

# Uncertainty, information and risk: how Investor-State disputes affect global policy diffusion\*

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I propose an informational mechanism to explain how multinational corporations (MNCs) use Investor-State disputes to slow down the global spread of costly regulations to their businesses. I rely on a multi-methods strategy to analyze my proposition in the context of the limited diffusion of certain anti-smoking policies around the world. First, the statistical analysis of novel, monthly-data for a sample of 95 countries from 1973 to 2016 reveals that anti-smoking policies challenged by international lawsuits diffused at slower speeds relative to comparable undisputed policies, while cases were ongoing. Second, primary and secondary qualitative sources and in-depth interviews demonstrate that uncertainty around these lawsuits induced both sued and third governments to delay the adoption of the challenged policies. Specifically, I show that governments inexperienced with international arbitration decided to wait for more information on the cases before deciding whether to adopt the disputed regulations. After information was revealed, developed countries estimated they could bear the risk of a potential costly lawsuit and promptly adopted the disputed policies, while developing countries did not. My findings indicate that MNCs can use international investment law to place countries in a world of uncertainty, and thus affect their sovereign powers by slowing down their policy-making processes.

## 1 Introduction

International investment agreements (IIAs) signed between countries allow multinational corporations (MNCs) to file arbitration claims against host governments if they think their investor rights have been breached. More recently, there has been a sharp increase in the number of disputes filed in response to policies and regulations adopted by host governments. This escalation of regulatory claims is puzzling at a first sight because it has been accompanied by a high rate of defeats for MNCs (Wellhausen, 2016; Pelc, 2017). What benefits do MNCs expect to derive from unsuccessful cases that do not yield compensation awards? One possibility is that foreign investors resort to international arbitration as a strategy to delay the diffusion of regulations they consider costly to their businesses. Firms

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have an interest in holding up the spread of new regulations if they represent a resource-consuming demand (Pfeffer and Salancik, 1978) that affects their costs to adapt to new regulatory environments. Therefore, even if the firm does not win the case and does not get compensation from it, it can still derive the tangible advantage of delaying the adoption of new resource-demanding regulations in markets of interest. The question then is: do Investor-State disputes delay global policy diffusion? And if so, under which conditions?

I argue that some governments, upon observing that a regulation triggered international arbitration against another government, are likely to take longer to adopt this regulation than they would have otherwise. International arbitration allows MNCs to slow down domestic policy-making processes because they can convey a strong signal to various governments at once. The signal's message is that adopting certain policies can lead to an international legal dispute whose potential costly implications are hard to estimate for some governments. Specifically, governments that are inexperienced with international arbitration will find that uncertainty about the case's consequences is too high to face the risk of being sued. Uncertainty is enhanced by the fact that the original case is filed against a country that proposes a new policy for the first time, so there is hardly a precedent on which governments can base their decisions. Thus, a claim against any one country may deter other countries from setting the same regulation, at least until more information about it is revealed. Once information is available, both the targeted respondent-State and other governments can then start to operate in a world of risk instead of one of uncertainty (Knight, 1921). This transition from uncertainty to risk means countries can perform calculations on the benefits of enacting a welfare-enhancing policy at a given point *versus* the potential costs that might arise from an arbitration that disputes it. In this world of risk, developed countries are more likely to follow through with the policy implementation because they estimate that they can bear the risk of suffering a costly lawsuit, now that they know what these costs are. This delay (or deterrence) in policy adoption because of the fear of getting sued by a foreign investor is often referred as the chilling effect of Investor-State disputes.

In order to verify the validity of the proposed theory, we need evidence indicating: (1) that disputed policies are indeed associated with slower diffusion processes while cases are ongoing (the presence of the chilling effect); (2) that these slower diffusion processes are the result of a group of countries' decision to delay the adoption of disputed policies, at least until more information about the case is revealed (the scope of the chilling effect). We can also take this opportunity to verify the extent to which the phenomenon of delayed adoption persists and affects countries' policy-making processes more generally (the depth of the chilling effect).

I present evidence for these claims by focusing on one specific set of regulations and by employing a multi-methods strategy. Specifically, I analyze the claims filed by the global tobacco manufacturer Philip Morris International against the governments of Uruguay (in 2010) and Australia (in 2011) in response to these countries' novel regulations for cigarettes' packaging. Such specificity allows me to test whether disputed anti-smoking policies diffused at slower rates in comparison to similar

undisputed anti-smoking policies, and to trace the steps governments took in the decision-making process that ultimately led a group of them to prefer to delay adoption, in the context of a worldwide movement of increasing stringency on anti-smoking regulations (Wipfli, 2015).

First, to test for the presence of the chilling effect, I coded data made available by anti-tobacco NGOs on the adoption of ten comparable anti-smoking policies across 95 countries from March of 1973 to December of 2016. I use event-history analysis techniques to measure the relative speed of diffusion of these ten anti-smoking policies, three of which have been challenged by Philip Morris. I demonstrate that the three packaging regulations targeted by international arbitration diffused more slowly than other seven undisputed anti-smoking policies, while cases were ongoing. I also show that important moments during the cases' development worked as mechanisms that revealed information, reduced uncertainty and prompted some countries to adopt the targeted policies. This approach allows me to analyze the pattern of adoption of comparable policies that should largely behave in the same way for a constant group of countries and while accounting for different diffusion starting times, if it were not for the fact that three of them have been disputed in international investment tribunals.

The approach just described indicates the presence of the chilling effect in the context of anti-smoking regulations, but it does not allow for testing the proposed informational mechanism. In order to do so, I collected and analyzed qualitative evidence from parliamentary discussions, ministerial declarations, reports of international organizations' meetings, specialized news sources and published experts' opinions for the sample of 95 countries used in the first stage. This evidence uncovers which countries decided to delay the adoption of the disputed anti-smoking regulations because of uncertainty around the probability of suffering a costly lawsuit. This analysis also demonstrates that countries that lack experience with international arbitration but that are wealthier promptly adopted the disputed policies once more information was revealed. On the other hand, countries more experienced with international arbitration, but that are less wealthy decided not to take further steps even after more information was available. The aforementioned treatment of qualitative evidence allows for defining the scope of the chilling effect, that is, which national-level characteristics are associated with more vulnerability to the phenomenon, and how the phenomenon affects countries differently.

Finally, I further analyze the validity of the mechanism and assess the persistence and extent of the chilling effect by performing an in-depth study of the Uruguayan case. *In loco* interviews with key actors involved with the Philip Morris case show that Uruguay's intentions to tackle smoking rates in the country were temporarily chilled through the works of international arbitration. This evidence also reveals that other countries observed the development of the Uruguayan regulations, manifested an intention to implement similar policies, but upon learning about the case, decided to wait for more information to be revealed before following through with their own implementation process. Moreover, the interviews indicate that Philip Morris' claim fundamentally altered the Uruguayan decision-making process in the realms of public health and of investment policy, making the government more cautious and thus, slower.

