

**CONFERENCE: *The New Roles of Corporations in Global Governance***

**PRIVATE INVESTMENT AND PUBLIC HEALTH**

*David Gartner\**

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\* Professor of Law at Arizona State University, Sandra Day O'Connor College of Law. J.D. Yale Law School. Ph.D. Massachusetts Institute of Technology. Thanks especially to Julian Arato, Aaron Caplan, Margaret Chon, Charlotte Garden, Lily Kahng, Benn McGrady, and Markus Wagner for their helpful comments.

## I. INTRODUCTION

In the twenty-first century non-state actors are increasingly shaping governance at all levels. Traditionally, international law and international institutions facilitated relationships among sovereign states, but now, corporations, non-governmental organizations, and other non-state actors are increasingly becoming participants rather than spectators. One of the important areas of law that has undergone a dramatic transformation in recent decades is international investment law. With the spread of investor-state dispute settlement as a core dimension of bilateral investment treaties, foreign investors can directly challenge states' actions in a range of areas. A number of investor-state cases focus on public health regulations, including Philip Morris International's recent challenges to the required health warnings and plain packaging for tobacco products in Uruguay and Australia. These cases reflect the growing role of non-state actors in shaping the international system and highlight the potential implications for the regulation of public health.

This Article analyzes the intersection of public health and international investment law and its implications for the future of investor-state dispute settlement. Part II examines the recent claims brought against Uruguay and Australia amidst the growing role of tobacco related non-communicable diseases in shaping mortality in low and middle-income countries. Part III traces the emergence of the modern system of investor-state dispute settlement. Part IV compares the unique features of the international investment regime with international trade and other areas of law. Part V assesses a range of proposed reforms to the international investment regime, including: direct exceptions for public health, more flexible standards of review, more restrictive conceptions of nationality, and the formation of a permanent appellate body.

## II. TOBACCO, PLAIN PACKAGING, AND INVESTMENT ARBITRATION

With the adoption of the Framework Convention on Tobacco Control, 178 governments around the world committed to enact comprehensive national policies designed to reduce tobacco consumption through warnings and restrictions on the marketing of tobacco products and other strategies.<sup>1</sup>

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<sup>1</sup> WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166. The current ratifying parties may be found at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IX-4&chapter=9&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en).

The World Health Organization is currently encouraging national governments to adopt plain packaging for tobacco products because it can reduce the attractiveness of these products to potential consumers. The tobacco industry questions whether plain packaging is in fact effective in reducing smoking and argues that plain packaging regulations constitute an expropriation requiring compensation.

In February of 2010, Phillip Morris International (PMI) filed an arbitration request against the government of Uruguay under a bilateral investment treaty between Uruguay and the government of Switzerland. The claim alleged the plain packaging legislation, which “prohibits different packaging or presentations for cigarettes sold under a given brand,” unfairly deprived the company of its intellectual property rights.<sup>2</sup> The Uruguayan government requires that 80% of packaging include graphic warnings and restricts tobacco advertising by allowing only a standard format for the use of brand names.<sup>3</sup> PMI claimed that the regulations unfairly limited the use of its trademarks and intellectual property under the Uruguay-Switzerland bilateral investment treaty.<sup>4</sup>

In late 2011, the Asian subsidiary of PMI filed an arbitration claim against Australia under its bilateral investment treaty with Hong Kong. Australian law restricts tobacco companies from displaying their brand names on packaging and mandates plain packaging on cigarette covers. The Australian legislation requires that products be sold in packaging of a specified color, without logos, and that graphic health warnings must cover 75% of the front of a pack and 90% of the back.<sup>5</sup> PMI claimed “Australia’s proposed legislation would ‘effectively prohibit Philip Morris International from using its intellectual property’ ” and that absent the use of its logos, “its product would not be readily distinguishable to the consumers from the products of its competitors.”<sup>6</sup> Among the potential obstacles to PMI’s claim is that it did not become the sole shareholder of PM Asia until about one year

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<sup>2</sup> Philip Morris Brands SARL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶¶ 6–8 (July 2, 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf>.

<sup>3</sup> Anita Ritwik, Recent Development, *Tobacco Packaging Arbitration and the State’s Ability to Legislate*, 54 HARV. INT’L L.J. 523, 523–24 (2013).

<sup>4</sup> See Philip Morris Brands SARL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 8 (July 2, 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf>; Lauge Poulsen, *The Relevance of Investment Treaties for Tobacco Control*, Presentation to the European Parliament (Dec. 3, 2013).

<sup>5</sup> Ritwik, *supra* note 3, at 525–26.

