0%BA%D1%83%D1%80%D0%B5%D0%BD%D0%B8%D0%B5-%D0%B2%D0%BE-%D0%B2%D1%81%D0%B5%D1%85-%D0%B7%D0%B4%D0%B0%D0%BD/ > accessed 14 October 2020.
[973] Flanders and Gentry (n 922).
[974] Bakhturidze (n 913).
[975] See annx 15.
[976] Novost.ge (n 972).
[977] ibid.
[978] Akhmeteli (n 916).
[979] ibid.

Some government officials have regarded the industry lobby as a further major obstacle for tobacco regulatory development more generally. Unsurprisingly, the industry opposed Law no 1278-RS and even considered bringing a claim to the Constitutional Court to challenge it.[980] The head of the Parliament Committee on Public Health and Social Matters observed that Georgia committed to implementing the FCTC by 2011 but was unable to deliver on its obligations because of 'very strong lobbying of the tobacco industry'.[981]

There were a plethora of other (more peripheral) reasons for opposing Law no 1278-RS.[982] Not unusually, ICC Georgia declared that the plain packaging requirement was tantamount to an infringement of intellectual property rights and would lead to an increase in illicit trade on the tobacco market.[983] A vice-speaker of the parliament argued that Law no 1278-RS was developed in a hurry and without consultation with the government and tobacco manufacturers.[984] He contended that the Law did not provide an effective mechanism for its implementation and that this could lead to the situation seen in Russia and Ukraine, where 'smoking is prohibited, but everyone is smoking'.[985] The provision allowing 'policemen to enter into any building and fine people' for smoking indoors was seen as a potential threat to human rights by another policy-maker.[986] Such arguments, however, did not amount to obstacles that would have been impossible to tackle as part of the existing law-making and law enforcement process.

Also, local customs and traditions were considered to be a barrier to tobacco regulatory development. An MP argued that the very strict measures in Georgia would be impossible to enforce because of the Georgian tradition of smoking at mass events such as weddings or funerals.[987] This view was also supported by one of the co-founders of the association of restaurateurs, who argued that Georgian traditions assume that people will often have banquets at bars and restaurants and 'it is hard to imagine that someone would be able to prohibit 100-200 guests to smoke on a wedding

[980] SOVA, 'A New Tobacco Control Law Will Enter into Force in Georgia' (18 May 2017) <https://sova.news/?p=19323> accessed 14 October 2020.
[981] Akhmeteli (n 916).
[982] Novost.ge (n 972).
[983] ibid.
[984] ibid.
[985] ibid.
[986] ibid.
[987] ibid.

celebration'.[988] At the other end of the spectrum, though, the radical changes were hailed by the Georgian Association of Oncologists, tobacco control NGOs and, more importantly, 90% of the Georgian respondents in a relevant public survey.[989] This suggests that many Georgians did not consider the regulatory changes to be problematic from a cultural point of view. Besides, the need for cultural change is a transitional issue that could be dealt with as part of the implementation process.

There seem to be two main reasons for the regulatory delay in Georgia. First, State economic self-interest explains why Georgia has generally refrained from radical changes to the tobacco regulatory framework. The industry generates considerable budget revenues and employs thousands of people. The State also benefits from tobacco FDI and policy-makers have expressly stated concerns around the potential for stricter regulatory measures leading to industrial flight. Two, the regulatory process has been hampered by the industry itself. A number of experts have noted 'aggressive' lobbying by tobacco companies against regulatory changes. Therefore, there are clear synergies between this and other case studies. Other, peripheral reasons for the regulatory delay include Georgian culture and difficulties implementing new laws, along with the poor elaboration of regulatory facts. However, these obstacles could be countered with suitable implementation provisions and enforcement mechanisms and therefore, they are unlikely to be the cause for the regulatory delay.

6.2.4. Conclusion

Each Transcaucasian state has been a recipient of tobacco FDI and has thought to preserve and attract further investment in the area. The analysis has shown that economic self-interest (including budget revenues and job security) and capital flight concerns have been the principal reasons for the delayed implementation of the FCTC. At the same time, there is no evidence that any of the Transcaucasian states have ever considered the long-term economic implications of the tobacco industry on the national economy or weighted these against the purported economic benefits. Further, market redistribution and the rise of tobacco corporate power have resulted in growth in the

[988] Akhmeteli (n 916).
[989] SOVA, 'Georgian Association of Oncologists Sounds an Alarm' (23 June 2016) <https://sova.news/2016/06/23/assotsiatsiya-onkologov-gruzii-bet-trevogu/> accessed 14 October 2020.

industry's influence on national governments and powerful tobacco lobbying aimed at preventing regulatory changes.

The regulatory delay in Transcaucasia can be better explained from the perspectives of the political economy[990] and the capital flight theory,[991] rather than by the regulatory chill hypothesis. Having found no evidence of regulatory chill, this study will now proceed to examine potential evidence of regulatory chill in national and international frameworks on investment protection.

6.3. The Constitutional Orders and the Status of International Law

The extent to which national law and institutions may be affected by international investment treaties could determine the likelihood of regulatory chill. Therefore, as the introduction to the legal axis of this analysis, this chapter will consider the constitutional orders of the states and the status of international law in the Transcaucasian national legal systems. Once again, since the results reflect very closely those of the earlier case studies, the remainder of this chapter will provide a brief overview of the findings and point to the relevant differences where appropriate.

In 1991, Armenia, Azerbaijan and Georgia proclaimed themselves independent, democratic, legal and social republics.[992] The mechanics of their respective statehoods are similar to both Ukraine and Belarus. The presidents are the heads of state and hold executive authority with certain legislative powers.[993] The parliaments are the principal legislative authorities.[994] However, there are differences in the distribution of power between the presidents and the parliaments. Armenia and Georgia are parliamentary republics with the majority of power concentrated within the parliaments. Azerbaijan is a semi-presidential republic where the president shares power with the prime minister

[990] Drope and others (n 536).
[991] See (n 128).
[992] Armenia declared its independence on 21 September 1991; Azerbaijan — 30 August 1991; and Georgia — 9 April 1991. Constitution of the Republic of Armenia (Adopted at the National Referendum on 5 July 1995) [hereinafter, Constitution of Armenia]; Constitution of the Republic of Georgia, Departments of the Parliament of Georgia, 31-33, 24 August 1995 [hereinafter, Constitution of Georgia]; Constitution of the Republic of Azerbaijan of 12 November 1995 [hereinafter, Constitution of Azerbaijan].
[993] ibid.
[994] ibid.

and the cabinet (appointed by the parliament).[995] The concentration of power within one or another state body shifts the political burden of the adoption of the FCTC. In Ukraine and Transcaucasia, tobacco legislation must be adopted by parliament in order to become an effective instrument of tobacco control. This contrasts with Belarus, where the president has broad legislative powers and thus many FCTC provisions have been adopted by his orders.[996] The democratic orders should enable effective tobacco regulatory development and yet further studies are needed to confirm whether any variables of those orders could have an impact on the likelihood of regulatory chill.

Judicial powers in the Transcaucasian states are traditionally held by the court of general jurisdiction and the constitutional courts, which decide on the conformity of national legislation to the states' constitutions.[997] As the Belarusian case showed, the constitutional courts are also important stakeholders in the tobacco regulatory process, in particular where required to interpret the conflict between the public health right and the freedom of entrepreneurial activity, as enshrined in the constitutions of each of the South Caucasian states.[998] The Constitutional Court could also play a more proactive role. For example, in 2008, the Framework Convention on Tobacco Control Implementation and Monitoring Centre in Georgia ('Centre') brought a case to the Georgian Constitutional Court against the Parliament of Georgia seeking to interpret the constitutionality of certain tobacco control legislation.[999] The Centre argued that the national tobacco legislation was incompatible with the FCTC, stating that the latter 'stipulates the international standards of living in an environment protected from tobacco and tobacco smoke, which are in direct compliance with the requirements of Article 15 and Article 37 of the Constitution of Georgia'.[1000] The claimant requested the Constitutional Court 'to order the Parliament of Georgia to nullify the impugned provisions and to take immediate measure for the comprehensive implementation of the [FCTC]'.[1001] The Court found that the failure of the impugned provisions to comply

[995] ibid.
[996] See ch 5.
[997] ibid.
[998] Constitution of Armenia (n 992) art art 10, 60 and 85; Constitution of Azerbaijan (n 992) art art 41, 59 and 130; Constitution of Georgia (n 992) art art 5, 6, 19, 26 and 28.
[999] *Framework Convention on Tobacco Control Implementation and Monitoring Centre in Georgia v the Parliament of Georgia,* Constitutional Court of Georgia Ruling N2/3/441 of 18 June 2008 <www.constcourt.ge/en/judicial-acts?legal=378 > accessed 8 October 2020 [hereinafter, *Centre v Parliament of Georgia*].
[1000] ibid, para i(10).
[1001] ibid, para i(11).

with an international agreement ratified by the State or a legislative act does not automatically amount to their incompatibility with certain articles of the Constitution of Georgia where the claimant has submitted no evidence that would objectively enable substantive discussion on the merits, and it dismissed the claim.[1002] That being said, it would be interesting to note whether this discussion might have taken a different turn if the Centre had supported its petition with any evidence of the incompatibility of existing provisions with the Constitution.

With regard to the status of IIL, each Transcaucasian state recognises the supremacy of international treaties ratified by the parliament over national legislation. Article 5 of the Constitution of Armenia provides that international treaties prevail over national legislation once they have been ratified by the parliament and published in the Official Gazette.[1003] According to Article 151 of the Constitution of Azerbaijan, in the event of a contradiction between national legislation (except for laws adopted on a referendum and the Constitution) and international treaties signed by Azerbaijan, the latter shall prevail.[1004] The status of international law in Georgia is defined in Article 4 of the Constitution stipulating that the legislation of Georgia shall comply with the universally recognised principles and norms of international law. [1005] An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia.[1006] Once ratified, international law becomes part of the national law systems and is directly applicable to legal relationships in the states.[1007] That said, this thesis could not locate evidence of any direct application of IIAs by national courts and state bodies in Transcaucasia.

The states commonly acknowledge that state immunity can be waived, hence they have pledged to observe their international obligations and yield to the jurisdiction of investment tribunals. Although Article 245(1) of the Armenian Code of Civil Procedure stipulates that state immunity is absolute,[1008] it does not preclude the State from arbitrating disputes with foreign investors providing there is a valid agreement for it.[1009]

[1002] ibid, para ii(3-4).
[1003] Constitution of Armenia (n 992) art 5.
[1004] Constitution of Azerbaijan (n 992).
[1005] Constitution of Georgia (n 992).
[1006] ibid.
[1007] Constitution of Azerbaijan (n 992) art 148.
[1008] Republic of Armenia Civil Procedure Code of 17 June 1998, art 245 (1).
[1009] Hazel Fox and Philippa Webb, *The Law of State Immunity* (OUP 2015).

Azerbaijan has explicitly acknowledged the possibility of waiving state immunity. Pursuant to Azerbaijani Civil Code Art 5.2, 43.2, Azerbaijan may consent to the jurisdiction of foreign courts as any other Azerbaijani entity may do in foreign trade transactions.[1010] As will be illustrated further, each of the Transcaucasian states has engaged in investor-State arbitration but to date, none has argued for immunity to oppose the jurisdiction of investment tribunals or the enforcement of the tribunals' awards.

To conclude, national constitutional orders and political systems generally enable the effective regulation of tobacco. The states' constitutional orders and the status of international law create gateways for IIL to directly affect legal relationships and public decision-making process; nevertheless, there is no evidence that public officials or the judiciary consider investment protection obligations when applying tobacco or other national regulations. Therefore, it is unlikely that IIAs have ever affected tobacco regulatory development in the Transcaucasian states through their direct enforcement in national courts. The chapter will proceed with scrutinising potential national law limitations for tobacco control regulatory development.

6.4. Tobacco Control and National Law Limitations

National legislation can constitute an independent hurdle for the adoption of progressive tobacco legislation. For example, when states provide excessive guarantees of the stability of the regulatory framework and taxation benefits in pursuit of FDI, it may be precluded from enforcing any regulatory changes against specific investors for several years. As such, these national guarantees could lead to regulatory delay. Drawing upon this, before venturing any further and discussing regulatory chill, this chapter will probe whether tobacco regulatory delay could have been caused by national law limitation.

[1010] Also observed by Gunduz Karimov, 'Azerbaijan' in Yarik Kryvoi and Kaj Hober, *Law and Practice of International Arbitration in the CIS Region* (Wolters Kluwer 2017).

National law in Transcaucasia has been proactive in the promotion of FDI, as evidenced by the states' investment policies and incentives.[1011] Similar to Ukraine and Belarus, the legislations of the South Caucasian states prescribe broad investment protections and guarantees. By way of example, the Law of Armenia 'On Foreign Investments' provides *inter alia* for national treatment, guarantees in case of nationalisation and confiscation, and guarantees regarding the return of profits (revenues) related to foreign investments.[1012] Article 7 also stipulates that in the event of changes to national legislation, 'the legislation that was effective at the moment of implementation of investments shall be applied, upon the request of a foreign investor, during *five years* from that moment'.[1013]

The Law of Georgia 'On the Promotion and Guarantees of Investment' also provides similar guarantees for investment inviolability, compensation in case of requisition, security during a state of war and military conflict and a *10-year* guarantee of the stability of the regulatory framework for established investments in case of any adverse changes in the legislation.[1014] In addition, the Law provides for UNCITRAL arbitration as a dispute resolution procedure.[1015]

In the same way, Azerbaijani Law 'On the Protection of Foreign Investments' provides for national treatment, guarantees in case of nationalisation and requisition, compensation for losses, the transfer of profits and other sums in foreign currency etc.[1016] The law also guarantees investors' interests against future adverse changes in legislation providing that the previous regime applies to affected investors for the ensuing *10 years*.[1017] However, this does not apply to changes in legislation concerning public health.[1018]

The bottom line is that each Transcaucasian state has generally mirrored many IIA guarantees in their national legislations. Importantly, the national laws also provide for the stability of the regulatory framework and the retrospective application of investment guarantees for a further five to ten years in case of adverse regulatory change. Only

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[1011] See UNCTAD, 'Investment Policy Review of Armenia' (21 October 2019) UNCTAD/DIAE/PCB/2019/3.
[1012] The Law of the Republic of Armenia on Foreign Investments of 31 July 1994 No ZR-115.
[1013] ibid, art 7 [emphasis added].
[1014] Law of Georgia on the Investment Activity Promotion and Guarantees of 12 November 1996 No 473-IS.
[1015] ibid, art 15.
[1016] Law of Azerbaijan 'On Protection of Foreign Investments' of 15 January 1992 No 57.
[1017] ibid, art 9.
[1018] ibid.

Azerbaijani law carves out public health from this provision. This creates the possibility that certain tobacco regulatory measures could be delayed in Armenia and Georgia as a result. Nonetheless, the thesis found no evidence that this has ever occurred to date, or that national laws have otherwise affected the regulatory development.

A further significant observation is that the Georgian law provides for UNCITRAL arbitration as an enforcement mechanism for the rights and guarantees of foreign investors. Azerbaijan is also considering changing its national legislation to include an arbitration clause. On 18 January 2018, the President of the Republic of Azerbaijan adopted the Decree 'On Some Measures Related to the Promotion of Investment Activity and Protection of the Rights of Foreign Investors' that tasked the government with developing a new law on 'Investment Activity', including an international arbitration mechanism.[1019] This is in line with Ukrainian and Belarusian legislation which also increasingly provides for ISDS. More abstractly, it demonstrates the general support for investment arbitration in the post-Soviet space. It evidences the governments' willingness to accept investment arbitration restrictions in their national laws. In turn, this undermines the regulatory chill hypothesis: should the governments have any concerns about ISDS and regulatory chill, why would they include investment arbitration clauses in national legislation?

The states' willingness to attract FDI has also resulted in broad tax benefits for foreign investors. While Azerbaijan provides certain benefits for foreign investors,[1020] the policies adopted by less wealthy Armenia and Georgia have been more forceful in this respect.[1021] By way of illustration, Armenia has had an advantageous tax regime for foreign companies and companies with a foreign capital participation of 30% or more that are investing in the State.[1022] Since 1998, companies investing more than USD 1 million in FDI have enjoyed substantial tax holidays (100% enterprise profit tax relief in the first year and a 50% reduction in the ensuing eight years).[1023] Kuparadze considered Georgia's tax liberalisation policy to be the main driver of the country's

[1019] Decree of the President of the Republic of Azerbaijan 'On Some Measures Related to the Promotion of Investment Activity and Protection of the Rights of Foreign Investors' of 18 January 2018.
[1020] See Nuran Kerimov and others, 'Taxation and Investment in Azerbaijan' (Deloitte 2020) <www2.deloitte.com/content/dam/Deloitte/az/Documents/tax/aze/TaxBrochures2016/Taxation%20and%20investment%20in%20Azerbaijan%202020_Baku2207.pdf> accessed 4 March 2021.
[1021] Azerbaijan is an oil-rich country, which underpins the state's economic growth and development. See eg BBC News, 'Azerbaijan Country Profile' (18 November 2020) <www.bbc.co.uk/news/world-europe-17043424> 18 January 2018.
[1022] International Center for Human Development (n 922) 23.
[1023] ibid, 23–24.

stable increase in inward FDI.[1024] He noted that since undergoing radical political changes in 2003, Georgia has adopted generous tax privileges for foreign investors that enabled it to be ranked fourth in the world among states with the lowest tax burden, based on a 2008 Forbes rating.[1025] These tax benefits do not differentiate the tobacco sector and therefore have also incentivised the growth of the tobacco industry in the state. However, while a favourable tax regime could stimulate increased tobacco production in the region, tobacco tax incentives alone could also simultaneously stymie attempts to combat tobacco-related illnesses.

Looking at this through the prism of regulatory chill, the review of the national legislation weakens the hypothesis somewhat, rather than supports it. National law to a large extent mirrors IIA provision and also provides for the stability of the regulatory framework in case of any adverse changes. At the same time, only Azerbaijani law carves out public health from this provision. This means that national governments would also have to consider their national provisions when adopting tobacco legislation and that the stability of regulatory framework provisions could potentially delay new tobacco regulatory measures in Armenia and Georgia. Nonetheless, this thesis finds no evidence that national law has affected tobacco regulatory development in this way. The fact that Azerbaijan is considering the provision within Georgian legislation for ISDS and similar regulatory changes serves as evidence against the regulatory chill argument, which is based on an assumption that governments have a fear of arbitration. The lenient policies and abundance of tax and other incentives for foreign tobacco investors, particularly in Azerbaijan and Armenia, could undermine the states' attempts to prevent tobacco-related illnesses. It confirms that the states put their economic interest ahead of the public health interest, thus confirming the previous findings that tobacco regulatory delay in Transcaucasia is not associated with regulatory chill.

6.5. The Proliferation of Investment Treaties and the Regulatory Chill Argument

[1024] Giorgi Kuparadze, "Tax Policy and Foreign Direct Investment (The Case of Georgia)' (2013) 3-4 Caucasus & Globalization 91.
[1025] ibid.

The tobacco regulatory delay in South Caucasia is potentially due to many factors. However, the main reasons lie within its political and economic structure. As in the cases of Ukraine and Belarus, the Transcaucasian states have been concerned with the loss of budget revenues along with industrial flight if more restrictive tobacco control measures are introduced. The states continue to promote and accept FDI as a means of boosting the tobacco sector; however, this collides with the need to address the high level of smoking prevalence in order to reduce smoking-related illnesses. The states' national legal regimes also provide certain regulatory restrictions and permit the direct application of IIAs, yet there is no evidence to support that either national law or IIAs applied directly by national bodies have ever hindered implementation of the FCTC. The remainder of this section will investigate the states' international investment framework and their involvement with international investment arbitration to further establish any potential role that these may have played in tobacco regulatory development. Similar to the previous case studies, it will first endeavour to trace 'internalisation' regulatory chill in IIAs and then proceed with an analysis of known disputes with foreign tobacco investors to verify the 'specific response' regulatory chill hypothesis.

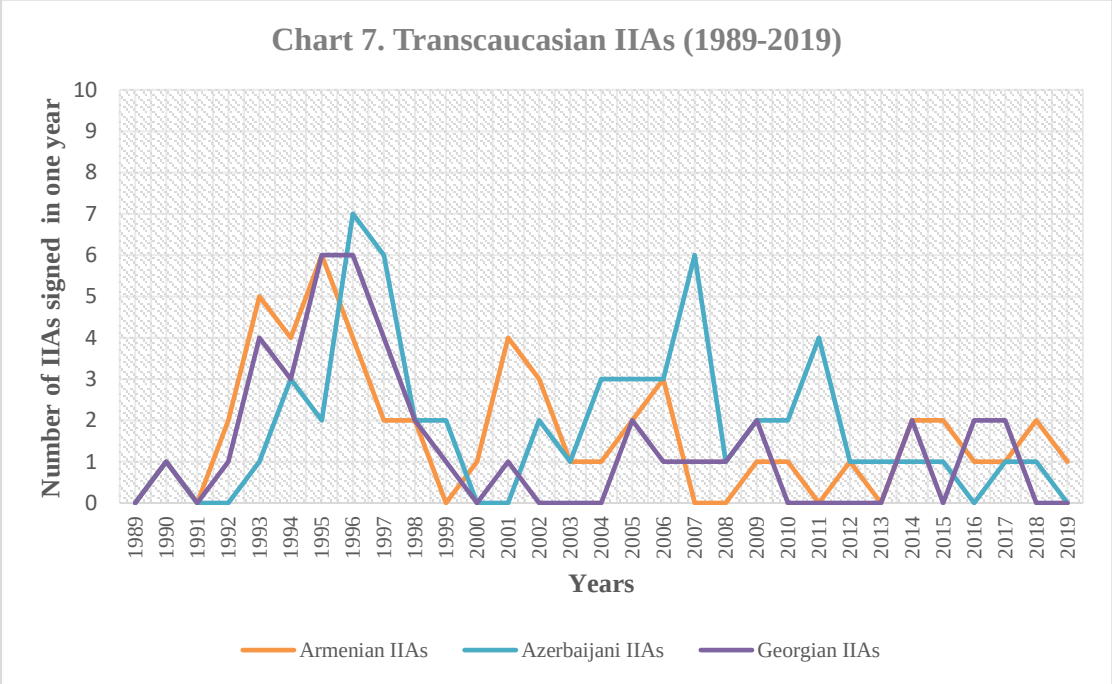
6.5.1. Tracing Internalisation Regulatory Chill in Investment Treaties

In the aftermath of the collapse of the Soviet Union, Armenia, Azerbaijan and Georgia joined other former Soviet republics in preserving existing trade relationships[1026] and developing new relationships and cooperation with foreign investors. Each of the South Caucasian states has partnership agreements with the EU and is a party to the ECT and several other PTAs.[1027] Since the 1990s, BITs have become 'a core element of the CIS states' policy to encourage investor confidence and certainty as to the business environment, providing for arbitration as a dispute resolution mechanism ... '.[1028] At the time of writing, Armenia had signed 44 BITs, Azerbaijan had 52 BITs in place and Georgia had 34 signed BITs.[1029] The majority of these contain between 12 and 15

[1026] See annx 17.
[1027] ibid.
[1028] Kryvoi and Hober (n 427) para 1.03 [A] (citations omitted).
[1029] See annx 16.

articles stipulating basic provisions for investment protection and providing for recourse to investor-State arbitration dispute resolution.[1030] Typically, the treaties include more than one option for arbitration, including ICSID, the SCC and ad hoc proceedings under UNCITRAL rules.[1031] The treaties only sporadically include general public health exceptions or other public health 'safety valves'.[1032] This, coupled with limited protections against treaty shopping and commonly included MFN clauses, enables any international investor to structure its business model to enjoy the best possible investment protection and thus creates possibilities for regulatory chill.

Nevertheless, there is no evidence to confirm the existence of regulatory chill. Indeed, the process of negotiating and signing IIAs was until recently ongoing and is likely to be continued in the future (see Chart 7).[1033]



As in the cases of Ukraine and Belarus, the peak of investment treaty negotiation in Transcaucasia was seen from the early 1990s and into the 2000s. Azerbaijan was an active negotiator between 2007 and 2011, signing six and four new BITs in these two

[1030] ibid.
[1031] ibid.
[1032] ibid.
[1033] See annx 16-17.

years respectively.[1034] Armenia signed three new BITs in 2006.[1035] More importantly, the IIA conclusion process has not been swayed by the growing number of investment arbitration claims. In 2007, two investment disputes were launched against Armenia and two further claims were brought in 2017 and 2018.[1036] Azerbaijan faced its first two ISDS claims in 2006 and the latter two in 2018 and 2019.[1037] Georgia faced 13 investment arbitration disputes between 2005 and 2019.[1038] Despite this, the South Caucasian states have continued their treaty negotiations. As can be seen from Chart 7, each has signed at least two IIAs in the past three years.

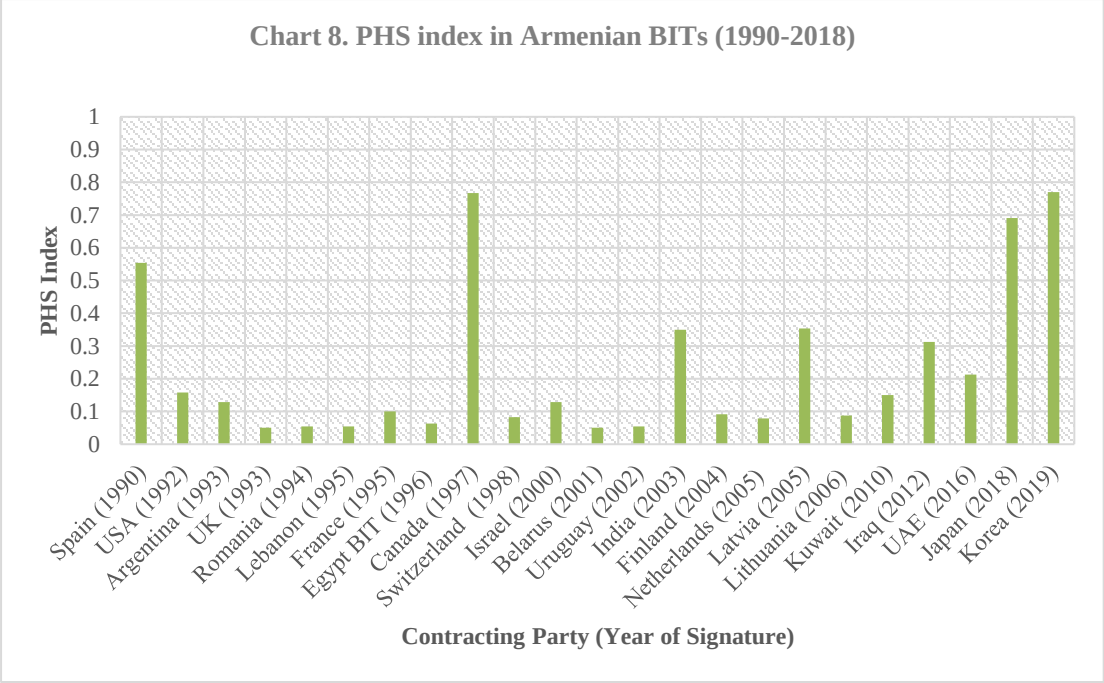
The first take on this analysis is that involvement in the international investment framework remains desirable for the Transcaucasian states despite the increasing odds of international investment disputes and the risk of further claims. This generally contradicts the regulatory chill theory, which assumes a fear on the part of the government concerning potential investment claims.

This concludes the quantitative analysis of IIAs. The remainder of this section will proceed with the quantitative coding of the treaties to confirm whether any changes to the treaty texts could provide evidence in favour of the regulatory chill hypothesis.[1039]

6.5.1.1. Armenia

At the time of writing, Armenia had signed 43 BITs, two of which it subsequently terminated: the 1998 Armenia–Italy BIT and the 2003 Armenia–India BIT.[1040] It has not renegotiated any of its BITs; therefore, for the coding analysis of the treaties, a random selection was made from the available BITs, representing various chronological years (see Chart 8).

[1034] ibid.
[1035] ibid.
[1036] See annx 18.
[1037] ibid.
[1038] ibid.
[1039] See s 3.2.4.
[1040] See annx 16.



As can be seen from Chart 8, high PHS can be sporadically observed in some of the treaties signed in various years. Numerous reasons underpin the enhanced scope of the regulatory space in those treaties. By way of illustration, the 1990 Armenia–Spain BIT scored a high PHS (0.554) due to its limited arbitration provision, which was typical of treaties negotiated by the Soviet Union.[1041] The 2003 Armenia–India BIT (terminated) scored 0.35 PHS because it did not include the FET standard.[1042] Some of the treaties include public health considerations: both the 1997 Armenia–Canada BIT and the 2005 Armenia–Latvia BIT included general public health exceptions and thus scored 0.77 PHS and 0.35 PHS.[1043]

More radical improvement in PHS can be observed in the most recent treaties. The 2016 Armenia–UAE BIT contained notable public health provisions, stating that '[t]he Contracting Parties recognize that it is inappropriate to encourage investment by relaxing public health … measures … [and] [t]he investor should respect laws and regulations that pertain to … the protection of public health ….[1044] Whilst provisions that 'softly' require the contracting states not to relax public health measures are more

[1041] See annx 19.
[1042] ibid.
[1043] ibid.
[1044] Agreement between the Government the Republic of Armenia and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (signed 22 July 2016, entered into force 21 November 2017) [hereinafter, 2016 Armenia – UAE BIT] art 12.

common in recent BITs, a treaty requirement for investors to respect public health laws is relatively rare. It is yet to be established how this latter requirement could be enforced and/or affect the State regulatory space; therefore, it was not factored in for the treaty coding. Even so, the treaty evidences an acknowledgement by the contracting state of the need to consider the public interest in relationships with foreign investors.

The 2018 Armenia–Japan BIT contains similar provisions on the non-lowering of public health standards, though it does not include the same obligations for foreign investors.[1045] A qualified FET standard, a requirement for the parties' interpretation of the treaty to bind a tribunal and a general public health exception, among other measures, led to a score for the treaty of 0.69 PHS.[1046] The relatively recent 2019 Armenia–Korea BIT also scored a high PHS, of 0.77.[1047] In its preamble, it confirms the parties' desire to achieve the promotion and protection of investments 'in a manner consistent with the protection of health … taking note of the need to ensure the attainment of legitimate governmental objectives to foster sustainable development'.[1048] It also carves out public health measures from the scope of indirect expropriation.[1049] However, the treaty does not include public health general exceptions.[1050]

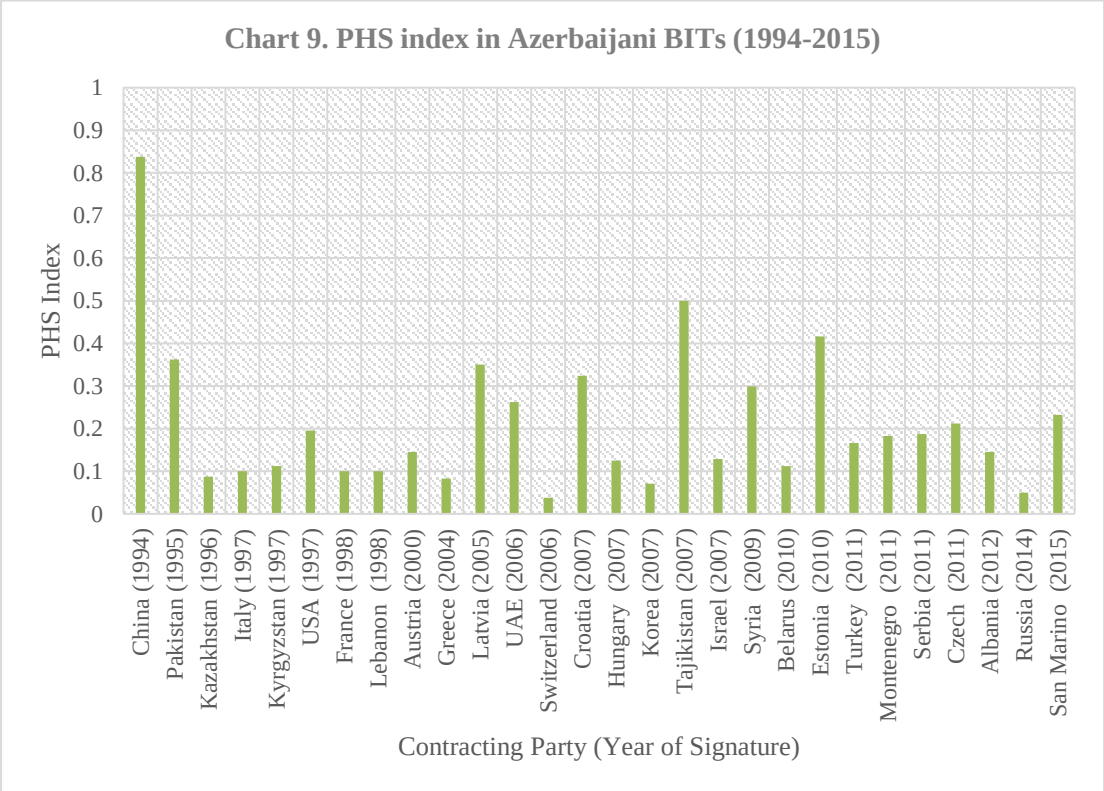
To sum up, until recently, Armenian BITs only sporadically included public health language and/or 'safety valves' to protect the State's regulatory space. This is a *prima facie* testament that Armenia did not have any consistent public health agenda for its BITs and did not consider the treaties to impose a threat to the public health or tobacco control interest. The more recent treaties that have a high PHS are generally more advanced but also do not have a clear and consistent approach to protecting the public health (tobacco control) interest. Therefore, it is premature to state that the Armenian state bodies have secured more public health regulatory space in the treaties because they are afraid of potential claims from foreign tobacco investors challenging tobacco regulations. In other words, this does not allow us to make a conclusive inference that

[1045] Agreement between Japan and the Government the Republic of Armenia for the Liberalisation, Promotion and Protection of Investments (signed 14 February 2018, entered into force 15 May 2019) [hereinafter, 2018 Armenia – Japan BIT].
[1046] See annx 19.
[1047] Agreement between the Government of the Republic of Korea and the Government of the Republic of Armenia for the Promotion and Reciprocal Protection of Investments (signed 19 October 2018, entered into force 3 October 2019) [hereinafter, 2019 Armenia–Korea BIT].
[1048] ibid, preamble.
[1049] See annx 19.
[1050] 2019 Armenia–Korea BIT (n 1047).

the improved PHS in the treaties may reflect potential internalisation regulatory chill. Taking into account that Armenia has not renegotiated any of its treaties and that the recent BITs contain no clear public health agenda, it can be inferred that the shift towards public health protection pertains to general guidelines and trends in the treaty negotiation and not to regulatory chill.

6.5.1.2. Azerbaijan

By way of an introduction, Azerbaijan has signed 52 BITs (including the now terminated 1997 Azerbaijan–Italy BIT and the 1994 Azerbaijan–Turkey BIT) and 5 PTAs.[1051] In 2011, Azerbaijan renegotiated its BIT with Turkey but has not renegotiated any others.[1052] One issue to point out is that the previous BIT with Turkey, along with those signed in 2017–2018 with Afghanistan and Turkmenistan, are not available for analysis. Therefore, for the treaty coding analysis, available BITs were randomly selected representing various chronological years (see Chart 9).



[1051] See annx 16–17.
[1052] See annx 16.