This study makes at least three contributions to the literature about the politics of Investor-State disputes. First, it provides a more precise test of the existence of the chilling effect phenomenon and of its effectiveness in deterring countries' regulatory ambitions (Cotula, 2008; Spears, 2010; Broude et al., 2016; Shoaf, 2013; Côté, 2014). Second, it develops a solid theory for why we see MNCs filing claims for which they have low chances of winning and getting compensation from. Third, it speaks to normative concerns about international investment law by indicating that MNCs can indirectly push some governments to delay welfare-enhancing regulations that impose costs on their businesses (Poulsen and Aisbett, 2013; Schultz and Dupont, 2014). More generally, my conclusions indicate that states' international commitments to economic openness can restrict governments' policy-making powers particularly with respect to their autonomy to set the timing of regulations' enactment. The effects of such restrictions persist to the extent that they shape states' policy-making processes by making governments more cautious and slower in effectively addressing welfare demands. This means that, while it is unlikely that Investor-State disputes can fully deter governments' regulatory ambitions, it can be effective in delaying them.

## **2 Foreign firms, state regulation and investment protection: a review**

There is a significant literature in international political economy and in international business that sees MNCs as active actors that are willing and able of influencing policy-making processes in host countries. The host state's political, social and economic environment imposes constraints on MNCs, especially when a new proposed regulation is identified by the firm as a resource-demanding requirement (Pfeffer and Salancik, 1978). MNCs try to shape policy in host countries not only when negotiating entry conditions (Agarwal and Ramaswami, 1992), but also after their costs are sunk (Fuchs, 2007; Jensen et al., 2012). MNCs might partner with domestic firms in order to benefit from the comparative advantage these players have in political interactions with the host government (Henisz, 2000), and to obtain fiscal and regulatory advantages within the government (Desbordes and Vauday, 2007). Foreign firms can also lobby host governments (Malesky, 2009; Doner and Schneider, 2000), pressure for policies of interest through the works of business associations and groups (Sell and Prakash, 2004), and establish supply chains to create a "common roof for protection" (Johns and Wellhausen, 2016). When MNCs engage with these or other options, they are trying to influence the business environment of host countries in order to protect the performance of their investments abroad.

One specific type of foreign investment protection is the one provided by the regime of international investment agreements (IIAs). IIAs are signed between two or more countries <sup>1</sup> to facilitate the

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<sup>1</sup>The United Nations Conference on Trade and Development (UNCTAD) regards both bilateral investment treaties (BITs) and multilateral treaties with investment provisions (TIPs) as belonging to the category of IIAs - *International Investment Agreements Navigator*: <http://investmentpolicyhub.unctad.org/IIA>

promotion of investment in a host country by offering protection to a firm of another nationality. The vast majority of IIAs include the provision of investor-state dispute settlement (ISDS) mechanisms<sup>2</sup>, which allow a foreign firm to file a lawsuit against a host country for alleged contractual breaches performed by the government, in international tribunals. This type of provision is unusual in international law because it deviates from the common state-to-state structure, as it happens to be the case for disputes of international trade, where aggrieved investors often have to lobby their governments to present a complaint against another state (Simmons, 2014; Allee and Peinhardt, 2014). The investor-to-state structure of ISDS grants MNCs the ability to sue a host government directly, and thus to affect this governments' calculations of costs and benefits that arise from the implementation of a particular act of the state. This act of the state can either be the direct takeover of a foreign firm's assets (direct expropriation), or the enactment of policies that hurt investors' interests without necessarily depriving them from their property rights (indirect expropriation). The latter type constitutes a category of political risk to investors (Jensen, 2008; Wellhausen, 2015) and a particular intricate issue in the regime of international investment law (Ruggie, 2007).

The regime acknowledges that states have the right to regulate in the public interest, and that such right should not be subject to investment disputes. However, the tension between states' regulatory powers and the eventual deterioration of the investment is inevitable in some cases. The UNCTAD recommends that IIAs distinguish between what constitutes regulation in good faith and what might be disguised as an attempt to perform creeping expropriation under the cover of rightful exertion of policy powers (UNCTAD, 2012). However, the organization recognizes that making such distinction is often difficult. The lack of precision for what constitutes creeping or regulatory expropriation allows foreign firms to use ISDS provisions present in IIAs to bring arbitration claims against host governments when these enact a new policy or regulation deemed as costly by the firm. Technically, IIAs allow for claims against creeping expropriation that clearly show opportunistic behavior. But this also means that firms can take advantage of this provision and file a case against policies enacted in good faith. MNCs have low chances to win these disputes, but this is not necessarily relevant from their standpoint (Pelc, 2017): it could be the case that the firm's goal does not encompass a successful outcome in the tribunal because the interest lies in delaying the adoption of policies that are costly to their operations.

The idea that IIAs constrain host states' regulatory capacity has been suggested by scholars of international law. For instance, Cotula (2008, 2014) discusses how investors seek stability in the host country's regulatory framework, especially for investments that are long-term and capital-intensive. Such demand can constrain governments from adopting regulations in areas like human rights and environmental protection, if these regulations are to be interpreted by investors as negative for the investment project. In a similar vein, Spears (2010) recognizes that the tension between the need for

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<sup>2</sup>A search performed in September of 2017 on the International Investment Agreements Mapping Project, administered by the UNCTAD and universities worldwide, indicated that nearly 95% of the mapped instruments contained an ISDS clause - *IIA Mapping Project*: <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>

promotion of foreign investment on one hand and the appropriate regulatory powers of the state to protect society on the other is inherent to the global economy, whose solution is to be found within the design of IIAs. This is akin to the approach taken by (Broude et al., 2016), who also identify a slow but increasing change in countries actively renegotiating provisions within IIAs that grant them more regulatory space. Along these same lines, Peinhardt and Wellhausen (2016) demonstrate that some governments have been successfully withdrawing or renegotiating their commitments relative to IIAs. This body of research shows that IIAs have the potential to constrain countries' policy powers, but that states also wish to keep their commitments that communicate a safe investment environment for foreign firms.

Despite the aforementioned literature that suggests the existence for the chilling effect phenomenon, empirical evidence that effectively identifies its occurrence is still scarce (Bonnitcha et al., 2017). Among notable exceptions is Van Harten and Scott (2016), who conduct over fifty structured interviews with governments' officials in the province of Ontario, Canada, and find that such actors have been increasingly taking the costs of potential arbitration into account when devising new policies, after having suffered backlash from the system. Schill (2007) and Shoaf (2013) are also important examples of attempts to identify whether IIAs constrain host countries' policy space, specifically with regards to environmental laws. More recently, (Pelc, 2017) has identified several trends within the regime of international arbitration that hint on the fact that MNCs have been probably deriving the benefit of dissuading regulatory ambitions in host governments. Taken together, all of these studies are important steps in the literature of the chilling effect, but they do not reach the point of empirically demonstrating the presence, the scope and the depth of the phenomenon. They also lack an explicit causal mechanism that elucidates how and under which conditions governments process the information about other countries being sued, and how they assess the costs they would have to face if they adopted the targeted policy and ended up being taken to arbitration themselves. This study proposes to precisely fill these theoretical and empirical gaps in the literature.