<sup>6</sup> *Id.* at 526.

after the Australian government announced its plain packaging initiative.<sup>7</sup> As a result, PMI may not have had a legitimate expectation that its trademark would not be affected through its investments in Australia. The Australian courts previously rejected PMI's claims.<sup>8</sup>

Australia's adoption of plain packaging sparked a number of other countries to take another look at this approach to regulation. In fact, even countries such as Canada, which had previously been dissuaded from this approach, resurrected proposals for more comprehensive labeling requirements for tobacco products.<sup>9</sup> The government of New Zealand in principle agreed to pursue plain packaging regulations and the proposal is now under consideration in the New Zealand Parliament.<sup>10</sup> The United Kingdom announced that it would evaluate the effectiveness of plain packaging restrictions, and Ireland is also considering adopting plain packaging regulations.<sup>11</sup> Turkey, which has among the highest rates of smoking in the world, is also considering proposals to ban logos and brand names on tobacco packaging.<sup>12</sup>

Although the tobacco industry argues that plain packaging is not an effective public health strategy, recent research seems to confirm that plain packaging can reduce the demand for tobacco products.<sup>13</sup> In Australia, research indicates that people using plain packaged cigarettes, as compared to branded packs, perceived their cigarettes to be lower in quality and less satisfying. People using plain packaged cigarettes were more likely to have thought about quitting in the past week and to view quitting as a higher

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<sup>7</sup> Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Agreements*, 15 J. INT'L ECON. L. 910 (2012).

<sup>8</sup> Poulsen, *supra* note 4.

<sup>9</sup> Drew Tyler, *The Tobacco Industry's Interest in Public International Law is Heating Up*, 16 ONT. BAR ASSOC. 3 (2013).

<sup>10</sup> *Parliament Health Committee Passes Plain Packaging Bill*, 3NEWS, [http://www.oba.org/en/pdf/sec\\_news\\_int\\_jul13\\_Tobacco\\_Tyler.pdf](http://www.oba.org/en/pdf/sec_news_int_jul13_Tobacco_Tyler.pdf) (last visited Aug. 6, 2014).

<sup>11</sup> *Cigarette Packaging: Republic of Ireland Bid to Ban Branded Tobacco*, MANUFACTURING J., <http://www.manufacturing-journal.net/economy-news/1580-cigarette-packaging-republic-of-ireland-bid-to-ban-branded-tobacco> (last visited Aug. 27, 2014).

<sup>12</sup> *More Bans on Smoking to be Introduced in Turkey*, HURRIET DAILY NEWS (Istanbul) (Nov. 5, 2013), <http://www.hurriyetdailynews.com/more-bans-on-smoking-to-be-introduced-in-turkey.aspx?pageID=238&nID=57363&NewsCatID=341>.

<sup>13</sup> Rachel Pechey et al., *The Impact of Plain Packaging on Smoking in Adults and Children*, 13 BMC PUB. HEALTH 18 (2013).

priority in their lives.<sup>14</sup> Similarly, health warnings with graphic pictures have been demonstrated to reduce the demand for cigarettes.<sup>15</sup> Plain packaging tends to increase the salience and believability of these pictorial warning labels.<sup>16</sup> A recent survey in Australia revealed that daily smoking rates declined by 15% between 2010 and December of 2013.<sup>17</sup> Thus, the early evidence suggests that plain packaging is associated with greater interest in quitting among adult smokers.<sup>18</sup>

The arbitration claim against Uruguay challenges both the size of the required graphic warnings and also the limits on the use of misleading logos, descriptors and colors on tobacco packaging. The size of the graphic warning label in the context of the Uruguay regulation is unlikely to be rejected by arbitrators, but it is possible that the requirement that tobacco companies use only one variant of an individual brand could be successfully challenged.<sup>19</sup> One of the key issues will be the level of scrutiny that will be applied to the regulation by the arbitrators. Investment tribunals generally give less deference to government policy decisions in areas such as health than does the World Trade Organization's appellate body.<sup>20</sup> Uruguay argued that Article 2(1) of its bilateral investment treaty with Switzerland excludes public health measures, but the arbitral tribunal found that this exclusion only applied to pre-established laws and regulations and that Article 2(1) did not create an exception to substantive obligations with respect to investment that had already been legally admitted.<sup>21</sup>

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<sup>14</sup> See Melanie Wakefield et al., *Introduction Effects of the Australian Plain Packaging Policy on Adult Smokers: A Cross-Sectional Study*, *BMJ OPEN* (2013), <http://bmjopen.bmj.com/content/3/7/e003175.full.pdf+html>.

<sup>15</sup> See James Thrasher et al., *Estimating the Impact of Pictorial Health Warnings and "Plain" Cigarette Packaging: Evidence from Experimental Auctions Among Adult Smokers in the United States*, 102 *HEALTH POL'Y* 41, 41 (2011).

<sup>16</sup> *Id.*

<sup>17</sup> Jamie Smyth, *Australia Smoking Rates Tumble After Plain Packaging Shift*, *FIN. TIMES* (Sydney) (July 16, 2014), <http://www.ft.com/intl/cms/s/0/c4016952-0d4a-11e4-bcb2-00144feabdc0.html?siteedition=uk#axzz3ERm1TQfn>.

<sup>18</sup> Wakefield et al., *supra* note 14.

<sup>19</sup> Benn McGrady, *Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: Philip Morris v. Uruguay*, in *PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES 4–5* (Tania Voon et al. eds., 2012).

<sup>20</sup> See Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 *U. PA. J. INT'L L.* 1 (2004), available at <http://scholarship.law.upenn.edu/jil/vol36/iss1/1/>.

<sup>21</sup> See *Philip Morris Brands SARL v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 57 (July 2, 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf>.

