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How Investment Arbitration Imposes a Risk on Foreign Bribery Investigations

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Abstract

Investment arbitration could be used to deter countries from practicing their police powers, and particularly, investigating bribery suspicions. Once facing a bribery investigation, a foreign investor might submit an arbitration claim against the host State, arguing that it violated the provisions of an international investment agreement between his home State and the host State. In certain cases, the host State might consider dropping the investigation if the investor would withdraw his arbitration claim. These arbitration claims resemble with so-called "SLAPPs" – Strategic Lawsuits Against Public Participation, which are filed by large corporations seeking to silence public scrutiny calling for regulation to be applied to these corporations. As with SLAPPs, strategic arbitrations against police powers (STRAPPs) aim to eliminate policies that contradict the claimant's interests, rather than achieving a favourable ruling.

Drawing from SLAPPs, the unwarranted effects of STRAPPs could be avoided by minimizing the effects of arbitration threats and claims against governments' police powers at an early stage of the dispute. This could be achieved by determining that unless the claimant has shown evidence of arbitrary or discriminatory treatment, a claim targeting governments' police powers does not reveal a prima facie cause of action – and should be dismissed swiftly. Alternately, an international fund that will provide financing to countries throughout their legal process may also help reduce such concerns. This solution could be of special significance to the OECD anti-bribery and integrity forum, as it would enhance the global combat against foreign bribery.

The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the OECD or of its member countries.

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1. Introduction

Several months after the public hearings of the arbitration between BSG Resources Ltd. and Guinea took place, several websites reported that Guinea examined dropping a bribery investigation against BSG. These developments raise concerns that Guinea was seeking an "easy way out" of the expensive arbitration proceedings with BSG by dropping the investigation.

This paper argues that investment arbitration could be used to deter countries from practicing their police powers, and particularly, investigating bribery suspicions. Once a foreign investor faces a bribery investigation by the state in which he invested (hereinafter: host State), he might submit an arbitration claim against the host State, arguing that it violated one or more provisions of an international investment agreement (IIA) between his home State and the host State. In certain cases, perhaps as with Guinea and BSG, the host State might consider dropping the investigation if the investor would withdraw his arbitration claim.

Arbitration claims targeting policies that are in the core of the doctrine of "police powers" are rarely successful. Still, IIAs often contain standards of treatment that create uncertainties about how an arbitration panel would interpret and apply them. Moreover, arbitration proceedings are timely and costly. Thus, inexperienced and poor governments may wish to avoid arbitration by terminating the initiatives that triggered the arbitration claim in the first place.

These arbitration claims resemble so-called "SLAPPs" – Strategic Lawsuits Against Public Participation (Canan, 1989; Pring, 1989; Pring and Canan, 1991, 1996). These claims are filed by large corporations seeking to silence public scrutiny calling for regulation to be applied to these corporations. Unfounded tort claims of millions of dollars have been filed against social activists and non-profit organizations that led public struggles on a range of issues, such as environmental protection. Defendants usually enjoyed limited resources, and often rather settle and agree to silence their criticism over handling an expensive lawsuit. Ultimately, SLAPPs weaken the ability of the public to influence legislators and regulators to act against such corporations.

In contrast to conventional SLAPPs, investment arbitration claims are filed directly against governments and aim to "silence" policies that contradict the claimant's interests, rather than achieve a favorable ruling. Using the terminology of SLAPPs, these claims could be described as STRAPPs – Strategic Arbitration Against Police Powers. Arbitration claims of this kind targeting bribery investigations (or, *STRAPPING down* bribery claims) could impose a significant setback on the combat against foreign bribery. Developing countries with limited resources might prefer to drop bribery investigations once the investor threatens with arbitration.