The treaty coding reveals no consistent trends in respect of improving PHS in Azerbaijani BITs. The high level of PHS in certain treaties is mainly attributable to the following assorted factors as opposed to a consistent policy of increasing the public health regulatory leeway: the limited scope of the arbitration clause (1994 Azerbaijan–China BIT and 2007 Azerbaijan–Tajikistan BIT); the absence of the FET standard (1995 Azerbaijan–Pakistan BIT and 2010 Azerbaijan–Estonia BIT); a narrower scope of protection for investment and investors (2007 Azerbaijan–Croatia BIT and 2009 Azerbaijan–Syrian Arab Republic BIT), and the limitation of other substantive investment guarantees (2006 Azerbaijan–United Arab Emirates BIT).[1053]

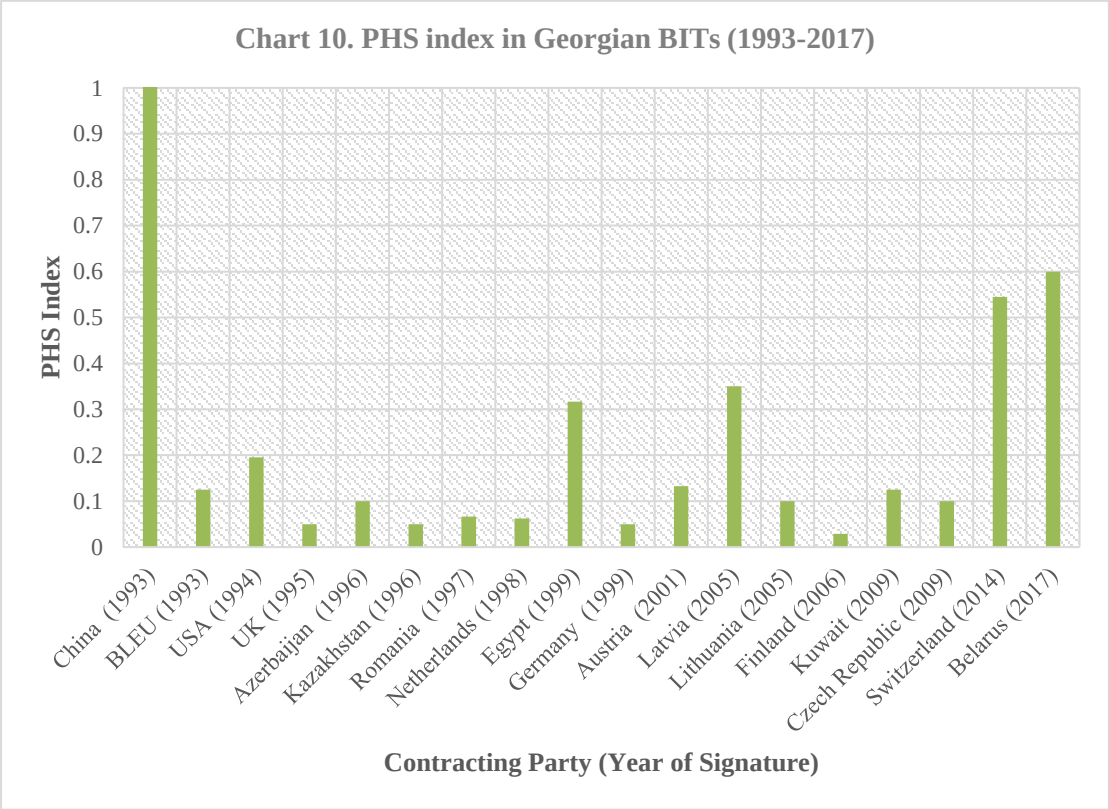
Very few of the reviewed BITs refer to public health in their preambles (1997 Azerbaijan–USA BIT; 2007 Azerbaijan–Croatia BIT; 2009 Azerbaijan–Syrian Arab Republic, etc).[1054] Further, the 2005 Azerbaijan–Latvia BIT includes a rather unusual public health exception: Article 15 provides that save for guarantees pertaining to (i) expropriation, (ii) protection from strife and (iii) transfers related to expropriation and protection from strife, the '[a]greement shall not be construed to prevent a Contracting Party from adopting or maintaining measures … necessary to protect human … health'.[1055] The practical application of such a limitation is yet to be ascertained, particularly in the context of its impact on potential indirect expropriation claims involving tobacco legislation, which is not included in the exception.

Again, the analysis of available Azerbaijani BITs shows that the State has no consistent public health agenda for its investment treaty negotiation practice. Only one of the treaties analysed includes a public health exception while several refer to public health in their preambles. On this basis, it is possible to conclude that no evidence of internalisation regulatory chill can be observed in the Azerbaijani investment treaty framework.

6.5.1.3. Georgia

[1053] See annx 19.
[1054] ibid.
[1055] Agreement between the Government of the Republic of Azerbaijan and the Government of the Republic of Latvia on the Promotion and Reciprocal Protection of Investments (signed 3 October 2005, entered into force 10 May 2006) [hereinafter, 2005 Azerbaijan – Latvia BIT] art 15.

Georgia has signed 37 BITs, including the now terminated 1997 Georgia–Italy BIT and two renegotiated BITs: with Turkey (1992 Georgia–Turkey BIT and 2016 Georgia–Turkey BIT) and Kyrgyzstan (1997 Georgia–Kyrgyzstan BIT and 2016 Georgia–Kyrgyzstan BIT).[1056] Again, because there is no information available on the renegotiated BITs, the coding analysis is based on the available BITs representing various chronological years, with a random selection again made for the analysis (see Chart 10).



As in the previous case studies, no consistent trends can be observed in terms of improving PHS in the Georgian BITs. As in the case of Azerbaijan, the treaty with the highest level of PHS (1.0875) was that signed with China, which is again attributable to the limited arbitration provisions it contains.[1057] Considering that in the same year Azerbaijan signed a BIT with BLEU that had a much lower PHS of 0.125, it can be concluded that Chinese negotiators suggested the limited scope for arbitration in the BITs it signed with both Azerbaijan and Georgia. This is further supported by the

[1056] See annx 16.
[1057] See annx 19.

generally limited provision for arbitration that was negotiated at around that time between China and Ukraine.[1058]

In principle, there appears to be no consistency among treaties signed in the same year. As a further example, the 2005 Georgia–Latvia BIT includes a general exception for measures 'necessary to protect human, animal or plant life or health', providing that that they 'are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment'.[1059] This is in contrast to the 2005 Georgia–Lithuania BIT that provides very limited protection for public health regulations with a PHS of 0.1.[1060] Notably, both Latvia and Lithuania are post-Soviet states and the respective BITs were signed almost within a one-month period. It is also noteworthy that a high level of PHS has previously been observed in Latvian BITs with both Armenia and Georgia. This suggests that the public health agenda in the 2005 Georgia–Latvia BIT was most likely included by Latvian treaty negotiators.

In its preamble, the 2006 Finland–Georgia BIT provides that the treaty objectives 'can be achieved without relaxing health, safety and environmental measures of general application'.[1061] Nonetheless, the treaty has a very low PHS index, of 0.029, because it does not contain any substantial provisions to secure public health regulatory space.[1062] Notably, the 2006 Belarus–Finland BIT includes the same public health language in its preamble and also has a very low PHS index of 0.054.[1063] It can therefore be concluded that the public health language within the preamble and the treaty text was generally suggested by Finland and that both Georgia and Belarus accepted the proposed drafts without much in the way of consideration, at least from the public health perspective. The latter two BITs, which Georgia signed with Switzerland and Belarus, have much higher PHS index scores (0.5445 and 0.5995 respectively) and both contain general public health regulatory exceptions.[1064] This is also in line with the previous case

[1058] See s 4.5.
[1059] Agreement between the Government of Georgia and the Government of the Republic of Latvia for the Promotion and Reciprocal Protection of Investments (signed 5 October 2005, entered into force 5 March 2006) art 13 [hereinafter, 2005 Georgia — Latvia BIT].
[1060] See annx 19.
[1061] Agreement between the Government of the Republic of Finland and the Government of Georgia on the Promotion and Protection of Investments (signed 24 November 2006, entered into force 30 December 2007).
[1062] See annx 19.
[1063] See annx 4.
[1064] See annx 19.

studies, which demonstrated a general trend of including public health provisions as well as a more limited scope of investment protection.

Again, no conclusive evidence of regulatory chill can be found based on the analysis of Georgian BITs. It can be inferred that a higher level of PHS in the two recent BITs pertains to general guidelines and trends in the treaty negotiation rather than the State's concerns over its public health regulatory space.

6.5.1.4. Conclusion

To conclude this section, neither the quantitative nor qualitative analysis of the IIAs brokered by the Transcaucasian states show any evidence of internalisation regulatory chill. Firstly, the states have continued to sign IIAs despite the instigation of arbitration claims. Secondly, there is no conclusive trend or observable policy by the states to improve the public health regulatory scope in IIAs. Certain improvements of PHS in more recent treaties, or greater PHS in earlier ones, are likely to pertain to the counterparties' agenda or general guidelines and trends in the treaty negotiation. More abstractly, the results are very similar to those found in the previous case studies and a comparison of the studies further supports this point. In turn, this contradicts the regulatory chill theory as no concerns regarding the potential risk of investor-State claims can be inferred from the above discussion.

6.5.2. Investor-State Disputes and 'Specific Response' Regulatory Chill

This section will turn to tracing specific response regulatory chill, which is thought when governments roll back tobacco law initiatives after facing the imminent threat of an arbitration claim. To this end, it will consider both known ISDS and other known disputes with foreign investors to elucidate whether foreign tobacco investors have ever had disputes with the states stemming from tobacco control legislation and, if so, whether such disputes have ever led to regulatory chill.

As mentioned earlier, each state in the South Caucasian region has been involved in ISDS. Georgia has the largest record of investment claims, having been a respondent

in 13 known ISDS.[1065] The value of the claims varied between USD 12 million[1066] and USD 180 million;[1067] however, the amounts actually awarded to investors were often several times lower than the amounts claimed.[1068] The disputes mainly arose out of executive decisions taken by the government, including the cancellation of concession rights;[1069] the invalidation of a share purchase in a state-owned plant;[1070] the termination of a contract for developing road infrastructure;[1071] the entry into administration of an investor's local company;[1072] and the alleged seizure of business premises.[1073] One dispute involved a legislative act that gave priority to tax authorities in bankruptcy proceedings.[1074] However, none of the ISDS claims against Georgia involved foreign tobacco investors. This thesis also finds no information relating to any other disputes with tobacco investors over prospective regulatory changes.

The ISDS experiences of Armenia and Azerbaijan differ mainly on a quantitative and not a qualitative basis. Each has been involved in four ISDS. The claims also arose mainly out of the government's executive decisions relevant to specific foreign investors. One case against Azerbaijan concerned a court decision to void the purchase of shares in a national oil company.[1075] Another case, which involved investment in the electricity sector and criminal accusations against local managers, saw the settlement of the largest claim for Azerbaijan, at USD 460 million.[1076] All four Armenian disputes were mounted by US investors.[1077] The claims derived mainly from decisions taken by the executive branch of the government: a decision by the Ministry of Environment to

[1065] See annx 18.
[1066] *iZee Enterprises LLC, Lazer-2 Tbilisi Ltd., and Cafe Rustaveli Ltd. v Georgia*, UNCITRAL, Settlement (1 January 2012) [hereinafter, *iZee v Georgia*].
[1067] *KazTransGas JSC v Georgia*, PCA Case No 2017-22, Settlement (13 September 2018) [hereinafter, *KazTransGas v Georgia*].
[1068] See annx 18.
[1069] *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Award (3 March 2010); *Ron Fuchs v The Republic of Georgia*, ICSID Case No ARB/07/15, Award (3 March 2010).
[1070] *Ares International Srl and MetalGeo Srl v Georgia*, ICSID Case No ARB/05/23, Award (8 February 2008).
[1071] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No ARB/08/19, Award (9 August 2012).
[1072] *KazTransGas v Georgia* (n 1067).
[1073] *iZee v Georgia* (n 968).
[1074] *Bidzina Ivanishvili v Georgia*, ICSID Case No ARB/12/27, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding (10 December 2012).
[1075] *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v The Republic of Azerbaijan*, ICSID Case No ARB/06/15, Award (8 September 2009).
[1076] *Barmek Holding AS v Republic of Azerbaijan*, ICSID Case No ARB/06/16, Award Embodying the Parties' Settlement Agreement (28 September 2009).
[1077] See annx 18.

deny the renewal of old mining licences and a refusal to grant new ones,[1078] government interference in an investment programme in a tyre plant,[1079] and a violation of the concession contracts for an infrastructure project.[1080] The latter claim amounted to USD 150 million – the largest sum for a claim against Armenia based on the information available.[1081] A pending dispute involves the failure of the enforcement bodies to investigate fraud committed by a local partner against a foreign investor.[1082]

None of these disputes, however, involves the tobacco industry or tobacco control regulations. Notably, in 2010, Ukraine initiated a WTO claim against Armenia challenging the distinction in the Armenian taxation policy between local and foreign producers of tobacco and alcohol.[1083] The policy was clearly discriminatory and the dispute was resolved swiftly when Armenia reviewed it.[1084] No further claims challenging tobacco policy or with tobacco investors have been identified.

In summary, each of the South Caucasian states has had experience with high-value investment arbitration claims, many of which arose out of executive decisions taken by the respective governments involving investors from the electricity, oil and gas, infrastructure, mining and other sectors. With the exception of the Ukrainian WTO claim against Armenian discriminatory tax policies, none of the known disputes in the region has related to tobacco control legislation or any decisions related to foreign tobacco investors. Thus, similar to the studies on Ukraine and Belarus, the existence of specific response regulatory chill was not observed in South Caucasia.

6.6. Discussion

[1078] *Global Gold Mining LLC v Republic of Armenia*, ICSID Case No ARB/07/7, Order Taking Note of the Discontinuance (9 May 2008).
[1079] *TS Investment Corp v Republic of Armenia*, LCIA, Award (1 August 2011).
[1080] *Joseph K Borkowski and Rasia FZE v Republic of Armenia*, ICSID Case No ARB/18/28.
[1081] ibid.
[1082] *Edmond Khudyan and Arin Capital & Investment Corp v Republic of Armenia*, ICSID Case No ARB/17/36.
[1083] WTO, *Armenia: Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages*, Request for the Establishment of a Panel by Ukraine - Revision (8 October 2010) WT/DS411/2/Rev.1.
[1084] See eg Eco-Accord Center for Environment and Sustainable Development, 'Ukraine to Test the WTO Dispute Resolution Mechanism for the First Time' (Globalization, the WTO and the NIS: Broadening Dialogue for Sustainable Human Development, October 2010).

Once again, the findings do not provide any direct evidence to support the existence of regulatory chill (qualified by this study's limitations). This echoes the main critique of the regulatory chill theory that it is based on 'hypothetical situations and weak counterfactual reasoning'[1085] and 'supported by little more than endless repetition'.[1086] However, the case study on Transcaucasia has yielded important results that need to be addressed before summarising the evidence on regulatory chill and discussing the results and contribution of this study. The remainder of this section will discuss the main findings in turn.

First, this chapter has found that tobacco control in the region is not adequate and is generally poorly monitored by the states. There are no effective mechanisms in place in any of the South Caucasian countries for assessing and monitoring tobacco smoking rates and the impact of regulatory interventions. Based on the available information it can be concluded that smoking prevalence and in turn the burden of tobacco have both increased in recent years in each Transcaucasian state, whilst the FCTC policies, in particular smoke-free and taxation measures, remain only partially implemented. It can therefore be concluded that the tobacco policies in place are not adequate and proportionate to the level required.

The rising smoking rates are also underpinned by the ineffectiveness of those FCTC measures that have been implemented based on ineffective enforcement mechanisms[1087] and/or factual non-observance of the measures by the tobacco companies.[1088] Another reason could be the increase in tobacco production and tobacco sales commonly reported in Transcaucasia. Efforts by the states to boost the industry are most likely to be underpinned by the understanding that the industry generates budget revenues and creates jobs. At the same time, there is no evidence to suggest that the Transcaucasian governments have ever considered the long-term economic implications of the industry on the State budgets or prioritised public health over the economic interest.

Another important finding stemming from the case studies is that supra-national regulations aimed at a convergence of regulatory policies in the context of trade facilitation could be a more effective tool for public health policies than public health

[1085] Fry (n 653).
[1086] Brower and Blanchard (n 86).
[1087] See s 6.1.
[1088] Mir and others (n 921).

treaties themselves. As such, Armenia did not comply with FCTC implementation and had weak tobacco policies until it was obliged to implement regulations due to its membership of the EAEU. At the time of writing, Armenia has implemented much stricter regulations than those in the other Transcaucasian states that are yet to enter into force. Notably, Belarus (another EAEU member) also has a much stronger tobacco regulatory framework (excluding taxation policy) compared to the other post-Soviet States.

The study reveals that the Transcaucasian states welcome tobacco FDI and foreign tobacco companies are expanding their businesses in the region. The post-Soviet states are FDI-sensitive and rely on the tobacco industry as an important source of budget revenues. This is evident by the growing investment in the area, which is welcomed by the governments. Some governments have gone as far as providing support to develop the tobacco sector, including subsidising tobacco growers. This is in contrast to the states' FCTC obligations. The findings further show that economic considerations have been the major factor in the development of tobacco regulatory policies and the main grounds upon which to object to tobacco regulatory initiatives. In line with the previous case studies, the level of tobacco control regulatory policy in the states reflects the balance that the governments strike between the need to protect public health and the states' economic interests. As Movsisyan and Connolly pointed out, '[f]or nations that have high smoking rates, growing social democracies and struggling economies, tobacco control must compete with many other priorities that high-income nations have already addressed'.[1089]

Indeed, the imminent economic needs of the transitional states take priority over the need to address the tobacco epidemic. Furthermore, the states' reliance on FDI, and on tobacco sector FDI in particular, is impeding the progress of tobacco control legislation. The political economy of FDI and capital flight theory can therefore provide better explanations for the tobacco regulatory delay. This is aligned with the previous studies on Ukraine and Belarus.

At the same time, the findings of this thesis are inconclusive in terms of confirming whether a certain type of political system and the distribution of power in the state could have any impact on the likelihood of regulatory chill. The status of international law under the national constitutions enables IIL to effectively impact the legal relationships

[1089] Movsisyan and Connolly (n 695).

in the states, although no evidence exists that IIAs have ever had a direct impact in terms of hampering the development of national tobacco regulations. The national laws of the South Caucasian states to a large extent mirror IIA provisions and also stipulate for the stability of the regulatory framework in case of any adverse regulatory changes. Since only Azerbaijani law carves out public health from this provision, the national governments in Armenia and Georgia would also have to consider their national provisions when adopting tobacco legislation and the notion that the stability of regulatory framework provisions could delay new regulatory measures in the states. Even so, this thesis finds no evidence that national law has affected tobacco regulatory development in the states. Instead, the inclusion of ISDS in national legislation provides evidence against the regulatory chill hypothesis, which is based on the assumption of a government's fear of arbitration. And lastly, the lenient policies and abundance of tax and other incentives for foreign tobacco investors, in particular in Azerbaijan and Armenia, could further explain the growing smoking rates in the region. This further confirms that the Transcaucasian states put their economic interest ahead of public health.

Finally, the analysis of IIA negotiation practices demonstrates that the states have continued to negotiate and sign investment treaties even after they faced ISDS. This includes Georgia, which has been a respondent in 13 investment arbitrations since 2005. The involvement in investment arbitrations has not affected the language used in the negotiated BITs. Even though greater PHS can be identified in recent BITs, this is likely to be due to modern guidelines and practices on the treaty negotiations as opposed to the governments' fears of investment treaty claims. None of the known investment arbitrations has involved tobacco regulatory innovations or the tobacco industry, thus countering the presence of any 'specific response' regulatory chill.

It can therefore be inferred that on balance, economic considerations and capital flight concerns are likely to explain the ineffective tobacco regulatory policies in the region and that the same tobacco policies would be in place even if the Transcaucasian states had no IIAs in force. This is in line with the previous case studies, which consistently demonstrated no evidence of regulatory chill.

6.7. Conclusion

Subject to the methodological limitations, it is possible to conclude that IIAs do affect tobacco control regulations and do not lead to regulatory chill in Armenia, Azerbaijan and Georgia. From the public health perspective, the existent tobacco regulations in these Transcaucasian states are not adequate and proportionate to the level required to combat their high levels of tobacco-related mortality. This illustrates the existing tobacco regulatory delay, which is a *prima facie* indicator of potential regulatory chill. Notwithstanding this, the case study consistently shows no evidence of regulatory chill (some evidence however may not be available in the public domain). Governmental concerns over budget revenues, job security and potential capital flight are likely to be the main reasons for the regulatory delay. Further, the growing presence of foreign MNCs and other private investors in the tobacco sector has resulted in a powerful tobacco lobby, which further stymies attempts to effectively regulate tobacco. This is generally consistent with the previous findings in Ukraine and to some extent Belarus with the caveat that in Belarus, the state controls the majority of the tobacco market. Peripheral reasons for the regulatory delay in Transcaucasia vary and include cultural aspects associated with smoking. However, such obstacles are unlikely to be determinant in the regulatory process and could be addressed within the law-making and law-enforcement stages.

The findings of this thesis are inconclusive in terms of their ability to confirm whether a certain type of political system and distribution of power in the state could have any impact on the likelihood of regulatory chill. Further research in this regard from the political studies' perspective would be welcomed. The status of international law under national constitutions generally enables IIL to effectively impact legal relationships in the states. Yet no evidence exists to confirm that IIAs have ever directly impeded the development of national tobacco regulations. The national law of the South Caucasian states to a large extent mirrors IIA provision and also provides for the stability of the regulatory framework in case of any adverse changes. Nonetheless, this thesis finds no evidence that national law has affected tobacco regulatory development in the states.

Further, the analysis of IIAs and disputes with foreign investors shows no evidence that international investment obligations have ever hampered tobacco regulatory measures and led to regulatory chill. Internalisation regulatory chill cannot be traced in international investment treaties. There have been no consistent changes in the policies of the Transcaucasian states regarding the negotiation of IIAs. Despite the growing

number of ISDS, the states have continued to sign IIAs and maintained most of their existing treaties. The states are generally supportive of arbitration, as evidenced by the national law provisions and existing IIAs that contain arbitration clauses. Likewise, there is no observable 'strategy' for securing greater regulatory space in the more recent or renegotiated BITs that could suggest the states are concerned about it when introducing tobacco policies. Further, there is no evidence of specific response regulatory chill. As far as this thesis can determine, tobacco companies have never challenged tobacco regulatory measures in either ISDS or elsewhere. It is therefore not possible to argue that tobacco regulatory development in any of the Transcaucasian states has been affected by specific response regulatory chill.

In the circumstances, the argument that IIAs lead to regulatory chill is unconvincing. This thesis has consistently demonstrated the absence of any evidence of regulatory chill in the post-Soviet States. While the inquiry has been concerned with the tobacco sector and tobacco regulatory development, the reasons for the regulatory delay, in particular the significance of FDI and budget revenues for these transitional states, suggests that to some extent, the present outcomes can be extrapolated to other post-Soviet states and sectors. Nevertheless, further research is required to confirm this.

7. Study Results and Contributions

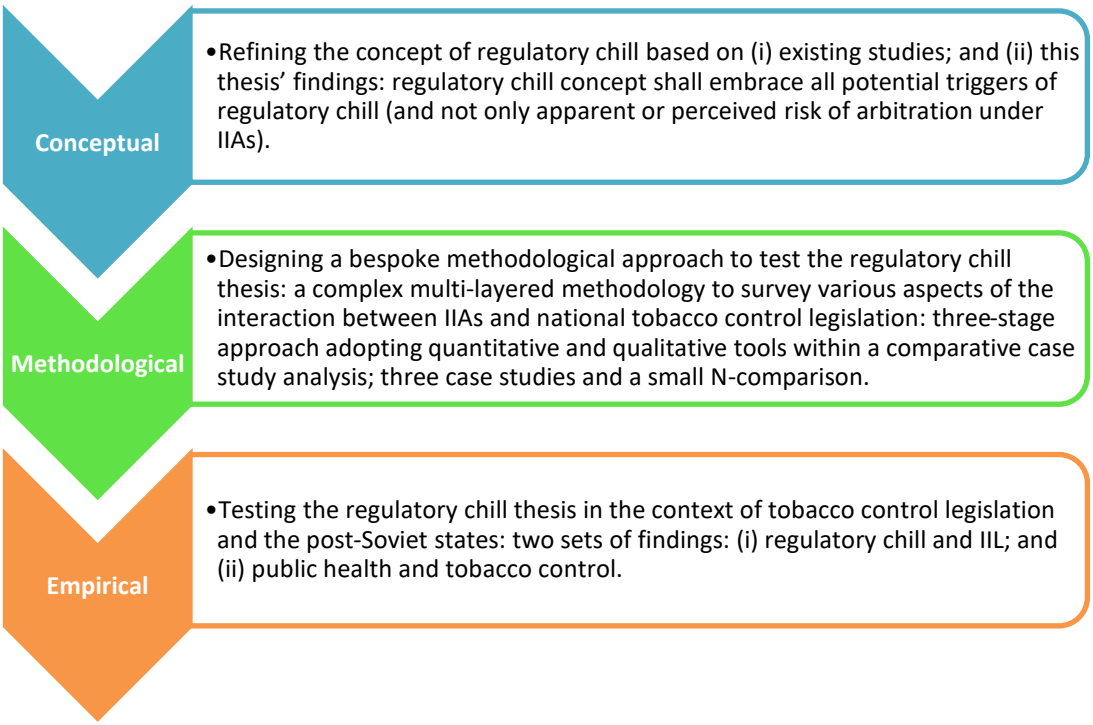
7.1. Introduction

This Chapter presents the findings and the study contribution including its conceptual, methodological and empirical contributions. It starts by reviewing the former two contributions and presents another layer of regulatory chill conceptualisation. It argues that the concept shall embrace all potential triggers and do not focus solely on the potential or perceived risk of arbitration under IIAs. It goes on to present empirical findings which given the inter-disciplinary nature of this thesis are categorised into (i) regulatory chill and IIL findings and (ii) public health and tobacco findings. It concludes by highlighting the significance of the studies for IIL and public health law.

7.2. Conceptual and Methodological Contributions

As stated above, the study's contributions to the field can be categorised into conceptual, methodological and empirical contributions (see Figure 3).

Figure 3. Study Contributions



This thesis has defragmented (deconstructed) the knowledge of the regulatory chill hypothesis. It argued that existing literature on the issue is largely disjointed. With minimal, if any, conceptualisation of the phenomenon, writers present contrasting views from various disciplines whilst adopting different methodologies for their research. The existing studies adopt contesting (if not mutually exclusive) definitions of what they understand to be regulatory chill. It is fair to state that to date, regulatory chill has remained an undeveloped theory, suffering from under-conceptualisation and methodological flaws. The bottom line is that it is very difficult, if not impossible, to establish the existence of regulatory chill unless one can demonstrate that illegitimate claims or perception of potential claims lead to regulatory chill. There are two major hurdles for this. One, establishing that measures delayed were *bona fide* or an investment claim illegitimate outside of formal adjudication and based on limited evidence could be a very problematic if not impossible task. On this ground, most of

the existing regulatory chill studies can be criticised.[1090] Two, proving the causal correlation between the regulatory delay and investment claims is another problematic task. Even where there is an investment claim and a regulatory delay, the causation between these two variables is not necessarily straightforward. Likewise, it is very challenging to establish causation between internalising threats of potential claims, which have never materialised, and regulatory delay. It is unlikely that policymakers can put this forward/admit it as a rationale for the non-adoption of regulatory measures of public interest. Therefore, it is problematic if not impossible to provide credible and uncontested evidence of regulatory chill. These deficiencies though, do not refute the hypothesis and thus this thesis went on to survey its different criteria to suggest the most appropriate framing of the hypothesis to use in the studies.[1091]

Notwithstanding that, this thesis demonstrates that such conceptualisation is not sophisticated and broad enough to capture all the aspects of regulatory chill and the mechanics of the regulatory process. The literature to date has had a propensity to construe regulatory chill as the phenomenon driven by one or two definite triggers, such as IIAs and their arbitration mechanism.[1092] Because of the restricted focus, scholars have often failed to consider other potential causes of regulatory chill. Where regulatory delay was established, the studies drew – not necessarily correct – inferences that regulatory chill had occurred as a result of a given trigger. By not acknowledging other triggers that could lead to an identical outcome, the studies could misjudge the causation and produce inaccurate findings.[1093] Given the significance of the issues at stake, the outcome of such miscalculations can be appalling.[1094]

For that reason, it is suggested that the thesis' framing should reflect on the above and acknowledge the fact that regulatory chill can be the outcome of a myriad of triggers, including but not exclusively, IIAs and their arbitration mechanisms. The list of potential causes shall not be exclusive since the existing studies do not allow for control of all external variables. Drawing upon this, the thesis suggests the following modified conceptualisation of regulatory chill:

[1090] See s 2.2.
[1091] See s 2.1.5.
[1092] Côté (n 51).
[1093] See s 2.2.
[1094] See ch 1.

> Regulatory chill is any impact – as opposed to progressive regulatory development – of different factors, including legal orders, social, economic or political phenomena, on *bona fide* public regulatory measures that is manifested when states:
>
> - maintain status quo,
> - revoke,
> - delay,
> - dilute, or
> - otherwise fail to improve such measures.
>
> (Public regulatory measures shall be understood as legislative, executive or judicial decisions of a broad regulatory nature affecting the public interest).

Such framing requires a broad and well-rounded study across different areas to discern the specific role of any of the factors, including IIAs and their arbitration mechanism. Further, it does not exclude the fact that several concurrent triggers may lead to regulatory chill and if so, the issue of causation should be considered, i.e. what factor (factors) had a prevailing role.

This brings us to the methodological contribution of this thesis.[1095] This study has designed a bespoke methodological approach to test the regulatory chill thesis. It comprises a complex three-stage approach adopting qualitative and quantitative tools and three case studies enabling for a small N-comparison.[1096] First, this methodology is one of a few attempts to study regulatory chill in a systematic way and the most comprehensive legal study to date. The overwhelming majority of regulatory chill literature represents anecdotal case studies. This anecdotal evidence (whilst also arguable) are silent on the magnitude of regulatory chill by default. It does not assist in understanding if there is a need to reform the existing system of international investment protection. More systematic research has been mainly conducted by political scientists. At the same time, the political scholars[1097] focused on a wide range of jurisdictions and this breadth did not allow them to dive into the depth of the issue in each of them. These studies are further limited by the lack of a comprehensive analysis of main legal sources – IIAs and national laws. In this light, this thesis suggests methodology which is systematic and broad enough to avoid anecdotal evidence, but at the same time not excessively wide-reaching to escape a cursory analysis. Conducting

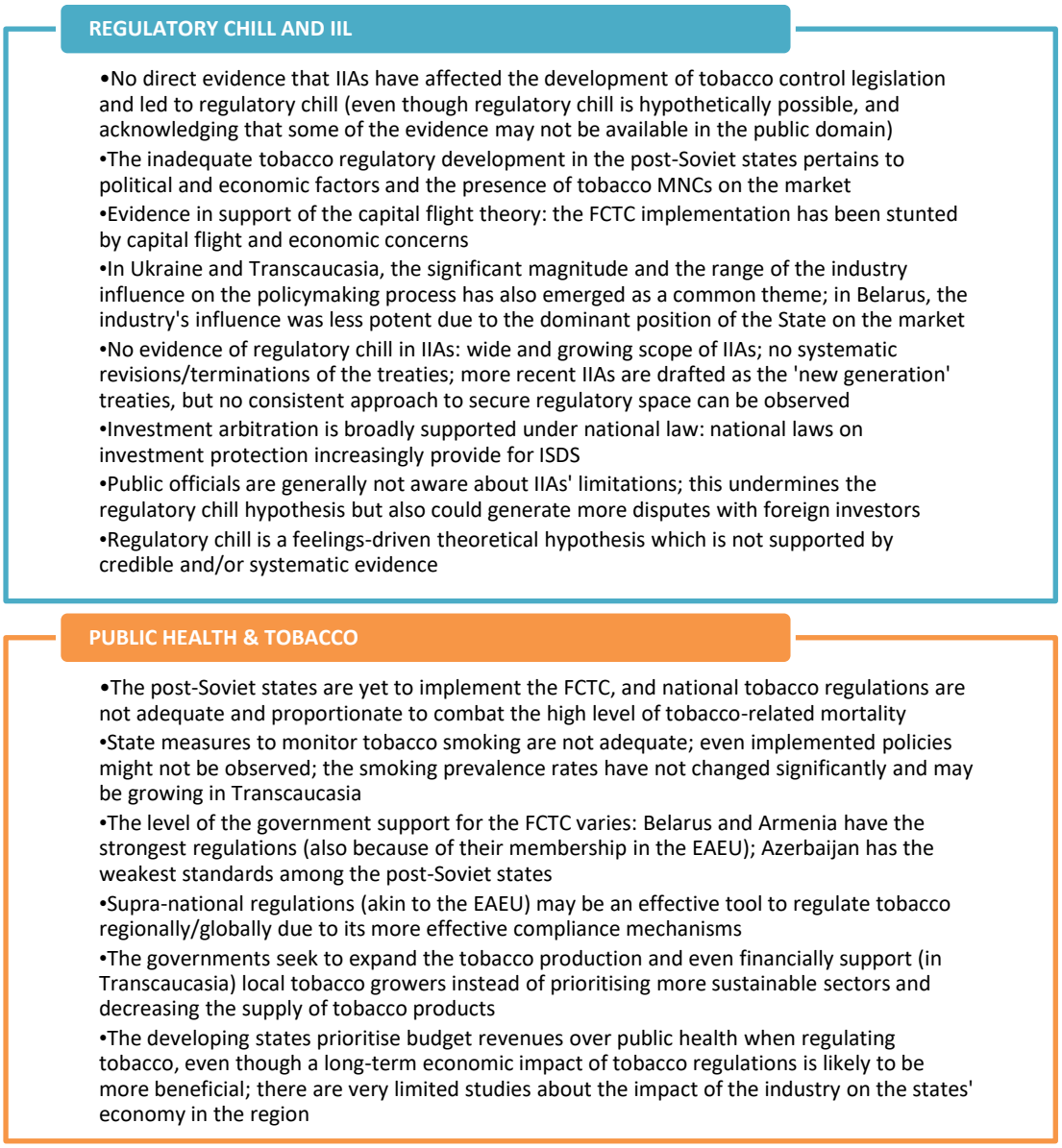
[1095] See ch 3.
[1096] ibid.
[1097] Including Côté (n 51) on whose work this thesis draws.

three case studies on five jurisdictions and a small N-comparison allows delineating common trends and providing specific policy suggestions. Second, the suggested methodology can be easily utilised to conduct similar research in other jurisdictions or be adopted for studies on regulatory chill in other sectors.

7.3. Empirical Contribution

Most importantly, this study makes a significant empirical contribution to the area by testing the regulatory chill thesis in the context of tobacco-control legislation and the post-Soviet States. The results could be split into two sets of findings: (i) on regulatory chill and IIAs/ISDS and (ii) on public health and tobacco legislation to implement the FCTC. The summary of the results is provided in Figure 4 below and the remainder of this section will consider each of them in turn.

Figure 4. Empirical Contribution



7.3.1. Regulatory Chill and IIAs/ISDS

First and foremost, the purpose of this thesis was to fill the gap in IIL literature and provide evidence on regulatory chill in a thesis that is both eloquent and edifying. To this end, the thesis conducted three case studies on the post-Soviet States to consider the research question of 'to what extent, if any, do IIAs affect tobacco regulations and lead to regulatory chill in the post-Soviet States?' This section will engage with the discussion of empirical findings on regulatory chill by systematising, comparing and distinguishing the outcomes in each of the case studies. It starts with explanations on the delay of FCTC implementation found in white papers, government press releases, statements, civil society reports, media reports, etc. It proceeds with the analysis of IIAs and ISDS, as well as national law restrictions, which may interfere with State power to regulate tobacco. And finally, it discusses other, more accidental, findings in favour or against the regulatory chill hypothesis that emerged in the case studies. It concludes by arguing that IIAs and their arbitration mechanisms do not affect the tobacco regulatory development in the post-Soviet States.

The evidence suggests that the delay of the FCTC implementation in the region is rather attributed to the States' concerns to lose FDI in the tobacco sector, budget revenues, jobs and social protection for local employees of tobacco corporations. Other variables, such as political transitions, smoking customs and technical difficulties of the FCTC implementation have also contributed to – but not triggered – the regulatory delay. And finally, the thesis suggests that the regulatory chill findings might not be unique for the tobacco sector and the post-Soviet States and the economic concerns might guide the regulatory development in the public interest in other sectors and jurisdictions.