### **3 Argument**

The literature reviewed in the previous section raises the possibility that MNCs file international investment disputes to delay the implementation of a costly regulation in a host country and its spread to other jurisdictions. In this section, I develop an argument based on an informational mechanism to explain why such disputes can be effective in delaying policy adoption, from which I derive testable hypotheses to be addressed in the upcoming sections. In a nutshell, I argue that regulations challenged by an MNC in an international investment tribunal are likely to diffuse at slower rates relative to comparable undisputed regulations, while cases are ongoing. These slower speeds of diffusion are observed because some governments decide to wait to adopt a policy they would like to enact until more information about the case is revealed. While a case is ongoing, countries are in a world of

uncertainty, where they cannot estimate the benefits of promptly adopting a welfare-enhancing policy *versus* the costs that a potential lawsuit could bring. Uncertainty should be particularly prominent among countries that are inexperienced with international arbitration. Then, once more information about the case is revealed, these countries move into a world of risk where they can perform better costs *vs* benefits calculations, and decide whether to adopt the policy or not. Now that countries can estimate the costs of adoption, developed governments should be more likely to promptly adopt the policy because they understand they can bear such costs. On the other hand, developing countries' calculations should indicate that the costs of a potential arbitration are too high and thus, this group should be more likely to keep delaying policy adoption.

But how exactly can Investor-State disputes delay policy diffusion? I illustrate the answer for this question by describing the following sequence: one country (the first-mover) initiates domestic procedures to enact a policy it regards as beneficial. Other countries (potential followers) observe the first-mover's activity to develop the policy, and consider adopting the same regulation themselves. In the meanwhile, an MNC with investment interests in the first-mover and in potential followers sees the policy development, and foresees that the policy will be costly to its business. Then, the MNC considers the strategies it can employ to influence the policy-making process according to its interests. In terms of preferences, the MNC would ideally like that all countries where it has an investment interest to completely back down from the intended policy. But at a minimum, the firm would like to delay the adoption of the regulation for as long as possible and in as many countries as possible, in order to buy time to adjust to the policy's future implementation. The use of Investor-State disputes is among the strategies the MNC can employ to achieve an outcome that is located along the spectrum that goes from full deterrence to minimum delay of the policy's adoption. These disputes can delay adoption in several countries at once because they can communicate a strong signal about a given policy to various governments at once. This signal informs that adopting that particular policy can lead to an international legal dispute whose potentially costly consequences are rife with uncertainty, and thus hard to estimate for some countries. This uncertainty reduces the benefits of fast adoption, and leads governments to prefer to wait to regulate the issue under dispute with the first-mover.

Delaying regulation in order to buy time for adjustment is a considerable benefit for MNCs. New regulations that change the business environment and require adaptation are resource-consuming demands for firms (Pfeffer and Salancik, 1978), whether they intend to comply or not with the new regulation. On one hand, if firms contemplate not to comply with the new regulation, they will still be facing costs with managing risks that did not exist before (Ritchie and Melnyk, 2011). On the other, firms that intend to comply with a new regulation may rationally decide for a strategy of delaying its adoption: if other firms comply first with the novel regulations, then there are examples of success and failure on which firms can base their decisions (Zhang and Greve, 2016). Of course, this behavior can ultimately lead to a collective action problem, in which no firm would take the first step in compliance. A potential solution would then be having a privileged actor providing the public good of delayed policy

implementation to all affected firms. This can be achieved by inducing the government responsible for generating the resource-consuming regulation to hold its implementation up. If the firm has global interests, then delaying the diffusion of the policy across several countries yields even greater benefits.

Because the MNC is aware of the benefits of delaying in-country policy implementation and its diffusion to other jurisdictions, I contend that there is an increased probability that it will start an international arbitration against a first-mover that proposes a resource-demanding regulation. As reviewed in the previous section, most IIAs allow MNCs to file claims against host governments to dispute the enactment of regulations based on the allegation that the policy in question is an indirect expropriation of the firm's investment, even if regulations are promoted in good faith. Once the case is filed, potential followers observe the arbitration because it is made public and because the information diffuses through several channels. A government official working in the Ministry of Foreign Affairs in Uruguay and an international investment lawyer with experience working for an Eastern European government mentioned, in independent interviews, that governments keep track of investment disputes filed against other countries, and specifically through their embassies<sup>3</sup>. Additionally, because the MNC is interested in discouraging as many countries as possible from following through with the same policy, it can promote press releases and media coverage to make the case as high-profile as possible.

The MNCs' lawsuit against the first-mover makes other governments decide to delay the adoption of a regulation because they are unsure about the total costs of a potential arbitration against themselves. It is difficult for them to anticipate what the outcome of the dispute will be, how much a potential compensation award will cost, how long the arbitration process will take, and how much the process' legal fees and expenses will amount to. Public records of investment disputes often display redacted costs and do not disclose information on the amount of compensation involved<sup>4</sup>. Furthermore, the case filed against the first-mover exacerbates uncertainty because it contests a novel regulation that is more likely to lack a precedent in previous decisions of arbitral tribunals.

Uncertainty around potential arbitration is thus widespread, but it is particularly prominent among countries that lack experience with this type of disputes because they are less likely to interact with investment lawyers and other experts that might have private information that can assuage the unpredictability of costs, and generally lack an apparatus to deal with arbitration. Additionally, from the pool of scarce information on costs, even the small portion that is known displays incredible variation (Gotanda, 2013; Franck, 2011). This means that the range of known costs is not particularly helpful for governments to estimate expected costs rising from arbitration *ex ante*.

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<sup>3</sup>Interviews 5 and 8.

<sup>4</sup>A search performed in September of 2017 on the Investment Dispute Settlement Navigator, administered by the UNCTAD, indicated that out of the 817 investment disputes currently mapped by the database, only 32% displayed the amount of compensation sought by the claimant. On the other hand, out of the 528 concluded cases so far, 89% of them revealed the amount of the compensation award ruled by the tribunal. These data demonstrate that information on potential costs is rather scarce by the time cases are filed by the claimant, and that the tribunal ruling works as a mechanism that reveals such information in most cases - *Investment Dispute Settlement Navigator: <http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts>*



Another point that merits attention is that an international lawsuit is not necessarily equally costly for MNCs and host countries. When asked broadly about the possibility of a regulatory chill in international arbitration, one lawyer specialized in the topic and working for a prominent international law firm, notes: *“In some instances, would-be-claimants will go ahead and file cases even with low chances of success, as they have little to lose and much to gain (...)”*<sup>5</sup>. This opinion is consistent with how IIAs’ provisions grant the upper hand in the procedures of international arbitration to MNCs (Bonnitcha et al., 2017), and indicates that investor-claimants are not always necessarily interested in obtaining compensation for damages from international arbitration. Delaying policy adoption and diffusion can yield tangible benefits for MNCs, even when the firm’s costs with the case are taken into consideration. Basically, the case’s proceedings, its associated legal fees and even the costs the investor-claimant has to bear from the free-riding of its competitors who will also enjoy the benefits of delayed regulation, are all offset by the benefits that slowing down the adoption of a policy by several countries yields.