In the Australian case, the arbitrators may never reach the merits because they have split the case into a jurisdictional phase and a merits phase and PMI's jurisdictional claim suffers from the timing of its purchase of PM Asia. However, if the panel reaches the merits, PMI will still need to defend its claim that the regulations "substantially deprive" the company of the value of its shares, which are dependent on the use of the intellectual property of its products.<sup>22</sup> In responding to the further claim that the plain packaging regulations are not "for a proven public purpose related to the internal needs of Australia" the Australian government may be aided somewhat by the fact that both the World Health Organization and the Secretariat of the Framework Convention on Tobacco Control have expressed support for the plain packaging initiative. On the other hand, PMI is also claiming that the regulation violates an umbrella clause of the investment agreement that requires Australia to uphold any obligation it has entered into with regard to investment with other parties, including the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).<sup>23</sup>

Regardless of the outcomes of these cases, there is little doubt that these claims are having a significant deterrent effect on other countries. In Namibia, substantially similar plain packaging regulations are law but have not been implemented based on fear of retaliation by the industry.<sup>24</sup> New Zealand is awaiting the outcome of the Australian arbitration before moving ahead with plain packaging.<sup>25</sup> For Uruguay, the potential cost of litigation alone nearly led to a reversal by the government. Even if PMI loses, prevailing governments will almost certainly still have to pay legal costs which average approximately \$8 million.<sup>26</sup> These costs are prohibitive for many governments in low and middle-income countries and will likely continue to dissuade many countries from adopting plain packaging.

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<sup>22</sup> Notice of Arbitration, Australia/Hong Kong Agreement for the Promotion and Protection of Investments, at 13 (Nov. 21, 2011), <http://italaw.com/sites/default/files/case-documents/ita0665.pdf>.

<sup>23</sup> Tania Voon et al., *Intellectual Property Rights in International Investment Agreements: Striving for Coherence in National and International Law*, in INTERNATIONAL ECONOMIC LAW AFTER THE CRISIS: A TALE OF FRAGMENTED DISCIPLINES 18 (C.L. Lim & Bryan Mercurio eds.) (forthcoming 2015).

<sup>24</sup> Sabrina Tavernise, *Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws*, N.Y. TIMES (Dec. 13, 2013), [http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?pagewanted=all&_r=0).

<sup>25</sup> Poulsen, *supra* note 4.

<sup>26</sup> Eric Crosbie et al., *Health Preemption Behind Closed Doors: Trade Agreements and Fast-Track Authority*, 104 AM. J. PUB. HEALTH 7 (Sept. 2014).

The potential stakes in terms of global public health of these cases are quite substantial. Currently, 80% of all deaths from non-communicable diseases (NCD) occur in low and middle-income countries. Tobacco use is one of the leading causes of these NCD deaths around the world. If current smoking patterns persist, tobacco will kill approximately one billion people this century, mostly in low and middle-income countries. As rates of smoking have declined in the United States and some other high-income countries, the industry has aggressively expanded its marketing efforts in low and middle-income countries.<sup>27</sup> Between 1970 and 2000, tobacco consumption more than doubled in the developing world. In Indonesia, for example, two-thirds of all adult males are smokers.<sup>28</sup>

Recent investment claims by the tobacco industry reflect its lack of success in using domestic courts and other forums to challenge regulation. The industry unsuccessfully sought to use the multilateral trade regime and the General Agreement on Tariffs and Trade (GATT) to open up markets in Southeast Asia.<sup>29</sup> Before the founding of the WTO, GATT arbitrators supported comprehensive tobacco control legislation and the industry subsequently shifted its focus to investment treaties.<sup>30</sup> In 1990, the GATT panel agreed that Thailand's ban on importing cigarettes violated the GATT. However, the panel also found that smoking constituted such a significant health risk and Thailand could restrict sales that ban advertising as long as it did not discriminate against foreign products.<sup>31</sup> The industry is also having limited success in suing in national courts, as evidenced by the Australian example and by a recent challenge in Norway. In 2012, the Norwegian courts ruled in favor of a challenged prohibition on the display of tobacco products at the point of sale under the European Economic Agreement.<sup>32</sup> As a result of these unfavorable rulings within domestic courts and beyond, the

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<sup>27</sup> M.J. Friedrich, *Tobacco Marketing Reaches Children in Developing Countries*, 310 JAMA 2030 (2013).

<sup>28</sup> Prabhat Jha & Richard Peto, *Global Effects of Smoking, of Quitting, and of Taxing Tobacco*, 370 NEW ENG. J. MED. 60 (2014).

<sup>29</sup> Glen Frankel, *U.S. Aided Cigarette Firms in Conquests Across Asia*, WASH. POST (Nov. 17, 1996), <http://washingtonpost.com/wp-srv/national/longterm/tobacco/stories/asia.htm>.

<sup>30</sup> Ross Mackenzie, *Why Bilateral Investment Treaties are the Last Refuge of Big Tobacco*, THE CONVERSATION (Aug. 16, 2012), <http://theconversation.com/why-bilateral-investment-treaties-are-the-last-refuge-of-big-tobacco-8880>.

<sup>31</sup> Frankel, *supra* note 29.