7.3.1.1. Explanations for the Delay of FCTC Implementation

The major outcome of this study is that it finds no direct evidence that IIAs have affected the development of tobacco-control legislation and led to regulatory chill. This thesis acknowledges that regulatory chill is hypothetically possible because each of the post-Soviet States has (i) an inadequate level of tobacco control regulations, (ii) a wide network of IIAs providing for broad investment obligations and ISDS (iii) accepted

FDI in the tobacco industry which enjoys international investment protection. Notwithstanding that, the study consistently demonstrates no direct evidence of regulatory chill in the context of tobacco-control regulations in each of the post-Soviet States. Instead, the inadequate tobacco regulatory development in the post-Soviet States pertains predominantly to economic reasons, more specifically to the concerns associated with loss of FDI and State budget revenues. Also, in particular, in Ukraine, the tobacco lobby has been very powerful in pushing back progressive tobacco policies. As a result of the systematic analysis of the post-FCTC green and white papers, explanatory notes, parliamentary discussions, press releases, media reports and other sources, various reasons or explanations for opposing tobacco regulatory innovations have been established as follows:

7.3.1.1.1. Loss of FDI and State Budget Revenues

Since the early 1990s, the post-Soviet States have been in transition from the planned Soviet economy into the market model. This was accompanied by an economic crisis, unemployment and dependency on foreign financial aid making the transitional States very sensitive to the loss of FDI and State budget revenues. As a result, economic self-interest has been the major deterrent factor for tobacco regulatory development in all the post-Soviet States. Government officials have explicitly opposed FCTC-consistent measures because of a potential loss of FDI and State budget revenues. Furthermore, the post-Soviet States welcome investment in the tobacco industry on the premise that this brings significant benefits to the economy. In Ukraine, the Minister of Economic Development and Trade opposed draft tobacco legislation to implement the FCTC because – in his view – it would result in UAH 4 billion loss for the State budget.[1098] In 2019, the President of Belarus opposed the increase of the tobacco excise tax, emphasising that 'tobacco and alcohol … earn a lot of money for the State budget, this is why there should be no sweeping changes'.[1099]

In Transcaucasia, the Government's support for the tobacco industry has also been unwavering tremendous. In Armenia, the tobacco industry is an important stakeholder for the whole economy, whilst their Government reportedly benefits from tobacco

[1098] RBC Ukraine (n 510).
[1099] President of the Republic of Belarus (n 662).

budget revenues as well as a low tobacco taxation policy. Meanwhile, in Georgia, tobacco has been an important part of their agricultural sector for more than 200 years.[1100] The State's support for the industry arguably exceeds its support for tobacco control; in 2015, local tobacco manufacturers received *circa* Euro 1.5 million support from the State budget, while the State's expenditure for tobacco control amounted to only Euro 20,000 in the same year.[1101]

Arguably, the prevalence of economic consideration has been the most potent in Azerbaijan. Their Control Law 1278-RS, introducing plain packaging measures, has been seen as a potential threat to the State budget by some legislators.[1102] The International Chamber of Commerce's (ICC) Secretary-General expressed further concerns that some tobacco producers may leave the State's market as a result of the need to implement expensive production lines for the new packaging.[1103] In 2017, the Azerbaijan Government reacted to the surge of imports of tobacco products up to USD 150 million by increasing domestic tobacco production; a State programme was set to double the tobacco production from 3,200 to 6,000 hectares by 2021.[1104] What is more, the intensified tobacco control in Europe and the world reduction of tobacco growing was seen by the industry (and potentially the Government) as an opportunity to boost tobacco production in Azerbaijan.[1105] Furthermore, the President of Azerbaijan personally attended the opening of a tobacco factory in Sumgayit Chemical Industrial Park[1106] and the Government supported and even subsidised local tobacco growers.[1107]

Drawing upon this, it is argued that the loss of FDI and the State budget revenues have been the key reasons for delaying the implementation of FCTC policies. The difficult economic situation is likely to tip the balance in favour of the State's economic interest and not public health interest in the transitional economies. Given the fact that no evidence of regulatory chill was found, it is apparent that the international investment framework has been beneficial rather than detrimental for progressive tobacco policies; if IIAs help to attract FDI – which is more likely than not – then they

[1100] Flanders and Gentry (n 922).
[1101] Bakhturidze (n 913).
[1102] Akhmeteli (n 916).
[1103] ibid.
[1104] Nazarli (n 891).
[1105] ibid.
[1106] AzerTAC (n 955).
[1107] Mena Report (n 948).

help to improve the economy that ultimately would lead to more financial freedom for the States to prioritise public health over the tax revenues.

7.3.1.1.2. Lobbying and Adverse Tobacco Industry Tactics

The tobacco lobby and adverse tobacco industry tactics are the second – in terms of significant themes – to emerge from this study. The industry's influence varies from State to State, which is likely to be underpinned by the tobacco market distribution. The lobbying power was the strongest in Ukraine, where MNCs have a dominant position, and the least potent in Belarus, where the State's *de facto* controls the tobacco market. At this point, a reader may be wondering what is wrong with lobbying and why has this been identified as a separate category? Firstly, civil society and experts have long suspected that tobacco lobbyists could cross the lines of ethically (and potentially legally) acceptable practices.[1108] The release of Big Tobacco's confidential documentation in the US has shown that the industry was behind many ostensibly independent quasi-academic organisations whose financial support by the industry was not disclosed.[1109] Secondly, lobbying is hardly regulated in the region and such non-regulation benefits the industry. In the absence of distinct rules, lobbying tactics are the matter of tobacco companies' business ethics – save for bribery and other illegal acts. Given the millions of US Dollars at stake, the corporations are unlikely to have high ethical standards when it comes to sweeping regulatory changes. The industry is likely to have a strong political presence in all post-Soviet States. This can be archived by taking part in general elections to get inside the State regulatory bodies/otherwise 'recruiting' public officials to block the FCTC-compliant legislation.

The Ukrainian example stands out. The power of the tobacco lobby in the State is clearly illustrated by the fact that Ukraine, which had no trade relationships with Australia, was the first to bring the WTO claim against Australia's plain packaging measures.[1110] This claim had *de facto* blocked Australian tobacco control measures.[1111] The only sensible explanations for this incident is that the industry used its influence

[1108] Gilmore, Collin and McKee (n 479).
[1109] See Report of the Committee of Experts on Tobacco Industry Documents, 'Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization' (July 2000).
[1110] See s 4.2.1.
[1111] DeloUa (n 481).

on the Ukrainian Government to issue the claim.[1112] Since 2012, the tobacco lobby in the Ukrainian Parliament has been successful in opposing tobacco legislation, including initiatives that had already been implemented in neighbouring Belarus and Russia.[1113] Several regulatory initiatives have been *de facto* 'blocked' and as a result, about 50% of the FCTC requirements are yet to be implemented. For example, the Ministry of Economic Development and Trade opposed the adoption of the Draft Law No 4030a[1114] on several grounds which accurately replicate the position advocated by the National Organisation of Retail Trade, the President of which had previously worked at Philip Morris Ukraine.[1115] In 2017, Transparency International Ukraine revealed the names of public officials involved in lobbying tobacco industries, including eight MPs.[1116] Notably, other industries have also been powerful in resisting public health legislation, such as the Draft Law 'On Amendments …regarding the restriction of the content of trans fatty acids in food)'[1117] leading the Ukraine Government to 'amend the Draft and prepare a regulatory impact analysis, including calculations of the financial burden for large, medium and small businesses'.[1118] It can be inferred therefore that economic considerations may also prevail public health considerations in the context of other industries.

The tobacco market in Transcaucasia was privatised in the mid- and late- 1990s. In contrast to Ukraine though, the tobacco market is more diverse and represented by the mixture of local and foreign investors (Big Tobacco as well as other investors from Canada, Japan, etc). The industry's lobbying has also been evident. Writers highlight a manifest presence of the tobacco industry in the Armenian Parliament which could lead to their passage of weak laws with no enforcement mechanisms.[1119] In Azerbaijan, support for the tobacco industry has been the strongest, whilst the tobacco control policies have been weakest among the post-Soviet States. In 2017, the Government had a State programme in place to boost tobacco production by 2021.[1120]

[1112] See s 4.2.1.
[1113] See (n 495).
[1114] RBC Ukraine (n 510).
[1115] ibid. For NORT's statement on the proposed legislation, see Inceoglu (n 511).
[1116] Transparency International Ukraine (n 501).
[1117] The Ministry of Health of Ukraine (n 513).
[1118] Ministry of Health of Ukraine Letter (n 515).
[1119] Movsisyan and Connolly (n 695).
[1120] Trend News Agency (n 958).

In Georgia, opposition to the tobacco industry has also been the most important factor leading to regulatory delay. Thus, the Head of the Parliament Committee on Public Health and Social Matters observed that Georgia was committed to implementing the FCTC by 2011 but was not able to deliver on its obligations because of 'very strong lobbying of the tobacco industry'.[1121] More recently, the Head of the Department of NCDs at Georgia's National Centre for Disease Control and Public Health highlighted the tobacco industry's aggressive lobbying even during the COVID-19 pandemic.[1122]

The industry's influence in Belarus was the least potent, arguably due to the dominant position of the State on the market[1123] and the concentration of power in the hands of the President making lobbying more difficult for the businesses. Nonetheless, in opposing the increase of tobacco excise tax, the President of Belarus explicitly referred to his agreement with an investor 'who undertook to sell tobacco products of our enterprises in the past and vowed to raise state budget revenues'.[1124] With Belarus continuing to accept tobacco investment,[1125] the industry's power is likely to grow making the State more predisposed towards negative lobbying.

In summary, the tobacco industry has been notorious for undermining tobacco regulatory policies in both developed and developing countries and the case studies clearly illustrate some of their tactics. The adverse tobacco tactics have been the second major delaying factor for FCTC implementation. It is plausible that the extent to which the industry gets involved in these adverse tactics depends on the market share and (especially) the presence of Big Tobacco on the market: the lobbying was the most potent in Ukraine (where Big Tobacco controls the market) and the least powerful in Belarus (where the State dominates the market). At the same time, national tobacco investors in Transcaucasia have also been powerful in resisting tobacco legislation. As the bottom line, the industry's resistance would always persist and does not depend on the existence of IIAs or even tobacco FDI. This is also likely to be relevant to other

[1121] Akhmeteli (n 916).
[1122] News-Georgia, 'About 11.4 Thousand People Died from the Consequences of Smoking in Georgia in a Year' (31 May 2020) <www.newsgeorgia.ge/%D0%BE%D1%82-%D0%BF%D0%BE%D1%81%D0%BB%D0%B5%D0%B4%D1%81%D1%82%D0%B2%D0%B8%D0%B9-%D0%BA%D1%83%D1%80%D0%B5%D0%BD%D0%B8%D1%8F-%D0%B2-%D0%B3%D1%80%D1%83%D0%B7%D0%B8%D0%B8-%D0%B7%D0%B0-%D0%B3%D0%BE%D0%B4/> accessed 14 October 2020.
[1123] See Grodno Tobacco Factory 'Neman' (n 665).
[1124] ibid.
[1125] BELSAT (n 712); PrimePress (n 713).

sectors and industries. Even though the presence of IIAs provides the industry with an additional tool to resist the regulatory development, this thesis finds no evidence that tobacco corporations have ever been threatened with investment arbitration to oppose tobacco regulatory measures implementing the FCTC.

7.3.1.1.3. Loss of Jobs

The tobacco industry has been providing employment and means of living for many people in the region. For instance, the Government of Ukraine rolled back its tobacco anti-cartel law when BAT – in protest to the proposed regulatory change – temporarily closed its factory in Priluky with 500 staff and thousands of other people dependant on the factory.[1126] The industry has also been a major employer in other post-Soviet States. In Belarus, the State-owned tobacco manufacturer GTF Neman, with its 72% market share, employs 1,100 personnel.[1127] In Georgia, the tobacco industry employs *circa* 52,000 people who are paid an estimated USD 2 billion in compensation every year.[1128] In Armenia, Grand Tobacco employs 900 people.[1129]In Azerbaijan, work with farmers and the creation of additional workplaces have been used by tobacco companies as arguments to access the market and gain the Government's support.[1130]

Therefore, loss of jobs can be an important consideration for implementing progressive tobacco legislation. Even though this has not been the prevalent argument in opposing the FCTC implementation, the Ukrainian example with anti-cartel legislation demonstrates that this factor alone could suffice to terminate a regulatory intervention in the public interest. The employment issue is tightly linked to economic considerations. From the State perspective, the loss of jobs sets a chain of adverse events in motion; the Government does not receive tax and national insurance contributions and, instead, pays benefits to employees as well as assisting in securing other employment. The risk is multiplied when Big Tobacco threatens to let people go.

[1126] ibid.
[1127] Grodno Tobacco Factory 'Neman' (n 665).
[1128] Flanders and Gentry (n 922).
[1129] Dan & Bradstreet, 'D&B Business Directory: GRAND TOBACCO, LLC' <www.dnb.com/business-directory/company-profiles.grand_tobacco_llc.6aa7cee847f8aefe938ff97243648440.html> accessed 18 March 2021.
[1130] The Business Year (n 945).

Thus, intertwined with economic self-interest concerns over employment and social protections could also result in the delay of FCTC implementation.

7.3.1.1.4. Other Explanations

Other explanations for the non-implementation of the FCTC include variables and technical difficulties with the policy change rather than specific triggers which could lead to regulatory chill. First and foremost, the States' political transition. Since gaining its independence in 1991, the post-Soviet States have been in the process of political transition embracing radical changes in the government regime and drastic legal reforms to transform the legal systems in line with the European and international standards. For the past 30 years, the transition has also been accompanied by civil revolutions, unrest and wars, including the Russia-Georgia Conflict, the Nagorno-Karabakh Conflict and the Russo-Ukrainian War in post-Euromaidan Ukraine. The political instability and need to deal with more imminent problems have also shifted the focus away from public health.

The political stability in Transcaucasia has also been affected by growing political and ethnic unrest.[1131] Again, the Ukrainian example stands out. Political developments in the State have led to repeated changes in the Government's composition. Since 2006, there have been five Parliament elections, including two extraordinary convocations in 2007 and 2014. These were accompanied by modifications to the structure of the Government and re-appointments of key political figures. The lack of steadiness in the Government has also prevented the formation of institutional memory, i.e. where certain individuals are consistently involved in the regulatory process, acquire and pass the knowledge to junior colleagues.[1132] The political instability affects the effectiveness of State agencies and diverts focus from public health to the more pressing issues. In turn, this affects the progressive tobacco legislation and implementation of the FCTC.

At the other end of the spectrum is the supra-presidential regime in Belarus, where President Lukashenko has been in power since the State's independence. As a consequence of his broad regulatory powers, the tobacco regulatory development

[1131] Paul B Henze, 'The Transcaucasus in Transition' (A Rand Note 1991) <www.rand.org/pubs/notes/N3212.html> accessed 12 February 2021; Amanda E Wooden, Christoph H Stefes (eds), *The Politics of Transition in Central Asia and the Caucasus: Enduring Legacies and Emerging Challenges* (Routledge 2014).
[1132] Sattorova and Vytiaganets (n 324) interview J88SVSI.

largely depends on the President. On one hand, the President has supported a healthy lifestyle and, as a result, Belarus has implemented more FCTC standards than any other post-Soviet State. On the other hand, the President's opposition to the increase of the tobacco excise tax has sufficed to prevent regulatory development.

Along the same lines, Movsisyan and Connolly argued that the'[t]ransition to social democracy and effective public governance has been slow in many post-Soviet Countries and this could partly explain the ineffective implementation of the tobacco control measures…'.[1133] At the same time, the transition *per se* is unlikely to trigger regulatory chill, therefore, this factor shall be considered rather a variable than a trigger. That being said, this thesis' findings are inconclusive to confirm whether a certain type of political system and distribution of power in the State could have any impact on the likelihood of regulatory chill and further research from the political studies' perspective would be welcomed in this respect.

Furthermore, illicit trade and unfair market distribution have been habitually invoked as a potential downside of plain packaging or other tobacco policies. The Ukrainian Ministry of Economic Development and Trade opposed a draft tobacco legislation to implement the FCTC because it could result in unfair market redistribution and increase illegal trade.[1134].Other explanations include technical not readiness, i.e. the need to allocate smoking areas and redesign smoking advertising campaigns; and legal challenges, i.e. poor elaboration of the law draft, including the absence of the effective implementation mechanism and its contradiction to other legislations.[1135] These are technical challenges that are part and parcel of any regulatory change and therefore do not prevent the regulatory development. Further explanation is the peoples' desire to smoke and that smoking is part of their culture. Critiques have considered this as the major obstacle to the progression of smoke-free policies in Georgia because such policies are resisted and maybe not followed by smokers.[1136] At the same time, smoking customs *per se* do not impinge the tobacco regulatory development but may vary the implementation of progressive measures. The latter though can be addressed by an educational element of the policy change that should accompany the process.

[1133] Movsisyan and Connolly (n 695).
[1134] RBC Ukraine (n 510).
[1135] See s 5.2, 6.2 and 7.2.
[1136] See s 6.2.3.

7.3.1.2. Search for Regulatory Chill in Investment Treaties and Case Law

Having considered the secondary sources to find the explanations for non-implementation of the FCTC, this thesis proceeded with the analysis of primary sources – IIAs and investment arbitration case law. First, the regulatory chill puts forward that governments could be intimidated by the prospects of investment claims and delay the regulatory development to avoid potential disputes. Nonetheless, the review of known investment arbitrations against the post-Soviet States reveals that tobacco-control policy has never been subject to investment disputes.[1137] What is more, regulatory policies implementing the FCTC have never been a subject of disputes with foreign or domestic investors more generally. Disputes with tobacco MNCs in Ukraine to date, have been concerned with the VAT control and tobacco pricing as a competition regulator, but these measures did not address the public health agenda as such.[1138] Consequently, there is no evidence of regulatory chill as a 'specific response' to the threat of arbitration.

Second, there is no direct evidence of internalising regulatory chill either. This thesis analysed statistically the trends of conclusion of IIAs and found that all the post-Soviet States (i) have a broad network of IIAs (ii) do not systematically terminate or re-negotiate treaties and (iii) continue signing new treaties with arbitration provisions. Qualitative coding of IIAs has shown that only a few, mostly more recent IIAs, employ public health or right to regulate language in their preamble, expropriation and other clauses, whilst every single BIT provides for investor-State arbitration.[1139]

Further, the thesis utilised a bespoke qualitative coding of BITs to compare re-negotiated and most recent BITs with earlier treaties. To compare the treaties, it uses PHS index indicating the number and the significance of treaty provisions which could secure more regulatory space for States and potentially prevent regulatory chill. It finds that, as a general rule, the States negotiated more PHS in most recent treaties. Nonetheless, none of them has had consistent policies – some recent treaties included

[1137] See annx 8, 13 and 18.
[1138] See s 4.5.3.
[1139] See annx 9, 14 and 19.

higher PHS whilst others' PHS could be significantly lower.[1140] This may suggest that the States did not have a consistent policy but considered the models offered by their counter-parties. And indeed, some treaties with the highest PHS in the region have been signed between the post-Soviet States and the same third parties (such as Turkey and Japan). The wording of those treaties is also similar. Therefore, it is more plausible than not that the States did not have any specific agenda to protect regulatory space and the more 'advanced' treaty texts are attributed to the States' counterparts' negotiators. Alternatively and additionally, the States could adopt UNCTAD recommendations/new practices in investment treaty drafting.

As the bottom line, there is no evidence to suggest that the Governments have embarked on the revision of their existing international investment obligations out of fear that the latter might impede regulatory sovereignty. In other words, both quantitative and qualitative analysis of IIAs shows no evidence of internalisation regulatory chill. The analysis of known ISDS and disputes with foreign investors also shows no evidence of specific response regulatory chill.

7.3.1.3. National Law Restrictions to Implement the FCTC

Next, the thesis analysed national law on investment protection to consider if any restrictions to regulate tobacco are imposed by national legislation. The analysis of national legislation has revealed that the attraction of foreign investment is the priority for the post-Soviet States. The Governments put in place various incentives to promote foreign investment, including tax exemptions, special tariffs and special mechanism of investment protection, including the arbitration provision. For example, Belarusian Law 'On Investments' provides that disputes with foreign investors which are not within the exclusive jurisdiction of the [national] courts',[1141] could be considered, at the option of the investor (i) an *ad hoc* tribunal under the The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (unless the parties agree otherwise) or (ii) the ICSID Tribunal[1142] Belarusian national legislation itself grants the recourse to international investment arbitration.[1143]

[1140] ibid.
[1141] See (n 789) and accompanying text.
[1142] Law 53-3 (n 787) art13.
[1143] ibid.

What is more, national laws on investment protections duplicate many provisions found in international investment treaties, including the provisions on non-discrimination, guarantees against expropriation and provisions for the stability of the regulatory framework. By way of example, the Law of Ukraine 'On the Regime of Foreign Investments' provides that 'in case changes in guarantees of protection of foreign investments … the state guarantees … [existing at the time of investment] shall be exercised within 10 years of [the legislation change]…'.[1144] On the other hand, those are independent regulatory restrictions that also could be enforced by arbitration. Further, this is another layer that independently or in addition to the international investment regime could lead to regulatory chill.

So why did the States keep extending investment protection and narrowing down their regulatory space? There are several plausible explanations for it. First, those incentives are in place to alleviate risks associated with investing in States undeveloped and/or non-independent justice systems, and/or unstable political environments and high level of corruption.[1145] Second, the States compete for foreign investment not only between each other but also with the rest of the world.[1146] And finally and more importantly, this shows that the Governments are either not concerned with the restrictions or prioritise FDI over the need to regulate in the public interest. In any case, this contradicts the regulatory chill hypothesis. Should the States have concerns about potential investment claims and their regulatory space, they would be unlikely to expose themselves to potential claims also through the national law. Should such concerns emerge, they could also stem from national law restrictions.

7.3.1.4. Other Empirical Findings to Deconstruct the Regulatory Chill Hypothesis

In addition to the above analysis, this thesis finds further empirical evidence to deconstruct the regulatory chill thesis. This thesis has started by arguing that regulatory chill in a broad sense could also be considered as an effect of one right or freedom on another one. Thus, national Constitutional economic rights can also clash with public

[1144] Law 94/96-BP (n 573) art 8.
[1145] See eg CCJE (n 551); 'Freedom House: All Data – Nations in Transit, 2005-2020 (2020) <https://freedomhouse.org/report/nations-transit> accessed 30 August 2020; in relation to Ukraine, *see* (n 428) and accompanying text.
[1146] See (n 17) and accompanying text.

health rights and lead to regulatory chill in that context. This is illustrated by Belarus' Constitutional Court judgement considering if tobacco control legislation interfered with entrepreneurs' property rights.[1147] Subsequently, the Court did not find the initiative in question to contradict the Constitutional freedom to entrepreneur activity and the regulation was adopted. This suggests that hypothetically, should the Decision be different, the tobacco legislation implementing the FCTC may not be adopted. And, this would be an example of regulatory chill in the context of constitutional rights. Nonetheless, one, it has not happened, and two, the current conceptualisation of regulatory chill does not include such a scenario in the scope of the concept.

Notwithstanding that, the Court's judgement is interesting from the investment treaty regulatory chill point of view. When considering whether or not the tobacco regulatory initiative contradicts the Constitution, the Court *de facto* uses the IIL test for its analysis whilst not referring to international investment obligations.[1148] This could suggest in favour of the regulatory chill hypothesis and it could be argued that in this way, the Government thought to pre-empt potential disputes with foreign investors. However, there is no evidence to corroborate this assumption.

Deregulation (i.e. the relaxation of existing regulatory standards) is perceived as the way to improve the business environment and facilitate FDI. Thus, in Ukraine, some public health standards have been relaxed to improve the business climate as a condition to receive financial support from IMF. Lowering of regulatory standards to attract FDI is known as a 'race to the bottom' and has also been considered by some as regulatory chill. Prominently, 'race to the bottom' may have also occurred in relation to tobacco legislation in the post-Soviet States. Thus, Armenia and Belarus had benefited from the lowest tax rate on tobacco in the EAEU.[1149] Critiques considered the intensified tobacco control in Europe and the world reduction of tobacco growing as an opportunity to boost the industry in Azerbaijan.[1150] Again, however, the existing evidence does not allow to verify this assumption and the current conceptualisation of regulatory chill does not include race to the bottom under the regulatory chill umbrella.

Further, this thesis relies on other empirical literature observing no evidence of internalising regulatory chill in the post-Soviet States. As the reader might be aware,

[1147] 2015 Constitutional Court Decision (n 778).
[1148] See further s 5.5.1.
[1149] See s 6.1 and s 7.1.1.
[1150] Nazarli (n 891).

this type of regulatory chill is manifested when policymakers internalise their knowledge of potential conflicts between IIAs and their regulatory initiatives. It follows that for internalisation regulatory chill to occur, policymakers should be at least aware of the intricacies of IIAs and their arbitration mechanisms. Importantly, the awareness cannot come from investors bringing the attention of policymakers to the IIA restrictions – it would transform the scenario into specific response chill (discussed above).

Previous empirical studies on Ukraine and other developing States show a very low level of awareness among policymakers.[1151] In many developing States, including the former Soviet States, there is very little expertise in investment treaty law, commonly confined to specific agencies dealing with and directly involved in investment disputes. This is a testimony against the regulatory chill argument; if decision-makers are not aware of the IIL restrictions, their decisions are outside of the regulatory chill hypothesis.

What is more, interviews conducted by Sattorova and Vytiaganets in Ukraine show that even if the policymakers were informed about the investment law restrictions, it would not preclude the regulatory development where there is strong 'political will' to do so. As a high-level Ukrainian Government official observed '[i]f the Government wants to adopt a certain law, it will do so without regards to any investment law restrictions'.[1152] Indeed, historically the Government in Ukraine circumvented tax privileges and increased royalties on gas production – despite IIAs' provision for FET and national guarantees of 10 years regulatory stability in the case of adverse regulatory changes.[1153] Consequently, other empirical studies also find no evidence of internalisation regulatory chill in Ukraine and other former Soviet countries, which arguably can be extrapolated to Armenia, Azerbaijan, Belarus and Georgia.

7.3.2. Discussion: IIAs and Regulatory Chill in the Post-Soviet States

[1151] Vytiaganets (n 28); Côté (n 51); Sattorova 2018 (n 324) 61–70.
[1152] Sattorova 2018 (n 324); Vytiaganets (n 28); Sattorova and Vytiaganets (n 324) interview M28DDAI.
[1153] See s 4.5.3.

The conceptual problems associated with the regulatory chill considered in conjunction with evidence from the case studies demonstrate that the hypothesis is largely unfounded and is likely to be inflated by academics and civil societies. IIAs and their arbitration mechanisms do not affect the tobacco regulatory development in the post-Soviet States and do not lead to regulatory chill. None of the ISDS or known disputes with foreign investors were concerned with FCTC implementation. Nor the analysis of IIAs or ISDS illustrate any direct evidence of regulatory chill; the Governments have not systematically terminated or re-negotiated to improve regulatory space. Even though more recent treaties include more public health considerations, it is unlikely to be attributed to the Governments' concerns over its regulatory environment. National laws increasingly provide similar protections for foreign investors and arbitration to enforce it. The delay of the FCTC implementation in the region is rather attributed to the States' concerns to lose FDI in the tobacco sector, budget revenues, jobs and social protection for local employees of tobacco corporations. As the second and less important trigger, the implementation of tobacco legislation was further attributed to lobbying and adverse tobacco industry tactics. This is particularly relevant to Ukraine and Transcaucasia. And finally, variables such as political transition, smoking customs and technical difficulties of the FCTC implementation have also contributed – but not triggered – the regulatory delay.

This brings us to the theory of capital flight which somehow has faded into the background with increasing regulatory chill concerns. The commonalities between the two theories are that the Government, which hands are tied because of concerns over the money/investment, prioritises the latter over public health, environment, cultural inheritance or other matters in the public interest. Foreign investment is at the heart of both theories; developing States rely heavily on it, compete for it and wish to preserve existing investment (i.e. prevent capital flight to more favourable jurisdictions) and to attract further investment (therefore, the reputation of the State is of the essence). The difference between the theories is in what *triggers* regulatory delay and its mechanics. In the case of capital flight, it is the need to preserve existing investment or attract new investment in a specific sector.

Thus, globalisation scholars have long suspected that, in competing for FDI, States may relax existing public health or environmental standards to create a 'haven' for industries seeking to minimise the production costs and increase their trading

profits.[1154] This is known as 'race to the bottom' and is of particular relevance for developing States experiencing an acute need of FDI to fund their development programmes[1155] '[i]n order not to lose investment and jobs, developing countries are thus forced to lower their standards and corrupt governments are supported as long as they favour the company's objectives'.[1156] Alternatively, States may simply refrain from enacting stricter regulatory policies beyond the status quo because it might discourage FDI inflow or cause capital flight. [1157] Not surprisingly, capital flight concern has also been invoked in some literature on investment treaty regulatory chill.[1158]

This is in line with this study's findings supporting the capital flight theory; the loss of FDI and State budget revenues have been the major trigger causing the tobacco regulatory delay in the post-Soviet States. The findings also reveal that the States have refrained from enacting stricter tobacco policies to benefit economically and compete with other States. Thus, Armenia and Belarus had benefited from the lowest tax rate on tobacco in the EAEU.[1159] Critiques considered the intensified tobacco controls in Europe and the world reduction of tobacco growing as an opportunity to boost the industry in Azerbaijan.[1160] There has also been an example of relaxation of public health standards to attract FDI in Ukraine.

Therefore, it may be concluded that the FCTC implementation and development of tobacco-control legislation in the post-Soviet States have not been affected by international investment treaties and its arbitration mechanisms. The regulatory delay is mainly attributed to the considerations of a broader economic impact and the concerns that more progressive regulations might adversely inflict the economies of the post-Soviet States. More specifically, policymakers' concerns over tobacco legislation have revolved around the loss of FDI, jobs and State budget revenues. A further important factor precluding regulatory development was lobbying, which, in particular, adversely affected tobacco industries in both the Ukraine and Transcaucasia. Given the significance of all these factors, it could be argued that the tobacco regulations would

[1154] Rudra (n 128); Grey (n 127) and Neumayer 2001b (n 126) 231.
[1155] ibid.
[1156] Colen, Maertens and Swinnen (n 132) 108.
[1157] See (n 128).
[1158] See eg Brown (n 86).
[1159] See s 6.1 and s 7.1.1.
[1160] Nazarli (n 891).

still be the same even if the post-Soviet States did not have IIAs in place. In other words, there is no causation between IIAs and their arbitration mechanisms and tobacco legislation in the post-Soviet States.

Given the commonalities of concerns for other developing States and sectors, these findings might not be unique to the tobacco sector and the post-Soviet States. The economic concerns might guide the regulatory development in the public interest in other sectors and jurisdictions (in particular, the former Soviet Union). Indeed, given that the main reason for the non-adoption of stronger tobacco legislation in the post-Soviet States were the economic considerations and the industry's influential lobby, it is unlikely that the situation in other areas is different. The *modus operandi* of various industries with the opposition of unfavourable regulatory decisions is unlikely to differ significantly across other developing countries. Previous studies also demonstrated that other industries adopt a 'tobacco playbook' to lobby against unfavourable regulatory decisions.[1161] In addition, the government rationale for regulatory decisions is likely to follow the same lines, i.e. whereby budget revenues, jobs and further FDI are prioritised over public considerations. Given the similarity in the market conditions and the economic situations in the majority of FDI-sensitive developing States, it could be inferred that the regulatory development in other jurisdictions would follow the same dynamics. *Mutatis mutandis*, the findings could be also applicable to industrialised countries. As Kelsey, Crosbie and Thomson show in their case studies on tobacco plain packaging legislation in New Zealand, lobbying and economic considerations also play a significant role in an industrialised country.[1162] In fact, in the case of developed States, room for regulatory chill is even more limited because wealthy nations have more bargaining power with foreign investors and are unlikely to be discouraged by the economic implications of potential claims.

7.4. Public Health and Tobacco Control in the Post-Soviet Space

[1161] Center for International Environmental Law (CIEL), 'Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis (November 2017)' <www.ciel.org/wp-content/uploads/2019/01/Smoke-Fumes.pdf > accessed 1 May 2021.
[1162] Kelsey (n 167) 30-31.

Another important contribution of this study is the empirical findings on the FCTC implementation and tobacco control. This Chapter will present these findings and argue that all the post-Soviet States are yet to implement the FCTC whilst the tobacco regulations are not adequate and proportionate to combat the high level of tobacco-related mortality in the States. It will further argue that the level of the governments' support for the FCTC in the States varies; Belarus and Armenia have the strongest regulations (also) because of their membership in the EAEU; Azerbaijan has one of the weakest tobacco regulatory standards. And finally, this Chapter will touch upon the interaction between the tobacco FDI and future tobacco control regulatory development. It will argue that the Governments in the post-Soviet States seek to expand the tobacco production and even sponsor (in Transcaucasia) local tobacco growers to support the industry instead of prioritising more sustainable sectors and decreasing the supply of tobacco products.

7.4.1. The Implementation of FCTC by Post-Soviet States

This study shows that all post-Soviet States – which are also parties to the FCTC – are yet to implement the treaty in full.[1163] Belarus has been a frontrunner in the implementation process, having adopted the largest number of articles, but still has been resistant to increase its level of excise tax. Alas, there has been very little decline in smoking prevalence, which arguably highlights the importance of tax and pricing measures in tobacco-related illnesses prevention. In contrast, Ukraine has not implemented any tobacco laws since 2012, but yet has significantly increased the excise tax rates which resulted in better smoking decline outcomes. The Transcaucasia region for a long time has been behind both Belarus and Ukraine in the FCTC implementation process. Armenia was under pressure to increase tobacco regulatory standards after joining Belarus in the EAEU. This resulted in more rapid tobacco regulatory development. The pace of the FCTC implementation in Azerbaijan was the most dawdling compared to other post-Soviet States, which arguably led to negative smoking prevalence rates. Overall, the FCTC policies in Transcaucasia, in particular, smoke-free and taxation, have remained not fully implemented. Given the high level of tobacco-

[1163] See annx 2.

related illnesses in the region, it can be argued that tobacco-control legislation in the States is not adequate.

What is more, the monitoring and reporting on the FCTC implementation and smoking prevalence have been poor in all post-Soviet States. The States have rarely conducted relevant surveys, the methods of their surveys are not always aligned with commonly accepted methods, such as STEP. Moreover, the results of those surveys are questionable. For instance, the level of daily smokers in Azerbaijan in the 2018 Report exceeds the number of current smokers.[1164] This is bizarre since the number of people who smoke should include those who smoke daily as well as those who smoke occasionally, and thus the number of people who smoke generally should be equal to or higher than the number of people who smoke daily. Furthermore, the Reports' data contradicts data from other sources. It is also worth pointing out that other authors have highlighted that even existing policies in the post-Soviet space are not always enforceable or work in practice. [1165] In turn, this casts doubts on – if not undermines – the accuracy of the States' reports on the FCTC implementation.

This does not suggest, though, that the FCTC efforts have been in vain. It has an obligatory status for its parties (even though its enforcement tools are not strong) and it is frequently invoked by government agencies when proposing tobacco legislation. This is evidenced by various green and white papers, media reports and press releases, as well as explanatory notes for different pieces of legislation. Even though in some post-Soviet Countries national Constitutions have a priority over international agreements, it is the FCTC and not the national Constitutions that drives tobacco regulatory development even though the public health objectives of those treaties are perfectly aligned.

It is also worth highlighting that the FCTC obligations have also been invoked in defence in ISDS claims over tobacco regulatory policies. The treaty symbolises (i) the broad agreement between 182 States in respect to the minimum regulatory standard for tobacco control measures and (ii) where appropriate, an argument against legitimate expectations (part of FET standard) that the level of tobacco control will not be increased. In light of the above, the FCTC has been an important tool and a shield for the States in advancing their tobacco-control policies. Notwithstanding that, the current

[1164] See s 6.1.2 and annx 1.
[1165] See Mir and others (n 921).

reporting mechanism is the only enforcement mechanism in place[1166] meaning that *de facto* States apply it voluntarily.

In a nutshell, the level of FCTC implementation and monitoring in the post-Soviet States is very poor and inadequate given the high level of tobacco-related illnesses in the region. Even though the States have made some progress, the implementation of the FCTC has been slow and ineffective – as evidenced by the arguably increasing number of smokers in Transcaucasia and a slight decrease in smoking prevalence in Ukraine and Belarus. At the same time, the FCTC has been an effective instrument to promote the tobacco regulatory standards and a shield for potential disputes over the level of tobacco regulatory standards.

7.4.2. Public Health and Tobacco Control Agenda in IIAs and Trade Unions

Public health and tobacco control regulatory agenda are increasingly becoming the concern of IIAs and trade unions. Along these lines, this thesis also reveals that all the post-Soviet States increasingly include public health provisions in their IIAs. Notwithstanding, this is unlikely to be attributed to the regulatory chill concern. Nonetheless, those provisions could be beneficial for tobacco control regulatory development. Even though their public health impact is justifiably arguable[1167] – at the end of the day, their purpose is to protect and promote FDI – including public health and tobacco control in IIAs may resolve the conflict between tobacco control and investment protection. IIAs *per se* do not prevent regulating in the public interest but instead, they provide security for foreign investors in case a State imposes regulations that would breach specific assurances given to investors or go beyond what one would legitimately factor in as risks to their investment. In other words, setting a clear and long-term indication of what would happen with the host State's regulatory environment in five or 10 years, where possible, could prevent potential disputes arising out of regulatory measures in the public interest. Alternatively, it would help the host States defend such claims because a clear regulatory agenda – such as the FCTC – sets a bar for investors' legitimate expectations (as mentioned above).

[1166] Also observed by Mir and others (n 921).
[1167] Sornarajah (n 4).

Regional trade unions could also be a powerful platform to advance tobacco control and public health regulatory agenda. Thus, the EAEU, which is a trade union between Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia, has been much more powerful and effective in advancing tobacco control policies than the FCTC. In particular, Armenia adopted many core pieces of tobacco legislation after it acceded to the EAEU in 2015. Belarus has been resisting the increase of excise tax to reflect the convergence of the EAEU tax policy. Notwithstanding it, the mere fact that the Government felt under pressure to change the tobacco tax rates evidences the trade union influence on tobacco measures. Besides, Belarus may still review its tobacco policy at a later stage. Thus, the underlying arrangement of the trade union and the political influence of more powerful States incentivises other Governments to follow the common agenda, which is beneficial for public health protection. The bottom line is that regulatory convergence also prevents the race to the bottom when competing for FDI. This is where the convergence of tobacco regulatory policies among the EAEU States comes to light again – by protecting their trade interests, the Member States also increase public health protection standards.