To summarize, while the case disputing a novel regulation is being processed by the tribunal, it is difficult for potential followers to estimate the magnitude of the costs of a possible arbitration against them with precision. The scarcity of information surrounding the case, the immense variation in the cost range of known cases, and the lack of precedence around the case in question make it rational for a government to delay policy adoption until uncertainty is reduced. Most likely, uncertainty can be reduced once the tribunal decides about the original case, or in a particular turning point throughout the case’s development. More specifically, in a world of uncertainty, countries that lack experience with arbitration should be the most uncertain ones about the benefits of promptly emulating the originally challenged regulation.

Once information about the case is revealed, these potential followers enter a world of risk and thus can update their risk-reward estimates, and take a more informed decision about either adopting the regulation or to continue to delay its implementation. Developed countries should be more prone to adopt a disputed policy after information is revealed because their estimations should inform that they can bear the costs that a potential arbitration disputing such policy could bring. On the other hand, developing countries should be more likely to conclude that the costs of a potential arbitration are not worth risking and thus, they should tend to keep delaying the policy adoption.

Treating international arbitration cases as realms of uncertainty that reveal information as they develop relates to a long tradition in the social sciences to differentiate between worlds of risk and uncertainty (Knight, 1921; Keynes, 1921; Nelson and Katzenstein, 2014). While actors operating in a world of risk know the probability distribution of unforeseen events, actors in a world of uncertainty do not have a basis to establish what an objective probability distribution would look like. Hence, the decision-making process is much more intricate under uncertainty than under risk. If firms decide to

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<sup>5</sup>Quotes obtained from an online forum of UNITAR’s E-learning Introductory Course on International Arbitration: <http://www.unitar.org/unitar-and-international-law-firm-lalive-offer-online-course-introduction-investment-arbitration>

file an investment dispute that lacks a precedent and that posits costs that followers cannot estimate with precision because these are inexperienced with arbitration, then they effectively prevent several countries from being informed under a setting of risk, and instead place them in an environment of uncertainty. The uncertainty setting pushes countries to wait for more information to be revealed, and to abstain from adopting the regulation in the meanwhile. This temporary abstention from action yields the firm the benefits of delayed regulation, which buys it time to adjust to a new resource-demanding policy that it foresees it could spread to several markets where it has an investment interest. The benefit of delayed regulation compensates for the costs the firm will have with legal fees and proceedings involving the case, and also with the advantage it grants to its competitors who will also enjoy the payoffs of having more time to adjust to a new policy.

I have established that uncertainty surrounding an Investor-State dispute filed against a first-mover makes potential followers cautious about adopting the same policy, resulting in delayed policy adoption. Therefore, all else equal and within one specific policy domain, one observable implication of this process should be as it follows:

*H1: Disputed policies should diffuse at relative slower speeds than comparable undisputed policies.*

Additionally, we should expect variation across governments in terms of their likelihood to delay the adoption of the challenged policy, or, in other words, of their vulnerability to a chilling effect. While the case is ongoing, we should expect governments to vary in their vulnerability to a regulatory chill based on their experience with international investment arbitration:

*H2: Under uncertainty, the less experienced a government is with Investor-State disputes, the more likely it is to delay policy adoption until information is revealed.*

It follows from H2 that governments that have faced several lawsuits should be more likely to be impervious to the threat of arbitration, since they are able to estimate costs with more precision, even under a world of uncertainty. It is also likely that governments that have been taken to arbitration several times should have adopted internal procedures that allow them to reduce the marginal cost of each lawsuit, and therefore, their decision to adopt the disputed policy or not should not be strongly influenced by the possibility of suffering a lawsuit.

Now, once more information about the case is revealed, allowing countries to perform risk-reward calculations with more precision, we can expect countries to differ in their likelihood of promptly adopting the disputed policy based on their ability to bear the costs of a potential arbitration. Wealthier nations can arguably face these costs better than poorer nations, and therefore:

*H3: Under risk, developed countries should be more likely to promptly adopt the disputed policy.*

I now turn to the description of the empirical strategy employed to assess these hypotheses.

## 4 Data, Methods and Results

### 4.1 Overview

I test the aforementioned hypotheses in the context of the disputes filed by the global tobacco manufacturer Philip Morris International against the governments of Uruguay and Australia, in February of 2010 and in November of 2011, respectively<sup>6</sup>. Uruguay and Australia were the first-movers in the adoption of certain regulations that restricted the display of logos and brands in cigarettes' packaging. Uruguay implemented two new requirements: the single-presentation of all of a manufacturer's different brands; and graphic health warnings that cover 80% of the package, a significant increment over the previous best practice (50%). Australia introduced plain packaging, also known as standardized packaging. These policies were introduced in a context of increasing stringency in anti-smoking regulations around the world in the beginning of the 2000s (Wipfli, 2015). Several governments manifested their commitment to fight the number one cause of preventable death in the world (World Health Organization, 2008) by adhering to the World Health Organization's Framework Convention on Tobacco Control (in force since 2005), and by adopting various anti-smoking regulations to tackle the issue. The fact that the fight against smoking entails several different regulations that share important common attributes offers an interesting opportunity for analysis.

Anti-smoking regulations form a clear policy domain in which several policies are largely comparable. First, anti-smoking policies tend to be complementary, meaning that countries committed with the cause usually adopt several policies to effectively reduce smoking rates. Second, certain groups of anti-smoking policies display very similar characteristics in terms of interest by countries and of implementation complexity level. The FCTC publishes a Global Progress Report every two years in which it describes the progress each member-State has made towards compliance with the treaty's provisions. The reports from 2012, 2014 and 2016 (World Health Organization, 2012, 2014, 2016) compare compliance rates for different articles in the treaty and indicate that countries have been particularly committed with adopting regulations concerning protection from exposure to tobacco smoke (Article 8), packaging and labeling of tobacco products (Article 11), and sales of tobacco products to and by minors (Article 16). Following these three main groups of policies is tobacco advertising (article 13). This means that these characteristics make anti-smoking regulations, at least the ones that regulate

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<sup>6</sup>A Swiss subsidiary of Phillip Morris took Uruguay to arbitration under the International Center for Settlement of Investment Disputes (ICSID), as provisioned by the BIT signed between Uruguay and Switzerland and in force since 1991. In the Australian case, it was a subsidiary located in Hong Kong that took the country to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL), as enabled by a BIT enforced in 1993 between Australia and Hong Kong. Particularly interesting about this case is the fact that Philip Morris Asia (one of the companies under PMI's corporate group) conducted a restructuring process that allowed it to enjoy the protections of the aforementioned BIT with Australia.

smoking in public places, packaging, access by minors, and advertisement, largely comparable in terms of interest by countries and complexity of implementation.

Given these similarities, we can apply the following rationale: if there is a pattern of diffusion for several comparable anti-smoking policies, we should expect the novel Uruguayan and Australian regulations (which refer to packaging) to roughly follow a similar pattern for a constant sample of countries and while accounting for different diffusion starting times. However, because these particular policies have been legally challenged by Philip Morris in international tribunals and generated uncertainty around countries' risk-reward calculations, potential followers decided to wait to adopt these policies until uncertainty was reduced by some development in the cases. This means that, if there was a chilling effect generated by these cases, the policies introduced by Uruguay and Australia should demonstrate a slower pattern of diffusion relative to other non-challenged anti-smoking policies while cases were ongoing. I assess this possibility by estimating a series of survival models with a sample of 95 countries that yields comparable measures of speeds of diffusion for ten anti-smoking policies belonging to the groups of packaging, advertisement and bans on smoking in public places <sup>7</sup>.