<sup>32</sup> Benn McGrady & Alexandra Jones, *Tobacco Control and Beyond: The Broader Implications of United States-Clove Cigarettes for Non-Communicable Diseases*, 39 AM. J.L. & MED. 265 (2013).

tobacco industry is increasingly turning towards the investor-state dispute settlement system to challenge national policies such as plain packaging.<sup>33</sup>

### III. EMERGENCE OF INVESTOR-STATE DISPUTE SETTLEMENT IN INTERNATIONAL INVESTMENT

The rise of investor-state dispute settlement is closely connected to the spread of bilateral investment treaties (BITs) in the late twentieth century. For a long time, diplomatic protection and investment contracts served as the basis for defending the interests of foreign investors. It was only after World War II that the modern system of investor-state dispute resolution took shape. National governments sought to secure greater legal protections for investors through bilateral agreements since the first BIT was signed in 1959 between West Germany and Pakistan.<sup>34</sup> Beginning in the 1990s there was a dramatic expansion in the number of BITs around the world.<sup>35</sup> While there were only approximately 100 BITs in 1980, there were 500 by 1992, 1,000 by 1994, 1,500 by 1998, 2,000 by 2000 and 2,500 by 2005.<sup>36</sup> The diffusion of BITs is closely associated with competitive pressures among developing countries seeking to gain access to foreign investment. Among the best predictors of BIT ratification is whether countries with a similar work force, infrastructure, and similar export profile had ratified them.<sup>37</sup> Countries are more likely to sign BITs when their competitors for investment have done so and when they are subject to IMF loan conditions.<sup>38</sup> The North American Free Trade Agreement (NAFTA) was one of the first trade agreements to

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<sup>33</sup> At the same time as these investment arbitrations are moving forward, a case is also being heard by a tribunal of the World Trade Organization in which a number of countries are claiming that Australia is in violation of its trade obligations under the General Agreement on Tariffs and Trade. See Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004); Tania Voon & Andrew Mitchell, *Implications of WTO Law for Plain Packaging of Tobacco Products*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES, *supra* note 19, at 109.

<sup>34</sup> Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990).

<sup>35</sup> ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATIES (2009).

<sup>36</sup> Beth Simmons, *Bargaining over BITs: The Regime for Protection and Promotion of International Investment*, 66 WORLD POL. 12, 31 (2014).

<sup>37</sup> *Id.* at 21.

<sup>38</sup> Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties 1960–2000*, 2008 U. ILL. L. REV. 265, 295.

incorporate investor-state dispute settlement as part of its investment chapter. Mexico had never before signed an investment treaty before NAFTA,<sup>39</sup> and two high-income countries, such as the United States and Canada, had never before entered into a comprehensive investment agreement.<sup>40</sup>

A broader effort to create a multilateral investment treaty governing investment, known as the Multilateral Agreement on Investment (MAI), was launched by the Organization for Economic Cooperation and Development (OECD) in 1995.<sup>41</sup> This effort faltered at the end of the twentieth century in the face of substantial opposition from a number of developing countries and civil society actors.<sup>42</sup> At the time, one of the strongest objections was that the proposed MAI gave foreign corporations the right to sue governments over health and other protective legislation.<sup>43</sup> Subsequently, trade agreements have become the most important multilateral mechanism for expanding BITs and the proposed Trans-Pacific Partnership (TPP) includes provisions for investor-state dispute settlement. Many of these investment chapters within trade agreements have largely mirrored the investor-state dispute settlement provisions initially put forward in the context of the MAI.<sup>44</sup>

Responding to recent concerns catalyzed by the claims brought by PMI, the United States Trade Representative (USTR) has suggested that the U.S. will support allowing public interest exceptions for health, safety, and environmental protection, but it remains unclear how broad or effective such exceptions might prove to be in practice. USTR initially proposed provisions which would have “explicitly recognized the unique status of tobacco products from a health and regulatory perspective” and would “include language in the ‘general exceptions’ chapter that allows health authorities in TPP governments to adopt regulations that impose origin-

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<sup>39</sup> William Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflection on the Australia-US Free Trade Agreement*, 39 VAND. J. INT'L L. 1, 15 (2006).

<sup>40</sup> J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 682, 692 (2007).

<sup>41</sup> Razeen Sappideen & Ling Ling He, *Investor-State Arbitration: The Roadmap from the Multilateral Agreement on Investment to the Trans-Pacific Partnership Agreement*, 40 FED. L. REV. 207, 209 (2012).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

neutral, science based restrictions on specific tobacco products.”<sup>45</sup> However, a subsequent proposal by the USTR merely suggested that a general exception that covered health would be included in the investment provisions which was viewed by many as a retreat from its earlier position.<sup>46</sup> It remains unclear what will ultimately emerge from the TPP negotiations and how such an exception might be interpreted in practice by different arbitral tribunals. Unlike the trade regime in which the WTO appellate body ensures some level of consistency across arbitration panels, there is no such possibility of appeal to a permanent body within the investment regime. Reversing arbitration decisions is still possible through the process of annulment but is quite difficult given that the grounds for granting an annulment are extremely narrow.<sup>47</sup>

#### IV. UNIQUE FEATURES OF ISDS IN THE INTERNATIONAL SYSTEM

International investment law is one of the few areas of international law in which non-state actors, defined as investors, are co-equals with states.<sup>48</sup> Among the many unique features of investor-state dispute settlement within the investment regime is the way it treats nationality. Almost universally, investment agreements provide greater rights and protections for foreign investors than they do for domestic investors. These rights are guaranteed only for those investors who are nationals of a specific country that has entered into an investment agreement with the host country. However, the requirements in terms of nationality are often quite formalistic based on criteria such as the place of incorporation.<sup>49</sup> Ownership can be indirect so long as beneficial ownership at relevant times is linked to a specific foreign country that has entered into an investment agreement with the host state.<sup>50</sup> Such foreign investors need not exhaust local remedies nor even engage with

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<sup>45</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, TPP TOBACCO PROPOSAL (May, 18, 2012), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/may/tpp-tobacco-proposal>.