Noteworthy, some IIAs include mechanics to prevent States from lowering their public health standards to attract FDI. For example, the 2015 Japan-Ukraine BIT stipulates '[t]he Contracting Parties recognise that it is inappropriate … to encourage investment … by relaxing its health, safety or environmental measures'.[1168] Unlike the EAEU, though, IIAs have also very little power to prevent the race to the bottom as it is not clear how and by whom this clause could be enforced in practice. For example, NAFTA Chapter 11 has a similar clause, stating that '[t]he Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures'.[1169] Yet, it has never been enforced in investment arbitration and, therefore, has been widely criticised for being toothless and not protecting regulatory freedom.[1170] As mentioned above, Ukraine has violated its commitment to not lower public health standards in pursuit of FDI. It is hard to imagine, however, that such 'deregulation' will ever become the subject of an investment dispute.

[1168] 2015 Japan–Ukraine BIT (n 596) art 25. See also 2018 Armenia – Japan BIT (n 1045) art 21.
[1169] North American Free Trade Agreement (NAFTA) (entered into force 01 January 1994), replaced by the United States–Mexico–Canada Agreement (USMCA) (in force 1 July 2020).
[1170] See eg Meg Kinnear, Andrea Bjorklund and John FG Hannaford, *Investment Disputes under NAFTA. An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International 2006).

In summary, although the Governments have internal constitutional responsibilities to protect public health, the tobacco control agenda is more effectively advanced from above, the international level, rather than from the below. The convergence of the policies among the States in such sensitive areas as public health, human rights or environment, is, therefore, the best way to move forward. As the case studies have shown, this is problematic to achieve by a public health instrument, such as the FCTC even though it has an official hard law status. Instead, by way of 'dragging along' public health with the protection of trade and investment is more effective to achieve public health objectives. The forceful regulatory convergence 'from the above', as well as transparent long-term regulatory agenda, could be effective solutions to the issues arising as a result of the inherent conflict between public health, FDI and investment protection.

7.4.3. Tobacco FDI and Tobacco Regulatory Control

Another important outcome of this study to be addressed is the impact of tobacco FDI on tobacco regulatory development. The study has shown that each of the post-Soviet States continue to accept and promote foreign investment in the tobacco industry. In 2018, President Lukashenko allocated about 1.48 hectares of what used to be the territory of Minsk to build a new tobacco factory based on Belarusian company, Inter Tobacco LLC.[1171] This results in the increasing economic reliance on the industry and increase of the tobacco burden and tobacco mortality. As a rule of thumb, more cigarettes produced means more cigarettes consumed (disregarding any exports). The more cigarettes are consumed, the more people will have tobacco-related illnesses and die prematurely. Will the government then be in a position to regulate tobacco when they are extensively reliant on the tobacco FDI? As the preceding discussion shows, it is unlikely.

Recent studies suggest that the economic effects of FDI vary depending on the reasons for the investment, the industry and the economic and institutional environment of the host state.[1172] In Ukraine, for example, about 85,000 deaths per year are

[1171] BELSAT (n 712); PrimePress (n 713).
[1172] Bonnitcha, Poulsen and Waibel (n 7) 156.

associated with tobacco-related diseases,[1173] whilst the tobacco burden on the State economy is believed to exceed USD 3 billion per year.[1174] At the same time, the Ukrainian Minister of Economic Development and Trade opposed the adoption of Draft Law No 4030a on tobacco control because, in his view, the proposed changes would cause unfair market redistribution, an increase in illegal trade, and UAH 4 billion loss (*circa* USD 140 million)[1175] for the State budget.[1176] It can, therefore, be argued that States might be better off without industries that lead to an increase in the level of NCDs among the population and pollute the environment. The fact that more than 70% of global deaths are attributed to NCDs is strong evidence of this.[1177] Nonetheless, there is a very limited study on this matter and no evidence to suggest that the Governments have ever considered the long-term economic implications of tobacco on national economies or weighted it against the alleged economic benefits for the State budget.

To conclude, this thesis shows that the developing countries prioritise budget revenues over public health in regulating tobacco even though the long-term economic impact of the latter is more detrimental; there are very limited studies about the impact of the industry on the States' economy in the region. Therefore, further studies are needed to address this in more detail.

[1173] Hnatyuk (n 458).
[1174] See Economic Truth (n 459).
[1175] Converted at the official rate of the National Bank of Ukraine at the time of writing.
[1176] RBC Ukraine (n 510).
[1177] See generally 'World Health Organization: Global Health Observatory (GHO) Data' <www.who.int/gho/ncd/mortality_morbidity/en/> accessed 22 March 2020.

8. Conclusion

Subject to the methodological limitations, this thesis concludes that the delay of the FCTC implementation in the post-Soviet States is likely to be attributed to the States' concerns about losing FDI in the tobacco sector, budget revenues and jobs if tobacco corporations cease to operate. The promotion of foreign investment is the priority policy agenda for all the post-Soviet States that compete with each other for FDI as well as benefit financially from weaker tobacco regulations in other countries. On this note, the competing narratives of capital flight and race to the bottom have found support by evidence derived from the case studies. The tobacco lobby and adverse tobacco tactics may hold a further explanation for the delay in implementing the FCTC. On balance, it is probable that the tobacco regulatory standards in the region would still be at the same level should the States have no IIAs signed. It can be concluded, therefore, that based on the evidence available in the public domain, IIAs do not affect tobacco regulations and do not lead to regulatory chill in the post-Soviet States.

What does this mean for the hypothesis and the law more generally? First and foremost, regulatory chill has not been confirmed by the case studies. This is a thought-provoking and even radical finding since the prevailing majority of the literature argues in favour of the hypothesis.[1178] Again, this thesis acknowledges that some evidence of regulatory chill may not be available in the public domain and therefore, these findings are qualified by this study's limitations. Second, the case studies show that the existing

[1178] See s 2.2.

conceptualisation of regulatory chill is not sophisticated enough to reflect the mechanics of regulatory decision-making and the way different social phenomena shape the law. It is therefore argued that the scope of regulatory chill should be broadened to include all potential factors which can lead to regulatory delay. To put it differently, the hypothesis' framing should acknowledge the fact that regulatory chill can be the outcome of a myriad of triggers, including but not exclusively, IIAs and their arbitration mechanisms. The list of potential causes is not exclusive since the control of all the variables is not possible or necessarily.

On higher reflection, the findings challenge the entire idea of the backlash against the international investment regime. The post-Soviet States have continued to support the regime and provide investors with broad, substantive and procedural rights under both IIAs and national legislation. The falsity of the regulatory chill thesis as the main driver of the international investment reform may question the prudence of the reform proposals seeking to expand the States' regulatory powers and narrow foreign investors' guarantees.

A uniform reform proposal based on the 'one size fits all' principle may not be desirable for all States and the proper multi-lateralisation of IIL is unlikely to be feasible in the imminent future.[1179] It is imperative to acknowledge that FDI and sustainable development are inextricably linked; and that the benefits of the system of foreign investment protection may outweigh possible concerns about competing public interests.[1180] For the avoidance of doubt, this thesis by no means claims that current IIAs do not require revision but highlights that any reform at this stage should be more thoroughly thought through.

Theoretical views on the law do not always reflect the realities on the ground. This thesis has shown how empirical research can help to answer pertinent questions of policymakers and legal scholars. It is therefore vital for further reform proposals to rely on robust, eloquent and edifying empirical research. On this note, this project presents a unique and comprehensive tool to examine the extent to which IIL affects the regulatory development of the host States, as well as the interaction between different legal orders more broadly.

[1179] MIRA is proposed as a flexible instrument where States would decide what reform proposals they adhere to. Anna Joubin-Bret (UNCITRAL), 'UNCITRAL Investor-State Dispute Settlement Reform' (9th Asia Pacific ADR Virtual Conference, 6 November 2020).
[1180] See eg Donnelly (n 114).

As a more far-reaching implication, this study invites readers to re-evaluate the research more broadly. It has demonstrated that a hypothesis shaking the whole system of international investment protection could also be misinterpreted, misjudged and underanalysed. It has shown that studies on the same subject matter from different disciplines could be disconnected and disintegrated. It has also indicated how the law and its social impact are entwined and how the analysis of either of those in isolation could bring more harm than benefit. This in turn, invites us to reconsider the way we analyse, accumulate knowledge and employ legal expertise in academia.

Another axis of this project is public health and tobacco control regulatory development. This thesis has found that the FCTC has proven to be a positive instrument supporting regulatory development in the public interest. It is not only pushing Governments to adopt tobacco-control policies but also serves as a roadmap for regulatory development. It serves both States and investors by minimising risks of investment claims or providing States with an additional argument in defending such claims. Drawing upon this, other areas of public interest would benefit from similar international treaties. At the same time, the FCTC does not suffice to address the tobacco pandemic and additional measures are needed.

One potential solution is the inclusion of tobacco control and the public health agenda in regional trade unions. As this thesis has shown, subsequent convergence of tobacco or other public regulatory policies can be an even more efficient tool to ensure the adoption of legislation in the public interest. Within the EAEU, Russia has successfully pressured Armenia to adopt stricter tobacco control measures as part of the union arrangements. Based on the same consideration, it is also likely that Belarus would increase the tobacco excise tax.[1181] Such a convergence of regulatory development also addresses race to the bottom concern by preventing States to compete with each other by lowering regulatory standards.

To effectively combat tobacco-control illnesses, it would be necessary to almost kill the industry. This entails not only losses for a handful of multi-national tobacco corporations, but also losses for national businesses, including State-owned enterprises. Therefore, any radical changes in the sector are unlikely to be an option in the short term for most developing States. An abrupt interference with the industry could also lead to the violation of international investment obligations and potentially national

[1181] See s 6.1.1.

legislation guarantees. Therefore, the most effective and sensible way to move forward would be to gradually increase the tax burden that should minimise smoking rates over the years to acceptable levels. At the end of the day, people have a right to smoke.

In terms of future investment protection policies, not all the industries and foreign investment might be beneficial for the host States; economic effects of FDI vary depending on the reasons for investment, industry, economic and institutional environment of the host State.[1182] So why should all industries be equally protected? If one has concerns that IIAs might prevent tobacco regulatory development, which is contested in this study, the exclusion of the tobacco industry from IIA protection and access to ISDS would alleviate such concerns. The idea of sector-based approaches to investment protection has already been supported by some countries.[1183] For instance, the EU started a taxonomy for green finance.[1184] Distinguishing harmful industries from beneficial industries could improve the regulatory standards in the public interest and enhance the legitimacy of the system of investment protection more generally.

An alternative solution is to follow the example of the 2019 Dutch Model BIT and enable investment tribunals to reduce the amount of damages awarded based on the behaviour of the investor in question.[1185] As the Ukrainian account attests, the industry lobby may have a strong impact on the Government, employing tactics which go beyond generally or legally acceptable levels.[1186] As a bright example, the initiation of a WTO claim against Australia by the Ukrainian Government is a shameful episode when the industry used the State's Government as its 'puppet' to progress its own agenda.[1187] Therefore, including a gateway to penalise such behaviour when adjudicating disputes might have a deterrent effect on such 'lobbyism' and further reduce regulatory chill concerns.

Further, a clear understanding of economic incentives could tip the balance to more support of public health in developing states. Whilst the policy analysis in developing countries may be confined to the economic considerations, it is paramount for the host

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[1182] Bonnitcha, Poulsen and Waibel (n 7) 156.
[1183] Nathalie Bernasconi-Osterwalder, 'IIA Reform in Times of COVID-19' (UNCTAD Virtual IIA Conference 2020, 26 November 2020).
[1184] ibid; see generally 'European Commission: EU Taxonomy for Sustainable Activities' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en > accessed 29 November 2020.
[1185] Netherlands Model Investment Agreement (22 March 2019) [hereinafter, 2019 Dutch Model BIT].
[1186] See ch 4.
[1187] ibid.

States to be equipped with clear data on public health and national health systems. This thesis has shown that the governments might not always apprehend when and how tobacco-control measures render any positive spillovers. It is particularly problematic where there is no current and valid data on smoking prevalence – a common issue for the post-Soviet States. Therefore, regular surveys using a uniform methodology across the States and further jurisdiction-specific broad research on the matter are needed.

One final general remark is in order. Because of its limitations, this study does not investigate the regulatory development in other sectors and regions/States. Therefore, one cannot assume that those findings are identical and can hold more generally outside the post-Soviet space. For that reason, this study calls upon further research based on the presented multi-tier methodology to investigate the impact of IIL on tobacco and other legislation in the public interest. This project would be improved if other writers broadened it to look at more jurisdictions and, in particular, non-English speaking parts of the world.

Annex 1. Smoking Prevalence among the Post-Soviet States (2010-2020)[1188]

Reporting Instrument	**Armenia**		**Azerbaijan**		**Belarus**		**Georgia**		**Ukraine**	
	Current smokers, %	Daily smokers,%	Current smokers, %	Daily smokers,%	Current smokers, %	Daily smokers,%	Current smokers, %	Daily smokers,%	Current smokers, %	Daily smokers,%
2010 Report	28.3	26.00	17.1	N/A	27.0	23.7			28.8	25.5
2012 Report	28.3	26.00	17.1	N/A	27.0	24.1	30.3	27.7	28.8	25.5
2014 Report	25.4	23.0			25.9	23.0	30.3	27.7	N/A	23.3
2016 Report			18.2	N/A			30.3	27.7		
2018 Report	N/A	N/A	16.2	23.2	23.2	20.5	31.1	28	22.8	20.1
2020 Factsheet	N/A	26.9	N/A	23.2	N/A	21.1	N/A	29.4	N/A	20.1

[1188] Source: FCTC Reports (n 466).

Annex 2. The FCTC Implementation in the post-Soviet States[1189]

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
SMOKE-FREE STATUS OF INDOOR PUBLIC PLACES, WORKPLACES, AND PUBLIC TRANSPORT (FCTC ART 8)						
All indoor workplaces	**Not Aligned** The law bans smoking in all educational, health care and cultural facilities; and restricts smoking to designated smoking areas in public workplaces.	**Not Aligned** The law bans smoking in some indoor workplaces but only restricts in others, including restaurants, bars and commercial facilities.	**Not Aligned** The law restricts smoking to designated smoking areas in workplaces, including healthcare, educational, cultural and sport facilities, as well as shops, catering facilities, and government institutions.	**Not Aligned** The law generally bans indoor smoking but provides a broad list of exceptions to the ban, including penitentiaries, detention cells casinos and cigar bars.	**Not Aligned** smoking to designated smoking areas in	To align with the FCTC Article 8 and the FCTC Article 8 Guidelines, the law must ban and not merely restrict smoking in all parts of all indoor public and work places.
All indoor public places	**Not Aligned** The law bans smoking in any cultural, educational or healthcare facilities. In other indoor public places, smoking is restricted to	**Not Aligned** The law prohibits smoking in healthcare and educational institutions, theatres and other public places, and restricts smoking to designated	**Not Aligned** The law	**Not Aligned** The law generally bans indoor smoking but provides a broad list of exceptions to the ban, including penitentiaries, detention cells	**Not Aligned** smoking to designated smoking areas in	To align with the FCTC Article 8 and the FCTC Article 8 Guidelines, the law must ban and not merely restrict smoking in all parts of all indoor public and work places.

[1189] Source: Campaign for Tobacco-Free Kids (n 96); Legal Information System of Armenia (n 429); Ministry of Justice of the Republic of Azerbaijan (n 429); National Legal Internet Portal of the Republic of Belarus (n 429); The Legislative Herald, (n 429); Verkhovna Rada of Ukraine (n 438);

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
	designated smoking areas, except for catering facilities, which may (but not must) have smoking areas.	smoking areas in catering facilities, commercial and administrative buildings.		casinos and cigar bars.		
All public transport	**Not Aligned** The law bans smoking in almost all public transport with the exception of designated train wagons and taxis that do not operate on fixed routes.	**Not Aligned** The law generally restricts smoking on public transport but permits designated smoking places on water and rail transport.	**Not Aligned** The law bans smoking in cars carrying children under 14 old and other transport but only	**Not Aligned** The law prohibits smoking on most public transport but permits smoking in taxis and on boats.	**Not Aligned**	To align with the FCTC Article 8 and the FCTC Article 8 Guidelines, the law should ban and not merely restrict smoking in all public transport.
Hospitals	**Aligned** The law prohibits smoking in healthcare facilities.	**Aligned** The law prohibits smoking in healthcare facilities.	**Not Aligned** The law	**Not Aligned** The law	**Aligned** The law prohibits smoking in healthcare facilities.	
Primary and secondary schools	**Aligned**	**Aligned** The law prohibits smoking in all educational institutions.	**Not Aligned**	**Aligned** The law bans smoking in educational institutions and other facilities for youngsters under 18.	**Aligned**	

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
Public transport facilities (waiting rooms)	**Aligned** The law prohibits smoking in public transport facilities.	**Not Aligned** The law restricts smoking to designated smoking areas (rooms or outdoor areas) in most transport facilities.	**Not Aligned** The law restricts smoking to designated areas in bus stations, airports, pedestrian subways, and underground stations.	**Not Aligned** The law permits designated smoking rooms in transit zones at airports.	**Not Aligned**	
SMOKE-FREE DUTIES AND PENALTIES (FCTC ART 8)						
Post signs	**Aligned**	**Aligned** The law requires managers of all companies, institutions and organisations to post "no smoking" signs or marks that are readily visible. 400 and 1000 manat.	**Not Aligned** The law does not impose a duty upon businesses to post "no smoking" signs.	**Aligned** The law requires business owners to post "no smoking" signs. The smoke-free penalties are between 500 and 1,000 laris.	**Aligned**	To align with the FCTC Article 8 and the FCTC Art. 8 Guidelines, the law should impose a duty upon businesses to post no-smoking signs and impose penalties for breach of that duty.
Not to smoke where prohibited	**Aligned**	**Aligned**	**Aligned**	**Aligned** The smoke-free penalties are between 500 and 1,000 laris.	**Aligned** 3 to 20 "income tax exemptions" established by law.	To align with the FCTC Article 8 and the FCTC Article 8 Guidelines, the law should impose penalties for breach of smoking ban.
REGULATED FORMS OF ADVERTISING, PROMOTION AND SPONSORSHIPS (FCTC ART 13)						
Domestic TV and radio	**Aligned**	**Aligned** The law prohibits all forms of	**Aligned**	**Aligned** The law prohibits advertising of tobacco products,	**Aligned**	To align with the FCTC Article 13 and the FCTC Article 13 Guidelines, the law should prohibit all

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
		tobacco direct adverting.		accessories and devices.		tobacco advertising and promotion, including domestic TV and radio.
Domestic newspapers and magazines	**Not Aligned** The law only prohibits tobacco advertising on the front and the last pages of newspapers and magazines.	**Aligned** The law prohibits all forms of direct and some forms of indirect adverting, also in local magazines and newspapers	**Aligned**	**Aligned** The law prohibits advertising of tobacco products, accessories and devices with the few exceptions, including printed materials exclusively for the industry representatives.	**Aligned**	To align with the FCTC Article 13 and the FCTC Article 13 Guidelines, the law should prohibit all tobacco advertising and promotion, including domestic newspapers and magazines.
Internet tobacco product sales	**Aligned**	**Not Aligned** Allowed	**Aligned**	**Aligned** The law bans the sale of tobacco via the internet.	**Not Aligned**	
Outdoor advertising)	**Aligned**	**Aligned** The law bans all forms of direct and some forms of indirect tobacco adverting, including outdoor tobacco advertising.	**Aligned**	**Aligned** The law prohibits any outdoor tobacco advertising.	**Aligned**	The law is aligned with the FCTC Article 13 and Article 13 Guidelines with respect to outdoor tobacco advertising.
Point of sale advertising/promotion	**Not Aligned**	**Aligned** The law prohibits all forms of direct and some forms of indirect adverting,	**Aligned**	**Aligned**	**Aligned**	

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
		including advertising at point of sale.				
Point of sale product display	**Not Aligned** The law does not prohibit the product display at the point of sale.	**Not Aligned** The law does not prohibit the product display at the point of sale.	**Aligned**	**Not Aligned** The law prohibits display of tobacco products at the point of sale with the exception of duty-free zones.	**Not Aligned** The law does not prohibit the product display at the point of sale.	To align with the FCTC Article 13 , the law should prohibit tobacco product display at the point of sale with no exceptions.
Vending machines	**Not Aligned**	**Aligned**	**Aligned**	**Aligned**	**Aligned**	To align with the FCTC Article 13 and the FCTC Article 13 Guidelines, the law should prohibit
Brand marking on physical structures	**Not Aligned** The law prohibits outdoor tobacco advertising, which includes brand marking on the outside of physical structures or vehicles. Nevertheless, brand marking *inside* physical structures (such as venues or retail outlets) is allowed.	**Aligned** The law prohibits direct and indirect tobacco advertising, which includes brand marking.	**Aligned** The law prohibiting brand marking on structures and equipment as well as brand stretching on non-tobacco products.	**Aligned** The law prohibits tobacco advertising, including brand marking.	**Not Aligned**	To align with the FCTC Article 13 and the FCTC Article 13 Guidelines, the law should prohibit all forms of tobacco advertising and promotion, including any kind of brans marking (including inside and outside structures).
Brand stretching/trademark diversification	**Not Aligned** The law bans the sale or distribution of any products 'bearing the name	**Aligned** The law prohibits direct and indirect advertising, which	**Aligned** The law bans the use of tobacco brand names, logos and other brand	**Aligned** The bans any type of advertising, including brand stretching.	**Aligned**	To align with the FCTC Article 13 and the FCTC Article 13 Guidelines, the law should prohibit any

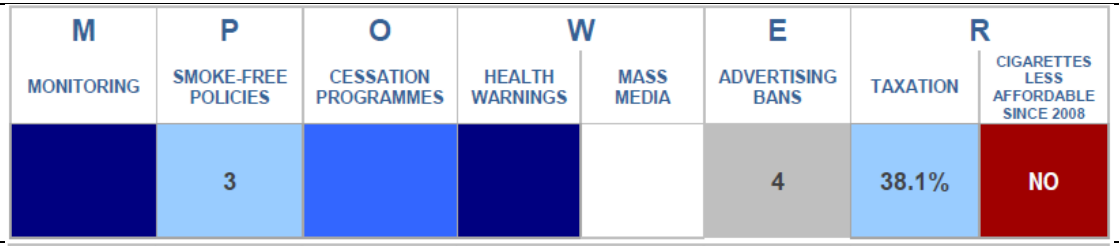
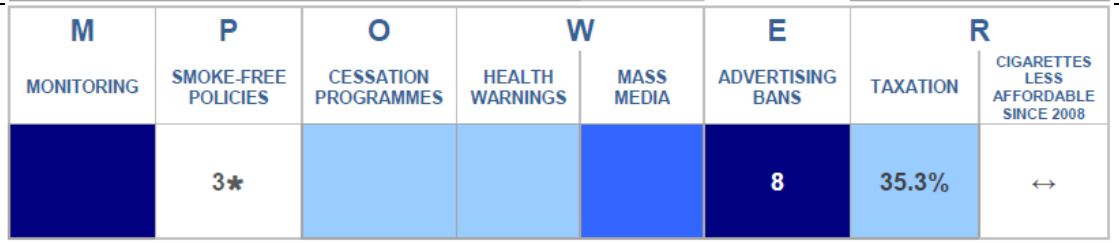
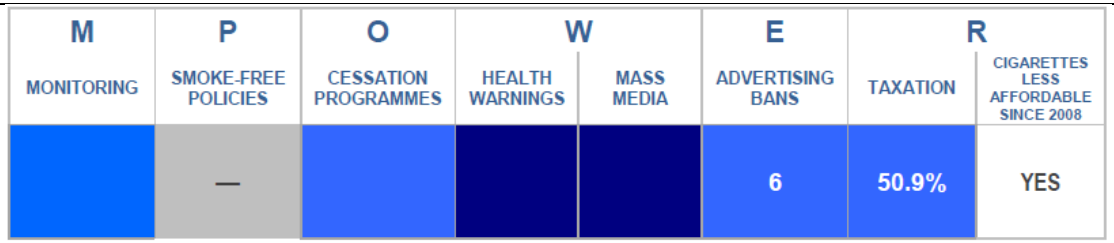
Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
	or trademark of any tobacco product,' with the exception of 'items relating to smoking, such as lighters or ashtrays'.	includes brand stretching.	indicia on non-tobacco products.			kind of brand stretching with no exceptions.
Tobacco industry sponsorship of events, activities, individuals, organisations or governments	**Not Aligned** The law prohibits tobacco industry sponsorship with the exception of sponsorship of international events, activities and participants thereof. Also, the law does not address sponsorship of national events, activities or participants thereof; sponsorship of organisations, governments, and corporate social responsibility.	**Aligned** The law specifically prohibits direct and indirect tobacco industry sponsorship.	**Not Aligned**	**Not Aligned** The law prohibit tobacco industry money donations in exchange of advertisement but does not include corporate social responsibility donations.	**Aligned**	To align with the FCTC Article 13 and the FCTC Article 13 Guidelines, the law should prohibit all tobacco industry sponsorship and contain a definition of "tobacco sponsorship" aligned with the FCTC.
Promotion by any means that are false, misleading or deceptive	**Aligned**	**Aligned** The law prohibits all forms of tobacco promotion and advertising.	**Aligned** The law prohibits the use of any markings that may directly or	**Aligned** The law bans any names, labelling or packaging that contain false or	**Aligned**	To align with the FCTC Article 13 and the FCTC Article 13 Guidelines, the law should explicitly prohibit promotion that

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
			indirectly mislead consumers that some tobacco products are less harmful than the other, including using such markings as 'light', 'mild', 'ultra' etc.	misleading information, creating a false impression on the properties, substance or harmful effects of tobacco products.		are misleading, deceptive, or likely to lead to a false impression about the characteristics and health effects of a tobacco product.
PACKAGING AND LABELLING: HEALTH WARNINGS/MESSAGES FEATURES (FCTC ART 11)						
Smoked Tobacco Products	**Not Aligned**	**Not Aligned**	**Aligned**	**Aligned**	**Not Aligned**	See comments on each of the states
Type of Warnings/ Messages Required	Text Warnings/Messages (on cigarettes)	Text Warnings/Messages	Text Warnings/Messages	Pictograms (Illustrations/Pictures), Text Warnings/Messages	Pictures (Photos), Text Warnings/Messages	
Location and Size of Warnings/ Messages on Unit Packaging:	30% of front, 30% of back	30% of front, 30% of back	50% of front, 50% of back	65% of front, 65% of back	50% of the front, 50% of back	
Rotation Required?	Required	Not required	Required	Required	Required	
No of Warnings/Messages authorized to be displayed at any given time	5	1	12	6	11	
	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should require	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should require	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should require	Aligned	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should specified	

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
	health messages on any kind of tobacco products (not only cigarettes). Also, health warnings should cover at least 50% of the principal display areas and warnings should consist of both text and pictures or pictorial messages. NB, relevant regulatory changes are by the State and are expected to enter into force from 1 January 2024.	rotation pictorial warning to appear on at least 50% of each display principal area.	health warnings and images to appear on all tobacco products/packages for retail sale.		whether several pictorial warnings are to appear concurrently or consecutively. If consecutively, the rotation period should be specified. Also, the law should Provide for review of health warnings every 12–36 months.	
Smokeless Tobacco Products	**Not Aligned**	**Not Aligned**	**Aligned**	**Not Aligned**	**Not Aligned**	See comments on each of the states
Type of Warnings/ Messages Required	Not Required	Text Warnings/Messages	Text Warnings/Messages	Text Warnings/Messages	Pictures (Photos), Text Warnings/Messages	
Location and Size of Warnings/ Messages on Unit Packaging:	N/A	30% of front, 30% of back	50% of front, 50% of back	30% of front, 30% of back	50% of the front, 50% of back	
Rotation Required?	Not Required	Required	Required	Not required	Required	
No of Warnings/Messages authorised to be	0	1	12	1	11	

Policy / Unit	Armenia	Azerbaijan	Belarus	Georgia	Ukraine	FCTC Requirements
displayed at any given time						
	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should, the law should require health warnings on all tobacco products, including smokeless tobacco products. Required warnings should contain text and pictures or pictorial content and occupy at least 30% of the principal display areas, and it is recommended to cover at least 50% of the principal display areas.	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should require rotating pictorial warnings to appear on at least 50% of each principal display area.	Aligned	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should require health warnings on all tobacco products, including smokeless tobacco products. Required warnings should contain text and pictures or pictorial content and occupy at least 30% of the principal display areas, and it is recommended to cover at least 50% of the principal display areas.	To align with the FCTC Article 11 and the FCTC Article 11 Guidelines, the law should also require health warnings on smokeless tobacco products. The set of health warnings should be reviewed every 12–36 months. Required warnings should contain text and pictures or pictorial content and occupy at least 30% of the principal display areas, and it is recommended to cover at least 50% of the principal display areas.	

Annex 3. WHO Report on the Global Tobacco Epidemic (2019)[1190]

State	Summary of MPOWER Measures
Armenia	
Azerbaijan	
Belarus	

[1190] Source: World Health Organization, 'WHO Report on the Global Tobacco Epidemic (2019)'.

	M	P	O	W		E	R	
	MONITORING	SMOKE-FREE POLICIES	CESSATION PROGRAMMES	HEALTH WARNINGS	MASS MEDIA	ADVERTISING BANS	TAXATION	CIGARETTES LESS AFFORDABLE SINCE 2008
Georgia		—				7	71.2%	↔
Ukraine		7				8	74.7%	YES

MPOWER score colour key

Complete policy	Moderate policy	Minimal policy	No policy or weak policy	Not categorized/ No data

Affordability category

YES	NO	↔
cigarettes became less affordable	cigarettes did not become less affordable	no trend change in affordability of cigarettes

The colours are explained in more detail in the MPOWER legend on the last page of this document.
In all tables "..." means data are not available and "–" means data are not required.

Annex 4. WHO Monitoring Tobacco Use and Prevention Policies (2018)[1191]

Policy	Groupings for Indicator	Indicator value				
		Armenia	Azerbaijan	Belarus	Georgia	Ukraine
Monitoring Tobacco Use and Prevention Policies	1 = No known data or no recent data or data that are not both recent and representative; 2 = Recent and representative data for either adults or youth; 3 = Recent and representative data for both adults and youth; 4 = Recent data	4	4	3	4	4
Protecting People from Tobacco Smoke	1 = Data not reported/not categorised; 2 = Up to two public places completely smoke-free; 3 = Three to five public places completely smoke-free; 4 = Six to seven public places completely smoke-free; 5 = All public places completely smoke-free (or at least 90% of the population covered by complete subnational smoke-free legislation)	3	1	2	4	4
Offering to Quit Tobacco Use	1 = Data not reported; 2 = None; 3 = NRT and/or some cessation services (neither cost-covered); 4 = NRT and/or some cessation services (at least one of which is cost-covered); 5 = National quit line, and both NRT and some cessation services cost-covered	4	3	4	4	3
Warning about the Dangers of Tobacco	1= Data not reported; 2 = No warning or warning covering <30% of pack surface; 3 = ≥30%* but no pictures or pictograms and/or other appropriate characteristics; 4 = 31%–49%* including pictures or pictograms and other appropriate characteristics; 5 = ≥50% including pictures or pictograms and appropriate characteristics	5	3	5	5	5
Enforcing Bans on Tobacco Advertising,	1 = Data not reported; 2 = Complete absence of a ban, or ban that does not cover national television (TV), radio and print media; 3 = Ban on national TV, radio and print media only; 4 = Ban on national TV, radio and print media as well as on some but not all other forms of direct and/or indirect advertising; 5 = Ban on all forms of direct and indirect	2	5	4	4	4

[1191] Source: World Health Organization, 'Tobacco Control: Progress Towards Selected Tobacco Control Policies for Demand Reduction: Monitoring Tobacco Use and Prevention Policies (Last Updated 28 May 2020)' < www.who.int/data/gho/data/themes/topics/indicator-groups/indicator-group-details/GHO/tobacco-control---progress-towards-selected-tobacco-control-policies-for-demand-reduction> accessed 10 September 2020.

Policy	Groupings for Indicator	Indicator value				
		Armenia	Azerbaijan	Belarus	Georgia	Ukraine
Promotion and Sponsorship						
Raising Taxes on Tobacco	1 = Data not reported; 2 = ≤ 25% of retail price is tax; 3 = 26–50% of retail price is tax; 4 = 51–75% of retail price is tax; 5 = >75% of retail price is tax	3	3	4	4	4
Anti-tobacco Mass Media Campaigns	1 = Data not reported; 2 = No national campaign conducted in the reporting period with a duration of at least three weeks; 3 = National campaign conducted with 1-4 appropriate characteristics; 4 = National campaign conducted with 5-6 appropriate characteristics, or with 7 characteristics excluding airing on TV and/or radio; 5 = National campaign conducted with at least 7 appropriate characteristics including airing on TV and/or radio.	1	4	5	5	3

Annex 5. Ukraine: Tobacco Control Legislation[1192]

No	Law	Date	Comments	Link
1.	Law of Ukraine 'On Measures to Prevent and Reduce the Consumption of Tobacco Products and Their Harmful Influence on the Population's Health' of 22 September 2005 (as amended) No 2899-IV	22.09.2005 (as amended on 11.06.2009)	The primary law governing smoke free, packaging and labelling requirements.	Official website http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2899-15 Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Law%20on%20Tobacco%20Control.pdf
2.	Law of Ukraine, 'On the Introduction of Changes to Some Legislative Acts of Ukraine on the Restriction of the Consumption and Sale of Beer and Low Alcoholic Beverages' of 11 February 2010 No 1824-17	11.02.2010	Introduced pictorial pack warnings.	Official website Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Law%201824-17.pdf
3.	Law of Ukraine 'On the State Regulation of Production and Circulation of Ethyl Alcohol, Cognac and Fruit Alcohols, Alcoholic Beverages and Tobacco Products' of 19 December 1995 No 481/95	19.12.1995 as amended on 16.07.2010.	Introduced packaging and labelling requirements.	Official website http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=481/95-%E2%F0 Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Law%20on%20Regulation%20of%20Alcohol%20and%20Tobacco%20.pdf
4.	Decree of the Cabinet of Ministers of Ukraine 'On Approval of the List of Pictures and Pictograms which are Not Included to Additional Health Warnings on Tobacco Product Packages' of 19 January 2011 No 306	19.01.2011	Introduced pictorial warnings	Official website https://zakon.rada.gov.ua/laws/show/306-2011-%D0%BF Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Decree%20306.pdf

[1192] Source: Verkhovna Rada of Ukraine (n 438); Campaign for Tobacco-Free Kids (n 96).

No	Law	Date	Comments	Link
5.	Law of Ukraine 'On Amendments to Certain Laws of Ukraine to Improve Certain Provisions on Limiting Places for Smoking' of 16 December 2012 No 4844-VI	16.12.2012	Broadened the list of smoke free zones..	Official website Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Law%20No%204844%2C%20SF%20Amdts..pdf
6.	Law of Ukraine 'On Advertising' of 3 July 1996 No 270/960-BP	03.07.1996 (as amended on 18.03.2008)	Regulates advertising and sponsorship of tobacco products.	Official website http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=270/96-%E2%F0 Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Law%20on%20Advertising.pdf
7.	Law of Ukraine 'On the Introduction of Changes to Some Legislative Acts of Ukraine on the Prohibition of Advertising, Sponsorship and Promotion of Sale of Tobacco Products' of 16 September 2012 No 3778	16.09.2012	Further restricts tobacco advertising, promotion and sponsorship.	Official website Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Law%205164.pdf
8.	The Code of Administrative Offenses of Ukraine of 7 December 1984 No 8073-X	07.12.1984 (as further amended)	Provides penalties for smoking where prohibited.	Official website http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=80731-10 Extract in English https://www.tobaccocontrollaws.org/files/live/Ukraine/Ukraine%20-%20Administrative%20Offenses%20Code.pdf

Annex 6. Ukraine: Signed BITs[1193]

Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
Qatar; Ukraine;	20/03/2018		Signed								N/A
Turkey; Ukraine;	09/10/2017		Signed	No	Yes	Yes	No	Yes	No	Yes	Yes
Japan; Ukraine;	05/02/2015	26/11/2015	In force	No	Yes	No	Yes	No	No	No	Yes
Israel; Ukraine;	24/11/2010	20/11/2012	In force	No	No	No	No	No	No	No	Yes
Saudi Arabia; Ukraine;	09/04/2008	18/02/2009	In force	No	No	No	No	No	No	No	Yes
Slovakia; Ukraine;	26/02/2007	20/02/2009	In force	No	No	No	No	No	No	No	Yes
Singapore; Ukraine;	18/09/2006	19/04/2007	In force	No	No	No	No	No	No	No	Yes
San Marino; Ukraine;	13/01/2006	15/10/2008	In force	No	No	No	No	No	No	No	Yes
Equatorial Guinea; Ukraine;	15/12/2005	19/10/2008	In force	No	No	No	No	No	No	No	Yes
Jordan; Ukraine;	30/11/2005	17/04/2007	In force	No	No	No	No	No	No	No	Yes
Finland; Ukraine;	07/10/2004	07/12/2005	In force	No	No	No	No	No	No	No	Yes
Brunei Darussalam; Ukraine;	18/06/2004	26/04/2006	In force	No	No	No	No	No	No	No	Yes
Panama; Ukraine;	04/11/2003	16/11/2005	In force	No	No	No	No	No	No	No	Yes
Ukraine; United Arab Emirates;	21/01/2003	28/02/2004	In force	No	No	No	No	No	No	No	Yes

[1193] Source: UNCTAD (IIA) (n 20); Verkhovna Rada of Ukraine (n 438).

Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
Albania; Ukraine;	25/10/2002	18/02/2004	In force	No	No	No	No	No	No	No	Yes
Syrian Arab Republic; Ukraine;	21/04/2002	16/03/2003	In force	No	No	No	No	No	No	No	Yes
Bosnia and Herzegovina; Ukraine;	13/03/2002	22/01/2004	In force	No	No	No	No	No	No	No	Yes
Oman; Ukraine;	14/01/2002	06/02/2003	In force	No	No	No	No	No	No	No	Yes
Kuwait; Ukraine;	12/01/2002	11/06/2013	In force	No	No	No	No	No	No	No	Yes
Morocco; Ukraine;	24/12/2001	25/04/2009	In force	No	No	No	No	No	No	No	Yes
India; Ukraine;	01/12/2001	12/08/2003	In force	No	No	No	No	No	No	No	Yes
Gambia; Ukraine;	14/07/2001	19/01/2006	In force	No	No	No	No	No	No	No	Yes
Tajikistan; Ukraine;	06/07/2001	27/05/2003	In force	No	No	No	No	No	No	No	Yes
Ukraine; Yemen;	01/02/2001	07/02/2002	In force	No	No	No	No	No	No	No	Yes
Libya; Ukraine;	23/01/2001	23/04/2003	In force	No	No	No	No	No	No	No	Yes
Serbia; Ukraine;	09/01/2001	14/08/2001	In force	No	No	No	No	No	No	No	Yes
Portugal; Ukraine;	25/10/2000	18/07/2003	In force	No	No	No	No	No	No	No	Yes
Congo, Democratic Republic of the; Ukraine;	11/10/2000	17/11/2010	In force	No	No	No	No	No	No	No	Yes
Slovenia; Ukraine;	30/03/1999	01/06/2000	In force	No	No	No	No	No	No	No	Yes
Russian Federation; Ukraine;	27/11/1998	27/01/2000	In force	No	No	No	No	No	No	No	Yes

Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
Macedonia, The former Yugoslav Republic of; Ukraine;	02/03/1998	25/03/2000	In force	No	No	No	No	No	No	No	Yes
Spain; Ukraine;	26/02/1998	13/03/2000	In force	No	No	No	No	No	No	No	Yes
Turkmenistan; Ukraine;	29/01/1998	28/09/1999	In force	No	No	No	No	No	No	No	Yes
Croatia; Ukraine;	15/12/1997	05/06/2001	In force	No	No	No	No	No	No	No	Yes
Latvia; Ukraine;	24/07/1997	30/12/1997	In force	No	No	No	No	No	No	No	Yes
Azerbaijan; Ukraine;	21/03/1997	09/12/1997	In force	No	No	No	No	No	No	No	Yes
Korea, Republic of; Ukraine;	16/12/1996	03/11/1997	In force	No	No	No	No	No	No	No	Yes
Turkey; Ukraine;	27/11/1996	21/05/1998	In force	No	No	No	No	No	No	No	Yes
Austria; Ukraine;	08/11/1996	01/12/1997	In force	No	No	No	No	No	No	No	Yes
Iran, Islamic Republic of; Ukraine;	21/05/1996	05/07/2003	In force	No	No	No	No	No	No	No	Yes
BLEU (Belgium-Luxembourg EcoNomic Union); Ukraine;	20/05/1996	27/07/2001	In force	No	No	No	No	No	No	No	Yes
Indonesia; Ukraine;	11/04/1996	22/06/1997	In force	No	No	No	No	No	No	No	Yes
Lebanon; Ukraine;	25/03/1996	26/05/2000	In force	No	No	No	No	No	No	No	Yes
Belarus; Ukraine;	14/12/1995	11/06/1997	In force	No	No	No	No	No	No	No	Yes
Chile; Ukraine;	30/10/1995	29/08/1997	In force	No	No	No	No	No	No	No	Yes

Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
Moldova, Republic of; Ukraine;	29/08/1995	27/05/1996	In force	No	No	No	No	No	No	No	Yes
Sweden; Ukraine;	15/08/1995	01/03/1997	In force	No	No	No	No	No	No	No	Yes
Argentina; Ukraine;	09/08/1995	06/05/1997	In force	No	No	No	No	No	No	No	Yes
Cuba; Ukraine;	20/05/1995	04/12/1996	In force	No	No	No	No	No	No	No	Yes
Italy; Ukraine;	02/05/1995	12/09/1997	Terminated	No	No	No	No	No	No	No	Yes
Switzerland; Ukraine;	20/04/1995	21/01/1997	In force	No	No	No	No	No	No	No	Yes
Romania; Ukraine;	23/02/1995		Signed	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Estonia; Ukraine;	15/02/1995	05/07/1995	In force	No	No	No	No	No	No	No	Yes
Georgia; Ukraine;	09/01/1995	24/04/1995	In force	No	No	No	No	No	No	No	Yes
Bulgaria; Ukraine;	08/12/1994	10/12/1995	In force	No	No	No	No	No	No	No	Yes
Canada; Ukraine;	24/10/1994	24/06/1995	In force	No	No	No	No	Yes	No	Yes	Yes
Hungary; Ukraine;	11/10/1994	03/12/1996	In force	No	No	No	No	No	No	No	Yes
Armenia; Ukraine;	07/10/1994	07/03/1996	In force	No	No	No	No	No	No	No	Yes
Kazakhstan; Ukraine;	17/09/1994	09/01/1997	In force	No	No	No	No	No	No	No	Yes
Greece; Ukraine;	01/09/1994	04/01/1997	In force	No	No	No	No	No	No	No	Yes
Netherlands; Ukraine;	14/07/1994	01/06/1997	In force	No	No	No	No	No	No	No	Yes
Slovakia; Ukraine;	22/06/1994	03/04/1996	Terminated	No	No	No	No	No	No	No	Yes
Israel; Ukraine;	16/06/1994	18/02/1997	Terminated	No	No	No	No	No	No	No	Yes
Ukraine; Viet Nam;	08/06/1994	08/12/1994	In force	No	No	No	No	No	No	No	Yes

Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
France; Ukraine;	03/05/1994	26/01/1996	In force	No	No	No	No	No	No	No	Yes
Czech Republic; Ukraine;	17/03/1994	02/11/1995	In force	No	No	No	No	No	No	No	Yes
Ukraine; United States of America;	04/03/1994	16/11/1996	In force	No	No	No	No	No	No	No	Yes
Lithuania; Ukraine;	08/02/1994	06/03/1995	In force	No	No	No	No	No	No	No	Yes
Kyrgyzstan; Ukraine;	23/02/1993	23/02/1993	In force	No	No	No	No	No	No	No	Yes
Ukraine; Uzbekistan;	20/02/1993	06/06/1994	In force	No	No	No	No	No	No	No	Yes
Germany; Ukraine;	15/02/1993	29/06/1996	In force	No	No	No	No	No	No	No	Yes
Ukraine; United Kingdom;	10/02/1993	10/02/1993	In force	No	No	No	No	No	No	No	Yes
Poland; Ukraine;	12/01/1993	14/09/1993	In force	No	No	No	No	No	No	No	Yes
Egypt; Ukraine;	21/12/1992	10/10/1993	In force	No	No	No	No	No	No	No	Yes
Mongolia; Ukraine;	05/11/1992	05/11/1992	In force	No	No	No	No	No	No	No	Yes
China; Ukraine;	31/10/1992	29/05/1993	In force	No	No	No	No	No	No	No	Yes
Denmark; Ukraine;	23/10/1992	29/04/1994	In force	No	No	No	No	No	No	No	Yes
Finland; Ukraine;	14/05/1992	30/01/1994	Terminated	No	No	No	No	No	No	No	Yes
Qatar; Ukraine;	20/03/2018		Signed (not in force)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mexico; Ukraine			In negotiation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
Malaysia; Ukraine;			In negotiation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Annex 7. Ukraine: Signed PTAs[1194]

Title of agreement	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Ukraine, of the Other Part	EU (European Union); Ukraine;	27/06/2014	01/01/2016	In force	No	Yes	N/A	No	No	No	No	No
Free Trade Agreement between EFTA and Ukraine	EFTA (European Free Trade Association); Ukraine;	24/06/2010	01/06/2012	In force	No	Yes	N/A	Yes	Yes	Yes	Yes	No
Trade and Investment Cooperation Agreement between Ukraine and the United States	Ukraine; United States of America;	28/03/2008		Signed	No	No	N/A	No	No	No	n/a	No
Agreement on the Establishment of the Common Economic Zone	Belarus; Kazakhstan; Russian Federation; Ukraine;	19/09/2003	20/05/2004	In force	No	No	N/A	No	No	No	N/A	No

[1194] Source: UNCTAD (IIA) (n 20); Verkhovna Rada of Ukraine (n 438).

Title of agreement	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
The Energy Charter Treaty	Energy Charter Treaty members;	17/12/1994	16/04/1998	In force	No	No	No	Yes	Yes	No	Yes	Yes
Agreement between Canada and Ukraine on Economic Cooperation	Canada; Ukraine;	24/10/1994	24/10/1994	In force	No	No	N/A	Yes	No	No	n/a	No
Partnership and Cooperation Agreement between the European Communities and Their Member States and Ukraine	EU (European Union); Ukraine;	14/06/1994	01/03/1998	Terminated	No	No	N/A	Yes	Yes	No	Yes	No
Agreement on Cooperation in investment sector	Azerbaijan; Armenia; Belarus; Georgia; Kazakhstan; Kyrgyzstan; Moldova; Russia; Tajikistan; Turkmenistan; Uzbekistan; Ukraine	24/12/1993	21/11/1994	In force /Provisionally applied	No	No	No	No	No	No	No	Yes

Annex 8. Ukraine: ISDS[1195]

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issue involved	Outcome of original proceedings	Claimed	Awarded
1.	1998	2000	*Joseph Charles Lemire v Ukraine (I)* (ICSID Case No ARB(AF)/98/1)	Ukraine - United States of America BIT (1994)	The dispute concerns the denial of a license for radio broadcasting and allegedly discriminatory treatment.	Settled	Data not available	Non-pecuniary relief
2.	2000	2003	*Generation Ukraine v Ukraine* (ICSID Case No ARB/00/9)	Ukraine - United States of America BIT (1994)	The dispute concerns alleged interference by local authorities with the investor's construction project resulting in damages of USD 9.4 billion.	Decided in favour of State	USD 9446 million	Data not available
3.	2002	2007	*Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18)	Lithuania-Ukraine BIT	The dispute concerns alleged retaliatory actions (including document seizures, public accusations of illegal conduct and judicial actions) initiated by the Government in response to a publication concerning an opposition politician.	Decided in favour of State	USD 65 million	Data not available

[1195] Source: UNCTAD (ISDS) (n 34).

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issue involved	Outcome of original proceedings	Claimed	Awarded
4.	2004	2006	*Western NIS Enterprise Fund v Ukraine* (ICSID Case No ARB/04/2)	Ukraine - United States of America BIT (1994)	The dispute concerns alleged refusal to enforce an arbitral award against a Ukrainian state company.	Settled	Data not available	Data not available
5.	2005	2008	*Limited Liability Company Amto v Ukraine* (SCC Case No 080/2005)	The Energy Charter Treaty (1994)	The dispute concerns alleged prevention by Ukrainian bankruptcy law and the conduct of bankruptcy proceedings from enforcing several court orders against a state-owned company.	Decided in favour of State	USD 23.80 million	Data not available
6.	2006	2011	*Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18)	Ukraine - United States of America BIT (1994)	The dispute arose as a result of alleged breach of a settlement agreement concluded with the State.	Decided in favour of investor	USD 46.6 million	USD 8.7 million

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issue involved	Outcome of original proceedings	Claimed	Awarded
7.	2007	2012	*Laskaridis Shipping Co LTD, Lavinia Corporation, A K Laskaridis and P K Laskaridis v Ukraine*	Greece - Ukraine BIT (1994)	The dispute concerns alleged expropriatory acts by the Government in relation to purchase of series of vessels from a now-insolvent Ukrainian shipyard.	Settled	USD 9 million	Data not available
8.	2007	2010	*Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16)	Austria - Ukraine BIT (1996)	The dispute concerns alleged expropriation of the investor's hotel by turning it into a public company and transferring its assets to a state-owned company without any compensation.	Decided in favour of investor	USD 11.4 million	USD 2.9 million
9.	2008	2012	*Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine* (ICSID Case No ARB/08/8)	Germany - Ukraine BIT (1993)	The dispute concerns contractual dispute with a state-owned company followed by the Government's decision to prohibit a ship (that was at the heart of the dispute) to leave Ukrainian territorial waters until matters are resolved.	Decided in favour of investor	USD 23.5 million	USD 3.8 million
10.	2008	2011	*Remington Worldwide Limited v Ukraine*	The Energy Charter Treaty (1994)	The dispute concerns alleged non-enforcement of a judgment rendered by a Russian court against state-owned national nuclear energy generating company "Energoatom".	Decided in favour of investor	USD 36 million	USD 4.5 million
11.	2008	2014	*OJSC "Tatneft" v Ukraine*	Russian Federation - Ukraine BIT (1998)	The dispute concerns alleged taking of shares in oil refinery "Ukrtatnafta" followed by a physical takeover of the company.	Decided in favour of investor	USD 2400 million	USD 112 million

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issue involved	Outcome of original proceedings	Claimed	Awarded
12.	2008	2012	*Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v Ukraine* (ICSID Case No ARB/08/11)	Ukraine - United States of America BIT (1994)	The dispute concerns contractual dispute with a state-owned company, involving alleged misconduct of Ukrainian courts, the Ministry of Justice and the Education Control Division of the General Control and Revision Office of Ukraine.	Decided in favour of State	USD 10.00 million	Data not available
13.	2008	2011	*GEA Group Aktiengesellschaft v Ukraine* (ICSID Case No ARB/08/16)	Germany - Ukraine BIT (1993)	The dispute concerns alleged misappropriation of diesel and raw materials by state-owned petrochemical company, 'Oriana'.	Decided in favour of State	USD 30.60 million	Data not available
14.	2009	2010	*Global Trading Resource Corp. and Globex International, Inc. v Ukraine* (ICSID Case No ARB/09/11)	Ukraine - United States of America BIT (1994)	The dispute concerns crop and animal production, hunting and related activities.	Decided in favour of State	USD 35 million	Data not available
15.	2014	Pending	*City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v Ukraine* (ICSID Case No ARB/14/9)	Netherlands - Ukraine BIT (1994)	The dispute concerns alleged failure to exercise regulatory oversight over investor's deposits in KreditPromBank after it was sold to Mykola Lagun.	Decided in favour of investor	Data not available	USD 8.9 million
16.	2014	Pending	*Krederi Ltd. v Ukraine* (ICSID Case No ARB/14/17)	Ukraine - United Kingdom BIT (1993)	The dispute arising out of a series of judicial rulings to annul contracts held by the investor's subsidiary or acquisition and commercial development of property.	Pending	USD 137 million	Pending

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issue involved	Outcome of original proceedings	Claimed	Awarded
17.	2015	Pending	*Gilward Investments B.V. v Ukraine* (ICSID Case No ARB/15/33)	Netherlands - Ukraine BIT (1994)	The dispute arising out of measures taken by the Government related relating to the bankruptcy of AeroSvit airline, resulting in damages of USD 530 million to the investor.	Pending	USD 695 million	Pending
18.	2015	2017	*JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v Ukraine* (PCA Case No 2015-11)	Ukraine - United Kingdom BIT (1993) Netherlands - Ukraine BIT (1994) The Energy Charter Treaty (1994)	The dispute concerns alleged discriminatory measures including regulatory changes to increase royalties on gas production from 28 to 55 per cent, resulting in damages of USD 180 million to the investor.	Decided in favour of investor	USD 270 million	USD 11.8 million
19.	2015	Pending	*Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v Ukraine* (SCC Case No V 2015/092)	The Energy Charter Treaty (1994)	The dispute concenrns alleged interference with the sales prices for natural gas.	Pending	USD 5000 million	Pending

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issue involved	Outcome of original proceedings	Claimed	Awarded
20.	2016	Pending	*Emergofin B.V. and Velbay Holdings Ltd. v Ukraine* (ICSID Case No ARB/16/35)	Netherlands - Ukraine BIT (1994)	The dispute arising out of a Ukrainian court judgement to expropriate the investors' majority stake in aluminium production company Zaporozhe Aluminium Plant.	Pending	Data not available	Pending
21.	2016	Pending	*Ministry of Land and Property of the Republic of Tatarstan v Ukraine*	Russian Federation - Ukraine BIT (1998)	The dispute concerns alleged taking of shares in Ukrainian oil refinery "Ukrtatnafta" as a result of several decisions rendered by Ukrainian courts.	Pending	USD 300 million	Pending
22.	2017	Pending	*Boyko v Ukraine* (PCA Case No 2017-23)	Russian Federation - Ukraine BIT (1998)	The dispute arising out of alleged takeover and seizure of Zhytomyrski Lasoschi chocolate factory belonging to the investor.	Pending	Data not available	Pending
23.	2018	2021	*Olympic Entertainment Group AS (Estonia) v Republic of Ukraine* (PCA Case No 2019-18)	Estonia - Ukraine BIT (1995)	The dispute arising out of the State's ban on gambling adopted in 2009.	Decided in favour of investor	USD 45.3 million	Data not available

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issue involved	Outcome of original proceedings	Claimed	Awarded
24.	2018	Pending	*Gazprom v Ukraine* (PCA Case No 2019-10)	Russian Federation - Ukraine BIT (1998)	The dispute arising out of a multi-billion dollar fine imposed by the State Antimonopoly Committee for alleged breach of competition law.	Pending	Data not available	Pending
25.	2019	Pending	*Vnesheconombank v Ukraine*	Russian Federation - Ukraine BIT (1998)	The dispute concerns alleged expropriation of the investor's shares in a state-owned Russian company.	Pending	USD 200 million	Pending
26.	2020	Pending	*Wang Jing, Li Fengju, Ren Jinglin and others v Republic of Ukraine*	China - Ukraine BIT (1992)	The dispute concerns alleged expropriation of the investor's interest in PJSC Motor Sich, a manufacturer of aircraft engines	Pending	USD 3500 million	Pending

Annex 9. Ukraine: Analysis of BITs

Part 1

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
1. Preamble	Cumulative	**0.33**	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to public health	0	0	0	0	0	0	0	0.33	0	0	0	0	0	0	0	0	0	0	0	0	0
2. Limitation to covered investment	Cumulative	**0.25**	Excludes portfolio investment/other specific assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
		0.25	Contains "in accordance with host State laws" requirement	0	0	0	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0	0.25	0	0.25	0	0.25	0	0.25	0.25
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	**0.33**	Excludes dual nationals	0	0	0	0	0	0	0	0	0	0	0.33	0	0	0	0	0	0	0	0	0	0	0
		0.33	Includes requirement of substantial business activity	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Defines ownership and control of legal entities	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
4. DoB clause	Cumulative	**0.5**	"Substantive business operations" criterion	0	0	0	0	0	0	0	0.5	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.5	Applies to investors from States with no diplomatic relations or under economic/trade restrictions	0	0	0	0	0	0	0	0.5	0	0	0	0	0	0	0	0	0	0	0	0	0
5. Scope of the treaty	Ordinal	**10**	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0.25	0	0	0	0.25	0.25	0.25	0.25	0.15	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
		0.25	Reference to "like circumstances" (or similar	0	0	0	0	0	0	0	0.25	0	0	0.25	0	0	0	0	0.25	0	0	0	0.25	0
		1	No NT clause	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7. MFN	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.5	Procedural issues (ISDS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8. FET	Ordinal	**1**	FET qualified	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	0	0	0
		5	No FET	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
9. Refining indirect expropriation	Cumulative	**0.5**	Definition provided	0	0	0	0	0	0	0	0	0.5	0	0	0	0	0	0	0	0	0	0	0	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10. Umbrella clause	Ordinal	**1**	Not included	0	0	0	0	0	0	0	0	1	1	1	0	0	1	1	1	1	1	0	0	1
11. Exceptions	Ordinal	**5**	General public health exception	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	0
12. Alternatives to arbitration	Ordinal	**0.25**	Voluntary recourse to alternatives	0.25	0	0	0	0	0.25	0	0	0	0	0	0.25	0.25	0	0	0	0	0	0	0	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
13. Scope of claims	Ordinal	**0.33**	Listing specific basis of claim beyond treaty	0	0	0	0	0	0	0	0.33	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.66	0	0.66	0	0	0.66
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	**1-9**	Limitation of Provisions subject to ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0
15. Limitation on scope of ISDS	Ordinal	**10**	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16. Type of consent to arbitration	Ordinal	**10**	Case-by-case consent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
17. Forum selection: domestic courts	Ordinal	**1**	Domestic court a pre-condition for ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
18. Particular features of ISDS	Cumulative	**0.5**	Limitation period	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0	0	0	0	0
		0.5	Limited remedies	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19. Interpretation	Cumulative	**5**	Binding interpretation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Renvoi	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20. Transparency in arbitral proceedings	Cumulative	**0.33**	Making documents publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Denmark - Ukraine BIT (1992)	Mongolia - Ukraine BIT (1992)	Egypt - Ukraine BIT (1992)	Ukraine – UK BIT (1993)	Germany - Ukraine BIT (1993)	Kyrgyzstan - Ukraine BIT (1993)	Lithuania - Ukraine BIT (1994)	Ukraine - USA BIT (1994)	Czech Rep. - Ukraine BIT (1994)	France - Ukraine BIT (1994)	Israel - Ukraine BIT (1994)*	Slovakia - Ukraine BIT (1994)	Netherlands - Ukraine BIT (1994)	Kazakhstan - Ukraine BIT (1994)	Hungary - Ukraine BIT (1994)	Canada - Ukraine BIT (1994)*	Bulgaria - Ukraine BIT (1994)	Estonia - Ukraine BIT (1995)	Switzerland - Ukraine BIT (1995)	Cuba - Ukraine BIT (1995)	Argentina - Ukraine BIT (1995)
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
				1	0.75	0.75	1	1	2	1.75	3.16	2.5	3	7.58	1.25	0.9	2	1.75	8.91	6.75	2.66	0.75	1.25	2.66
PHS INDEX				0.05	0.04	0.04	0.05	0.05	0.1	0.09	0.158	0.13	0.15	0.38	0.06	0.05	0.1	0.09	0.45	0.34	0.13	0.04	0.06	0.13

Part 2

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
1. Preamble	Cumulative	**0.33**	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to public health	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2. Limitation to covered investment	Cumulative	**0.25**	Excludes portfolio investment/ other specific assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
		0.25	Contains "in accordance with host State laws" requirement	0.25	0.25	0.25	0	0.25	0	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	**0.33**	Excludes dual nationals	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Includes requirement of substantial business activity	0	0.33	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0.33	0	0	0
		0.33	Defines ownership and control of legal entities	0.33	0	0	0	0	0	0	0	0	0	0.33	0	0	0	0	0	0.33	0	0	0	0

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
4. DoB clause	Cumulative	**0.5**	"Substantive business operations" criterion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0	0	0
		0.5	Applies to investors from States with no diplomatic relations or under economic/trade restrictions	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5. Scope of the treaty	Ordinal	**10**	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0	0	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0	0.25	0.25	0.25	0.25	0	0.25

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
		0.25	Reference to “like circumstances” (or similar	0	0	0	0	0	0	0	0.25	0	0	0.25	0.25	0	0	0	0	0	0	0	0	0
		1	No NT clause	0	0	0	0	1	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0
7. MFN	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0		0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0.25	0.25	0.25		0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.5	Procedural issues (ISDS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8. FET	Ordinal	**1**	FET qualified	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
		5	No FET	0	0	0	0	0	0	0	5	0	5	0	0	5	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
9. Refining indirect expropriation	Cumulative	**0.5**	Definition provided	0.5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0	0.5	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10. Umbrella clause	Ordinal	**1**	Not included	1	1	1	1	1	0	0	1	0	1	0	1	1	1	1	1	0	1	0	1	0
11. Exceptions	Ordinal	**5**	General public health exception	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12. Alternatives to arbitration	Ordinal	**0.25**	Voluntary recourse to alternatives	0	0	0	0	0.25	0	0	0	0	0	0	0.25	0	0.25	0	0.25	0	0	0.25	0	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	**0.33**	Listing specific basis of claim beyond treaty	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0	0.66	0	0	0	0	0	0	0	0	0.66	0	0	0	0	0	0	0	0	0	0.66
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	**1-9**	Limitation of Provisions subject to ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15. Limitation on scope of ISDS	Ordinal	**10**	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
16. Type of consent to arbitration	Ordinal	**10**	Case-by-case consent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10	0
17. Forum selection: domestic courts	Ordinal	**1**	Domestic court a pre-condition for ISDS	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
18. Particular features of ISDS	Cumulative	**0.5**	Limitation period	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.5	Limited remedies	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19. Interpretation	Cumulative	**5**	Binding interpretation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0
		1	Renvoi	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Sweden - Ukraine BIT (1995)	Chile - Ukraine BIT (1995)	Belarus - Ukraine BIT (1995)	Lebanon - Ukraine BIT (1996)	Indonesia - Ukraine BIT (1996)	BLEU - Ukraine BIT (1996)	Austria - Ukraine BIT (1996)	Turkey - Ukraine BIT (1996)	Korea - Ukraine BIT (1996)	Croatia - Ukraine BIT (1997)	Spain - Ukraine BIT (1998)	N. Macedonia - Ukraine BIT (1998)	Russia- Ukraine BIT (1998)	Portugal - Ukraine BIT (2000)	Gambia - Ukraine BIT (2001)	India - Ukraine BIT (2001)	Morocco - Ukraine BIT (2001)	Bosn.and Herz. - Ukraine BIT (2002)	Albania - Ukraine BIT (2002)	Ukraine - UAE BIT (2003)	Panama - Ukraine BIT (2003)
20. Transparency in arbitral Proceedings	Cumulative	**0.33**	Making documents publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
				2.83	2.99	3	1.75	3	2.5	1	7	0.75	7	2.24	2.25	7	2.25	7.75	2.25	1.66	3.33	2	17.5	1.66
PHS INDEX				0.14	0.15	0.15	0.09	0.15	0.13	0.05	0.35	0.04	0.35	0.11	0.11	0.35	0.11	0.39	0.11	0.08	0.17	0.1	0.89	0.08

Part 3

Category	Type	Value	Indicator	Finland - Ukraine BIT (2004)	Israel- Ukraine BIT (2006)	Singapore - Ukraine BIT (2006)	Slovakia - Ukraine BIT (2007)	Japan - Ukraine BIT (2015)	Turkey - Ukraine BIT (2017)	Ukraine - Qatar BIT (2018)
1. Preamble	Cumulative	**0.33**	Reference to right to regulate	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0
		0.33	Reference to public health	0.33	0	0	0	0.33	0.33	0
2. Limitation to covered investment	Cumulative	**0.25**	Excludes portfolio investment/other specific assets	0	0	0	0	0.25	0	0
		0.25	Lists required characteristics of investment	0	0	0	0	0	0.25	0
		0.25	Contains "in accordance with host State laws" requirement	0.25	0.25	0.25	0.25	0.25	0.25	0.3
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	**0.33**	Excludes dual nationals	0	0.33	0	0	0	0	0.3
		0.33	Includes requirement of	0	0.33	0	0	0	0.33	0.3

Category	Type	Value	Indicator	Finland - Ukraine BIT (2004)	Israel- Ukraine BIT (2006)	Singapore - Ukraine BIT (2006)	Slovakia - Ukraine BIT (2007)	Japan - Ukraine BIT (2015)	Turkey - Ukraine BIT (2017)	Ukraine - Qatar BIT (2018)
			substantial business activity							
		0.33	Defines ownership and control of legal entities	0	0	0	0.33	0	0	0
4. DoB clause	Cumulative	**0.5**	"Substantive business operations" criterion	0	0	0	0	0.5	0.5	0
		0.5	Applies to investors from States with no diplomatic relations or under economic/trade restrictions	0	0	0	0	0.5	0.5	0.5
5. Scope of the treaty	Ordinal	**10**	Excludes public health / tobacco regulation	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0
		0.25	Post-establishment	0	0.25	0	0.25	0.25	0.25	0.3
		0.25	Reference to “like circumstances” (or similar	0	0.25	0	0	0.25	0.25	0

Category	Type	Value	Indicator	Finland - Ukraine BIT (2004)	Israel- Ukraine BIT (2006)	Singapore - Ukraine BIT (2006)	Slovakia - Ukraine BIT (2007)	Japan - Ukraine BIT (2015)	Turkey - Ukraine BIT (2017)	Ukraine - Qatar BIT (2018)
		1	No NT clause	0	0	1	0	0	0	0
7. MFN	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0
		0.25	Post-establishment	0	0.25	0.25	0.25	0.25	0	0.3
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0.25	0.3
		0.5	Procedural issues (ISDS)	0	0	0	0	0.5	0.5	0
		1	No MFN clause	0	0	0	0	0	0	0
8. FET	Ordinal	**1**	FET qualified	0	0	0	0	1	1	0
		5	No FET	0	0	0	0	0	0	0
9. Refining indirect expropriation	Cumulative	**0.5**	Definition provided	0	0	0	0	0	0	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	2.5	0
10. Umbrella clause	Ordinal	**1**	Not included	0	0	1	0	0	1	0
11. Exceptions	Ordinal	**5**	General public health exception	0	0	0	0	0	5	0

Category	Type	Value	Indicator	Finland - Ukraine BIT (2004)	Israel- Ukraine BIT (2006)	Singapore - Ukraine BIT (2006)	Slovakia - Ukraine BIT (2007)	Japan - Ukraine BIT (2015)	Turkey - Ukraine BIT (2017)	Ukraine - Qatar BIT (2018)
12. Alternatives to arbitration	Ordinal	**0.25**	Voluntary recourse to alternatives	0	0.25	0.25	0	0	0	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0
		15	No ISDS	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	**0.33**	Listing specific basis of claim beyond treaty	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0	0	0	0	0.66	0.66	0.7
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	**1-9**	Limitation of Provisions subject to ISDS	0	0	0	0	0	0	0
15. Limitation on scope of ISDS	Ordinal	**10**	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0
16. Type of consent to arbitration	Ordinal	**10**	Case-by-case consent	0	0	0	0	0	0	0
17. Forum selection: domestic courts	Ordinal	**1**	Domestic court a pre-condition for ISDS	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Finland - Ukraine BIT (2004)	Israel- Ukraine BIT (2006)	Singapore - Ukraine BIT (2006)	Slovakia - Ukraine BIT (2007)	Japan - Ukraine BIT (2015)	Turkey - Ukraine BIT (2017)	Ukraine - Qatar BIT (2018)
18. Particular features of ISDS	Cumulative	**0.5**	Limitation period	0	0	0	0	0.5	0	0.5
		0.5	Limited remedies	0	0	0	0	0	0	0
19. Interpretation	Cumulative	**5**	Binding interpretation	0	0	0	0	0	0	0
		1	Renvoi	0	0	0	0	0	0	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0
20. Transparency in arbitral proceedings	Cumulative	**0.33**	Making documents publicly available	0	0	0	0	0	0	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0
		0.33	Amicus curie	0	0	0	0	0	0	0
				0.83	2.16	3	1.33	5.49	13.6	3.3
PHS INDEX				0.04	0.11	0.15	0.07	0.27	0.68	0.2

Annex 10. Belarus: Tobacco Control Legislation[1196]

No	Law	Date of adoption	Comments	Source
1.		20.10.2000 (amended on 13.01.2017)	Prescribes that the convicted shall not smoke in outside designated smoking areas.	Official website https://pravo.by/document/?guid=12551&p0=W21732093&p1=1
2.	Decree of the President of the Republic of Belarus 'On State Regulations of the Production, Trafficking and Consumption of Tobacco Raw Materials and Tobacco Products' of 17 December 2002 No 28.	17.12.2002	.	Official website www.pravo.by/document/?guid=3961&p0=Pd0200028
3.	GOST 3935-2000 'General Specifications for Cigarettes Adopted by Inter-State Council Warning Labels' (as amended 06.02.2010).	01.01.2003	Prescribes general technical specifications and health warnings on cigarette packets of not less than 30% of the principal display areas.	Official website http://www.eurasiancommission.org/ru/act/texnreg/deptexreg/tr/Pages/tabac.aspx
4.	Code of the Republic of Belarus 'On Administrative Offenses' of 21 April 2003 No 194-3.	21.04.2003	Prescribes penalties for smoking in places where smoking is prohibited; violation of health warning provisions; and violation of tobacco advertising and promotions provisions.	Official website https://pravo.by/document/?guid=3871&p0=hk0300194
5.	Decree 'On State Regulation of Import of Tobacco Raw Materials and Tobacco Products and Modifications and Amendments on the Decree of the President of the Republic of Belarus No 28 of December 17, 2002' No 4 of 18 October 2007.	18.10.2007	Prescribes the exclusive right of the State to import raw tobacco and tobacco products under specific classification.	Official website https://mart.gov.by/files/live/sites/mart/files/documents/%D0%94%D0%B5%D0%BA%D1%80%D0%B5%D1%82%20%D0%9F%D1%80%D0%B5%D0%

[1196] Source: National Legal Internet Portal of the Republic of Belarus (n 438); Campaign for Tobacco-Free Kids (n 96).