Focusing the analysis on a single domain of policies also allows for more precision in disentangling the causal mechanism that drives the chilling effect. I perform this task in two steps. First, I use data collected from primary and secondary sources for the sample of 95 countries used to estimate the survival models to identify the potential followers who decided to wait to adopt Uruguay's and/or Australia's novel anti-smoking policies because of uncertainty. I then demonstrate that inexperienced countries with international arbitration (measured by the number of investor-State disputes a country has faced) were more likely to wait for more information before deciding to effectively adopt the disputed regulations. I also show that developed countries (measured by their GDP per capita) were more likely to promptly adopt the challenged policies once information was revealed. These findings establish the scope of the chilling effect in the context of anti-smoking regulations.

Second, I build a case study of the dispute filed by Philip Morris against Uruguay, which uses data obtained from in-depth interviews conducted with key actors involved with the case. The case study allows for tracing the process through which Uruguay reacted to the arbitration claims brought by Philip Morris step by step, and aggregates more evidence that countries in the region consulted Uruguay about their novel policies and the case it was responding in order to try to make a more informed decision about their own regulations. The case study also demonstrates that the claims affected Uruguay's policy-making process by making both the Executive and the Legislative powers overall more cautious and thus, by slowing down the elaboration and implementation of public health regulations and of investment policies. These findings hinge on the fact that the chilling effect generated by Investor-State disputes can have deeper effects for some countries.

Challenges with empirically assessing the chilling effect phenomenon are abundant (Tienhaara,

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<sup>7</sup>Data on adoption for policies restricting the access to cigarettes to minors was not available.

2011; Bonnitcha et al., 2017). A pure quantitative approach would be appropriate to determine the global extent of the phenomenon for a given group of policies, but it stumbles upon the difficulties of establishing countries' intentions to adopt the challenged policy in the first place, and also in capturing a phenomenon that should have happened, but it has not. Thus, qualitative evidence is necessary to get at potential followers' intentions, and also to the process through which they reacted to original claims against the first-movers. In other words, qualitative data provides evidence that potential followers decided to wait to adopt a desired policy because of the uncertainty around the costs of being sued, but it is not particularly useful to assess broader patterns of diffusion from which we would expect challenged policies to deviate from.

Therefore, by conducting an empirical analysis comprised by three stages (a set of statistical models, the systematization of qualitative evidence for a large-N sample, and an in-depth case study) as described above, this study overcomes part of the difficulties with the empirical study of the chilling effect, and helps the scholarship to get closer to establishing the phenomenon's existence, scope and depth, and its correspondent causal mechanism.

## 4.2 The presence of the chilling effect: measuring the speed of diffusion of anti-smoking policies

In order to test hypothesis 1, I use event-history analysis techniques to obtain relative measures of adoption speeds of ten comparable anti-smoking policies across countries. My starting point is the idea that anti-smoking policies should diffuse across countries. Shipan and Volden (2008) find that these policies diffused across cities in the United States between 1975 and 2000, and disentangle the mechanisms through which such diffusion happened. Their findings indicate that cities either learned from earlier adopters, reacted to economic competition

The novel, monthly-data coded for this study allows for analyzing how anti-smoking policies diffused globally for a sample of 95 countries in the period ranging from March of 1973 to December of 2016. The data has been obtained from the websites of two anti-tobacco NGOs: the Global Legal Center, who maintains the Tobacco Control Laws website; and the Canadian Cancer Society<sup>9</sup>. The sample is restricted to 95 jurisdictions because these are the ones for which comprehensive data on regulations' adoption was available. I coded the month and year in which each country enacted each of the ten anti-smoking policies being analyzed by this study. Out of these ten policies, seven refer to regulations not contested by MNCs through international arbitration, and three concern the initiatives that Philip Morris disputed against Uruguay and Australia. The seven undisputed policies were randomly selected across three groups of policies that are relevant for this study and for which data was available: labeling and packaging; marketing and advertisement; and bans on smoking in public places. The specific undisputed policies were: bans on smoking in restaurants and pubs; bans on smoking in public transport; bans on cigarettes' advertisement on TV and radio; bans on cigarettes' brand marking on physical structures; the prohibition of misleading packaging; the requirement for health warnings on packaging to include pictures; and the requirement for graphic health warnings (GHWs) to cover at least 50% of the package. The disputed policies are the Uruguayan requirement for GHWs to cover more than 80% of the package and the demand for single-presentation of a manufacturer's brands; and the Australian initiative for plain packaging.

I rely on the method developed by Mallinson (2016) to build continuous and comparable measures of the relative speeds of diffusion for the policies of interest. This method entails the estimation of one survival model for each anti-smoking policy being considered in the study, and more specifically, the use of the Weibull distribution for the calculation of the speed of diffusion of each policy. The Weibull distribution allows the hazard function to increase or decrease monotonically over time, or to be reduced to a flat exponential distribution if the hazard is not changing across time (Mallinson, 2016). As a result, I obtain one parameter for each anti-smoking policy under analysis that provides a measure of global adoption speed that is comparable among them. These measures are comparable because each resulting model is an intercept-only model, with the response variable being the time to adoption of the policy by each country. This technique also allows for adjusting the average adoption times to the right censoring of countries that have not adopted the policy by the end of the analysis period, and to account for different diffusion starting points.

Given that I have ten anti-smoking policies, I estimate ten survival models following the technique described above. The unit of analysis is country in all models. The dependent variable in each of these models is the duration in months from the moment the first country in the sample enacts the policy being considered to the point each other country has enacted the policy itself. In other words, the dependent variable captures the time until adoption for each follower in the sample relative to the

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<sup>9</sup> *Tobacco Control Laws*: <https://www.tobaccocontrollaws.org/> and *The Canadian Cancer Society*: <https://www.cancer.org/>

moment the first mover for each policy enacted the regulation. The resulting coefficient is akin to the average of time until adoption, but adjusted for the right censoring of countries that have not adopted the policy. All models have the dependent variable right-censored in December of 2016: if a country has not adopted a policy by December of 2016, it is considered to have “survived”.

Results from the estimation of the survival models are presented in Figures 1 and 2, for clarity purposes<sup>10</sup>. The graphs plot the number of months elapsed since the moment the first-mover adopted a policy against the cumulative number of followers that emulated the policy. Each series in the graph represents one anti-smoking policy, and brings its correspondent rescaled speed measure between parentheses. The closer the speed measure next to the line is to 1, the fastest its diffusion has been. Undisputed policies are represented in gray lines, while the disputed policies are in orange. The vertical lines along the x-axis mark important moments in the cases’ development, as indicated in each figure.