<sup>46</sup> Andrew Mitchell, Tania S. Voon & Devon Whittle, *Public Health and the Trans-Pacific Partnership*, 4 ASIAN J. INT'L L. (forthcoming 2014).

<sup>47</sup> Simmons, *supra* note 36, at 38.

<sup>48</sup> Jason Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2010).

<sup>49</sup> Jean Francois Hebert, *Issues of Corporate Nationality in Investment Arbitration in Improving International Investment Agreements*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTION AND REALITY (Michael Waibel et al. eds., Kluwer, 2010).

<sup>50</sup> Robert Wisner & Nick Gallus, *Nationality Requirements in Investor—State Arbitration*, 5 J. WORLD INV. & TRADE 927, 934 (2004).

national judicial structures in any way before proceeding to international arbitration. Such arbitration claims need not involve home state support but can instead be brought directly and independently by a foreign investor.

Investment tribunals are significantly different from the arbitration process in related fields such as international trade. In the trade regime, there is greater transparency, the possibility of appeal to an established appellate body, and generally a multilateral rather than a bilateral treaty basis for arbitration claims. While multilateral trade disputes under the WTO peaked in the late 1990s, investment disputes under International Centre for Settlement of Investment Disputes (ICSID) are just now peaking. Another somewhat unique dimension of the investment dispute settlement regime is the North-South axis of most cases. Only 4% of the respondents in ICSID investment claims are high-income while 73% of GATT and WTO respondents were high-income.<sup>51</sup> In recent years investors have won 70% of known cases while since 1987 they won only 31% of such cases.<sup>52</sup> Some 29% of the claims related to the oil and gas sectors while 42% related to the service sector.<sup>53</sup>

Although a common rationale for BITs is that they are important for low and middle-income countries in attracting foreign investment, there is some debate over whether this is actually the case in practice. Some scholars have found little evidence of a positive effect on foreign direct investment (FDI) in states that adopt BITs.<sup>54</sup> However, Tim Buthe and Helen Milner found that more FDI is catalyzed by trade agreements that include strong mechanisms for credible commitment such as investor-state dispute settlement.<sup>55</sup> Perhaps comprehensive trade and investment agreements are more important inducements for foreign investment than BITs alone.

The uniqueness of the investment regime, especially in comparison with the trade regime, has been explained in functional terms by Alan Sykes among others.<sup>56</sup> Sykes argues that capital importers require credible commitments from governments that they will not engage in expropriation, and that a private

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<sup>51</sup> Simmons, *supra* note 36, at 19.

<sup>52</sup> Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010).

<sup>53</sup> Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 41 (2007).

<sup>54</sup> Yackee, *supra* note 48, at 399, 405 n.35, 409–10.

<sup>55</sup> Tim Buthe & Helen V. Milner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI Through International Trade Agreements?*, 52 AM. J. POL. SCI. 741, 745–46 (2008).

<sup>56</sup> Alan O. Sykes, *Public Versus Private Enforcement of International Law: Standing and Remedy*, J. LEGAL STUD. 631, 633–42 (2005).

right of action for damages is the most efficient mechanism for such a commitment.<sup>57</sup> By contrast, the types of commitments within trade agreements are better seen as between governments and, therefore the reciprocal possibility of trade sanctions is a better enforcement mechanism.<sup>58</sup> In this view, the purpose of investment agreements is to reduce the potential risk of expropriation for private investors so a private right of action that can trigger monetary compensation is a relatively inexpensive commitment device for states.<sup>59</sup> In trade, sanctions are used in part because they are more effective at inducing governments to comply with their obligations.<sup>60</sup> Furthermore, developing countries are likely to reject a system based on monetary damages within the trade regime.<sup>61</sup> Thus, trade remains essentially a domain in which states shape enforcement while investment is increasingly an arena of law in which non-state actors are the primary enforcers of state obligations.

While the investment regime might be functional from a certain perspective, it is also relatively unique in the way that it empowers non-state actors relative to states and in the way that it involves nation-states substantially limiting their own sovereign powers.<sup>62</sup> Another quite plausible assessment is that the investment regime is at the early stages of the type of transformation that the trade regime underwent in the wake of the establishment of the WTO.<sup>63</sup> While the trade regime is now more successful at incorporating concerns related to human health, this was not always the case, and it is not impossible that the investment regime could move in a similar direction.<sup>64</sup> Ultimately, the evolution of the investment regime is part of a much wider story about the rise of non-state actors that has been characterized as one of the most important dimensions of globalization.<sup>65</sup> The rise of powerful non-state actors in the twenty-first century has contributed to an important shift away from public authority at the national level.<sup>66</sup>

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<sup>57</sup> *Id.* at 631.