No	Law	Date of adoption	Comments	Source
				B7%D0%B8%D0%B4%D0%B5%D0%BD%D1%82%D0%B0%20%D0%A0%D0%91%20%D0%BE%D1%82%2018.10.2007%20%E2%84%964.pdf
6.	Law of the Republic of Belarus 'On Advertising' No 225-З of 10 May 2007.	10.05.2007	, including brands stretching.	Official website https://pravo.by/document/?guid=3871&p0=h10700225nf,fr
7.	Decree of the President of the Republic of Belarus 'On Issues of State Regulations of Productions, Distributions and Advertising of Beer, Alcohol and Tobacco Products' No 3. Of 29 February 2008.	29.02.2008	Aligns existing legislation with advertisement restrictions.	Official website www.minfin.gov.by/upload/gosznak/acts/dekret_290208_3.pdf
8.	Resolution of Ministry of Economics of the Republic of Belarus 'On Prices for Tobacco Products' No 61 of 29 March 2010.	29.03.2010	Regulates pricing of tobacco products.	Official version http://expert.by/EC/monitorings/135266.txt
9.	Decree of the President of the Republic of Belarus 'On Licensing of Certain Types of Activities' of 1 September 2010 No 450.	01.09.2010	Regulates licensing of production, wholesale and retail trade of tobacco products.	Official website https://pravo.by/document/?guid=3871&p0=P31000450
10.	Order of the Ministry of Health of the Republic of Belarus 'On Approval of the Concept for Implementation of the State Policy on Countering Tobacco Use for 2011-2015 and the Comprehensive Action Plan for Tobacco Control for 2011-2015' of 15 April 2011 No 385.	15.04.2011	Contained a list of measures aimed at implementing the FCTC.	Official website http://minzdrav.gov.by/ru/dlya-spetsialistov/normativno-pravovaya-baza/baza-npa.php?ELEMENT_ID=8029

No	Law	Date of adoption	Comments	Source
11.	Order of the Ministry of Health of the Republic of Belarus 'On the Adoption of the Instruction on the Procedure for Implementation of Effective Control Over Observance of a Smoking Ban in the Health Care Organisations and in Adjoining Territories and the Model Regulation on the Commission on Control Over a Smoking Ban in the Health Care Organisation' of 1 July 2011 No 710.	01.07.2011	Introduces procedure to observe smoking restrictions in the health care organisations and adjoining territories.	Official website www.vsmu.by/images/stories/health/MZ_smoking.pdf
12.	Ruling of the Ministry of Health of the Republic of Belarus 'On Introducing Additions and Amendments to Some Sanitation Norms, Rules, and Hygienic Standards' of 3 November 2011 No 111.	03.11.2011	Restricts smoking in institutions (organisations) of health care, education and sports as well as other public places.	Official website: http://minzdrav.gov.by/ru/dlya-spetsialistov/normativno-pravovaya-baza/baza-npa.php?ELEMENT_ID=7019
13.	Board Decision of the Eurasian Economic Commission 'On Transitional Provisions of the Technical Regulations of the Customs Union 'Technical Regulations for Tobacco Products' (TR TS 035/2014) / Technical regulations of the Customs Union "Technical regulations for tobacco products" (TRTS 035/2014)' No 53.	12.05.2015 (in force since 05.05.2016)	Introduces marking requirements for tobacco products, including health warnings to cover 50% of each side of the pack..	Official website: www.eurasiancommission.org/ru/act/texnreg/deptexreg/tr/Pages/tabac.aspx
14.	Resolution of the Council of Ministers of the Republic of Belarus 'On Approval of the State Programme "Health of the People and the Demographic Security of the Republic of Belarus" for 2016–2020' of 14 March 2016 No 200.	14.03.2016	Intends to address the UN SDG 3 in terms of strengthening the implementation of the FCTC to decrease smoking prevalence to 24.5 %.	Official website: www.government.by/upload/docs/filecdf0f8a76b95e004.PDF
15.	Decision of the Council of the Eurasian Economic Commission 'On Approval of Sketches with Warnings on Harmful Effect of Tobacco Consumption and Specification of Their	17.03.2016	Regulates the format of text and image warnings for all tobacco product packages for retail sale.	Official website https://docs.eaeunion.org/docs/ru-ru/01010143/cncd_27042016_18

No	Law	Date of adoption	Comments	Source
	Application on Consumer Packaging of Tobacco Products' No 18 of 17 March 2016.			
16.	Resolution of the Ministry of Internal Affairs of the Republic of Belarus 'On Vesting Officials of Internal Affairs Bodies with the Powers to Draw up Protocols on Administrative Offenses and Prepare Cases on Administrative Offenses for Consideration' No 47 of 1 March 2010.	16.02.2018	Authorises the Ministry of Internal Affairs as the enforcement authority for violations of tobacco control laws and regulations.	Official website https://pravo.by/upload/docs/op/W21832862_1519851600.pdf
17.	Decree of the President of the Republic of Belarus 'On Amendments of the Decrees of the President of the Republic of Belarus' No 2 of 24 January 2019.	24.01.2019	Prohibits open display of liquids for electronic smoking systems in shop windows and other commercial equipment; prohibits advertisement and sale to the minors fluids for electronic smoking systems. Expands the list of public places, where smoking is prohibited. Introduces a further ban on the use for storage and sale of tobacco products of equipment placed above checkout counters from 1 January 2022.	Official website https://pravo.by/upload/docs/op/Pd1900002_1548450000.pdf Press-release: https://mart.gov.by/news/24--2019--no-2
18.	Agreement on the Principles of the Tax Policy in the Area of Excise Tax For Tobacco Products of the Member States of the Eurasian Economic Union (signed 19 December 2019, ratified July 2020).	19.12.2019 (ratified in July 2020)	Increases the excise tax and provides for the unification of the excise tax policy in the EAEU Member-States.	Official text www.consultant.ru/document/cons_doc_LAW_341116/ Information on the Treaty ratification: https://primepress.by/news/kompanii/belarus_ratifitsirovala_soglashenie_o_printsipakh_ustanovleniya_aktsizov_na_tabachnuyu_produktsiyu_v-22410/
19.	Resolution of the Council of Ministers of the Republic of Belarus 'On Amendments to the Resolutions of the Council of Ministers Of the	15.04.2020	Bans the sale of non-tobacco nicotine-containing products to the minors under 18; at trading places in	Official text: https://pravo.by/docum

No	Law	Date of adoption	Comments	Source
	Republic of Belarus on Retail Trade Issues' No 232 of 15 April 2020.		markets; via the internet; picking and commission trading; methods of open display and self-service etc.	ent/?guid=12551&p0=C22000232&p1=1 Press-release: https://mart.gov.by/news/nicotine_press_conference
20.	Decree of the President of the Republic of Belarus of 21 May 2020 No 2.	21.05.2020	Amending regulation on production, circulation and electronic smoking systems, liquids for electronic smoking systems, systems for the consumption of tobacco regarding the prohibition of the sale of electronic smoking systems and systems for tobacco consumption to persons under 18.	Press-release: https://mart.gov.by/news/zapret_molozhe_18

Annex 11. Belarus: Signed BITs[1197]

No	Short title	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
1.	Belarus - Uzbekistan BIT (2019)	Belarus; Uzbekistan;	01/08/2019	N/A	Signed	No	No	No	No	No	No	Yes	Yes
2.	Belarus - Hungary BIT (2019)	Belarus; Hungary;	14/01/2019	28/09/2019	In force	Yes	Yes	Yes	No	No	No	Yes	Yes
3.	Belarus-India BIT (2018)	Belarus; India;	24/09/2018	23/11/2003	Signed	Yes	No	Yes	No	No	No	Yes	Yes
4.	Belarus-Turkey BIT (2018)	Belarus; Turkey;	14/02/2018	N/A	Signed	No	Yes	Yes	No	No	No	Yes	Yes
5.	Belarus-Georgia BIT (2017)	Belarus; Georgia	01/03/2017	01/12/2017	In force	No	No	Yes	No	Yes	No	No	Yes
6.	Belarus-Turkmenistan BIT (2015)	Belarus; Turkmenistan	10/12/2015	18/10/2016	In force	No	No	Yes	No	No	No	No	Yes
7.	Belarus - Cambodia BIT (2014)	Belarus; Cambodia;	23/04/2014	14/04/2016	In force	No	No	No	No	No	No	No	Yes
8.	Belarus - Lao People's Democratic Republic BIT (2013)	Belarus; Lao People's Democratic Republic;	01/07/2013	N/A	Signed	No	No	Yes	No	No	No	No	Yes

[1197] Source: UNCTAD (IIA) (n 20); National Legal Internet Portal of the Republic of Belarus (n 438).

9.	Azerbaijan - Belarus BIT (2010)	Azerbaijan; Belarus;	03/06/2010	01/07/2011	Signed	No	No	No	No	No	No	No	Yes
10.	Belarus - Estonia BIT (2009)	Belarus; Estonia;	21/10/2009	N/A	Signed	No	No	No	No	No	No	No	Yes
11.	Belarus - Saudi Arabia BIT (2009)	Belarus; Saudi Arabia;	20/07/2009	07/08/2010	In force	No	No	No	No	No	No	No	Yes
12.	Belarus - Mexico BIT (2008)	Belarus; Mexico;	04/09/2008	27/08/2009	In force	No	No	No	No	No	No	No	Yes
13.	Belarus - Venezuela, Bolivarian Republic of BIT (2007)	Belarus; Venezuela, Bolivarian Republic of;	06/12/2007	13/08/2008	In force	No	No	No	No	No	No	No	Yes
14.	Belarus - Slovenia BIT (2006)	Belarus; Slovenia;	18/10/2006	N/A	Signed	No	No	No	No	No	No	No	Yes
15.	Belarus - Korea, Dem. People's Rep. of BIT (2006)	Belarus; Korea, Dem. People's Rep. of;	24/08/2006	31/05/2007	Signed	No	No	No	No	No	No	No	No
16.	Belarus - Finland BIT (2006)	Belarus; Finland;	08/06/2006	10/04/2008	In force	No	Yes	No	No	No	Yes	No	Yes
17.	Belarus - Slovakia BIT (2005)	Belarus; Slovakia;	26/08/2005	01/09/2006	In force	No	No	No	No	No	No	No	Yes
18.	Belarus - Bosnia and Herzegovina BIT (2004)	Belarus; Bosnia and Herzegovina;	29/11/2004	22/01/2006	In force	No	No	No	No	No	No	No	Yes
19.	Belarus - Oman BIT (2004)	Belarus; Oman;	10/05/2004	18/01/2005	In force	No	No	No	No	No	No	No	Yes
20.	Belarus - Denmark BIT (2004)	Belarus; Denmark;	31/03/2004	20/07/2005	In force	No	No	No	No	No	No	No	Yes
21.	Belarus - Yemen BIT (2003)	Belarus; Yemen;	18/07/2003	N/A	Signed	No	No	No	No	No	No	No	Yes
22.	Belarus - Jordan BIT (2002)	Belarus; Jordan;	20/12/2002	22/12/2005	In force	No	No	No	No	No	No	No	Yes
23.	Belarus - India BIT (2002)	Belarus; India;	27/11/2002	23/11/2003	Terminated	No	No	No	No	No	No	No	Yes

24.	Bahrain - Belarus BIT (2002)	Bahrain; Belarus;	26/10/2002	16/06/2008	In force	No	No	No	No	No	No	No	Yes
25.	Belarus - BLEU (Belgium-Luxembourg Economic Union) BIT (2002)	Belarus; BLEU (Belgium-Luxembourg Economic Union);	09/04/2002	N/A	Signed	No	No	No	No	No	No	No	Yes
26.	Belarus - Kuwait BIT (2001)	Belarus; Kuwait;	10/07/2001	14/06/2003	In force	No	No	No	No	No	No	No	Yes
27.	Belarus - Croatia BIT (2001)	Belarus; Croatia;	26/06/2001	14/07/2005	In force	No	No	No	No	No	No	No	Yes
28.	Belarus - Macedonia, The former Yugoslav Republic of BIT (2001)	Belarus; Macedonia, The former Yugoslav Republic of;	20/06/2001	22/11/2002	Signed	No	No	No	No	No	No	No	Yes
29.	Belarus - Lebanon BIT (2001)	Belarus; Lebanon;	19/06/2001	29/12/2002	In force	No	No	No	No	No	No	No	Yes
30.	Belarus - Mongolia BIT (2001)	Belarus; Mongolia;	28/05/2001	01/12/2001	In force	No	No	No	No	No	No	No	Yes
31.	Armenia - Belarus BIT (2001)	Armenia; Belarus;	26/05/2001	02/10/2002	In force	No	No	No	No	No	No	No	Yes
32.	Austria - Belarus BIT (2001)	Austria; Belarus;	16/05/2001	01/06/2002	In force	No	No	No	No	No	No	No	Yes
33.	Belarus - Qatar BIT (2001)	Belarus; Qatar;	17/02/2001	06/08/2004	In force	No	No	No	No	No	No	No	Yes
34.	Belarus - Libya BIT (2000)	Belarus; Libya;	01/11/2000	23/02/2002	In force	No	No	No	No	No	No	No	Yes
35.	Belarus - Cuba BIT (2000)	Belarus; Cuba;	08/06/2000	16/08/2001	In force	No	No	No	No	No	No	No	Yes
36.	Belarus - Singapore BIT (2000)	Belarus; Singapore;	15/05/2000	13/01/2001	In force	No	No	No	Yes	No	No	Yes	Yes
37.	Belarus - Israel BIT (2000)	Belarus; Israel;	11/04/2000	14/08/2003	In force	No	No	No	No	No	No	No	Yes

38.	Belarus - United Arab Emirates BIT (2000)	Belarus; United Arab Emirates;	27/03/2000	16/02/2001	In force	No	No	No	Yes	No	No	No	Yes
39.	Belarus - Moldova, Republic of BIT (1999)	Belarus; Moldova, Republic of;	28/05/1999	19/11/1999	In force	No	No	No	No	Yes	No	No	Yes
40.	Belarus - Kyrgyzstan BIT (1999)	Belarus; Kyrgyzstan;	30/03/1999	11/11/2001	In force	No	No	No	No	Yes	No	No	Yes
41.	Belarus - Lithuania BIT (1999)	Belarus; Lithuania;	05/03/1999	16/05/2002	In force	No	No	No	No	No	No	No	Yes
42.	Belarus - Tajikistan BIT (1998)	Belarus; Tajikistan;	03/09/1998	25/08/1999	In force	No	No	No	No	No	No	No	Yes
43.	Belarus - Cyprus BIT (1998)	Belarus; Cyprus;	29/05/1998	03/09/1998	In force	No	No	No	No	No	No	No	Yes
44.	Belarus - Syrian Arab Republic BIT (1998)	Belarus; Syrian Arab Republic;	11/03/1998	01/10/1998	In force	No	No	No	No	No	No	No	Yes
45.	Belarus - Latvia BIT (1998)	Belarus; Latvia;	03/03/1998	21/12/1998	In force	No	No	No	No	No	No	No	Yes
46.	Belarus - Korea, Republic of BIT (1997)	Belarus; Korea, Republic of;	22/04/1997	09/08/1997	In force	No	No	No	No	No	No	No	Yes
47.	Belarus - Egypt BIT (1997)	Belarus; Egypt;	20/03/1997	18/01/1999	In force	No	No	No	No	No	No	No	Yes
48.	Belarus - Pakistan BIT (1997)	Belarus; Pakistan;	22/01/1997	N/A	Signed	No	No	No	No	No	No	No	Yes
49.	Belarus - Czech Republic BIT (1996)	Belarus; Czech Republic;	14/10/1996	09/04/1998	In force	No	No	No	No	No	No	No	Yes
50.	Belarus - Serbia BIT (1996)	Belarus; Serbia;	06/03/1996	25/01/1997	In force	No	No	No	No	No	No	No	Yes
51.	Belarus - Bulgaria BIT (1996)	Belarus; Bulgaria;	21/02/1996	11/11/1997	In force	No	No	No	No	No	No	No	Yes
52.	Belarus - Ukraine BIT (1995)	Belarus; Ukraine;	14/12/1995	11/06/1997	In force	No	No	No	No	No	No	No	Yes

53.	Belarus - Turkey BIT (1995)	Belarus; Turkey;	08/08/1995	20/02/1997	Terminated	No	No	No	No	No	No	No	Yes
54.	Belarus - Italy BIT (1995)	Belarus; Italy;	25/07/1995	12/08/1997	In force	No	Yes	No	No	No	No	No	Yes
55.	Belarus - Iran, Islamic Republic of BIT (1995)	Belarus; Iran, Islamic Republic of;	14/07/1995	23/06/2000	In force	No	No	No	No	No	No	No	Yes
56.	Belarus - Romania BIT (1995)	Belarus; Romania;	31/05/1995	08/01/1997		No	No	No	No	No	No	No	Yes
57.	Belarus - Netherlands BIT (1995)	Belarus; Netherlands;	11/04/1995	01/08/1996	In force	No	No	No	No	Yes	No	No	Yes
58.	Belarus - Sweden BIT (1994)	Belarus; Sweden;	20/12/1994	01/11/1996	In force	No	No	No	No	No	No	No	Yes
59.	Belarus - United Kingdom BIT (1994)	Belarus; United Kingdom;	01/03/1994	28/12/1994	In force	No	No	No	No	No	No	No	Yes
60.	Belarus - United States of America BIT (1994)	Belarus; United States of America;	15/01/1994	N/A	Signed	No	Yes	No	No	No	No	No	Yes
61.	Belarus - France BIT (1993)	Belarus; France;	28/10/1993	N/A	Signed	No	Yes	No	No	No	No	No	Yes
62.	Belarus - Switzerland BIT (1993)	Belarus; Switzerland;	28/05/1993	13/07/1994	In force	No	No	No	No	No	No	No	Yes
63.	Belarus - Germany BIT (1993)	Belarus; Germany;	02/04/1993	23/09/1996	In force	No	No	No	No	No	No	No	Yes
64.	Belarus - China BIT (1993)	Belarus; China;	11/01/1993	14/01/1995	In force	No	No	No	No	No	No	No	Yes
65.	Belarus - Finland BIT (1992)	Belarus; Finland;	28/10/1992	11/12/1994	Terminated	No	No	No	No	No	No	No	Yes
66.	Belarus - Viet Nam BIT (1992)	Belarus; Viet Nam;	08/07/1992	24/11/1994	In force	No	No	No	No	No	No	No	Yes
67.	Belarus - Poland BIT (1992)	Belarus; Poland;	24/04/1992	18/01/1993	In force	No	No	No	No	No	No	No	Yes
68.	Belarus - Spain BIT (1990)	Belarus; Spain;	26/10/1990	28/11/1991	In force	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

69.	Belarus - Belgium/Luxembourg BIT (1989)	Belarus; Belgium;	09/02/1989	02/08/1991	In force	No	No	No	No	No	No	No	Yes
70.	Belarus - Belgium/Luxembourg BIT (1989)	Belarus; Luxembourg;	09/02/1989	18/08/1991	In force	No	No	No	No	No	No	No	Yes

Annex 12. Belarus: Signed PTAs[1198]

No	Title of agreement	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
1.	Free Trade Agreement between the Eurasian Economic Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part	Eurasian Economic Union; Viet Nam;	29/05/2015	05/10/2016	In force	No	No	No	Yes	Yes	Yes	Yes	Yes
2.	Treaty on Eurasian Economic Union	Eurasian Economic Union;	29/05/2014	01/01/2015	In force	No	No	No	No	No	No	No	Yes
3.	Agreement on Trade in Services and Investment in the Member States of the Common Economic Space	Belarus; Kazakhstan; Russian Federation;	09/12/2010	01/01/2012	In force	No	No	n/a	Yes	Yes	Yes	n/a	No
4.	Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community	Belarus; Kazakhstan; Kyrgyzstan; Russian Federation; Tajikistan;	12/12/2008	11/01/2016	In force	No	No	No	No	No	No	No	Yes

[1198] Source: UNCTAD (IIA) (n 20); National Legal Internet Portal of the Republic of Belarus (n 438).

5.	Agreement on the Establishment of the Common Economic Zone	Belarus; Kazakhstan; Russian Federation; Ukraine;	19/09/2003	20/05/2004	In force	No	No	n/a	No	No	No	n/a	No
6.	Convention on Protection of Investor Rights	Armenia; Belarus; Kazakhstan; Kyrgyzstan; Moldova, Republic of; Tajikistan;	28/03/1997	21/01/1999	In force	No	No	No	No	No	No	Yes	Yes
7.	Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and Their Member States, of the One Part, and Belarus, of the Other Part	Belarus; EU (European Union);	06/03/1995		Signed	No	No	n/a	Yes	Yes	No	Yes	No
8.	The Energy Charter Treaty	Energy Charter Treaty members;	17/12/1994	16/04/1998	In force	No	No	No	Yes	Yes	No	Yes	Yes
9.	Agreement on Cooperation in investment sector	Azerbaijan; Armenia; Belarus; Georgia; Kazakhstan; Kyrgyzstan; Moldova; Russia; Tajikistan; Turkmenistan; Uzbekistan; Ukraine	24/12/1993	21/11/1994	In force	No	No	No	No	No	No	No	Yes

Annex 13. Belarus: ISDS[1199]

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
1.	2018	N/A	*Delta Belarus Holding BV v Republic of Belarus* (ICSID Case No ARB/18/9)	Belarus - Netherlands BIT (1995)	The dispute arising out of the revocation of Delta Bank's operating licence.	Pending	Data not available	N/A
2.	2018	N/A	*GRAND EXPRESS Non-Public Joint Stock Company v Republic of Belarus* (ICSID Case No ARB(AF)/18/1)	Treaty on Eurasian Economic Union (2014) Eurasian Investment Agreement	The dispute concerning participation in a joint venture to develop railcar manufacturing in Belarus.	Pending	Data not available	N/A
3.	2018	N/A	*OOO Manolium Processing v The Republic of Belarus* (PCA Case No 2018-06)	Treaty on Eurasian Economic Union (2014)	The dispute concerning the termination of an agreement for a construction development project and alleged confiscation of the investor's assets.	Pending	Data not available	N/A

[1199] Source: UNCTAD (ISDS) (n 34).

Annex 14. Belarus: Analysis of BITs

Part 1

Category	Type	Value	Indicator	Belarus-Belgium /Luxembourg BIT (1989)	Belarus-Finland BIT (1992)	Belarus-China BIT (1993)	Belarus-UK (1994)	Belarus-Ukraine BIT (1995)	Belarus-Turkey BIT (1995)	Belarus - Czech Republic BIT (1996)	Belarus - Pakistan BIT (1997)	Belarus-Cyprus BIT (1998)	Belarus-Lithuania BIT (1999)	Belarus-UAE BIT (2000)	Austria-Belarus BIT (2001)	Belarus-BLEU BIT (2002)	Belarus-Yemen BIT (2003)	Belarus-Denmark BIT (2004)
1. Preamble	Cumulative	**0.33**	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to public health	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2. Limitation to covered investment	Cumulative	**0.25**	Excludes portfolio investment/other specific assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Contains "in accordance with host State laws" requirement	0.25	0	0.25	0	0.25	0.25	0.25	0.25	0	0	0.25	0	0	0.25	0.25

Category	Type	Value	Indicator	Belarus-Belgium /Luxembourg BIT (1989)	Belarus-Finland BIT (1992)	Belarus-China BIT (1993)	Belarus-UK (1994)	Belarus-Ukraine BIT (1995)	Belarus-Turkey BIT (1995)	Belarus - Czech Republic BIT (1996)	Belarus - Pakistan BIT (1997)	Belarus-Cyprus BIT (1998)	Belarus-Lithuania BIT (1999)	Belarus-UAE BIT (2000)	Austria-Belarus BIT (2001)	Belarus-BLEU BIT (2002)	Belarus-Yemen BIT (2003)	Belarus-Denmark BIT (2004)
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	**0.33**	Excludes dual nationals	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Includes requirement of substantial business activity	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Defines ownership and control of legal entities	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4. Do B clause	Cumulative	**0.5**	"Substantive business operations" criterion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.5	Applies to investors from States with no diplomatic	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Belarus-Belgium /Luxembourg BIT (1989)	Belarus-Finland BIT (1992)	Belarus-China BIT (1993)	Belarus-UK (1994)	Belarus-Ukraine BIT (1995)	Belarus-Turkey BIT (1995)	Belarus - Czech Republic BIT (1996)	Belarus - Pakistan BIT (1997)	Belarus-Cyprus BIT (1998)	Belarus-Lithuania BIT (1999)	Belarus-UAE BIT (2000)	Austria-Belarus BIT (2001)	Belarus-BLEU BIT (2002)	Belarus-Yemen BIT (2003)	Belarus-Denmark BIT (2004)
			relations or under economic/trade restrictions															
5. Scope of the treaty	Ordinal	**10**	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0	0	0	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0	0.25	0.25
		0.25	Reference to "like circumstances" (or similar	0	0	0	0	0	0	0	0	0	0.25	0	0	0	0	0
		1	No NT clause	1	1	1	0	0	0	0	0	1	0	0	0	1	0	0
7. MFN	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25

Category	Type	Value	Indicator	Belarus-Belgium /Luxembourg BIT (1989)	Belarus-Finland BIT (1992)	Belarus-China BIT (1993)	Belarus-UK (1994)	Belarus-Ukraine BIT (1995)	Belarus-Turkey BIT (1995)	Belarus - Czech Republic BIT (1996)	Belarus - Pakistan BIT (1997)	Belarus-Cyprus BIT (1998)	Belarus-Lithuania BIT (1999)	Belarus-UAE BIT (2000)	Austria-Belarus BIT (2001)	Belarus-BLEU BIT (2002)	Belarus-Yemen BIT (2003)	Belarus-Denmark BIT (2004)
		0.5	Procedural issues (ISDS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8. FET	Ordinal	**1**	FET qualified	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
		5	No FET	0	0	5	0	0	5	0	0	0	0	0	0	0	0	0
9. Refining indirect expropriation	Cumulative	**0.5**	Definition provided	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10. Umbrella clause	Ordinal	**1**	Not included	1	1	1	0	1	1	1	0	1	0	0	1	0	0	0
11. Exceptions	Ordinal	**5**	General public health exception	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Belarus-Belgium /Luxembourg BIT (1989)	Belarus-Finland BIT (1992)	Belarus-China BIT (1993)	Belarus-UK (1994)	Belarus-Ukraine BIT (1995)	Belarus-Turkey BIT (1995)	Belarus - Czech Republic BIT (1996)	Belarus - Pakistan BIT (1997)	Belarus-Cyprus BIT (1998)	Belarus-Lithuania BIT (1999)	Belarus-UAE BIT (2000)	Austria-Belarus BIT (2001)	Belarus-BLEU BIT (2002)	Belarus-Yemen BIT (2003)	Belarus-Denmark BIT (2004)
12. Alternatives to arbitration	Ordinal	**0.25**	Voluntary recourse to alternatives	0	0.25	0	0.25	0	0	0	0	0	0	0	0.25	0	0	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	**0.33**	Listing specific basis of claim beyond treaty	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0.66	0	0	0	0	0	0	0.66	0	0	0	0	0	0	0
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	**1-9**	Limitation of Provisions subject to ISDS	8	0	1	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Belarus-Belgium /Luxembourg BIT (1989)	Belarus-Finland BIT (1992)	Belarus-China BIT (1993)	Belarus-UK (1994)	Belarus-Ukraine BIT (1995)	Belarus-Turkey BIT (1995)	Belarus - Czech Republic BIT (1996)	Belarus - Pakistan BIT (1997)	Belarus-Cyprus BIT (1998)	Belarus-Lithuania BIT (1999)	Belarus-UAE BIT (2000)	Austria-Belarus BIT (2001)	Belarus-BLEU BIT (2002)	Belarus-Yemen BIT (2003)	Belarus-Denmark BIT (2004)
15. Limitation on scope of ISDS	Ordinal	**10**	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16. Type of consent to arbitration	Ordinal	**10**	Case-by-case consent	0	0	0	0	0	0	0	15	0	0	0	0	0	0	0
17. Forum selection: domestic courts	Ordinal	**1**	Domestic court a pre-condition for ISDS	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0
18. Particular features of ISDS	Cumulative	**0.5**	Limitation period	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.5	Limited remedies	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19. Interpretation	Cumulative	**5**	Binding interpretation	5	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Belarus-Belgium /Luxembourg BIT (1989)	Belarus-Finland BIT (1992)	Belarus-China BIT (1993)	Belarus-UK (1994)	Belarus-Ukraine BIT (1995)	Belarus-Turkey BIT (1995)	Belarus - Czech Republic BIT (1996)	Belarus - Pakistan BIT (1997)	Belarus-Cyprus BIT (1998)	Belarus-Lithuania BIT (1999)	Belarus-UAE BIT (2000)	Austria-Belarus BIT (2001)	Belarus-BLEU BIT (2002)	Belarus-Yemen BIT (2003)	Belarus-Denmark BIT (2004)
		1	Renvoi	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20. Transparency in arbitral proceedings	Cumulative	**0.33**	Making documents publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
				16.41	2.75	8.75	1	3	7	2	16.66	2.5	1	1	2	2.5	1	1
PHS INDEX				0.821	0.138	0.438	0.05	0.15	0.35	0.1	0.833	0.125	0.05	0.05	0.1	0.125	0.05	0.05

Part 2

Category	Type	Value	Indicator	Belarus-Slovakia BIT (2005)	Belarus-Finland BIT (2006)	Belarus-Venezuela BIT (2007)	Belarus-Mexico BIT (2008)	Belarus-Saudi Arabia BIT (2009)	Azerbaijan-Belarus BIT (2010)	Belarus-Lao P' s Dem. Rep. BIT (2013)	Belarus- Cambodia BIT (2014)	Belarus-Turkmen. BIT (2015)	Belarus-Georgia BIT (2017)	Belarus-Turkey BIT (2018)	Belarus-India BIT (2018)	Belarus-Hungary BIT (2019)	Belarus-Uzbekistan BIT (2019)
1. Preamble	Cumulative	**0.33**	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0.33	0.33	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0	0	0	0	0	0.33	0.33	0
		0.33	Reference to public health	0	0.33	0	0	0	0	0	0	0	0	0.33	0	0.33	0
2. Limitation to covered investment	Cumulative	**0.25**	Excludes portfolio investment/other specific assets	0	0	0	0.25	0	0	0	0	0	0	0	0.25	0	0.25
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0.25	0.25	0.25	0	0.25
		0.25	Contains "in accordance with host State laws" requirement	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0.25	0	0	0	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	**0.33**	Excludes dual nationals	0	0	0	0	0	0	0	0	0	0	0	0.33	0	0
		0.33	Includes requirement of	0	0	0	0.33	0	0	0.33	0	0.33	0.33	0.33	0.33	0.33	0

Category	Type	Value	Indicator	Belarus-Slovakia BIT (2005)	Belarus-Finland BIT (2006)	Belarus-Venezuela BIT (2007)	Belarus-Mexico BIT (2008)	Belarus-Saudi Arabia BIT (2009)	Azerbaijan-Belarus BIT (2010)	Belarus-Lao P' s Dem. Rep. BIT (2013)	Belarus- Cambodia BIT (2014)	Belarus-Turkmen. BIT (2015)	Belarus-Georgia BIT (2017)	Belarus-Turkey BIT (2018)	Belarus-India BIT (2018)	Belarus-Hungary BIT (2019)	Belarus-Uzbekistan BIT (2019)
			substantial business activity														
		0.33	Defines ownership and control of legal entities	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4. DoB clause	Cumulative	**0.5**	"Substantive business operations" criterion	0	0	0	0	0	0	0	0	0	0.5	0.5	0	0.5	0
		0.5	Applies to investors from States with no diplomatic relations or under economic/trade restrictions	0	0	0	0	0	0	0	0	0	0.5	0	0.5	0.5	0
5. Scope of the treaty	Ordinal	**10**	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25

Category	Type	Value	Indicator	Belarus-Slovakia BIT (2005)	Belarus-Finland BIT (2006)	Belarus-Venezuela BIT (2007)	Belarus-Mexico BIT (2008)	Belarus-Saudi Arabia BIT (2009)	Azerbaijan-Belarus BIT (2010)	Belarus-Lao P' s Dem. Rep. BIT (2013)	Belarus- Cambodia BIT (2014)	Belarus-Turkmen. BIT (2015)	Belarus-Georgia BIT (2017)	Belarus-Turkey BIT (2018)	Belarus-India BIT (2018)	Belarus-Hungary BIT (2019)	Belarus-Uzbekistan BIT (2019)
		0.25	Reference to "like circumstances" (or similar	0	0	0	0.25	0	0	0.25	0	0.25	0.25	0	0.25	0.25	0
		1	No NT clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7. MFN	Cumulative	**0.5**	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0	0.25	0.25
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25
		0.5	Procedural issues (ISDS)	0	0	0	0	0	0	0	0	0.5	0	0.5	0	0	0.25
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	1	0	0
8. FET	Ordinal	**1**	FET qualified	0	0	0	1	0	0	0	0	0	0	0	0	1	0
		5	No FET	0	0	0	0	0	0	0	0	0	0	0	5	0	0
9. Refining indirect expropriation	Cumulative	**0.5**	Definition provided	0	0	0	0	0	0	0.5	0	0	0	0	0.5	0.5	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	2.5	0	2.5	2.5	2.5	2.5	2.5	0

Category	Type	Value	Indicator	Belarus-Slovakia BIT (2005)	Belarus-Finland BIT (2006)	Belarus-Venezuela BIT (2007)	Belarus-Mexico BIT (2008)	Belarus-Saudi Arabia BIT (2009)	Azerbaijan-Belarus BIT (2010)	Belarus-Lao P' s Dem. Rep. BIT (2013)	Belarus- Cambodia BIT (2014)	Belarus-Turkmen. BIT (2015)	Belarus-Georgia BIT (2017)	Belarus-Turkey BIT (2018)	Belarus-India BIT (2018)	Belarus-Hungary BIT (2019)	Belarus-Uzbekistan BIT (2019)
10. Umbrella clause	Ordinal	**1**	Not included	0	0	0	0	1	1	0	1	0	1	1	1	1	0
11. Exceptions	Ordinal	**5**	General public health exception	0	0	0	0	0	0	0	0	0	5	5	5	5	5
12. Alternatives to arbitration	Ordinal	**0.25**	Voluntary recourse to alternatives	0	0	0	0	0	0.25	0	0	0	0	0	0	0.25	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	**0.33**	Listing specific basis of claim beyond treaty	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0.66	0	0	0.66	0	0	0	0	0	0.66	0.66	0.66	0.66	0
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	**1-9**	Limitation of Provisions subject to ISDS	0	0	0	0	0	0	0	0	0	0	0	1	0	0
15. Limitation on scope of ISDS	Ordinal	**10**	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16. Type of consent to arbitration	Ordinal	**10**	Case-by-case consent	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Belarus-Slovakia BIT (2005)	Belarus-Finland BIT (2006)	Belarus-Venezuela BIT (2007)	Belarus-Mexico BIT (2008)	Belarus-Saudi Arabia BIT (2009)	Azerbaijan-Belarus BIT (2010)	Belarus-Lao P' s Dem. Rep. BIT (2013)	Belarus- Cambodia BIT (2014)	Belarus-Turkmen. BIT (2015)	Belarus-Georgia BIT (2017)	Belarus-Turkey BIT (2018)	Belarus-India BIT (2018)	Belarus-Hungary BIT (2019)	Belarus-Uzbekistan BIT (2019)
17. Forum selection: domestic courts	Ordinal	**1**	Domestic court a pre-condition for ISDS	0	0	0	0	0	0	0	0	1	0	0	1	0	0
18. Particular features of ISDS	Cumulative	**0.5**	Limitation period	0	0	0	0.5	0	0	0	0	0.5	0	0.5	0.5	0.5	0
		0.5	Limited remedies	0	0	0	0.5	0	0	0	0	0	0	0	0.5	0	0
19. Interpretation	Cumulative	**5**	Binding interpretation	0	0	0	5	0	0	0	0	0	0	0	5	5	0
		1	Renvoi	0	0	0	0	0	0	0	0	0	0	0	1	0	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20. Transparency in arbitral proceedings	Cumulative	**0.33**	Making documents publicly available	0	0	0	0	0	0	0	0	0	0	0	0.33	0.33	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0.33	0.33	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0.33	0	0
				1.66	1.08	1	9.74	1.75	2.25	4.58	1.75	6.08	11.99	12.57	28.72	20.64	6.75
PHS INDEX				0.083	0.054	0.05	0.487	0.088	0.113	0.229	0.088	0.304	0.6	0.629	1.436	1.032	0.338

Annex 15. Transcaucasia: Tobacco Control Legislation[1200]

Armenia

No	Law	Date of adoption	Comments	Source
1.	Code 'On Administrative Offences'	01.06.1986		Official website: http://www.arlis.am/DocumentView.aspx?DocID=103041 Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Admin.%20Offenses%20Code.pdf
2.	Law of the Republic of Armenia 'On Advertising' of 4 June 1996 (as amended).	04.06.1996	Contains specific restrictions related to tobacco advertising on TV and radio, print media, and outdoor media.	Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Ad%20Law.pdf
3.	Law of the Republic of Armenia 'On Fixed Payments for Tobacco Products' of 24 March 2000 (as amended)	24.03.2000	Regulates tax and customs on tobacco products imported or produced in the State.	Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Fixed%20Payment%20Law.pdf
4.	GOST 3935-2000 'General Specifications for Cigarettes Adopted by Inter-State Council Warning Labels' of 1 January 2003 (as amended on 06.02.2010)	01.01.2003	Prescribes general technical specifications and health warnings on cigarette packets of not less than 30% of the principal display areas.	Official website http://www.eurasiancommission.org/ru/act/texnreg/deptexreg/tr/Pages/tabac.aspx
5.	Law of the Republic of Armenia on Restrictions on the Sale, Consumption, and Use of Tobacco (as amended)	02.03.2005	Regulates the sale of tobacco products, packaging and labelling of tobacco products, and smoking in public places.	Original language: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Law%20on%20Restrictions%20of%20Sale%

[1200] Source: Legal Information System of Armenia (n 438); Ministry of Justice of the Republic of Azerbaijan (n 438); The Legislative Herald, (n 438); Campaign for Tobacco-Free Kids (n 96).

