

Investment law is chilling health policy: fact or fiction?

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RESEARCH IN BRIEF

BACKGROUND

International investment treaties provide **Investor–State Dispute Settlement (ISDS)** mechanisms, which grant corporations standing to bring legal action directly against governments in order to guarantee the rights and protections they are afforded within the agreements.

ISDS has been used to **challenge public interest policies** including: including measures on **taxation**, chemical and **mining bans, environmental restrictions**, transportation and disposal of hazardous waste, **health insurance, tobacco**, the price and delivery of **water**, and regulations to improve the economic situation of **minority populations**.

OBJECTIVES

01.

Review existing peer-reviewed published literature to unpack the state of the knowledge on regulatory chill: how is it investigated? what evidence has been produced?

02.

Generate a conceptual framework to drive a cohesive research agenda going forward.

METHODOLOGY

Critical narrative review: reviews the most significant works in the field, while also seeking to develop conceptual innovation, typically resulting in a hypothesis or model.

Databases:

Web of Science, ProQuest, ProQuest Dissertations, Google Scholar:

Search terms

‘regulatory chill’ or ‘regulatory freeze’ in title, abstract, topic.

A total of **33 articles** were reviewed.

MAJOR FINDINGS

Mixed findings for the possibility of regulatory chill across analyses of treaties and awards (e.g. legal analyses), and analyses of policy-maker internalisation (e.g. key informant interviews). Consistent finding of regulatory chill in case study approach - but - usually selected *a priori* on assumption of regulatory chill.

POLITICAL AND ECONOMIC FACTORS

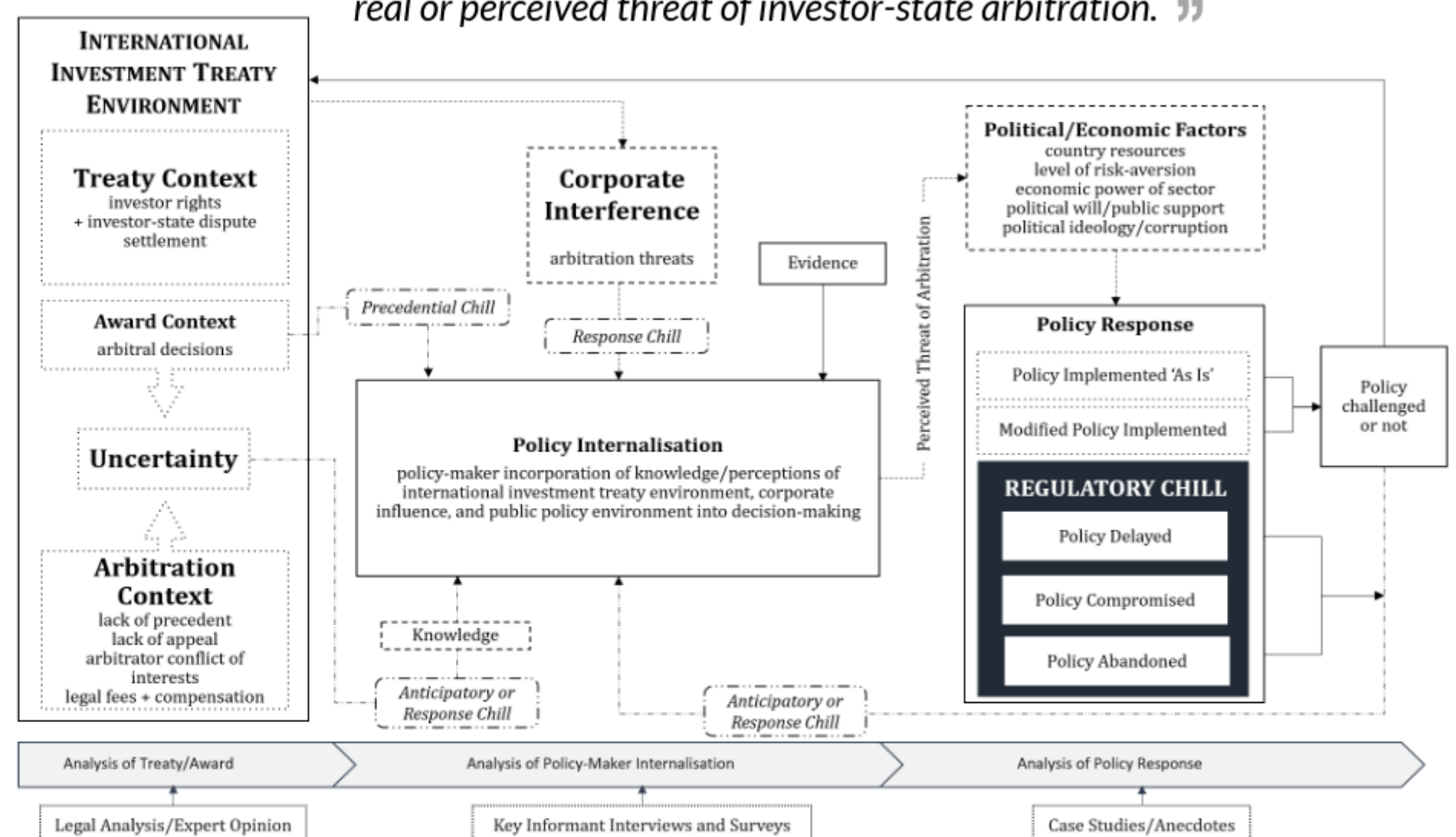
government capacity, desire to act, power of the sector being regulated, level of risk aversion within the state, ideological commitment to neoliberal policies, hiding unpopular domestic policies

LEGAL ENVIRONMENT

lack of binding precedent, lack of appeal process, conflicts of interest, perceived pro-industry orientation of tribunals, high cost of defense

CONCEPTUAL FRAMEWORK: REGULATORY CHILL

“*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.*”



CONCLUSION

“THE PERSPECTIVE OF REGULATORY CHILL OFFERED HERE IS THAT IT IS NEITHER AN INEVITABILITY NOR A FICTIONAL CONCERN, BUT RATHER ONE POSSIBLE RESPONSE TO A COMPLEX SET OF INTERACTING CONDITIONS THAT VARY ACROSS POLITICAL AND ECONOMIC CONTEXTS.”



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