Drawing from SLAPPs, the unwarranted effects of STRAPPs could be avoided by minimizing the effects of arbitration threats and claims against governments' police powers at an early stage of the dispute. This could be achieved by determining that unless the claimant has shown evidence of arbitrary or

discriminatory treatment, a claim targeting governments' police powers does not reveal a prima facie cause of action – and should be dismissed swiftly. Alternately, an international fund that will provide financing to the countries throughout their legal process may also help reduce such concerns. This solution could be of special significance to the OECD anti-bribery and integrity forum as it would enhance the global combat against foreign bribery.

2. International Investment Arbitration and its Possible Implications on the Regulatory Space of Countries

IAs are treaties between two or more countries designed to protect the foreign investors. Though they are not always identical, they usually have a common basic structure. Almost all IAs include obligations to refrain from discriminating against foreign investors party to the agreement; prohibition on the expropriation of property of foreign investors for an improper purpose without proper compensation; and granting the investors fair and equitable treatment (hereinafter: FET). Finally, almost all IAs include investor-state dispute settlement (ISDS) mechanisms. These mechanisms allow foreign investors of one party to the agreement to submit arbitration claims against the other party, due to potential violations of the IIA (Newcombe and Paradell, 2009).

A central issue regarding the international investment legal regime is the concern for a regulatory chill: governments might refrain from adopting regulations that serve public interests in fear that such regulations would trigger costly and unpredictable investment arbitration disputes (See, e.g., Schill, 2007; Aaken, 2010; Brown, 2013; Tienhaara, 2018; Tobin, 2018). One possible cause for a regulatory chill is that IAs mandate minimum standard of treatment of foreign businesses that, in many instances, are not clear and definite enough. Economic analyses of law teach us that such uncertainty would cause potential injurers (in this case, host States) to take excessive care to mitigate risk of being found liable of negligence. (Cotula, 2014).

For example, almost all IAs include provisions that require contracting countries to provide foreign investors "fair and equitable treatment". However, concluding what constitutes "fair treatment" could be disputable (Chriki, forthcoming). In certain instances, countries might refrain from adopting measures out of fear that a tribunal would find an infringement of the fair and equitable standard – even if eventually it might have been found to be in line with this standard.

The novelty of this paper is its focus on cases in which the chilling effect of the arbitration claim seems to be the main goal of the claim – and not the possible compensation for alleged damages. These claims, referred here as "STRAPPs", have much in common with SLAPPs: the legal consequence of the claim is almost irrelevant – and its main objective is to prevent regulations that are contrary to the interests of the claimant.

3. Drawing from Conventional SLAPPs to International Investment Arbitration: Possible Examples for International SLAPPs against Police Powers

Uncovering SLAPPs is a difficult task since they usually end with a settlement between the parties before the courts issue a judicial decision. Thus, the phenomenon of SLAPPs is often illustrated through anecdotal evidence of social activists describing how they were required to cease their public activity in order to avoid expensive legal proceedings. Uncovering investment arbitration SLAPPs is even harder. Many arbitration proceedings are confidential, and fear of public criticism may incentivize government officials not to reveal that they agreed changing policies due to a threat of arbitration.

In this section I will describe the main characteristics of “conventional” SLAPPs, and present anecdotal evidence of the use of international investment arbitration to “*STRAPP down*” police powers in three different contexts: health policies against tobacco products; tax and anti-trust policies; and criminal investigations. These examples illustrate how investment arbitration may be used to circumvent states’ police powers.

Notably, many investment arbitration tribunals recognize the right of states to implement their police powers under customary international law, in a way that overrides the provisions of IIAs (Brower and Steven, 2001; Brower and Schill, 2008). Thus, when countries practice their police powers, their actions are not considered as a breach of the obligation to refrain from expropriation, unless they are carried out in a manner that discriminates between investors of one state and investors of another state, or between foreign investors and local investors. The police powers of states are mentioned in a number of international conventions, and have been recognized by international organizations such as the United Nations, and the OECD, which established the status of these powers as customary law. “Police Powers” often refer to the authority of the state to impose taxes, proceed with criminal proceedings against suspects, and apply policies designed to protect public health.