Figure 1 displays the speed of diffusion for the seven anti-smoking policies not challenged by arbitration and the two novel policies proposed by Uruguay<sup>11</sup>. These were adopted by the country in June of 2009 and disputed by Philip Morris with a notice of arbitration filed in February of 2010. The vertical line labeled as “*Claim filed*” indicates the starting point of the case, while “*Claim dismissed*” marks its conclusion in July of 2016, when the tribunal dismissed all claims brought by the investor and ruled in favor of Uruguay. The vertical line in between these two and labeled as “*WHO brief*” indicates the moment in which the World Health Organization filed an *amicus curiae* brief. According to ICSID’s arbitration rules, the forum in which the dispute took place, the tribunal may allow a non-disputing party to file a written submission regarding a matter within the scope of the dispute. These written submissions aim at assisting the tribunal with determining a factual or legal issue related to the case. In the Uruguayan case, the submission aimed at providing the tribunal with general evidence about the effects of packaging standards on reducing tobacco consumption, and also on the health risks and on the global burden of disease associated with smoking, all of which were questioned by the claimant in the process. The WHO also provided facts concerning the status of tobacco control globally, in face of the investor’s allegations that Uruguay’s measures surpassed expectations concerning regulation. Therefore, the WHO’s brief marks an important point in the case’s development because it reveals information that helps to assuage uncertainty for potential followers. The international organization supplied information that contested part of the factual claims made by Philip Morris, which arguably weakened their case and thus, made it less likely to result in a costly compensation award to be paid by the respondent state

The speeds of diffusion calculated for each policy conform to expectations in the Uruguayan case: using a standardized scale that ranges from 0 to 1, “*Size of Warning ≥ 80%*” displays the slowest rate of diffusion (0). Conversely, “*Size of Warning ≥ 50%*” is the policy that diffuses the fastest among

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<sup>10</sup>Regression outputs can be found in the appendix.

<sup>11</sup>For visualization purposes, the graph starts in January 1991.

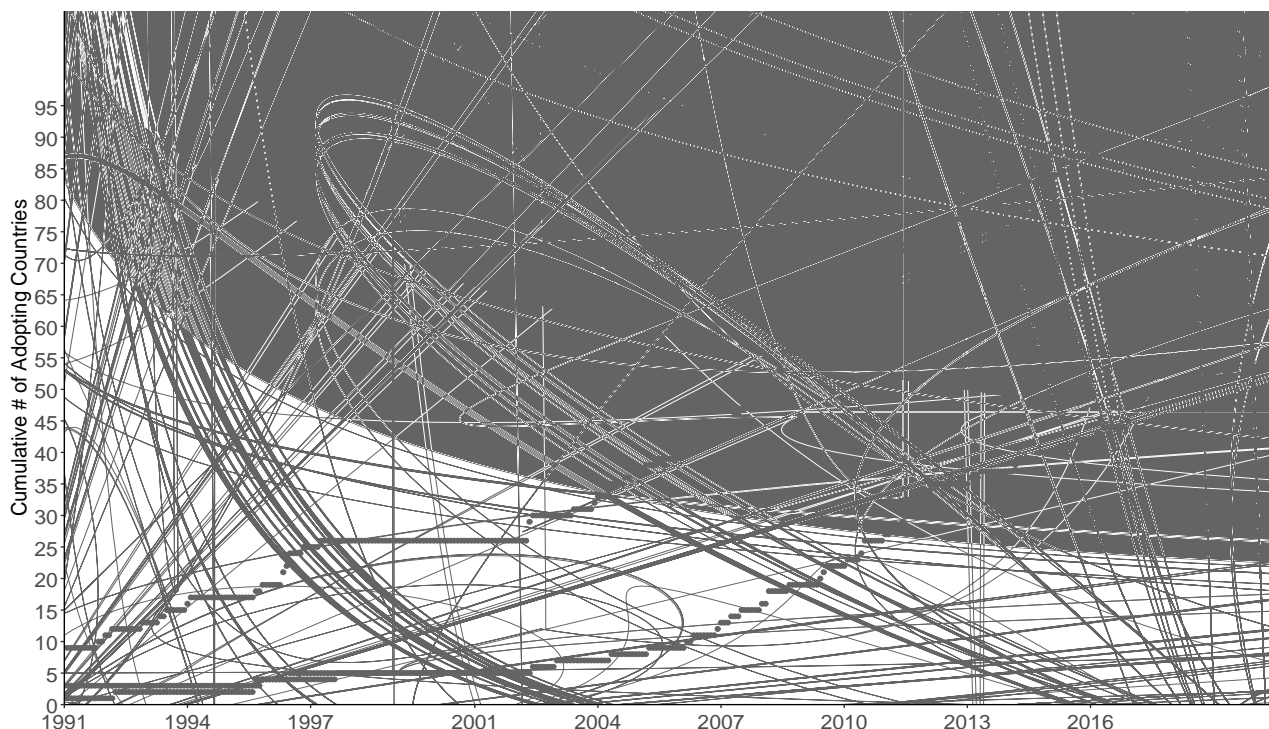


Figure 1: *Plot of the cumulative number of adopting countries since first adoption for seven unchallenged anti-smoking policies (in gray) and for “Size of Warnings  $\geq 80\%$ ” and “Single-Presentation” (in orange), disputed by Philip Morris in Philip Morris vs Uruguay. Numbers between brackets represent the speed of diffusion of each policy, where 1 is the fastest.*

the group (1). These results are interesting because “Size of Warning  $\geq 80\%$ ” and “Size of Warning  $\geq 50\%$ ” are the two most similar policies in the analyzed group, and yet, they show markedly different speeds of diffusion, which adds evidence to the claim that Investor-State disputes can slow down global policy adoption.

Additionally, the figure shows that all seven policies that were not challenged by MNCs in international tribunals (those in gray) continued their trend of diffusion even while the case was ongoing. That is, the fact that PMI challenged specific policies in an international investment tribunal did not seem to affect countries’ decisions to keep enacting unchallenged policies to tackle smoking. This is a first piece of evidence to the argument that countries perform risk-reward calculations that involve the possibility of being taken to arbitration when deciding to adopt a disputed policy.

Third, timing seems to play an important role in the policy-making process of countries in the sample. The figure shows that, after the case is filed, it takes several months for a country to follow Uruguay’s new standard: 90 months, to be precise. On the other hand, diffusion starts to pick up immediately after the WHO files its brief that weakens the firm’s claims, which arguably works as a mechanism that reveals information and reduces uncertainty. Then, when the tribunal rules in favor of Uruguay, there is a shy continuation of diffusion until the period of analysis ends. At this point, it is not possible yet to check whether more diffusion will take place, but it is interesting to point out



that diffusion does not occur when information about the case's consequences is lacking.

Therefore, despite some limitations, these results suggest that countries that wanted to significantly enhance the required size of graphic health warnings to the new threshold of 80% might have had their regulatory ambitions "chilled" by the effects of the Philip Morris vs Uruguay case. Obviously, stronger claims about this phenomenon require more data, and of a kind that allows to explore countries' intentions to do so, which will be analyzed in upcoming sections.