No	Law	Date of adoption	Comments	Source
				2C%20Consumption%2C%20and%20Use%20-%20national.pdf Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Law%20on%20Restrictions%20of%20Sale%2C%20Consumption%2C%20and%20Use.pdf
6.	Resolution of the Government of the Republic of Armenia 'On Approving the Technical Regulation on Tobacco' No 540-N of 28 April 2005.	18.05.2005	Regulates tobacco product packaging and labelling.	Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Resolution%20No.%20540-N%20.pdf
7.	Order of the Ministry of Health of the Republic of Armenia 'On Approving the Warning Texts About Adverse Effects of Tobacco on Human Health' No 916-N of 5 December 2005.	05.12.2005	Prescribes packaging and labelling requirements for tobacco products.	Original language: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Dec.%20No.%20916-N%20-%20national.pdf Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Order%20No.%20916-N%20%28HWs%29.pdf
8.	Decision of the Government of the Republic of Armenia 'For the License Requirements to Sale Alcohol and Cigarettes' No 843-N of 18 July 2007.	18.07.2007	Introduces licensing of the retail sale of tobacco products in stores and catering facilities.	Original: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20Decision%20No.%20843-N_2007%20-%20national.pdf
9.	Eurasian Economic Commission Technical Regulations for Tobacco Products	09.01.2015	Regulates tobacco product packaging and labelling.	Official website: https://docs.eaeunion.org/Pages/DisplayDocument.aspx?s=%7Be1f13d1d-5914-465c-835f-2aa3762eddda%7D&w=9260b414-defe-45cc-88a3-eb5c73238076&l=%7B8a412e96-924f-4b3c-8321-0d5e767e5f91%7D&EntityID=3484 Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Ar

No	Law	Date of adoption	Comments	Source
				menia/Armenia%20-%20EEC%20Tech.%20Regs..pdf
10.	Eurasian Economic Commission Board Decision 'On Transitional Provisions of the Technical Regulations of the Customs Union "Technical Regulations for Tobacco Products" (TR TS 035/2014)' No 53.	12.05.2015	Introduces technical regulations for the EAEU States.	Official website: https://docs.eaeunion.org/Pages/DisplayDocument.aspx?s=%7Be1f13d1d-5914-465c-835f-2aa3762eddda%7D&w=9260b414-defe-45cc-88a3-eb5c73238076&l=%7B8a412e96-924f-4b3c-8321-0d5e767e5f91%7D&EntityID=7744 Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20EEC%20Transitional%20Provisions.pdf
11.	Decision of the Council of the Eurasian Economic Commission No 18 of 17 March 2016.	17.03.2016	Regulates the format of text warning and images to be used, on tobacco product packaging.	Original: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20EEC%20Decision%20No.%2018%20on%20GHWs%20-%20national.pdf Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Armenia/Armenia%20-%20EEC%20Decision%20No.%2018%20on%20GHWs.pdf
12.	Law of the Republic of Armenia 'On the Reduction and Prevention of Harm to Health by the Use of Tobacco Products and their Substitutes" of 13 February 2020.	13.02.2020	The law prohibits wholesale and retail sale of chewing tobacco, the sale of cigarettes to the minors, sale of cigarettes by self-service, including automatic machines or mechanical devices; prohibits the sale of tobacco in theatres, concert centres, museums, libraries, cinemas and other public places. Introduces further policies to be implemented in 2022 and 2024.	Original language: https://www.arlis.am/DocumentView.aspx?docid=139759

Azerbaijan

No	Law	Date of adoption	Comments	Source
1.	Code of the Republic of Azerbaijan 'On Taxation' of 11 July 2000.	11.07.2000	Introduces tax measures for tobacco products.	Official website: www.e-qanun.az/framework/5394
2.	Decision of the Ministers of the Republic of Azerbaijan 'On Rates of Customs Duties on Imported Goods' of 12 April 2001 (as amended).	12.04.2001	Introduces customs duties on tobacco products.	Official website: www.e-qanun.az/framework/2175
3.	Law of the Republic of Azerbaijan 'On Tobacco and Tobacco Products' of 8 June 2001 No 138-IIG.	08.06.2001	Bans smoking in healthcare, educational facilities; restricts smoking in hotels, workplaces, and other public facilities. Introduces requirements for signs in designated smoking areas.	Official website: www.e-qanun.az/framework/2697 Unofficial English translation: https://untobaccocontrol.org/impldb/wp-content/uploads/reports/azerbaijan_2016_annex3_law_on_tobacco_and_tobacco_products_2002.pdf
4.	Law of the Republic of Azerbaijan 'On Television and Radio Broadcasting' of 31 October 2002 (as amended).	31.10.2002	Prohibits advertising of tobacco products on television and radio.	Official website: www.e-qanun.az/framework/1125 Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20TV%20%26%20Radio%20Broadcasting%20Law.pdf
5.	Standard AZS 335-2009 'On Tobacco Products - Packaging and Marking' of 29 April 2009.	29.04.2009	Introduces requirements for tobacco product packaging and labelling.	Original language: www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20AZS%20No.%20335-2009%20-%20national.pdf Unofficial English translation: www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20AZS%20No.%20335-2009.pdf
6.	Decree of the Ministers of the Republic of Azerbaijan 'On Approval of "Rules of Passengers	17.09.2009	Bans smoking on public transport (except taxis).	Official website: www.e-qanun.az/framework/18414

No	Law	Date of adoption	Comments	Source
	and Luggage Carriage on Road Transport"' of 17 September 2009 No 141.			Unofficial English translation: www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20Road%20Transport%20Rules.pdf
7.	Law of the Republic of Azerbaijan 'On Advertising' of 7 July 2015 (as amended).	17.07.2015	Bans direct and some forms of indirect advertising.	Official website: www.e-qanun.az/framework/30348 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20Law%20on%20Advertising.pdf
8.	Code of the Republic of Azerbaijan 'On Administrative Offences' of 12 March 2015 (as amended).	12.03.2015	Introduces penalties for breach of tobacco regulated policies.	Official website: www.e-qanun.az/code/24 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20Code%20on%20Admin.%20Offenses.pdf
9.	Decree of the Government of the Republic of Azerbaijan 'On the Implementation of Law No 887-VQ on Restriction of Tobacco Use' of 29 December 2017 No 1774.	29.12.2017	Introduces enforcement mechanisms for the relevant law.	Official website: www.e-qanun.az/framework/39435 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20Decree%20No.%201774.pdf
10.	Law of the Republic of Azerbaijan 'On Restrictions on Use of Tobacco Products' of 1 December 2017 No 887-VQ.	01.12.2017	Broadens the list of smoke-free public places; introduces further requirements for display of signs and marks in smoke-free zones and penalties for the breach of the requirements. Prohibits all forms of advertising or promotion of tobacco products, including the tobacco industry sponsorship.	Official website: www.e-qanun.az/framework/37481 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20TC%20Law%202017.pdf

No	Law	Date of adoption	Comments	Source
11.	Decision of the Government of the Republic of Azerbaijan 'On Requirements for Specialised Places for Smoking' of 3 April 2018 No 127.	03.04.2018	Regulates designated smoking areas.	Official website: www.e-qanun.az/framework/38442 Unofficial English translation https://www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20Decision%20No.%20127_2018.pdf
12.	Resolution of the Government of the Republic of Azerbaijan 'On Amendment of the Terms of Use of Baku Metropoliten' of 17 April 2018 No 159.	17.04.2018	Prohibits smoking in certain public transport facilities.	Official website: www.e-qanun.az/framework/20456files/live/Azerbaijan/Azerbaijan%20-%20Decision%20No.%20159%20%20-%20national.pdf Unofficial English translation www.tobaccocontrollaws.org/files/live/Azerbaijan/Azerbaijan%20-%20Decision%20No.%20159%20.pdf

Georgia

No	Law	Date of adoption	Comments	Source
1.	Code 'On Administrative Offences' of 15 December 1984.	15.12.1984	Introduces penalties for breach of tobacco control regulations.	Original language: https://matsne.gov.ge/ru/document/view/16270?publication=32 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Admin%20Offenses%20Code.pdf
2.	Law of Georgia 'On Advertising' of 18 February 1998 No 1228 (as amended on 24 December 1999)	18.02.1998	Prohibits all types of tobacco advertising with some exceptions, the tobacco industry sponsorship; requires the display of films / other creative products showing tobacco products to be accompanied by a clip or a pictogram about the dangers of tobacco smoking.	Original: https://matsne.gov.ge/ru/document/view/31840?publication=27 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Law%20on%20Advertising%20%28excerpts%29.pdf
3.	Law of Georgia 'On Tobacco Control' of 6 June 2003.	06.06.2003	Determines main directions of tobacco control; *inter alia*, prohibits the sale of tobacco products (i) to the minors, (ii) at all types of medical, schooling, state, sports and cultural institutions, (iii) through electronic or mechanical vending machines; introduces packaging and labelling requirements; restricts tobacco use in certain areas.	Unofficial English translation: https://matsne.gov.ge/ka/document/download/1160150/0/en/pdf
4.	Law of Georgia 'On Amendments to the Law of Georgia "On Public Broadcaster"' of 23 December 2004.	23.12.2004	Prohibits advertisement of tobacco products (including e-cigarettes), tobacco accessories and/or devices designated for tobacco consumption.	Official website: https://matsne.gov.ge/ka/document/view/32866?publication=59

No	Law	Date of adoption	Comments	Source
5.	Law of Georgia 'On Amendments to the Law "On Tobacco Control"' of 30 December 2008.	30.12.2008	Broadens the list of public institutions, where smoking is prohibited and the requirements on tobacco packaging and labelling.	Official: https://matsne.gov.ge/ka/document/view/17608?publication=020on%20Tobacco%20Control%20-%20national.pdf Unofficial English translation: https://www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Amendments%20to%20Law%20on%20Tobacco%20Control.pdf
6.	Order of the Ministry of Health, Labour and Social Affairs of Georgia 'On the Sale of Tobacco in Georgia' of 27 March 2009 No 122.	27.03.2009	Approves medical warnings for tobacco products.	Original language: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Order%20No.%20122%20%282009%29%20-%20national.pdf
7.	Law of Georgia 'On Tobacco Control' of 15 December 2010 No 4059-RS.	15.12.2010	The main authority regulating e-cigarettes and the production, distribution, and consumption of tobacco products.	Official website: https://matsne.gov.ge/ka/document/view/1160150 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20TC%20Law%202010.pdf
8.	Resolution of the Government of Georgia 'Approval of the Technical Regulations on the Maximum Permissible Norms of Tobacco Products for Sale in Georgia, the Rules of their Measurement and Regulation, and the Technical Regulations on Medical Warnings Indicated on Advertisements, Blocks and Boxes at the Places of Sale of Tobacco Products' No 538 of 5 September 2014.	05.09.2014	Introduces maximum permissible norms of substances in tobacco products and regulates medical warnings and pictograms.	Official: https://matsne.gov.ge/ka/document/view/2491098?publication=0 English: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Decree%20No.%20538%20%282014%29%20on%20Tech.%20Regs%20on%20HWs%2C%20Testing%2C%20Max%20Levels.pdf

No	Law	Date of adoption	Comments	Source
9.	Law of Georgia 'On Changes to the Law "On Lotteries, Gambling and Betting Games"' of 17 May 2017 No 860-IIS.	17.05.2017	Prohibits promotional drawings for a sale of tobacco products, tobacco accessories and/or tobacco devices.	Original language: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%202017%20APS%20Amendments%20-%20national.pdf Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%202017%20Amdts.%20to%20Law%20on%20Ads.pdf
10.	Law of Georgia 'On Changes to the Code of Administrative Offences' of 17 May 2017 No 861-IIS.	17.05.2017	Establishes fines for smoking where prohibited and other breaches of tobacco control regulations.	Official website: https://matsne.gov.ge/ka/document/view/3677550 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%202017%20Amdts.%20to%20Code%20of%20Admin.%20Offenses.pdf
11.	Law Of Georgia 'On Amendments to Law No 4059-RS "On Tobacco Control"' of 26 July 2017 no 1278-RS.	26.07.2017	Prohibits display of tobacco products in shops; broadens the list of indoor places where spoking is prohibited; furthers obligations to place pictogram warnings on tobacco packs..	Official website: https://matsne.gov.ge/ka/document/view/1160150 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Decree%20No.%2014%20of%202018.pdf [media https://novost.ge/2017/05/08/%D0%B2-%D0%B3%D1%80%D1%83%D0%B7%D0%B8%D0%B8-%D0%B7%D0%B0%D0%BF%D1%80%D0%B5%D1%82-%D0%BD%D0%B0-%D0%BA%D1%83%D1%80%D0%B5%D0%BD%D0%B8%D0%B5-%D0%B2%D0%BE-

No	Law	Date of adoption	Comments	Source
				%D0%B2%D1%81%D0%B5%D1%85-%D0%B7%D0%B4%D0%B0%D0%BD/]
12.	Decree of the Government of Georgia 'On the Approval of Permissible Levels, Their Measurements and Regulations as well as Health Warnings and Their Appearance on Packaging of Tobacco Products' of 15 January 2018 No 14.	15.01.2018	Requires health warnings to appear on different types of tobacco products and e-cigarettes.	Original language: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Decree%20No.%2014%20of%202018%20-%20national.pdf Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Decree%20No.%2014%20of%202018.pdf
13.	Order of the Government of Georgia 'On the Approval of Reporting Forms for Manufacturers and Importers on the Composition of Ingredients in Tobacco Products' of 1 May 2018 No 01/20/N.	01.05.2018	Regulates the disclosure of the content and emission levels of tobacco products.	Original language: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Order%20No.%2001-20%20of%202018%20-%20national.pdf
14.	Law of Georgia 'On Amendments to Law No 4059-RS "On Tobacco Control"' of 5 July 2018 No 3121-RS.	05.07.2018	Prohibit smoking in smoke free areas of prisons.	Official website: https://matsne.gov.ge/ka/document/view/1160150 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Law%20No.%203121-RS%20%28amd%27ing%20TC%20Law%29.pdf
15.	Law of Georgia 'On Amendments to the Law "On Tobacco Control (Law No 4059-RS)"'of 9 January 2019 No 3956-IS.	09.01.2019	Broadens the list of smoke free places and regulates the disclosure of the content and emission levels of tobacco products	Official website: https://matsne.gov.ge/ka/document/view/1160150 Unofficial English translation: www.tobaccocontrollaws.org/files/live/Georgia/Georgia%20-%20Law%20No.%203956-IS.pdf

Annex 16. Transcaucasia: Signed BITs[1201]

Armenia

No	Short title	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health excention	ISDS
1.	Armenia - Korea, Republic of (2018)	Armenia; Korea;	19/10/2018	03/10/2019	In force								
2.	Armenia - Japan (2018)	Armenia; Japan	14/02/2018		In force	No	Yes	No	Yes	No	Yes	Yes	Yes
3.	Armenia - United Arab Emirates BIT (2016)	Armenia; United Arab Emirates;	22/07/2016	21/11/2017	In force								
4.	Armenia - Jordan BIT (2014)	Armenia; Jordan;	29/10/2014		Signed								
5.	Armenia - Iraq BIT (2012)	Armenia; Iraq;	07/11/2012	26/06/2016	In force								
6.	Armenia - Kuwait BIT (2010)	Armenia; Kuwait;	25/06/2010	04/09/2013	In force								
7.	Armenia - Syrian Arab Republic BIT (2009)	Armenia; Syrian Arab Republic;	17/06/2009	04/01/2010	In force								
8.	Armenia - Kazakhstan BIT (2006)	Armenia; Kazakhstan;	06/11/2006		Signed								
9.	Armenia - Lithuania BIT (2006)	Armenia; Lithuania;	25/04/2006	16/03/2007	In force	No	No	No	No	No	No	No	Yes

[1201] Source: UNCTAD (IIA) (n 20); Legal Information System of Armenia (n 438); Ministry of Justice of the Republic of Azerbaijan (n 438); The Legislative Herald, (n 438).

10.	Armenia - Sweden BIT (2006)	Armenia; Sweden;	08/02/2006	01/05/2008	In force								
11.	Armenia - Latvia BIT (2005)	Armenia; Latvia;	07/10/2005	21/04/2007	In force	No	Yes	No	Yes	No	No	Yes	Yes
12.	Armenia - Netherlands BIT (2005)	Armenia; Netherlands;	10/06/2005	01/08/2006	In force	No	No	No	No	Yes	No	No	Yes
13.	Armenia - Finland BIT (2004)	Armenia; Finland;	05/10/2004	20/03/2007	In force	No	No	No	No	No	No	No	Yes
14.	Armenia - India BIT (2003)	Armenia; India;	23/05/2003	30/05/2006	In force	No	No	No	No	No	No	No	Yes
15.	Armenia - Uruguay BIT (2002)	Armenia; Uruguay;	06/05/2002	15/12/2013	In force	No	No	No	No	No	No	No	Yes
16.	Armenia - Qatar BIT (2002)	Armenia; Qatar;	22/04/2002		Signed								
17.	Armenia - Tajikistan BIT (2002)	Armenia; Tajikistan;	02/04/2002		Signed								
18.	Armenia - Austria BIT (2001)	Armenia; Austria;	17/10/2001	01/02/2003	In force	No	Yes	No	No	No	No	No	Yes
19.	Armenia - Russian Federation BIT (2001)	Armenia; Russian Federation;	15/09/2001	08/02/2006	In force	No	No	No	No	No	No	No	Yes
20.	Armenia - BLEU (Belgium-Luxembourg Economic Union) BIT (2001)	Armenia; BLEU (Belgium-Luxembourg Economic Union);	07/06/2001	19/12/2003	In force	No	No	No	No	No	No	No	Yes
21.	Armenia - Belarus BIT (2001)	Armenia; Belarus;	26/05/2001	02/10/2002	In force	No	No	No	No	No	No	No	Yes
22.	Armenia - Israel BIT (2000)	Armenia; Israel;	19/01/2000	25/06/2003	In force	No	No	No	No	No	No	No	Yes
23.	Armenia - Switzerland BIT (1998)	Armenia; Switzerland;	19/11/1998	04/11/2002	In force	No	No	No	No	No	No	No	Yes
24.	Armenia - Italy BIT (1998)	Armenia; Italy;	23/07/1998	13/01/2003	In force	No	No	No	No	No	No	No	Yes
25.	Armenia - Canada BIT (1997)	Armenia; Canada;	08/05/1997	29/03/1999	In force	No	No	No	Yes	Yes	No	Yes	Yes
26.	Armenia - Georgia BIT (1996)	Armenia; Georgia;	04/06/1996	18/02/1997	In force								
27.	Armenia - Turkmenistan BIT (1996)	Armenia; Turkmenistan;	19/03/1996		Signed								
28.	Armenia - Egypt BIT (1996)	Armenia; Egypt;	09/01/1996	01/03/2006	In force	No	No	No	No	No	No	No	Yes
29.	Armenia - Germany BIT (1995)	Armenia; Germany;	21/12/1995	04/08/2000	In force								
30.	Armenia - France BIT (1995)	Armenia; France;	04/11/1995	21/06/1997	In force	No	No	No	No	No	No	No	Yes

31.	Armenia - Iran, Islamic Republic of BIT (1995)	Armenia; Iran, Islamic Republic of;	06/05/1995	26/02/1997	In force								
32.	Armenia - Lebanon BIT (1995)	Armenia; Lebanon;	01/05/1995	01/10/1998	In force	No	Yes	No	No	No	No	No	Yes
33.	Armenia - Bulgaria BIT (1995)	Armenia; Bulgaria;	10/04/1995	27/03/1996	In force								
34.	Armenia - Cyprus BIT (1995)	Armenia; Cyprus;	18/01/1995	01/07/1996	In force								
35.	Armenia - Ukraine BIT (1994)	Armenia; Ukraine;	07/10/1994	07/03/1996	In force	No	No	No	No	No	No	No	Yes
36.	Armenia - Romania BIT (1994)	Armenia; Romania;	20/09/1994	24/12/1995	In force	No	No	No	No	No	No	No	Yes
37.	Armenia - Kyrgyzstan BIT (1994)	Armenia; Kyrgyzstan;	04/07/1994	27/10/1995	In force								
38.	Armenia - United Kingdom BIT (1993)	Armenia; United Kingdom;	27/05/1993	11/07/1996	In force	No	No	No	No	No	No	No	Yes
39.	Armenia - Greece BIT (1993)	Armenia; Greece;	25/05/1993	28/04/1995	In force								
40.	Argentina - Armenia BIT (1993)	Argentina; Armenia;	16/04/1993	20/12/1994	In force	No	No	No	No	No	No	No	Yes
41.	Armenia - Viet Nam BIT (1993)	Armenia; Viet Nam;	01/02/1993	28/04/1993	In force								
42.	Armenia - United States of America BIT (1992)	Armenia; United States of America;	23/09/1992	29/03/1996	In force	No	Yes	No	No	No	No	No	Yes
43.	Armenia - China BIT (1992)	Armenia; China;	04/07/1992	18/03/1995	In force								
44.	Armenia - Spain BIT (1990)	Armenia; Spain;	26/10/1990	28/11/1991	In force	No	No	No	No	No	No	No	Yes

Azerbaijan

No	Short title	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
1.	Azerbaijan-Turkmenistan BIT (2018)	Azerbaijan; Turkmenistan	22/11/2018	10/04/2019	In force								
2.	Azerbajian - Afganistan BIT (2017)	Azerbaijan; Afghanistan	01/12/2017		Signed								
3.	Azerbaijan - San Marino BIT (2015)	Azerbaijan; San Marino;	25/09/2015		Signed	No	Yes	No	No	No	No	No	Yes
4.	Azerbaijan - Russian Federation BIT (2014)	Azerbaijan; Russian Federation;	29/09/2014	16/11/2015	In force	No	Yes	No	No	No	No	No	Yes
5.	Azerbaijan - Macedonia, The former Yugoslav Republic of BIT (2013)	Azerbaijan; Macedonia, The former Yugoslav Republic of;	19/04/2013		Signed								N/A
6.	Albania - Azerbaijan BIT (2012)	Albania; Azerbaijan;	09/02/2012		Signed	No	No	No	No	No	No	No	Yes
7.	Azerbaijan - Turkey BIT (2011)	Azerbaijan; Turkey;	25/10/2011	02/05/2013	In force		No	Yes	No	No	No	No	Yes

8.	Azerbaijan - Montenegro BIT (2011)	Azerbaijan; Montenegro;	16/09/2011	02/11/2012	In force	No	No	No	No	No	No	No	Yes
9.	Azerbaijan - Serbia BIT (2011)	Azerbaijan; Serbia;	08/06/2011	14/12/2011	In force	No	No	No	No	No	No	No	Yes
10.	Azerbaijan - Czech Republic BIT (2011)	Azerbaijan; Czech Republic;	17/05/2011	09/02/2012	In force	No	No	Yes	Yes	No	No	No	Yes
11.	Azerbaijan - Belarus BIT (2010)	Azerbaijan; Belarus;	03/06/2010		Signed	No	No	No	No	No	No	No	Yes
12.	Azerbaijan - Estonia BIT (2010)	Azerbaijan; Estonia;	07/04/2010		Signed	No	No	No	No	No	No	No	Yes
13.	Azerbaijan - Syrian Arab Republic BIT (2009)	Azerbaijan; Syrian Arab Republic;	08/07/2009	04/01/2010	In force	No	No	No	No	No	No	No	Yes
14.	Azerbaijan - Kuwait BIT (2009)	Azerbaijan; Kuwait;	10/02/2009	02/03/2013	In force								
15.	Azerbaijan - Jordan BIT (2008)	Azerbaijan; Jordan;	05/05/2008	25/12/2008	In force								N/A
16.	Azerbaijan - Croatia BIT (2007)	Azerbaijan; Croatia;	02/10/2007	30/05/2008	In force	No	Yes	No	No	No	No	No	Yes
17.	Azerbaijan - Qatar BIT (2007)	Azerbaijan; Qatar;	28/08/2007		Signed								N/A
18.	Azerbaijan - Hungary BIT (2007)	Azerbaijan; Hungary;	18/05/2007	26/02/2008	In force	No	No	No	No	Yes	Yes	No	Yes
19.	Azerbaijan - Korea, Republic of BIT (2007)	Azerbaijan; Korea, Republic of;	23/04/2007	25/01/2008	In force	No	No	No	No	No	No	No	Yes
20.	Azerbaijan - Tajikistan BIT (2007)	Azerbaijan; Tajikistan;	17/03/2007	26/02/2008	In force	No	No	No	No	No	No	No	Yes
21.	Azerbaijan - Israel BIT (2007)	Azerbaijan; Israel;	20/02/2007	16/01/2009	In force	No	No	No	No	No	No	No	Yes
22.	Azerbaijan - United Arab Emirates BIT (2006)	Azerbaijan; United Arab Emirates;	01/11/2006	24/08/2007	In force	No	No	No	Yes	No	No	Yes	Yes

23.	Azerbaijan - Lithuania BIT (2006)	Azerbaijan; Lithuania;	08/06/2006	01/07/2007	In force								N/A
24.	Azerbaijan - Switzerland BIT (2006)	Azerbaijan; Switzerland;	23/02/2006	25/06/2007	In force	No	No	No	No	No	No	No	Yes
25.	Azerbaijan - Latvia BIT (2005)	Azerbaijan; Latvia;	03/10/2005	10/05/2006	In force	No	No	No	Yes	No	No	Yes	Yes
26.	Azerbaijan - Saudi Arabia BIT (2005)	Azerbaijan; Saudi Arabia;	09/03/2005		Signed								N/A
27.	Azerbaijan - Bulgaria BIT (2004)	Azerbaijan; Bulgaria;	07/10/2004		Signed								N/A
28.	Azerbaijan - Greece BIT (2004)	Azerbaijan; Greece;	21/06/2004	03/09/2006	In force	No	No	No	No	No	No	No	Yes
29.	Azerbaijan - BLEU (Belgium-Luxembourg Economic Union) BIT (2004)	Azerbaijan; BLEU (Belgium-Luxembourg Economic Union);	18/05/2004	27/05/2009	In force	No	No	No	No	No	No	No	Yes
30.	Azerbaijan - Finland BIT (2003)	Azerbaijan; Finland;	26/02/2003	10/12/2004	In force	No	No	No	No	No	No	No	Yes
31.	Azerbaijan - Romania BIT (2002)	Azerbaijan; Romania;	29/10/2002	29/01/2004	In force								N/A
32.	Azerbaijan - Egypt BIT (2002)	Azerbaijan; Egypt;	24/10/2002		Signed								N/A
33.	Austria - Azerbaijan BIT (2000)	Austria; Azerbaijan;	04/07/2000	28/05/2001	In force	No	Yes	No	No	No	No	No	Yes
34.	Azerbaijan - France BIT (1998)	Azerbaijan; France;	01/09/1998	24/08/2000	In force	No	No	No	No	No	No	No	Yes
35.	Azerbaijan - Lebanon BIT (1998)	Azerbaijan; Lebanon;	11/02/1998		Signed	No	No	No	No	No	No	No	Yes
36.	Azerbaijan - Moldova, Republic of BIT (1997)	Azerbaijan; Moldova, Republic of;	27/11/1997	28/01/1999	In force								N/A

37.	Azerbaijan - Italy BIT (1997)	Azerbaijan; Italy;	25/09/1997	04/02/2000	Terminated	No	No	No	No	No	No	No	Yes
38.	Azerbaijan - Kyrgyzstan BIT (1997)	Azerbaijan; Kyrgyzstan;	28/08/1997	28/08/1997	In force	No	No	No	No	No	No	No	Yes
39.	Azerbaijan - Poland BIT (1997)	Azerbaijan; Poland;	26/08/1997	10/02/1999	In force								N/A
40.	Azerbaijan - United States of America BIT (1997)	Azerbaijan; United States of America;	01/08/1997	02/08/2001	In force	No	No	Yes	No	No	No	No	Yes
41.	Azerbaijan - Ukraine BIT (1997)	Azerbaijan; Ukraine;	21/03/1997	09/12/1997	In force	No	No	No	No	No	No	No	Yes
42.	Azerbaijan - Iran, Islamic Republic of BIT (1996)	Azerbaijan; Iran, Islamic Republic of;	28/10/1996	20/06/2002	In force								N/A
43.	Azerbaijan - Norway BIT (1996)	Azerbaijan; Norway;	25/09/1996		Signed								N/A
44.	Azerbaijan - Kazakhstan BIT (1996)	Azerbaijan; Kazakhstan;	16/09/1996	30/04/1998	In force	No	No	No	No	No	No	No	Yes
45.	Azerbaijan - Uzbekistan BIT (1996)	Azerbaijan; Uzbekistan;	27/05/1996	02/11/1996	In force								N/A
46.	Azerbaijan - Georgia BIT (1996)	Azerbaijan; Georgia;	08/03/1996	10/07/1996	In force								N/A
47.	Azerbaijan - United Kingdom BIT (1996)	Azerbaijan; United Kingdom;	04/01/1996	11/12/1996	In force								N/A
48.	Azerbaijan - Germany BIT (1995)	Azerbaijan; Germany;	22/12/1995	29/07/1998	In force								N/A
49.	Azerbaijan - Pakistan BIT (1995)	Azerbaijan; Pakistan;	09/10/1995		Signed	No	No	No	No	No	No	No	Yes
50.	Azerbaijan - China BIT (1994)	Azerbaijan; China;	08/03/1994	01/04/1995	In force	No	No	No	No	No	No	No	Yes

51.	Azerbaijan - Turkey BIT (1994)	Azerbaijan; Turkey;	09/02/1994	08/09/1997	Terminated								N/A
52.	Azerbaijan - Spain BIT (1990)	Azerbaijan; Spain;	26/10/1990	28/11/1991	In force	No	No	No	No	No	No	No	Yes

Georgia

No	Short title	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
1.	Georgia - United Arab Emirates BIT (2017)	Georgia; United Arab Emirates;	17/07/2017		Signed								
2.	Georgia - Turkey BIT (2016)	Georgia; Turkey;	19/07/2016		Signed								N/A
3.	Georgia - Switzerland BIT (2014)	Georgia; Switzerland ;	03/06/2014	17/04/2015	In force	No	Yes	No	Yes	Yes	Yes	Yes	Yes
4.	Georgia - Kuwait BIT (2009)	Georgia; Kuwait;	13/10/2009	30/05/2013	In force	No	No	No	No	No	No	No	Yes
5.	Czech Republic - Georgia BIT (2009)	Czech Republic; Georgia;	29/08/2009	13/03/2011	In force	No	No	No	No	No	No	No	Yes
6.	Georgia - Sweden BIT (2008)	Georgia; Sweden;	30/10/2008	01/04/2009	In force								N/A
7.	Finland - Georgia BIT (2006)	Finland; Georgia;	24/11/2006	30/12/2007	In force	No	Yes	No	No	No	No	No	Yes
8.	Georgia - Lithuania BIT (2005)	Georgia; Lithuania;	09/11/2005	01/11/2006	In force	No	No	No	No	No	No	No	Yes

9.	Georgia - Latvia BIT (2005)	Georgia; Latvia;		05/03/2006	In force	No	No	No	Yes	No	No	Yes	Yes
10.	Austria - Georgia BIT (2001)	Austria; Georgia;	01/10/2001	01/03/2004	In force	No	No	No	No	No	No	No	Yes
11.	Egypt - Georgia BIT (1999)	Egypt; Georgia;	10/08/1999		Signed	No	No	No	No	No	No	No	Yes
12.	Georgia - Moldova, Republic of BIT (1997)	Georgia; Moldova, Republic of;	28/11/1998	25/02/1999	In force								N/A
13.	Georgia - Netherlands BIT (1998)	Georgia; Netherlands ;	03/02/1998	01/04/1999	In force	No	No	No	No	No	No	No	Yes
14.	Georgia - Romania BIT (1997)	Georgia; Romania;	11/12/1997	12/06/1998	In force	No	No	No	No	No	No	No	Yes
15.	Georgia - Italy BIT (1997)	Georgia; Italy;	15/05/1997	26/07/1999	In force	No	No	No	No	No	No	No	Yes
16.	Georgia - Kyrgyzstan BIT (1997)	Georgia; Kyrgyzstan;	22/04/1997	28/10/1997	In force								N/A
17.	France - Georgia BIT (1997)	France; Georgia;	03/02/1997	13/04/2000	In force	No	No	No	No	No	No	No	Yes
18.	Georgia - Kazakhstan BIT (1996)	Georgia; Kazakhstan ;	17/09/1996	24/04/1998	In force	No	No	No	No	No	No	No	Yes
19.	Armenia - Georgia BIT (1996)	Armenia; Georgia;	04/06/1996	18/02/1997	In force								N/A
20.	Georgia - Turkmenistan BIT (1996)	Georgia; Turkmenist an;	20/03/1996	21/11/1996	In force								N/A
21.	Azerbaijan - Georgia BIT (1996)	Azerbaijan; Georgia;	08/03/1996	10/07/1996	In force								N/A
22.	Georgia - Iran, Islamic Republic of BIT (1995)	Georgia; Iran, Islamic Republic of;	27/09/1995	22/06/2005	In force								N/A

23.	Georgia - Uzbekistan BIT (1995)	Georgia; Uzbekistan;	04/09/1995	24/05/1999	In force								N/A
24.	Georgia - Israel BIT (1995)	Georgia; Israel;	19/06/1995	18/02/1997	In force	No	No	No	No	No	No	No	Yes
25.	Georgia - United Kingdom BIT (1995)	Georgia; United Kingdom;	15/02/1995	15/02/1995	In force	No	No	No	No	No	No	No	Yes
26.	Bulgaria - Georgia BIT (1995)	Bulgaria; Georgia;	19/01/1995	06/08/1999	In force								N/A
27.	Georgia - Ukraine BIT (1995)	Georgia; Ukraine;	09/01/1995	24/04/1995	In force	No	No	No	No	No	No	No	Yes
28.	Georgia - Greece BIT (1994)	Georgia; Greece;	09/11/1994	03/08/1996	In force	No	No	No	No	No	No	No	Yes
29.	Georgia - United States of America BIT (1994)	Georgia; United States of America;	07/03/1994	10/08/1999	In force	No	Yes	No	No	No	No	No	Yes
30.	Georgia - Germany BIT (1993)	Georgia; Germany;	25/06/1993	27/09/1998	In force	No	No	No	No	No	No	No	Yes
31.	BLEU (Belgium-Luxembourg Economic Union) - Georgia BIT (1993)	BLEU (Belgium-Luxembourg Economic Union); Georgia;	23/06/1993	03/07/1999	In force	No	No	No	No	No	No	No	Yes
32.	China - Georgia BIT (1993)	China; Georgia;	03/06/1993	01/03/1995	In force	No	No	No	No	No	No	No	Yes
33.	Georgia - Turkey BIT (1992)	Georgia; Turkey;	30/07/1992	28/07/1995	In force								N/A
34.	Georgia - Spain BIT (1990)	Georgia; Spain;	26/10/1990	28/11/1991	In force								N/A

Annex 17. Transcaucasia: Signed PTAs[1202]

Armenia

No	Title of agreement	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
1.	Armenia - Singapore Agreement on Trade in Services and Investment (2019)	Armenia; Singapore;	01/10/2019		Signed	No	No	Yes	Yes	Yes	No	Yes	Yes
2.	Armenia-EU Comprehensive and Enhanced Partnership Agreement (CEPA)	Armenia; EU (European Union);	24/11/2017		Signed	No	No	No	Yes	Yes	Yes	Yes	Yes
3.	Free Trade Agreement between the Eurasian Economic Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part	Eurasian Economic Union; Viet Nam;	29/05/2015	05/10/2016	In force	No	No	No	No	No	No	No	Yes
4.	Trade and Investment Framework Agreement between Armenia and the United States of America	Armenia; United States of America;	07/05/2015		Signed								
5.	Treaty on Eurasian Economic Union	Eurasian Economic Union;	29/05/2014	01/01/2015	In force	No	No	No	No	No	No	No	Yes

[1202] Source: UNCTAD (IIA) (n 20); Legal Information System of Armenia (n 438); Ministry of Justice of the Republic of Azerbaijan (n 438); The Legislative Herald (n 438).

6.	Convention on Protection of Investor Rights	Armenia; Belarus; Kazakhstan; Kyrgyzstan; Moldova, Republic of; Tajikistan;	28/03/1997	21/01/1999	In force	No	No	No	No	No	No	Yes	Yes
7.	Partnership and Cooperation Agreement between the European Communities and Their Member States, on the One Part, and the Republic of Armenia, on the Other Part	Armenia; EU (European Union);	22/04/1996	01/07/1999	In force	No	No		Yes	Yes	No	Yes	No
8.	The Energy Charter Treaty	Energy Charter Treaty members;	17/12/1994	16/04/1998	In force	No	No	No	Yes	Yes	No	Yes	Yes
9.	Agreement on Cooperation in the Field of Investment Activities available at https://zakon.rada.gov.ua/rada/show/997_144/sp:max20#Text	Azerbaijan; Armenia; Belarus; Georgia; Kazakhstan; Kyrgyzstan; Moldova; Russia; Tajikistan; Turkmenistan; Uzbekistan; Ukraine	24/12/1993	21/11/1994	In force/Provisionally applied	No	No	No	No	No	No	No	Yes

Azerbaijan

No	Title of agreement	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health regulations	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS
1.	Agreement on Promotion and Protection of Investment among Member States of the Economic Cooperation Organization	ECO (Economic Cooperation Organization);	07/07/2005		Signed	No	No	No	No	No	No	No	Yes
2.	Partnership and Cooperation Agreement between the European Community and Their Members States, on the One Part, and the Republic of Azerbaijan, on the Other Part	Azerbaijan; EU (European Union);	22/04/1996	01/07/1999	In force	No	No	n/a	Yes	Yes	No	Yes	No
3.	The Energy Charter Treaty	Energy Charter Treaty members;	17/12/1994	16/04/1998	In force	No	No	No	Yes	Yes	No	Yes	Yes
4.	Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference	OIC (Organisation of Islamic Cooperation);	05/06/1981	01/02/1988	In force	No	No	No	No	No	No	No	Yes
5.	Agreement on Cooperation in the Field of Investment	Azerbaijan; Armenia;	24/12/1993	21/11/1994	In force/	No	No	No	No	No	No	No	Yes

	Activities available at https://zakon.rada.gov.ua/rada/show/997_144/sp:max20#Text	Belarus; Georgia; Kazakhstan; Kyrgyzstan; Moldova; Russia; Tajikistan; Turkmenistan; Uzbekistan; Ukraine			Provisionally applied								

Georgia

No	Title of agreement	Parties	Date of signature	Date of entry into force	Status	Preamble: Reference to right to regulate	Preamble: Reference to health	Expropriation: Carve-out for public health	Other clauses: Reference to Public Health	Other clauses: Right to Regulate	Not to lower regulatory standards	General public health exception	ISDS	Preamble: Reference to right to regulate
1.	Free Trade Agreement between China and Georgia	China; Georgia;	13/05/2017		Signed	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
2.	Free Trade Agreement between the EFTA States and Georgia	EFTA (European Free Trade Association); Georgia;	27/06/2016	01/09/2017	In force	No	Yes	N/A	N/A	Yes	Yes	Yes	Yes	No
3.	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part	EU (European Union); Georgia;	27/06/2014	01/07/2016	In force	No	Yes	No	No	Yes	Yes	Yes	Yes	No
4.	Trade and Investment Framework Agreement between the United States and Georgia	Georgia; United States of America;	20/06/2007	20/06/2007	In force	No	No	N/A	N/A	No	No	No	N/A	No
5.	Partnership and Cooperation Agreement Establishing a Partnership	EU (European Union); Georgia;	22/04/1996	01/07/1999	Terminated	No	No	N/A	N/A	Yes	Yes	No	Yes	No

	between the European Communities and Their Member States, of the One Part, and Georgia, of the Other Part													
6.	Free Trade Agreement between Georgia and Turkmenistan	Georgia; Turkmenistan;	20/03/1996	01/01/2000	In force	No	No	N/A	N/A	Yes	Yes	No	N/A	Yes
7.	The Energy Charter Treaty	Energy Charter Treaty members;	17/12/1994	16/04/1998	In force	No	No	No	No	Yes	Yes	No	Yes	Yes
8.	Agreement on Cooperation in the Field of Investment Activities	Azerbaijan; Armenia; Belarus; Georgia; Kazakhstan; Kyrgyzstan; Moldova; Russia; Tajikistan; Turkmenistan; Uzbekistan; Ukraine	24/12/1993	21/11/1994	In force/Provisionally applied	No	No	No	No	No	No	No	No	Yes

Annex 18. Transcaucasia: ISDS[1203]

Armenia

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
1.	2007	2011	*TS Investment Corp v Republic of Armenia*	Armenia - United States of America BIT (1992)	The dispute concerns alleged interference with the investor's investment programme.	Decided in favour of State	N/A	N/A
2.	2007		*Global Gold Mining LLC v Republic of Armenia* (ICSID Case No ARB/07/7)	Armenia - United States of America BIT (1992)	The dispute concerns the Government's denial to renew mining licenses.	Settled	N/A	

[1203] Source: UNCTAD (ISDS) (n 34).