<sup>58</sup> *Id.* at 633.

<sup>59</sup> *Id.* at 662.

<sup>60</sup> *Id.* at 654.

<sup>61</sup> *Id.* at 660.

<sup>62</sup> See Joost Pauwelyn, *At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can be Reformed*, 29 ICSID REV. 386, 395 (2014).

<sup>63</sup> Wagner, *supra* note 20, at 5.

<sup>64</sup> *Id.* at 57–58, 67.

<sup>65</sup> Peter J. Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 VAND. J. INT'L L. 1101, 1101 (2013).

<sup>66</sup> *Id.* at 1102–03.

## V. THE FUTURE OF THE INTERNATIONAL INVESTMENT REGIME

Defenders of the current international investment regime argue that it should be viewed through the lens of private international law and that the defining features of arbitration should continue to be confidentiality and the autonomy of the disputing parties.<sup>67</sup> Under this view, deference to state regulatory policies is in tension with the tradition in commercial arbitration of the equality of arms. Yet as international investment claims increasingly reach matters of broader public concern such as health, many critics of the system suggest that it falls short of the standards of transparency and accountability that are expected in other areas of public law.<sup>68</sup> Critics of the current international investment regime have suggested a number of possible reforms to the system of investor-state dispute settlement. These proposed reforms range from greater transparency, to a permanent appellate body, to exclusions and safe harbors for health and other concerns, to more flexible standards of review of state regulation. Each of these approaches faces challenges and not one of these reforms alone is likely to fundamentally transform the current international investment regime.

The investment regime has recently made some noticeable shifts in the direction of greater transparency. The demands for greater transparency in the investment regime were sparked in part by the public response to a 2000 decision under NAFTA, *Metalclad v. United Mexican States*, where the tribunal found that expropriation includes “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of [the] property.”<sup>69</sup> In 2001, the NAFTA Free Trade Commission issued an interpretive note that stated that nothing in the agreement precluded parties from releasing documents submitted to or issued by tribunals.<sup>70</sup> While NAFTA arbitrations were subsequently subject to certain transparency requirements, it was only last year that the United Nations Commission on International Trade Law (UNCITRAL) adopted new

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<sup>67</sup> See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT. L. (2009).

<sup>68</sup> Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 84 (2013).

<sup>69</sup> ICSID Case No. ARB(AF)/97/1, Award, at 28 (Claims Resolution Trib. 2000), <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>.

<sup>70</sup> Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 KAN. L. REV. 1339, 1369 (2006).

rules designed to help expand transparency throughout its arbitration process. Under these rules, which will only apply to arbitrations based on investment treaties concluded after April 1, 2014, arbitration panels can accept submissions related to treaty interpretation from third parties as long as they do not “disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.”<sup>71</sup>

While transparency is often viewed as a key mechanism for fostering accountability, the case of investment arbitration may be more complicated. In recent years, efforts to foster greater transparency within ICSID have led to a range of institutional reforms that have failed to promote disclosure in cases in which the parties are most committed to secrecy.<sup>72</sup> In cases involving investments with long time horizons, where a particular party expects that it will lose, or that might send negative signals to investors about state credibility, the proceedings of arbitrations are still generally kept secret.<sup>73</sup> In addition, investment arbitration remains a very obscure arena of international law to most non-experts. Thus the feedback mechanism through which transparency catalyzes accountability in other sectors is limited by the lack of effective intermediary actors.<sup>74</sup>

Another proposed reform of the investment regime is the idea of creating a permanent appellate body or other mechanisms to foster greater consistency and predictability in the system. Currently, most BITs give the choice of forum between UNCITRAL and ICSID exclusively to the investor bringing an arbitration claim.<sup>75</sup> Some scholars have suggested that there is increasingly movement toward a multilateral system within the investment regime that is grounded on bilateral treaties.<sup>76</sup> As the number of investor claims has increased dramatically, the inconsistency of decisions by

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<sup>71</sup> United Nations Commission on International Trade Law Rules on Transparency in Treaty-Based Investor-State Arbitration, G.A. Res. 68/109, at 8–9, U.N. Doc. A/RES/68/109 (Dec. 16, 2013).

<sup>72</sup> Emilie M. Hafner-Burton et al., *The Transparency of Investor-State Arbitration* 2–3 (Univ. Cal. San Diego Lab. on Int'l Law and Regulation, Working Paper No. 18, 2014), available at [http://irps.ucsd.edu/ehafner/pdfs/Transparency\\_in\\_Arbitration\\_2014.pdf?abstractid=2132948](http://irps.ucsd.edu/ehafner/pdfs/Transparency_in_Arbitration_2014.pdf?abstractid=2132948).

<sup>73</sup> *Id.*

<sup>74</sup> David Gartner, *Uncovering Bretton Woods: Conditional Transparency, the World Bank, and the International Monetary Fund*, 44 GEO. WASH. INT'L L. REV. 121, 141–42 (2013).

<sup>75</sup> David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513, 524 (2009).