The case of the "*Single-Presentation*" requirement is more difficult because there is a completely lack of diffusion for this policy. On one hand, this pattern could indicate that followers did not see the policy as desirable. On the other hand, it could also indicate that Philip Morris has been extremely successful in delaying the adoption of this policy. At this point, the simple depiction of the policy's lack of diffusion (which obviously hindered the possibility of estimating its diffusion speed, and hence the legend (NA)) cannot reveal what the dynamics involved with single-presentation regulations were. Again, the need for more data that allows for capturing countries' intentions and decision-making processes is necessary to investigate the complete lack of diffusion for this specific policy.

Figure 2 brings again the speed of diffusion for the seven undisputed anti-smoking policies displayed in the previous figures (in gray), but now in comparison with the new Australian regulation demanding plain packaging for cigarettes (in orange). Once and again, the vertical lines on the extremes represent the case's initiation (in June of 2011) and ruling (in December of 2015). Contrary to the Uruguayan case, the claims against Australia were dismissed by the tribunal in the phase of analysis of jurisdiction and admissibility. The case's actual conclusion took place recently, in July of 2017, when the tribunal decided on the allocation of costs between the parties. Therefore, the claims against Australia were never evaluated in terms of merit, which does not mean that there was not uncertainty around it throughout its development.

From the graph, it is clear that the case against Australia did not preclude undisputed anti-smoking policies (in gray to keep diffusing, which indicates that, overall, countries intended to promote regulations to reduce the number of smokers. Then, Philip Morris files the case only two months after Australia enacts its plain packaging regulation, and while the case is ongoing and uncertainty is high, there are not any countries that adopt the policy. Once the tribunal dismisses the case's jurisdiction and admissibility, it takes only four months for the first followers to enact the same regulation, which yields a quite fast speed of diffusion (0.73). This observed pattern strengthens the idea that there was a group of countries that was interested in following Australia's novel regulation and that has been discouraged from doing so because of the uncertainty surrounding arbitration. A favorable decision to Australia allowed this group of governments to estimate that an eventual arbitration would entail a cost that they could bear, which motivated them to promptly adopt plain packaging.

As expected, the results from these analyses do not provide smoking-gun evidence that the policies disputed by Philip Morris against Uruguay and Australia generated a chilling effect. However, they do indicate that: (1) the pattern of diffusion of disputed policies is different from the pattern of

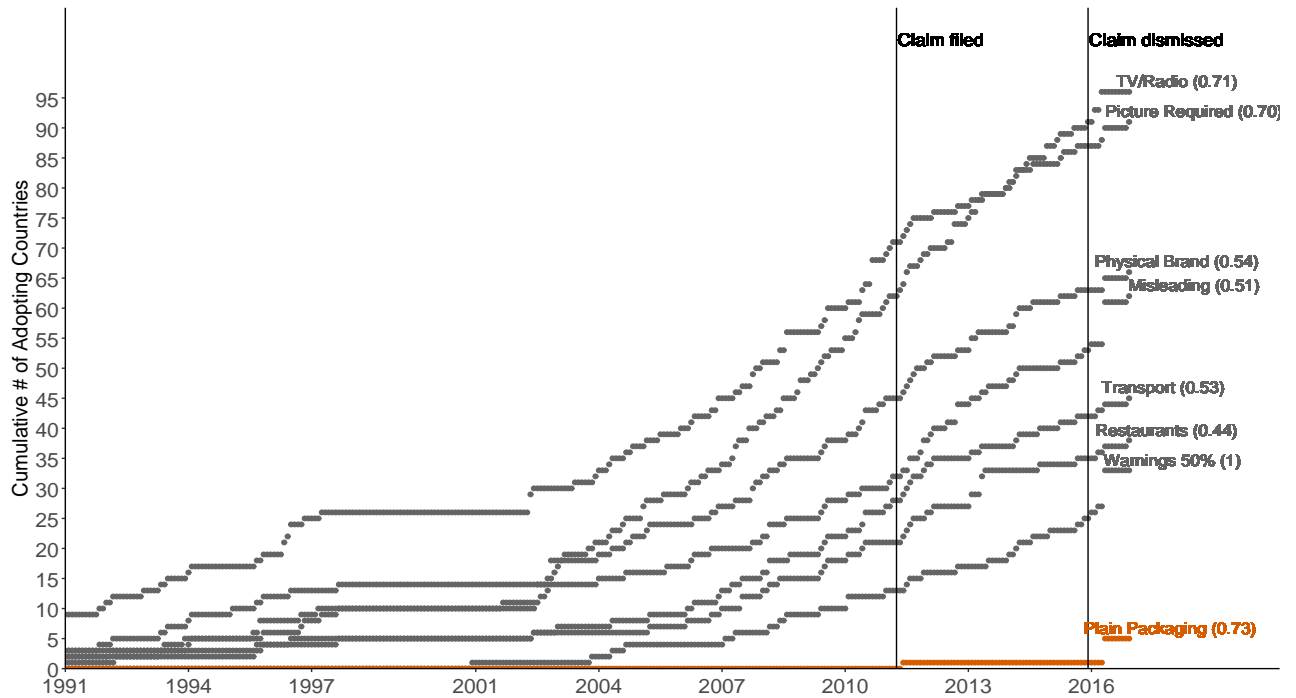


Figure 2: Plot of the cumulative number of adopting countries since first adoption for seven unchallenged anti-smoking policies (in gray) and for “Plain Packaging” (in orange), disputed by Philip Morris in *Philip Morris vs Australia*. Numbers between brackets represent the speed of diffusion of each policy, where 1 is the fastest.

diffusion of undisputed ones, while cases are ongoing; (2) information supplied either by the conclusion of the cases or by important turning points in the cases’ development influenced followers’ decisions regarding the time of adoption of challenged policies; (3) overall, countries were interested and engaged in promoting anti-smoking policies when Philip Morris’ claims hit, as indicated by the continued diffusion of policies not targeted by international arbitration. With the limitations of this first stage of analysis in mind, I now turn to the assessment of qualitative data in order to evaluate how Philip Morris’ claims placed both first-movers and potential followers in a world of uncertainty, affecting governments’ policy-making processes and slowing down the global diffusion of the disputed anti-smoking regulations.

### 4.3 The scope of the chilling effect: delayed regulatory ambitions

The previous section has shown that the pattern of diffusion of disputed regulations is different from the pattern of diffusion of undisputed ones, within a same policy realm, across time, and while cases are ongoing. Those findings also indicate that information seems to have played an important role in countries’ decision-making processes. In order to verify that this was the case, I rely on qualitative evidence. Specifically, I compiled and examined primary and secondary sources available online for the sample of 95 countries used in the first stage of this study to look for evidence that countries:

(1) were interested in adopting any of the disputed policies; (2) decided to wait to do so because they were uncertain about the costly consequences of a potential lawsuit against themselves. The sources consulted for this analysis entailed parliamentary discussions, ministerial declarations, reports of international organizations' meetings, specialized news sources and published experts' opinions<sup>12</sup>.