Given the importance of states’ police powers, the possibility of a new breed of SLAPPs that limit them warrants special attention. More specifically, the ability to “*STRAPP down*” criminal investigations carried on by host states with investment arbitration, may have far reaching implications on the ability of (poor) states to investigate suspicions of bribery. Once faced with such investigation, a foreign investor might attempt to shut it down by threatening long and expensive investment arbitration claims against the country. The following sections illustrate that this concern is not merely theoretical.

3.1 SLAPPs: Main Characteristics and Concerns

The main characteristic of SLAPPs is that they are filed in order to prevent public criticism against the claimants, and not necessarily to provide compensation for direct damages. In their study, Pring and Canan highlighted three typical stages of SLAPPs (Pring and Canan, 1996): First, citizens form an opinion on a certain issue that disturbs them and choose to express it publicly; secondly, these citizens are sued by parties who fear that a change in policy will harm their economic interests; and, finally, the defendant settles and agrees to silence his public activity in exchange for the termination of the claim. In

the exceptional case in which the legal proceedings continue, the defendant will usually prevail – though the legal proceedings might still cause the defendants and other citizens to refrain from participating in future public activity (Stein, 1989).

Therefore, SLAPPs cause chilling effect on public participation as a result of a claim filed against them, or out of fear that a claim would be submitted against them in the future if they act in the public sphere (Canan, 1989). A chilling effect on public participation significantly reduces the possibility for public activity that will propel regulatory changes, and undermines the democratic process as a whole, while imposing a burden on the freedom of speech.

While individuals enjoy freedom of speech and may exercise it to influence society, states do so by practicing their fundamental police powers. Similar to SLAPPs, threats of arbitration against states who practice their legitimate police powers could limit their most essential ability to influence society.

3.2 Evidence of STRAPPs: a New Breed of SLAPPs Against States' Police Powers

Though investment arbitration targets governments, and not individuals, several investment arbitration claims strikingly resemble “conventional” SLAPPs. Some of these claims are examined here to illustrate how investment arbitration could be used to undermine states' police powers.

3.2.1 Health Regulations: Investment Arbitration Against Tobacco Packaging

The World Health Organization (WHO) promotes policies aiming to reduce the positive image of smoking in order to reduce the volume of smoking (Blanke and Silva, 2004). To this end, the WHO called upon countries to adopt a policy that permits only the use of uniform tobacco packages, better known as "Plain Packaging" (World Health Organization, 2016). These include large verbal and graphic warnings that illustrate the dangers associated with smoking; a uniform color and font identical to all tobacco brands – thus eliminating the use of trademarks on tobacco packages; and the use of one type of cigarettes for each brand name.

Tobacco companies have opposed these regulations and employed a strong lobby in many countries to prevent it. This struggle was led by leading tobacco manufacturers such as Philip Morris (hereinafter: PM). One tactic that was reportedly used by PM to fight Plain Packaging or other similar policies, was to threaten countries that considered such regulations with investment arbitration claims valued in millions and billions of dollars (Weiler, 2010; Tobin, 2018).

Uruguay was among the first countries to impose significant restrictions on tobacco packaging, though its policies were less stringent than Plain Packaging (Mander, 2014). Later, Australia was the first country to fully adopt Plain Packaging (World Health Organization, 2016). Shortly after adopting these policies, PM submitted arbitration claims against both countries. PM's claim against Australia was rejected for technical reasons after several years of discussions (PM v. Australia, Jurisdiction, 2011). The claim against Uruguay was rejected after six years, following a lengthy legal process that

was funded by an external donor due to Uruguay's limited resources that, reportedly, almost led Uruguay to settle and cancel the regulations (PM v. Uruguay, Award, 2016). The Tribunal determined that Uruguay exercised legitimate "police powers" by adopting regulations designed to protect public health, and that therefore its policy did not violate its obligations under the IIA

As with SLAPPs, it seems that PM's strategy was not intended to merely obtain financial compensation. The legal costs of PM were valued at approximately 17 million dollars, while the requested compensation only reached approximately 22 million dollars – implying that unless PM perceived it had great chances to win the arbitration, its profit expectancy was negative. Seemingly, PM was not led by the financial value of the single proceeding against Uruguay, but rather another broader interest.