<sup>76</sup> See, e.g., Stephan Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 94–96 (2011) (finding a functional equivalence between the bilateral investment regime and a multilateral system).

investment arbitration panels has also become more widespread.<sup>77</sup> One possible response to this dynamic is the creation of an independent appellate body with the power to review arbitration awards similar to that which already exists within the WTO.<sup>78</sup> While such an appellate body could make a real contribution to the consistency of investment rulings, it is not clear that it would be any more protective of public health regulations, and many scholars argue that it is ultimately unlikely to happen.<sup>79</sup>

Another approach to reforming the investment regime that seems to be gaining some traction is the idea of creating explicit exceptions and exclusions for government regulation of health and other areas. For example, the recent investment agreement between Australia and Singapore, and the recent agreement between Canada and China create a general exception for health and the environment based on Article XX of the GATT.<sup>80</sup> Article XX creates a general exception for regulations “necessary to protect human, animal or plant life or health.”<sup>81</sup> Despite the precedent from the trade regime for the adoption of an explicit health exception, the number of investment agreements which include such a provision remains relatively small.<sup>82</sup>

The most recently revised United States model BIT reflects to some degree this shift toward broader exceptions. The U.S. model BIT is highly significant because it generally serves as the template not just for U.S. negotiators but also for many other countries around the world in designing new BITs.<sup>83</sup> The 2012 version incorporates new language on environmental and labor issues and explicitly recognizes that state parties have the right to

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<sup>77</sup> Franck, *supra* note 53, at 44–47.

<sup>78</sup> Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

<sup>79</sup> *Id.*

<sup>80</sup> See Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?*, 39 *AM. J.L. & MED.* 332 (2013); Robert Stumberg, *Safeguards for Tobacco Control: Options for the TPPA*, 39 *AM. J.L. & MED.* 382 (2013).

<sup>81</sup> Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments art. 33, Can.-China, Sept. 8, 2012, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng>.

<sup>82</sup> Andrew Newcombe, *The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?*, in *IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS* 267, 268 (Armand de Mestral & Céline Lévesque eds., 2012).

<sup>83</sup> See Mark S. Manger & Clint Peinhardt, *Learning and Diffusion in International Investment Agreements* (2014), available at [http://www.uni-heidelberg.de/md/awi/peio/manger\\_peinhardt\\_26.08.2013.pdf](http://www.uni-heidelberg.de/md/awi/peio/manger_peinhardt_26.08.2013.pdf).

exercise discretion in terms of implementing environmental policies and regulations.<sup>84</sup> There is also new language on health that states, “except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”<sup>85</sup> Beyond these general exceptions, some scholars have suggested that investment agreements ought to explicitly exclude tobacco products from the coverage of the agreement.<sup>86</sup>

Another set of reforms that have been proposed by a range of scholars focus on the standard of review that arbitrators apply in evaluating regulations of national governments. Some have argued that strict standards of review are not well matched with important questions of national regulation and have suggested that there should be a “margin of appreciation” provided to national governments by investment tribunals.<sup>87</sup> One such formulation is the least restrictive alternative test which has been applied by arbitration panels in the trade regime and requires arbitrators to initially determine if the state is pursuing a permissible objective, whether those measures are necessary, and, finally, to analyze the possible alternatives to the challenged measure.<sup>88</sup> However, others have challenged the idea that more deferential standards of review are truly necessary or would even be effective in the context of the investment regime.<sup>89</sup> Another weakness of the margin of appreciation approach is that it may not be easily transferrable to the context of ad-hoc tribunals as reflected in the fact that so far investment tribunals that have utilized the margin of appreciation have applied different standards of review in practice.<sup>90</sup>

A related approach to limiting the discretion of arbitrators by establishing more flexible standards of review is to borrow from the arena of

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<sup>84</sup> Lise Johnson, *The 2012 United States Model BIT and What the Changes (or Lack Thereof) Suggest About Future Investment Treaties*, 8 POL. RISK INS. NEWSL. 2, 5 (Nov. 2012), <http://www.robertwraypllc.com/wp-content/uploads/2012/11/RWPLLC-POLITICAL-RISK-INSURANCE-NEWSLETTER-VOLUME-VIII-ISSUE-2-2.pdf>.

<sup>85</sup> U.S. DEP'T OF STATE, U.S. MODEL BILATERAL INV. TREATY at annex B. (2012).

<sup>86</sup> Stumberg, *supra* note 80, at 382.

<sup>87</sup> William Burke White & Andreas Von Staden, *Private Litigation in a Public Law Sphere: Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 344–46 (2010).

<sup>88</sup> *Id.* at 303–05.

<sup>89</sup> Justin M. Jacinto & Rahim Moloo, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, 2012 Y.B. INT'L INVEST. L. & POL'Y 391.

<sup>90</sup> Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545, 551 (2014).

administrative law and create new accountability mechanisms for the entire arbitration process. A number of scholars have highlighted the way in which the investment arbitration regime transfers power to expert decision-makers and lacks the mechanisms of political control that are required of similar expert bodies within the context of the nation-state.<sup>91</sup> To the degree that investor-state arbitration is emerging as an institutional structure similar to other international institutions, there is an argument for applying principles of global administrative law that include transparency, participation, and the right to appeal or seek further review.<sup>92</sup>

Broader participation could include allowing other non-state actors, beyond investors, to participate in the arbitration process. At a minimum, this might involve submitting amicus or other submissions to arbitration panels, but it could also involve a role for other non-state actors in appointing arbitrators or in bringing or defending claims more directly before such panels. In some limited arbitration cases, non-governmental organizations have also been granted amicus curiae status.<sup>93</sup> In the 2001 *Methanex Corp. v. United States* case under NAFTA, the arbitral tribunal declared that it had the power to accept amicus briefs based on the experience of the trade regime but rejected the request of non-parties to attend the oral hearings.<sup>94</sup> Later in 2001, the NAFTA Free Trade Commission confirmed that tribunals had the discretionary power to accept submissions from non-parties to the dispute.<sup>95</sup> ICSID panels historically refused amicus status to NGOs until a revision of its rule of procedure in 2006, which allowed NGOs to attend hearings if none of the parties objected,

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<sup>91</sup> Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391 (2012).