3.	2017		*Arin Capital & Investment Corp. and Edmond Khudyan v Republic of Armenia* (ICSID Case No ARB/17/36)	Armenia - United States of America BIT (1992)	The dispute concerns alleged failure to act on the investors' repeated claims that they were defrauded by their local business partner.	Pending	USD 15 million	
4.	2018		*Joseph K. Borkowski and Rasia FZE v Republic of Armenia* (ICSID Case No ARB/18/28)	Armenia - United States of America BIT (1992)	The dispute concerns alleged breach of concession contracts by the Government.	Pending	USD 150 million	

Azerbaijan

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
1.	2006		*Barmek Holding A.S. v Republic of Azerbaijan* (ICSID Case No ARB/06/16)	The Energy Charter Treaty (1994) [1994 Azerbaijan – Turkey BIT]	The dispute concerns alleged breach of a contract for the provisions of electricity services, which in turn led to criminal accusations against the investor's managers.	Settled (28 September 2009)	USD 460 million	N/A
2.	2006	2009	*Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v Republic of Azerbaijan* (ICSID Case No ARB/06/15)	The Energy Charter Treaty (1994)	The dispute arising out of the investor's loss of its shares in Azpetrol Group and Azpetrol Oil Services Group, following a court's decisions to void the original purchase contract.	Decided in favour of State (dismissed on jurisdiction)	USD 300 million	
3.	2018		*Cem Selçuk Ersoy v Republic of Azerbaijan* (ICSID Case No ARB/18/6)	Azerbaijan - Turkey BIT (1994)	The dispute concerns alleged unfair treatment and indirect expropriation of investment in a tunnel construction project.	Pending	USD 60 million	
4.	2019		*Mohammad Bahari v Azerbaijan*	Azerbaijan - Iran, Islamic Republic of BIT (1996)	N/A (related to manufacture of food products and beverages sector)	Pending	N/A	
5.	2020		*Zaur Leshkasheli and Rosserlane Consultants Limited v Republic of Azerbaijan*	The Energy Charter Treaty (1994) Azerbaijan - Georgia BIT (1996)	The dispute concerns alleged interference by a state-owned company with the operation of the investors' oil field.	Pending	USD 700 million	Pending

			(ICSID Case No ARB/20/20)					

Georgia

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
1.	2005	2010	*Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18)	Georgia - Greece BIT (1994) The Energy Charter Treaty (1994)	The dispute arising out of the Government's decree cancelling concession rights in a project to develop an oil pipeline to transport oil and gas from Azerbaijan to the Black Sea.	Decided in favour of investor	USD 30.2 million	USD 15.1 million
2.	2005	2008	*Ares International S.r.l. and MetalGeo S.r.l. v Georgia* (ICSID Case No ARB/05/23)	Georgia - Italy BIT (1997)	The dispute arising out of the Government's declaration of invalidity of a share purchase agreement to purchase shares in a state-owned metallurgical plant.	Decided in favour of investor	USD 113 million	USD 3.5 million
3.	2007	2010	*Ron Fuchs v The Republic of Georgia* (ICSID Case No ARB/07/15)	Georgia - Greece BIT (1994)	The dispute arising out of the Government's decree cancelling concession rights in a project to develop an oil pipeline to transport oil and gas from Azerbaijan to the Black Sea.	Decided in favour of investor	USD 30.2 million	USD 15.1 million
4.	2008	2012	*Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*	Georgia - Turkey BIT (1992)	The dispute arising out of alleged termination of an infrastructure construction contract.	Decided in favour of investor	N/A	N/A

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
			(ICSID Case No ARB/08/19)					
5.	2008		*iZee Enterprises LLC, Lazer-2 Tbilisi Ltd., and Cafe Rustaveli Ltd. v Georgia*	Georgia - United States of America BIT (1994)	The dispute arising out alleged seizure of claimant's business premises by the State Interior Department.	Settled	USD 12 million	N/A
6.	2008		*Itera International Energy LLC and Itera Group NV v Georgia* (I) (ICSID Case No ARB/08/7)	Georgia - United States of America BIT (1994) Georgia - Netherlands BIT (1998)	The dispute concerns alleged debt restructuring and other measures leading to devaluation of the investors' assets.	Discontinued	USD 46.4 million	N/A
7.	2009		*Itera International Energy LLC and Itera Group NV v Georgia (II)* (ICSID Case No ARB/09/22)	Georgia - United States of America BIT (1994) Georgia - Netherlands BIT (1998)	The dispute concerns alleged debt restructuring and other measures leading to devaluation of the investors' assets.	Settled	N/A	N/A

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
8.	2012		*Bidzina Ivanishvili v Georgia* (ICSID Case No ARB/12/27)	France - Georgia BIT (1997)	The dispute arising out allegedly discriminatory legislative changes on the bankruptcy procedures allegedly targeting the investor's assets.	Discontinued	USD 186 million	N/A
9.	2017	2018	*KazTransGas JSC v Georgia*	The Energy Charter Treaty (1994) Georgia - Kazakhstan BIT (1996)	The dispute arising out the Government's appointment of a Special Administrator of the investor's subsidiary KazTransGas-Tbilisi, resulting in the investor's loss of control over the company and damages.	Settled	USD 180 million	USD 40 million
10.	2017		*Gardabani Holdings B.V. and Silk Road Holdings B.V v Georgia* (ICSID Case No ARB/17/29)	Georgia - Netherlands BIT (1998)	The dispute concerns alleged refusal to raise electricity tariffs.	Pending	USD 175 million	
11.	2018		*Iconia Capital LLC v Georgia*	Georgia - United States of America BIT (1994)	The dispute concerns alleged to delay and halt the claimant's construction project, including attempts to take over the investor's land plot and a denial to issue construction permits.	Pending	USD 10 million	

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
12.	2019		*Range Resources Limited v Georgia*	The Energy Charter Treaty (1994)	The dispute concerns alleged wrongful termination of a production sharing contract for an oil and gas project.	Discontinued	USD 21.9 million	Data not available
13.	2019		*Zaza Okuashvili v Georgia*	Georgia - United Kingdom BIT (1995)	The dispute arising out of the Government's measures to collect tax debt incurred by Omega Group Tobacco, a cigarette manufacturing company.	Pending	N/A	Pending
14.	2020		*Telcell Wireless, LLC and International Telcell Cellular, LLC v Georgia* (ICSID Case No ARB/20/5).	Georgia - United States of America BIT (1994)	The dispute concerns alleged interference in the management MagtiCom, including the arrest of its founder on the basis of tax evasion charges.	Pending	N/A	Pending
15.	2020		*Bob Meijer v Georgia* (ICSID Case No ARB/20/28*)*	Georgia - Netherlands BIT (1998)	The dispute arising out of a unilateral termination of an agreement to develop a deep water port by the Government.	Pending	N/A	Pending

No	Year of initiation	Year of decision	Case name	Applicable IIA	Governance-related issues details	Outcome of original proceedings	Claimed by the investor	Awarded by the tribunal
16.	2020		*Nasib Hasanov v Georgia* (ICSID Case No ARB/20/44)	Azerbaijan - Georgia BIT (1996)	The dispute concerns alleged interference in the management of a local internet provider, in which the investor holds interest.	Pending	N/A	Pending

Annex 19. Transcaucasia: Analysis of BITs

Armenia

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
1. Preamble	Cumulative	0.33	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33
		0.33	Reference to public health	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0	0.33	0	0	0	0	0.33	0.33
2. Limitation to covered investment	Cumulative	0.25	Excludes portfolio investment/other specific assets	0	0	0	0	0	0	0	0	0.25	0	0	0	0	0	0	0	0	0	0	0	0	0	0.25

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.25
		0.25	Contains "in accordance with host State laws" requirement	0	0	0.25	0	0	0	0.25	0	0.25	0.25	0.25	0.25	0	0.25	0.25	0	0.25		0	0	0.25	0	0.25
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	0.33	Excludes dual nationals	0	0	0	0	0	0	0	0	0.33	0	0.33	0	0.33	0	0	0	0	0	0	0	0	0	0.33

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
		0.33	Includes requirement of substantial business activity	0	0.33	0.33	0	0.33	0.33	0	0	0	0.33	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Defines ownership and control of legal entities	0	0	0.33	0	0	0	0	0	0	0.33	0	0	0	0	0	0.33	0	0	0	0	0	0	0	0
4. DoB clause	Cumulative	0.5	"Substantive business operations" criterion	0	0.5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0.5	0.5
		0.5	Applies to investors from States with no diplomatic	0	0.5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0.5	0.5

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
			relations or under economic /trade restrictions																							
5. Scope of the treaty	Ordinal	10	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	0.5	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Reference to “like circumstances” (or similar	0	0.25	0.25	0	0	0	0	0	0.25	0	0	0	0	0	0	0.25	0	0	0.25	0.25	0	0.25	0.25
		1	No NT clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
7. MFN	Cumulative	0.5	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0	0.25
		0.5	Procedural issues (ISDS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0.5	0.5
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8. FET	Ordinal	1	FET qualified	0	1	0	0	0	0	1	0	1	0	0	0	0	0	1	0	0	0	1	1	0	1	1
		5	No FET	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0	0	0	0
9. Refining indirect	Cumulative	0.5	Definition provided	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0.5

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
expropriation																										
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2.5
10. Umbrella clause	Ordinal	1	Not included	1	0	0	0	0	0	0	0	1	0	1	0	0	1	0	0	1	1	0	1	1	1	1
11. Exceptions	Ordinal	5	General public health exception	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0	0	5	0	0	0	0	5	0
12. Alternatives to arbitration	Ordinal	0.25	Voluntary recourse to alternatives	0	0	0	0.25	0	0	0	0	0	0	0.25	0	0	0	0	0.25	0	0	0	0	0	0.25	0

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.75	0.75	0	0
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	0.33	Listing specific basis of claim beyond treaty	0.33	0.33	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0
		0.66	Limited to treaty claims	0	0	0.66	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.66
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment	1-9	Limitation of Provisions subject to ISDS	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
15. Limitation on	Ordinal	10	Exclusion of public	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
scope of ISDS			health policy from ISDS																							
16. Type of consent to arbitration	Ordinal	10	Case-by-case consent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17. Forum selection: domestic courts	Ordinal	1	Domestic court a pre-condition for ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
18. Particular features of ISDS	Cumulative	0.5	Limitation period	0	0	0	0	0	0	0	0.5	0.5	0	0	0	0	0	0	0	0	0	0	0.5	0	0.5	0.5
		0.5	Limited remedies	0	0	0	0	0	0	0	0	0.5	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0
19. Interpretation	Cumulative	5	Binding interpretation	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0	0	0	0	0	0	0	0	5

Category	Type	Value	Indicator	Armenia - Spain BIT (1990)	Armenia - USA BIT (1992)	Argentina - Armenia BIT (1993)	Armenia - UK BIT (1993)	Armenia - Romania BIT (1994)	Armenia - Lebanon BIT (1995)	Armenia - France BIT (1995)	Armenia - Egypt BIT (1996)	Armenia - Canada BIT (1997)	Armenia - Switzerland BIT (1999)	Armenia - Israel BIT (2000)	Armenia - Belarus BIT (2001)	Armenia - Uruguay BIT (2002)	Armenia - India BIT (2003)	Armenia - Finland BIT (2004)	Armenia - Netherlands BIT (2005)	Armenia - Latvia BIT (2005)	Armenia - Lithuania BIT (2006)	Armenia - Kuwait BIT (2010)	Armenia - Iraq BIT (2012)	Armenia - UAE (2016)	Armenia - Japan BIT (2018)	Armenia - Korea, R. BIT (2019)
		1	Renvoi	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0
20. Transparency in arbitral proceedings	Cumulative	0.33	Making documents publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0
				11.08	3.16	2.57	1	1.08	1.08	2	1.25	15.33	1.66	2.58	1	1.08	7	1.83	1.58	7.08	1.75	3	6.25	4.25	13.82	15.4
PHS INDEX				0.554	0.158	0.1285	0.05	0.054	0.054	0.1	0.0625	0.767	0.083	0.129	0.05	0.054	0.35	0.0915	0.079	0.354	0.0875	0.15	0.3125	0.2125	0.691	0.77

Azerbaijan

Part 1

Category	Type	Value	Indicator	Azerbaijan - China BIT (1994)	Azerbaijan - Pakistan BIT (1995)	Azerbaijan - Kzakhstan (1996)	Azerbaijan - Italy BIT (1997)	Azerbaijan - Kyrgyzstan BIT (1997)	Azerbaijan - USA BIT (1997)	Azerbaijan - France BIT (1998)	Azerbaijan - Lebanon BIT (1998)	Austria - Azerbaijan BIT (2000)	Azerbaijan - Greece BIT (2004)	Azerbaijan - Latvia BIT (2005)	Azerbaijan - United Arab Emirates BIT (2006)	Azerbaijan - Switzerland BIT (2006)	Azerbaijan - Croatia BIT (2007)
1. Preamble	Cumulative	0.33	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33
		0.33	Reference to public health	0	0	0	0	0	0.33	0	0	0	0	0	0	0	0.33
2. Limitation to covered investment	Cumulative	0.25	Excludes portfolio investment/other specific assets	0	0	0	0	0	0	0	0	0	0	0	0.25	0	0.25
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Contains "in accordance with host State laws" requirement	0.25	0.25	0	0.25	0.25	0	0.25	0	0	0.25	0.25	0.25	0	0.25
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0.25	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Azerbaijan - China BIT (1994)	Azerbaijan - Pakistan BIT (1995)	Azerbaijan - Kzakhstan (1996)	Azerbaijan - Italy BIT (1997)	Azerbaijan - Kyrgyzstan BIT (1997)	Azerbaijan - USA BIT (1997)	Azerbaijan - France BIT (1998)	Azerbaijan - Lebanon BIT (1998)	Austria - Azerbaijan BIT (2000)	Azerbaijan - Greece BIT (2004)	Azerbaijan - Latvia BIT (2005)	Azerbaijan - United Arab Emirates BIT (2006)	Azerbaijan - Switzerland BIT (2006)	Azerbaijan - Croatia BIT (2007)
3. Definition of covered investors	Cumulative	0.33	Excludes dual nationals	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33
		0.33	Includes requirement of substantial business activity	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33
		0.33	Defines ownership and control of legal entities	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4. DoB clause	Cumulative	0.5	"Substantive business operations" criterion	0	0	0	0	0	0.5	0	0	0.5	0	0	0.5	0	0.5
		0.5	Applies to investors from States with no diplomatic relations or under economic/trade restrictions	0	0	0	0	0	0.5	0	0	0	0	0	0	0	0
5. Scope of the treaty	Ordinal	10	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Azerbaijan - China BIT (1994)	Azerbaijan - Pakistan BIT (1995)	Azerbaijan - Kzakhstan (1996)	Azerbaijan - Italy BIT (1997)	Azerbaijan - Kyrgyzstan BIT (1997)	Azerbaijan - USA BIT (1997)	Azerbaijan - France BIT (1998)	Azerbaijan - Lebanon BIT (1998)	Austria - Azerbaijan BIT (2000)	Azerbaijan - Greece BIT (2004)	Azerbaijan - Latvia BIT (2005)	Azerbaijan - United Arab Emirates BIT (2006)	Azerbaijan - Switzerland BIT (2006)	Azerbaijan - Croatia BIT (2007)
6. National treatment (NT)	Cumulative	0.5	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Reference to "like circumstances" (or similar	0	0.25	0	0	0	0.25	0	0.25	0	0	0	0	0	0.25
		1	No NT clause	1	0	0	0	0	0	0	0	0	0	0	0	0	0
7. MFN	Cumulative	0.5	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.5	Procedural issues (ISDS)	0	0	0	0	0	0	0	0	0	0	0	0.5	0	0.5
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8. FET	Ordinal	1	FET qualified	0	0	0	0	0	1	1	0	0	0	0	1	0	1
		5	No FET	0	5	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Azerbaijan - China BIT (1994)	Azerbaijan - Pakistan BIT (1995)	Azerbaijan - Kzakhstan (1996)	Azerbaijan - Italy BIT (1997)	Azerbaijan - Kyrgyzstan BIT (1997)	Azerbaijan - USA BIT (1997)	Azerbaijan - France BIT (1998)	Azerbaijan - Lebanon BIT (1998)	Austria - Azerbaijan BIT (2000)	Azerbaijan - Greece BIT (2004)	Azerbaijan - Latvia BIT (2005)	Azerbaijan - United Arab Emirates BIT (2006)	Azerbaijan - Switzerland BIT (2006)	Azerbaijan - Croatia BIT (2007)
9. Refining indirect expropriation	Cumulative	0.5	Definition provided	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10. Umbrella clause	Ordinal	1	Not included	1	1	1	1	1	1	0	1	0	0	1	1	0	1
11. Exceptions	Ordinal	5	General public health exception	0	0	0	0	0	0	0	0	0	0	5	0	0	0
12. Alternatives to arbitration	Ordinal	0.25	Voluntary recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	0.33	Listing specific basis of claim beyond treaty	0	0	0	0	0	0.33	0	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0	0	0	0	0	0	0	0	0.66	0.66	0	0	0	0.66

Category	Type	Value	Indicator	Azerbaijan - China BIT (1994)	Azerbaijan - Pakistan BIT (1995)	Azerbaijan - Kzakhstan (1996)	Azerbaijan - Italy BIT (1997)	Azerbaijan - Kyrgyzstan BIT (1997)	Azerbaijan - USA BIT (1997)	Azerbaijan - France BIT (1998)	Azerbaijan - Lebanon BIT (1998)	Austria - Azerbaijan BIT (2000)	Azerbaijan - Greece BIT (2004)	Azerbaijan - Latvia BIT (2005)	Azerbaijan - United Arab Emirates BIT (2006)	Azerbaijan - Switzerland BIT (2006)	Azerbaijan - Croatia BIT (2007)
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	1-9	Limitation of Provisions subject to ISDS	9	0	0	0	0	0	0	0	0	0	0	0	0	0
15. Limitation on scope of ISDS	Ordinal	10	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16. Type of consent to arbitration	Ordinal	10	Case-by-case consent	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17. Forum selection: domestic courts	Ordinal	1	Domestic court a pre-condition for ISDS	0	0	0	0	0	0	0	0	0	0	0	1	0	0

Category	Type	Value	Indicator	Azerbaijan - China BIT (1994)	Azerbaijan - Pakistan BIT (1995)	Azerbaijan - Kzakhstan (1996)	Azerbaijan - Italy BIT (1997)	Azerbaijan - Kyrgyzstan BIT (1997)	Azerbaijan - USA BIT (1997)	Azerbaijan - France BIT (1998)	Azerbaijan - Lebanon BIT (1998)	Austria - Azerbaijan BIT (2000)	Azerbaijan - Greece BIT (2004)	Azerbaijan - Latvia BIT (2005)	Azerbaijan - United Arab Emirates BIT (2006)	Azerbaijan - Switzerland BIT (2006)	Azerbaijan - Croatia BIT (2007)
18. Particular features of ISDS	Cumulative	0.5	Limitation period	0	0	0	0	0	0	0	0	0.5	0	0	0	0	0
		0.5	Limited remedies	0	0	0	0	0	0	0	0	0.5	0	0	0	0	0
19. Interpretation	Cumulative	5	Binding interpretation	5	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Renvoi	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20. Transparency in arbitral proceedings	Cumulative	0.33	Making documents publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PHS INDEX				16.75	7.25	1.75	2	2.25	3.91	2	2	2.91	1.66	7	5.25	0.75	6.48

Part 2

Category	Type	Value	Indicator	Azerbaijan - Hungary BIT (2007)	Azerbaijan - Korea BIT (2007)	Azerbaijan - Tajikistan (2007)	Azerbaijan - Israel BIT (2007)	Azerbaijan - Syrian Arab Republic BIT (2009)	Azerbaijan - Belarus (2010)	Azerbaijan - Estonia BIT (2010)	Azerbaijan - Turkey BIT (2011)	Azerbaijan - Montenegro BIT (2011)	Azerbaijan - Serbia (2011)	Azerbaijan _Czech Republic BIT (2011)	Albania-Azerbaijan BIT (2012)	Azerbaijan - Russian Federation (2014)	Azerbaijan - San Marino BIT (2015)
1. Preamble	Cumulative	0.33	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0.33	0	0.33	0	0.33	0	0.33	0.33	0	0.33
		0.33	Reference to public health	0	0	0	0	0.33	0	0.33	0.33	0	0	0.33	0	0	0.33
2. Limitation to covered investment	Cumulative	0.25	Excludes portfolio investment/other specific assets	0	0	0	0	0	0	0	0.25	0	0.25	0	0	0	0
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Contains “in accordance with host State laws” requirement	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	0.33	Excludes dual nationals	0	0	0	0.33	0.33	0	0.33	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Azerbaijan - Hungary BIT (2007)	Azerbaijan - Korea BIT (2007)	Azerbaijan - Tajikistan (2007)	Azerbaijan - Israel BIT (2007)	Azerbaijan - Syrian Arab Republic BIT (2009)	Azerbaijan - Belarus (2010)	Azerbaijan - Estonia BIT (2010)	Azerbaijan - Turkey BIT (2011)	Azerbaijan - Montenegro BIT (2011)	Azerbaijan - Serbia (2011)	Azerbaijan _Czech Republic BIT (2011)	Albania-Azerbaijan BIT (2012)	Azerbaijan - Russian Federation (2014)	Azerbaijan - San Marino BIT (2015)
		0.33	Includes requirement of substantial business activity	0	0	0	0	0.33	0	0.33	0	0.33	0.33	0.33	0.33	0	0.33
		0.33	Defines ownership and control of legal entities	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4. DoB clause	Cumulative	0.5	"Substantive business operations" criterion	0.5	0	0	0	0.5	0	0	0	0	0.5	0	0.5	0	0.5
		0.5	Applies to investors from States with no diplomatic relations or under economic/trade restrictions	0	0	0	0	0	0	0	0.5	0.5	0	0.5	0.5	0	0
5. Scope of the treaty	Ordinal	10	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	0.5	Pre-establishment only	0	0	0	0.25	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Reference to "like circumstances" (or similar	0	0	0	0	0	0	0	0.25	0	0	0.25	0.25	0	0

Category	Type	Value	Indicator	Azerbaijan - Hungary BIT (2007)	Azerbaijan - Korea BIT (2007)	Azerbaijan - Tajikistan (2007)	Azerbaijan - Israel BIT (2007)	Azerbaijan - Syrian Arab Republic BIT (2009)	Azerbaijan - Belarus (2010)	Azerbaijan - Estonia BIT (2010)	Azerbaijan - Turkey BIT (2011)	Azerbaijan - Montenegro BIT (2011)	Azerbaijan - Serbia (2011)	Azerbaijan _Czech Republic BIT (2011)	Albania-Azerbaijan BIT (2012)	Azerbaijan - Russian Federation (2014)	Azerbaijan - San Marino BIT (2015)
		1	No NT clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7. MFN	Cumulative	0.5	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.25	Economic integration agreements	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25
		0.5	Procedural issues (ISDS)	0	0	0	0	0.5	0	0	0	0.5	0	0.5	0	0	0.5
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8. FET	Ordinal	1	FET qualified	0	0	0	0	1	0		1	0	0	0	0	0	0
		5	No FET	0	0	0	0	0	0	5	0	0	0	0	0	0	0
9. Refining indirect expropriation	Cumulative	0.5	Definition provided	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10. Umbrella clause	Ordinal	1	Not included	1	0	1	1	1	1	1	0	0	1	1	0	0	1
11. Exceptions	Ordinal	5	General public health exception	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Azerbaijan - Hungary BIT (2007)	Azerbaijan - Korea BIT (2007)	Azerbaijan - Tajikistan (2007)	Azerbaijan - Israel BIT (2007)	Azerbaijan - Syrian Arab Republic BIT (2009)	Azerbaijan - Belarus (2010)	Azerbaijan - Estonia BIT (2010)	Azerbaijan - Turkey BIT (2011)	Azerbaijan - Montenegro BIT (2011)	Azerbaijan - Serbia (2011)	Azerbaijan _Czech Republic BIT (2011)	Albania-Azerbaijan BIT (2012)	Azerbaijan - Russian Federation (2014)	Azerbaijan - San Marino BIT (2015)
12. Alternatives to arbitration	Ordinal	0.25	Voluntary recourse to alternatives	0	0	0	0.25	0	0.25	0	0	0	0	0	0	0	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	0.33	Listing specific basis of claim beyond treaty	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0	0.66	0	0	0.66	0	0	0	0.66	0.66	0	0	0	0.66
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	1-9	Limitation of Provisions subject to ISDS	0	0	8	0	0	0	0	0	0	0	0	0	0	0
15. Limitation on scope of ISDS	Ordinal	10	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16. Type of consent to arbitration	Ordinal	10	Case-by-case consent	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17. Forum selection: domestic courts	Ordinal	1	Domestic court a pre-condition for ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	Azerbaijan - Hungary BIT (2007)	Azerbaijan - Korea BIT (2007)	Azerbaijan - Tajikistan (2007)	Azerbaijan - Israel BIT (2007)	Azerbaijan - Syrian Arab Republic BIT (2009)	Azerbaijan - Belarus (2010)	Azerbaijan - Estonia BIT (2010)	Azerbaijan - Turkey BIT (2011)	Azerbaijan - Montenegro BIT (2011)	Azerbaijan - Serbia (2011)	Azerbaijan _Czech Republic BIT (2011)	Albania-Azerbaijan BIT (2012)	Azerbaijan - Russian Federation (2014)	Azerbaijan - San Marino BIT (2015)
18. Particular features of ISDS	Cumulative	0.5	Limitation period	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.5	Limited remedies	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19. Interpretation	Cumulative	5	Binding interpretation	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Renvoi	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Rights of non-disputing contracting party	0	0	0	0	0	0	0	0	0	0	0	0	0	
20. Transparency in arbitral proceedings	Cumulative	0.33	Making documents publicly available	0	0	0	0	0	0	0	0	0.33	0	0	0	0	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PHS INDEX				2.5	1.41	10	2.58	5.98	2.25	8.32	3.33	3.65	3.74	4.24	2.91	1	4.65

Georgia

Category	Type	Value	Indicator	China - Georgia BIT (1993)	BLEU - Georgia BIT (1993)	Georgia - USA BIT (1994)	Georgia - UK BIT (1995)	Azerbaijan - Georgia BIT (1996)	Georgia - Kazakhstan BIT (1996)	Georgia - Romania BIT (1997)	Georgia-Netherlands BIT (1998)	Egypt -Georgia BIT (1999)	Georgia - Germany BIT (1999)	Austria-Georgia BIT (2001)	Georgia - Latvia BIT (2005)	Georgia - Lithuania BIT (2005)	Finland - Georgia BIT (2006)	Georgia-Kuwait BIT (2009)	Czech R. - Georgia BIT (2009)	Georgia - Switzerland (2014)	Belarus-Georgia BIT (2017)
1. Preamble	Cumulative	0.33	Reference to right to regulate	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Reference to sustainable development	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0
		0.33	Reference to public health	0	0	0.33	0	0	0	0	0	0	0	0	0	0	0.33	0	0	0.33	0
2. Limitation to covered investment	Cumulative	0.25	Excludes portfolio investment/other specific assets	0	0	0	0	0	0	0	0	0	0	0.25	0	0	0	0	0	0	0
		0.25	Lists required characteristics of investment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.25	0.25
		0.25	Contains "in accordance with host State laws" requirement	0.25	0	0	0	0.25	0.25	0.25	0	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25

Category	Type	Value	Indicator	China - Georgia BIT (1993)	BLEU - Georgia BIT (1993)	Georgia - USA BIT (1994)	Georgia - UK BIT (1995)	Azerbaijan - Georgia BIT (1996)	Georgia - Kazakhstan BIT (1996)	Georgia - Romania BIT (1997)	Georgia-Netherlands BIT (1998)	Egypt -Georgia BIT (1999)	Georgia - Germany BIT (1999)	Austria-Georgia BIT (2001)	Georgia - Latvia BIT (2005)	Georgia - Lithuania BIT (2005)	Finland - Georgia BIT (2006)	Georgia-Kuwait BIT (2009)	Czech R. - Georgia BIT (2009)	Georgia - Switzerland (2014)	Belarus-Georgia BIT (2017)
		0.25	Sets out closed (exhaustive) list of covered assets	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Definition of covered investors	Cumulative	0.33	Excludes dual nationals	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.33	Includes requirement of substantial business activity	0	0	0	0	0	0	0.33	0	0.33	0	0	0	0	0	0	0	0.33	0.33
		0.33	Defines ownership and control of legal entities	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4. DoB clause	Cumulative	0.5	"Substantive business operations" criterion	0	0	0.5	0	0	0	0	0	0	0	0.5	0	0	0	0	0	0.5	0.5
		0.5	Applies to investors from States with no diplomatic relations or	0	0	0.5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5

Category	Type	Value	Indicator	China - Georgia BIT (1993)	BLEU - Georgia BIT (1993)	Georgia - USA BIT (1994)	Georgia - UK BIT (1995)	Azerbaijan - Georgia BIT (1996)	Georgia - Kazakhstan BIT (1996)	Georgia - Romania BIT (1997)	Georgia-Netherlands BIT (1998)	Egypt -Georgia BIT (1999)	Georgia - Germany BIT (1999)	Austria-Georgia BIT (2001)	Georgia - Latvia BIT (2005)	Georgia - Lithuania BIT (2005)	Finland - Georgia BIT (2006)	Georgia-Kuwait BIT (2009)	Czech R. - Georgia BIT (2009)	Georgia - Switzerland (2014)	Belarus-Georgia BIT (2017)
			under economic/trade restrictions																		
5. Scope of the treaty	Ordinal	10	Excludes public health / tobacco regulation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6. National treatment (NT)	Cumulative	0.5	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.25	Post-establishment	0	0	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0	0.25	0.25	0.25
		0.25	Reference to “like circumstances” (or similar	0	0	0.25	0	0	0	0	0.25	0	0	0	0	0	0	0.25	0	0	0.25
		1	No NT clause	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7. MFN	Cumulative	0.5	Pre-establishment only	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	China - Georgia BIT (1993)	BLEU - Georgia BIT (1993)	Georgia - USA BIT (1994)	Georgia - UK BIT (1995)	Azerbaijan - Georgia BIT (1996)	Georgia - Kazakhstan BIT (1996)	Georgia - Romania BIT (1997)	Georgia-Netherlands BIT (1998)	Egypt -Georgia BIT (1999)	Georgia - Germany BIT (1999)	Austria-Georgia BIT (2001)	Georgia - Latvia BIT (2005)	Georgia - Lithuania BIT (2005)	Finland - Georgia BIT (2006)	Georgia-Kuwait BIT (2009)	Czech R. - Georgia BIT (2009)	Georgia - Switzerland (2014)	Belarus-Georgia BIT (2017)
		0.25	Post-establishment	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0	0.25	0.25	0.25
		0.25	Economic integration agreements	0.25	0.25	0	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0.25	0	0.25	0.25	0.25	0.25
		0.5	Procedural issues (ISDS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0
		1	No MFN clause	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8. FET	Ordinal	1	FET qualified	1	1	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
		5	No FET	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0	0	0	0
9. Refining indirect expropriation	Cumulative	0.5	Definition provided	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		2.5	Carve-out for general public health or tobacco regulatory measures	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2.5
10. Umbrella clause	Ordinal	1	Not included	0	0	1	0	1	0	0	0	0	0	0	1	1	0	0	1	0	1

Category	Type	Value	Indicator	China - Georgia BIT (1993)	BLEU - Georgia BIT (1993)	Georgia - USA BIT (1994)	Georgia - UK BIT (1995)	Azerbaijan - Georgia BIT (1996)	Georgia - Kazakhstan BIT (1996)	Georgia - Romania BIT (1997)	Georgia-Netherlands BIT (1998)	Egypt -Georgia BIT (1999)	Georgia - Germany BIT (1999)	Austria-Georgia BIT (2001)	Georgia - Latvia BIT (2005)	Georgia - Lithuania BIT (2005)	Finland - Georgia BIT (2006)	Georgia-Kuwait BIT (2009)	Czech R. - Georgia BIT (2009)	Georgia - Switzerland (2014)	Belarus-Georgia BIT (2017)
11. Exceptions	Ordinal	5	General public health exception	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	5	5
12. Alternatives to arbitration	Ordinal	0.25	Voluntary recourse to alternatives	0	0	0	0.25	0	0	0	0.25	0	0	0	0	0	0	0.25	0	0	0
		0.75	Mandatory recourse to alternatives	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		15	No ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13. Scope of claims	Ordinal	0.33	Listing specific basis of claim beyond treaty	0	0	0.33	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		0.66	Limited to treaty claims	0	0	0	0	0	0	0	0	0	0	0.66	0	0	0	0	0	0.66	0.66
14. Limitation on provisions subject to ISDS	Ordinal. Variable (assessment depends on the scope of limitation)	1-9	Limitation of Provisions subject to ISDS	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	China - Georgia BIT (1993)	BLEU - Georgia BIT (1993)	Georgia - USA BIT (1994)	Georgia - UK BIT (1995)	Azerbaijan - Georgia BIT (1996)	Georgia - Kazakhstan BIT (1996)	Georgia - Romania BIT (1997)	Georgia-Netherlands BIT (1998)	Egypt -Georgia BIT (1999)	Georgia - Germany BIT (1999)	Austria-Georgia BIT (2001)	Georgia - Latvia BIT (2005)	Georgia - Lithuania BIT (2005)	Finland - Georgia BIT (2006)	Georgia-Kuwait BIT (2009)	Czech R. - Georgia BIT (2009)	Georgia - Switzerland (2014)	Belarus-Georgia BIT (2017)
15. Limitation on scope of ISDS	Ordinal	10	Exclusion of public health policy from ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16. Type of consent to arbitration	Ordinal	10	Case-by-case consent	10	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17. Forum selection: domestic courts	Ordinal	1	Domestic court a pre-condition for ISDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
18. Particular features of ISDS	Cumulative	0.5	Limitation period	0	0	0	0	0	0	0	0	0	0	0.5	0	0	0	0	0	0.5	0
		0.5	Limited remedies	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0	0	0
19. Interpretation	Cumulative	5	Binding interpretation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.5	0
		1	Renvoi	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
		1	Rights of non-disputing	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Category	Type	Value	Indicator	China - Georgia BIT (1993)	BLEU - Georgia BIT (1993)	Georgia - USA BIT (1994)	Georgia - UK BIT (1995)	Azerbaijan - Georgia BIT (1996)	Georgia - Kazakhstan BIT (1996)	Georgia - Romania BIT (1997)	Georgia-Netherlands BIT (1998)	Egypt -Georgia BIT (1999)	Georgia - Germany BIT (1999)	Austria-Georgia BIT (2001)	Georgia - Latvia BIT (2005)	Georgia - Lithuania BIT (2005)	Finland - Georgia BIT (2006)	Georgia-Kuwait BIT (2009)	Czech R. - Georgia BIT (2009)	Georgia - Switzerland (2014)	Belarus-Georgia BIT (2017)
			contracting party																		
20. Transparency in arbitral proceedings	Cumulative	0.33	Making documents publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0
		0.33	Making hearings publicly available	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0
		0.33	Amicus curie	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0.33	0
PHS INDEX				21.75	2.5	3.91	1	2	1	1.33	1.25	6.33	1	2.66	7	2	0.58	2.5	2	10.89	11.99

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