In addition, PM reportedly threatened other countries with limited resources with arbitration, which led to the deregulation of tobacco packaging (Tienhaara, 2018). Uruguay itself had almost decided to repeal the regulation it adopted until Michael Bloomberg's announcement that he would finance the costs of the arbitration process.

The effects of SLAPPs and PM's arbitration proceedings are thus quite similar. SLAPPs undermine the likelihood that a government would adopt regulations due to the curtailment of public activity by individuals in the society. PM's arbitration proceedings undermined the likelihood that countries would adopt regulations that are contrary to their interests (Tobin, 2018).

3.2.2 Tax and Antitrust Regulations: Noble Energy and the Regulatory Framework of Natural Resources in Israel

The discovery of several significant natural gas reservoirs in the economic waters of Israel since 2009 triggered several modifications of the regulatory and legal changes applicable to natural resources. Among others, these included a significant tax increase over profits made from natural resources; limitations over natural gas exports; and antitrust restrictions (De Vries, 2017; Reich, 2018).

Given the significant changes in the applicable legal environment, Israel was faced with the possibility that one of the main stakeholders, Noble Energy, would submit an arbitration claim against Israel. According to Israeli government officials, Noble Energy argued that Israel had frustrated its "legitimate expectations" which were protected according to an IIA between Israel and Cyprus (2015).

In order to avoid arbitration, Israel initiated negotiations with the relevant gas companies that culminated in an official government decision outlining a "gas framework". The gas framework was intended to enhance the development of the gas reservoirs by increasing regulatory certainty. To this end, it outlined core regulations of taxation, export, and gas pricing. In addition, it included a stability clause which declared that the Government would not initiate regulatory changes in issues relating to gas taxation, export limits and antitrust restrictions for a decade, and would oppose private bills relating to these issues throughout that period. The Government's decision raised certain legal difficulties and broad

public criticism, which was fueled by the Antitrust Commissioner's objection to the Framework. Consequently, a petition against the legality of the framework was submitted to the Israel High Court of Justice. Though most claims were rejected, the Court disqualified the stability clause, since it limited the regulatory freedom of future governments. Notably, several Justices have also implied that a stability clause could increase the risk of future arbitration proceedings.

When the framework was brought before the Economic Affairs Parliamentary Committee, several Israeli Parliament Members argued against it, pointing out that a better scheme may have been achieved had it not been for the threat of arbitration. Members of the team that led the negotiations acknowledged that the framework was the best possibility available given the circumstances. Interestingly, it seems that government officials were mostly concerned by the threat of arbitration even though they were skeptical that Noble would actually succeed. For example, the Deputy head of the Israel National Economic Council argued that “It was clear to us that arbitration proceedings are very long. They will take several years, and eventually we will probably reach the same point, or very close to the point where we are today, though suffering from a much more significant and stressful shortage of gas.” (Economic Affairs Parliamentary Committee, 2015)

These events demonstrate the risk of a possible regulatory chill imposed by STRAPPs on policies that are commonly considered to be at the heart of states' police powers: the ability to adjust taxes to a state's needs and to impose antitrust restrictions on monopolies. The resemblance to “ordinary” SLAPPs is quite clear: tax and antitrust regulations concerning the natural gas industry were under public scrutiny; once the government examined new regulations, Noble Energy threatened with international arbitration, aiming to achieve better outcomes in negotiations and reduce the effects of the public protest. Though the government seemed to estimate the risk of such arbitration as low, it was concerned by the lengthy and costly legal proceedings, especially due to the limited natural gas resources available at the time. Therefore, it settled with Noble Energy and avoided those legal proceedings – though acknowledging that a better outcome may have been achieved were it not for the threat of arbitration.