<sup>92</sup> Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, 8 Transnational Dispute Mgmt. (2011), available at <http://www.transnational-dispute-management.com/article.asp?key=1700>.

<sup>93</sup> See generally Alberto Salazar, *Defragmenting International Investment Law to Protect Citizen-Consumers: The Role of Amici Curiae and Public Interest Groups*, 19 L. & BUS. REV. AM. 183, 185–86 (2013) (discussing the law surrounding the participation of non-disputing parties in arbitration).

<sup>94</sup> *Id.*

<sup>95</sup> Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTION AND REALITY 253 (Michael Waibel et al. eds., Kluwer, 2010).

and allowed panels to accept written submissions from third parties under certain conditions.<sup>96</sup>

Given the somewhat strained claims to nationality involved in the PMI challenge to Australia, refining the definition of nationality within the context of BITs might be an important reform. Under the rules of the NAFTA Investment Chapter, for example, redress can be denied only “if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities” in the alleged home state.<sup>97</sup> Under ICSID rules, the nationality that determines jurisdiction is defined as extending “to any legal dispute arising directly out of an investment between a contracting state . . . and a national of another contracting state.”<sup>98</sup> Currently, nationality is determined largely by relevant national laws, but this leads to a great deal of inconsistency in the application of these rules and opens up the possibility of gaming the system through forum shopping or nationality shopping.

The claims brought by the tobacco industry have generated a substantial backlash and have increased the resistance of some states in signing on to new BITs.<sup>99</sup> Yet, even reforms that alter the terms and definitions of new BITs are unlikely to fundamentally re-shape the overall system, given the large number of existing agreements. As a result, there is growing interest in some quarters in the re-negotiation of existing BITs. While renegotiation by a handful of governments is unlikely to significantly shift the international investment regime, the European Union is interested in renegotiating the existing BITs adopted by countries in the region using the authority that was allocated to it under the Lisbon Treaty.<sup>100</sup> Since, collectively, the EU states are party to more than 1,200 BITs, such an intervention by the EU holds the potential to change as many as half of all existing BITs.

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<sup>96</sup> Patrick Dumberry & Érik Labelle Eastaugh, *Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 360, 366 (Jean D’aspremont ed., Routledge, 2011).

<sup>97</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

<sup>98</sup> International Centre for Settlement of Investment Disputes, ICSID Convention, Rules, and Regulations (2006), [http://www.sloarbitration.eu/Portals/0/Arbitrazno-pravo/CRR\\_English-final.pdf](http://www.sloarbitration.eu/Portals/0/Arbitrazno-pravo/CRR_English-final.pdf).

<sup>99</sup> Benn McGrady, *International Investment Law*, in REGULATING TOBACCO, ALCOHOL, AND UNHEALTHY FOODS: THE LEGAL ISSUES 1–4 (Tania Voon et al. eds., 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2309486](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309486).

<sup>100</sup> See August Reinisch, *The EU on the Investment Path-Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements*, 12 SANTA CLARA J. INT’L L. (2014).

## VI. CONCLUSION

The emerging system of investor-state dispute settlement is one of the most dramatic examples of the growing influence of non-state actors in shaping the international system in the twenty-first century. While non-state actors are increasingly participants in a range of areas of international law and assuming more substantive roles within many international institutions, there is perhaps no other field in which non-state actors have such formal authority relative to states. As investment arbitration claims intersect more often with state regulatory policies, public health is becoming a central battleground in which private investors are directly challenging state action. The recent claims against Australia and Uruguay over plain packaging highlight the tensions within the investor-state dispute settlement system and are likely to catalyze further interest in reforming the current system to better accommodate competing interests related to public health.

Whether one views international investment as a unique arena requiring its own approach or a relatively new field which is likely to undergo an evolution similar to the trade regime, investor-state dispute settlement is at a critical juncture. The past failures of multilateral efforts to shape the investment arena have given rise to an extremely fragmented system based largely on a patchwork of bilateral agreements. Yet given the global reach of many investors and the common regulatory challenges facing many states, investor-state dispute settlement is increasingly assuming many of the characteristics of a multilateral system, especially as it is incorporated into multilateral trade agreements. The challenges to plain packaging in Australia and Uruguay will almost certainly shape the response by national governments around the world to tobacco regulation. These arbitral decisions are likely to resonate far beyond the concrete dispute over plain packaging and influence the direction of public health regulation and the terms of investor-state dispute settlement in a range of areas. At the same time, these decisions and the broader public health concerns that they implicate could very well contribute to greater momentum for a comprehensive multilateral approach to private investment and public health.