3.2.3 Avoiding Criminal Proceedings: The case of Foreign Bribery

Foreign investors who are subject to bribery investigations might have recourse to investment arbitration. Investors could claim, for example, that the investigations are led by political motives. Since tribunals rarely acknowledge the inadmissibility of investment disputes based on bribery allegations (Lamm, Greenwald and Young, 2014), these proceedings could be lengthy and, ultimately, expensive. Respondent States seeking to use bribery allegations as a shield in investment disputes have to prove such allegations (Lamm, Greenwald and Young, 2014). This is a difficult task, especially in early stages of the investigations. Therefore, in certain situations, states might prefer avoiding the costs and risks of arbitration and feel compelled to settle with the investor – offering termination of the investigations in return, for withdrawal of the claims of the investor.

The ongoing transnational foreign bribery investigations against Benny Steinmetz and his company,

BSG Resources (BSGR), provide a glimpse into this scenario. BSGR, a company controlled by Benny Steinmetz, acquired mining rights in a large iron ore deposit in Guinea in 2008, shortly before the death of the former Guinean, Lansana Conté. Following suspicions that BSGR maintained its mining rights by bribing Conté's wife, who seemingly influenced him weeks before his death to hand the mining rights to BSGR, criminal investigations have taken place in several jurisdictions – including in Guinea. Guinea published a preliminary report of the findings of the investigation in 2014, establishing its suspicions that BSGR's mining rights were acquired by bribe. Consequently, Guinea revoked BSGR's mining rights – and in response, BSGR initiated arbitration proceedings against Guinea through ICSID. As the bribery investigations proceeded, the arbitration tribunal concluded a 9 day hearing on merits and jurisdiction in June 2017 (ICSID). Several months later, Guinea reportedly examined dropping the bribery investigation against BSG ((*Billionaire Beny Steinmetz's BSGR will return to operate Simandou mine in Guinea*, 2017; Levy, 2017). Though to date both the arbitration and the legal proceeding are still on track, the reported negotiations elicit concerns that Guinea was seeking “an easy way out” of arbitration by agreeing to drop its bribery allegations.

Notably, the possibility of a settlement agreement that requires the host State not pursue criminal proceedings against the investor is not unprecedented. For example, in *Sanum v. Laos* (Sanum v. Laos, 2014), bribery suspicions that arose after the commencement of the arbitration led the parties to reach a settlement agreement that specifically stated, among other provisions, that “Laos shall discontinue the current criminal investigations against Sanum / Savan Vegas and its management or other personnel and shall not reinstate such investigations provided that the terms and conditions agreed herein are duly and fully implemented by the Claimants.”

4. Possible Solutions for Preventing SLAPPs and their Relevance to Investment Disputes

Coping with SLAPPs is challenging: it requires a mechanism that will deter claimants from filing a lawsuit in the first place. In addition, it requires a mechanism that will allow the defendant to remove the lawsuit filed against him quickly and inexpensively to reduce the chilling effect that accompanies the claim. It seems that a similar type of solution is necessary to reduce the chilling effect of STRAPPs: as in domestic SLAPPs, the chilling effect is due to the filing of the claim, and it is necessary to enable the countries to end the futile actions initiated against them within a short time and at low costs. Solutions adopted in the past to deal with SLAPPs may be helpful in finding a solution for STRAPPs.

4.1 Preventing SLAPPs

Several states in the U.S. have adopted "Anti-SLAPP" legislation, which allows quick settlement of SLAPPs and imposes the costs of the trial on the plaintiff (Ernst, 2015). A striking example of Anti-SLAPP legislation is the Californian law, which allows the quick dismissal of SLAPPs, while imposing punitive damages on the claimant (Tate, 2000). If the defendant succeeds in proving that he is being sued for exercising his right to freedom of speech, the burden of proof is transferred to the plaintiff. If the plaintiff fails to meet this burden, the claim will be dismissed. In addition, once a request

to dismiss the claim on these grounds is submitted, all disclosure proceedings are suspended – thus eliminating unnecessary hearings and expensive procedures. Finally, the court is required to conclude a hearing on the matter within 30 days after the request to dismiss the claim is submitted.

Pring presented an additional solution that suffers from practical difficulties and has not been adopted, to simply provide immunity to social activists (Pring, 1989, p. 13). Although this solution would completely block SLAPPs, it may be perceived as far-reaching as it blocks the plaintiff completely, even in cases where his claim may be justified. Alternatively, a state-backed fund designated to cover legal costs in the case of a claim relating to freedom of speech, as well as the determination of this type of claim as eligible for free representation by law, are also expected to reduce the chilling effect that may accompany claims SLAPP (Ernst, 2015).

4.2 Anti-SLAPP Solutions as Possible Mechanisms for Preventing STRAPPs

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

As far as investment law is concerned, the picture is more complex. Any dispute may impose a regulatory chill on the respondent country or third countries, regardless of its justification. Adopting anti-SLAPP-like solutions for any investment arbitration claim would seem to be over-reaching, as it may hinder the rights of investors more than necessary and may be impractical. Such solutions could significantly reduce the ability of investors to bring countries to arbitration, especially in cases where it is difficult to base their factual claims without discussion.

However, not every arbitration claim requires clarification of factual disputes between the investor and the state. Particularly, in *PM v. Uruguay*, the tribunal was hardly required for factual issues, and focused on Uruguay's authority to adopt a policy to protect public health. Evidently, the main dispute in this matter regarded the boundaries that should be imposed on the authority of states to protect public health. The tribunal determined that this authority was almost unlimited, given its significant component of the state's police powers.

Claims that target the right of states practice their police powers should not be treated the same as other claims. As demonstrated in *PM v. Uruguay*, these claims are usually unsuccessful, and therefore could cause an unwarranted regulatory chill both on the respondent and on other countries.

The adoption of procedural rules similar to those of the Anti-SLAPP legislation adopted in California, that will impose the burden of proof and punitive costs on the complainant; and reassure a hearing on the matter in a short period of time, may significantly reduce the chilling effect of such arbitration proceedings. Such rules could reduce the very concern of arbitration claims triggered by adoption of

measures that are in the country's police powers, since they impose the burden of proof on the claimant. In addition, they could shorten the period during which third countries would suffer from a regulatory chill. Finally, imposing punitive costs on the claimant would deter against the filing of claims designed solely to deter countries from adopting a policy that investment laws generally allow.

As mentioned above, in *PM v. Uruguay*, Uruguay tried to adopt a line of defense in this style and sought to dismiss the arbitration claim, arguing the tribunal had no authority to deal with the dispute because it concerned its ability to protect public health. The Tribunal rejected this argument, stating that the IIA on which the procedure was based did not stipulate that a tribunal would not discuss actions taken to protect public health, and therefore the tribunal must discuss claims that Uruguay had acted within the framework of its police powers only in its final award.

However, it seems that the tribunal could have reached a different conclusion and prevented the chilling effect that arguably lasted more than half a decade.

Arbitration tribunals enjoy the authority to determine whether they have jurisdiction over a certain dispute, and dismiss arbitration claims where they believe they lack jurisdiction (Nigel Blackaby *et al.*, 2009, para. 10.37). This decision could be affected by the Tribunal's determination of whether the proceedings may harm public policy considerations (Nigel Blackaby *et al.*, 2009, para. 2.117); and whether the claimant's arguments reveal a *prima facie* cause of action. The existence of a *prima facie* cause of action is commonly determined by examining whether the claimant's claims should be accepted, given the assumption that all of its factual claims are accurate (Sheppard, 2008, pp. 951–960).

These two exceptions may serve as a conduit for the import of an anti-SLAPP rule, similar to that in California, into investment arbitration. In view of the importance of the police powers of states, it seems that when the very existence of the arbitration process may harm the powers of the police of the state, this may harm public policy considerations. Accordingly, if the plaintiff fails to prove at this stage a reasonable chance of winning the claim, the tribunal could determine that the dispute is not arbitrable, and therefore is not within its jurisdiction. Furthermore, in view of the assertion that, as a rule, police powers override violations of the terms of IIAs, it seems that a claim against actions at the heart of the state's policing powers will usually not establish a cause for action.

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

While adoption of these solutions is in the discretion of tribunals, countries could also amend their IIA, in order to ensure a quick disposal of strategic arbitration claims. Such provisions may establish, for example, the following arrangement: once a request for arbitration is submitted, the respondent may argue that the Tribunal has no authority to adjudicate the dispute between the State and the Investor as it pertains to the country's police powers. As a result of the opposition of the state, the Tribunal would conduct timely hearings during which the investor would have to prove these claims do not touch the state's police powers, or that although they relate to these powers, the claim shows reasonable chances to succeed, since, for example, the policy discriminates against foreign investors. Finally, such a clause may also establish punitive damages against the plaintiff in cases where the State's arguments for dismissal are accepted.

The establishment of an insurance fund to provide countries a liability insurance or legal financing aid throughout arbitration may also help reduce the concerns of a regulatory chill (See Chriki, 2018). While insurance could mitigate concerns of a regulatory chill, an insurer might be concerned that insured governments would not act as carefully toward foreign investors as they would in absence of insurance. In theory, the insurance could exclude deliberate violations of IIAs. However, determining intent is likely to be impossible, and efforts to do so might undermine its purpose of enhancing predictability. Thus, insurers could use objective criteria to determine what types of measures should be covered by the policy. For example, the insurance could be limited to measures that promote clearly defined public interests such as bribery investigations. Such limited insurance could have an important role in the global combat against foreign bribery.

5. Conclusion

Scholars have been increasingly critical of the chilling effect that may accompany the international arbitration mechanisms that exist in IIAs. This criticism often calls for changes in existing IIAs, with recommendations to eliminate the possibility of investors to initiate arbitration proceedings against states for breach of the IIA. In practice, this solution was rejected by most countries. Even when states change their IIAs, they often choose to leave the arbitration clauses in them.

This study sought to point out that some of the chilling affects caused by investor-state dispute settlement mechanisms that exist in most IIAs are somewhat similar to SLAPPs. An analysis of three examples of possible STRAPPs makes it possible to discern that, as SLAPPs, these arbitration claims and threats were meant to deter host States and other countries from imposing regulations that hindered the investors interests – regardless of the legal outcome of such arbitration. Particularly, as in SLAPPs, PM seemingly coordinated efforts against countries with limited economic resources, that were less likely to enter arbitration, and may have been more likely to settle and cancel the regulations in exchange for cancellation of the arbitration proceedings against them. STRAPPs target policies that lie at the heart of states' police powers. Prospects of these lawsuits are relatively low, and so, as with SLAPPs there is a more significant interest to allow the dismissal of these claims at an early stage, before they generate a significant chilling effect on other countries.

This work adds a significant dimension to the discussion held so far among scholars regarding the chilling effect that may be caused by IIAs. By highlighting the similarities between STRAPPs and SLAPPs, this paper offers a number of relatively simple solutions that may reduce the chilling effect of international investment arbitration on countries that wish to practice their police powers: creating an option for an early dismissal of claims that target countries' police powers. In the context of foreign bribery, the proposed liability insurance or legal aid financing fund could be of special interest for the OECD anti-bribery and integrity forum. A fund or insurance that would support the contracting parties of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions could provide significant support to their efforts to investigate foreign bribery suspicions.

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