In analyzing the aforementioned sources, I first identified which countries demonstrated an interest in pursuing plain packaging policies inspired by the Australian and/or Uruguayan regulations. Interest in adopting these disputed policies might have been manifested through an official declaration, a consultation with other countries, or a debate introduced in the parliament, for instance. Countries for which there was no evidence of interest comprise a first group named *Disinterested*. This group is not relevant for the scope of this study because countries that are not interested in adopting the disputed regulations could not possibly be chilled. Of course, one could think that for some countries, the information about their interest to regulate was just extremely private and thus, not accessible through any of the researched sources, which would mean that the group of interested countries should be larger. However, if more countries were interested in regulating than what is showed by the collected data, this would mean that the chilling effect is underestimated rather than overestimated by this study. Another potential concern refers to the level of commitment of interested countries: how can we be confident that a country's demonstration of interest is credible? To be clear, for the purposes of identifying delayed adoption of regulation, interest does not need to mean resolve from the government. It could be the case that one party or a particular minister is interested in promoting the policy, and whether these actors have been affected by Philip Morris' claims is the focus of the second part of the analysis. Identifying how serious these actors' intent is is not a completely solvable issue, but in coding interested and disinterested countries, I set the bar high for evidence of interested countries. Therefore, the chances that I am underestimating interested countries are higher than the chances that I am overestimating them, which also means that I could be underestimating the chilling effect itself, but hardly overestimating it.

Having identified *Interested* and *Disinterested* countries, I then proceeded to investigate the reasons why interested countries did not adopt the novel Australian and Uruguayan regulations while the cases were ongoing (under uncertainty), and whether they proceeded with their intentions after more information was available or not (under risk). This analysis allowed me to identify variation across interested countries with respect to how the lawsuits affected their decisions to promote these policies and thus to classify them in three subgroups: *Risk-takers*, *Risk-averse*, and *Impervious*.

*Risk-taker* countries are interested countries that adopted the regulation shortly after more information about the case was revealed and uncertainty was reduced, but not before such moments. For this group, information about the success of Australia and/or Uruguay in their cases transformed the world of uncertainty into one of risk, where the benefits of adopting the regulation surpassed

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<sup>12</sup>A detailed compilation of the sources and their summaries is being organized to be available in an online qualitative appendix of this paper. For now, sources and summaries are available upon request.

the costs. These countries understand that they can face the risk of suffering a lawsuit for adopting a disputed policy because they can bear the costs that would stem from it, once they know what the costs would be. On the other hand, *Risk-averse* countries are interested countries that have not adopted the regulation until the end of the period of analysis. For this group of countries, more information also took them from a world of uncertainty to one of risk, but with the difference that the costs of enacting the disputed regulation were perceived as high. Finally, *Impervious* countries are the ones that demonstrated interest in promoting the policy, did not enact it until the end of the period of analysis, but for which the qualitative evidence shows that Philip Morris' lawsuits were not a fundamental reason for lack of regulation. Thus, similar to *Disinterested* countries, these jurisdictions were not subject to a chilling effect.

I here present results for the Australian plain packaging initiative<sup>13</sup>. Table 1 shows details about the interested countries classified into the three aforementioned subgroups for the Australian case and its plain packaging policy. Out of the 95 countries in the sample, I identified 41 that demonstrated interest in promoting the policy. The *Risk-taker* group is comprised by eight jurisdictions that adopted plain packaging regulations shortly after the case was decided in favor of Australia. The analyzed sources indicate that uncertainty about the costs that a potential lawsuit could bring played a fundamental role in making these countries cautious about promptly implementing plain packaging themselves. Within this group, the countries that were the quickest in manifesting interest in the policy were the countries within the United Kingdom (November of 2010)<sup>14</sup> and Norway (December of 2010). New Zealand (April of 2012), France (November of 2012) and Ireland (September of 2013) all manifested interest in the policy (referring to the Australian innovation when doing so) while the case was ongoing. The New Zealander case has been largely documented in other publications and it is often the poster-child of the chilling effect (Bonnitcha et al., 2017): the New Zealander government blatantly declared that it would wait for the Australian case decision before moving forward with its own regulation. Clear documented manifestations like the one from New Zealand are rare, but we can deduct that other governments also had their regulatory ambitions delayed by the effects of the claims against Australia by analyzing their cases in greater depth.

The case of **Ireland** stands out<sup>15</sup>. Records of debates in the Seanad Éireann, the Irish upper house, indicate that interest in plain packaging goes back to at least September of 2013, when members of the legislature discuss anti-smoking policies the country could adopt and clearly refer to

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<sup>13</sup>The analysis for the Uruguayan policies is still in progress.

<sup>14</sup>Countries within the United Kingdom have autonomy to set their own anti-smoking regulations. For example, each country adopted bans on smoking in public venues on different moments. With plain packaging though, policy paths have followed the same pattern for all jurisdictions.

<sup>15</sup>Given space constraints, I only report one case per group in the paper. However, evidence and summaries for the other countries will be available in the online qualitative appendix. For now, sources and summaries are available upon request.

Risk-takers: prompt regulation	Risk-averse: no regulation	Impervious: no regulation	
England	Burkina Faso	Argentina	Oman
France	Canada	Botswana	Pakistan
Ireland	Chile	Brazil	Peru
New Zealand	Hong Kong	Ecuador	Philippines
Northern Ireland	Mexico	Gambia	Romania
Norway	Panama	Iceland	Seychelles
Scotland	Singapore	India	South Africa
Wales	Thailand	Kenya	Sri Lanka
	Togo	Malaysia	Sweden
	Uruguay	Mauritius	Turkey
		Moldova	UAE
		Nepal	

Table 1: *Countries interested in plain packaging and their actions under risk (after information).*

the Australian regulation and to its potential benefits to reduce smoking rates among teenagers<sup>16</sup>. In December of the same year, we can find more debates within the legislature about adopting plain packaging, where representatives declare that “*We are in ongoing contact with our Australian colleagues to ensure our initiative benefits from their experience*”. There are also mentions to the English, the Scottish and the New Zealander ongoing initiatives at the time, which is evidence of a diffusion process occurring by learning, and seemingly clustering around developed countries with similar legal and cultural traditions<sup>17</sup>.

More importantly, the Irish records show the government’s awareness and concern about legal challenges in response to plain packaging regulations. One member of the legislature poses a question about the possibility of Ireland being sued and “liable for hundreds of millions of euros in compensation”: “*is that a credible threat or is it really an attempt to bully and scare us? (...) In a number of occasions I have read that the introduction of standardized packaging would damage Ireland’s reputation as a protector of intellectual property. Will the Minister comment on this?*”<sup>18</sup>. The discussion does not evolve much from there in that moment, but these records are evidence that members of the Irish legislature were both aware and concerned about the costly consequences of a potential lawsuit. The Irish Public Health (Standardised Packaging of Tobacco) Act 2015 is adopted by the Legislative power in March of 2015, but the Order that commences it is promulgated only in May of 2016 - that is, after the case was decided in favor of Australia and coinciding with the World Health Organization promotion of its *Get Ready for Plain Packaging* campaign<sup>19</sup>. Several discussions between March of

<sup>16</sup> *Seanad Eireann Debate - Thursday, 19 Sep 2013*: <https://beta.oireachtas.ie/en/debates/debate/seanad/2013-09-19/3/>

<sup>17</sup> *Joint Committee on Health and Children Debate - Thursday, 5 Dec 2013*: [https://beta.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_health\\_and\\_children/2013-12-05/3/](https://beta.oireachtas.ie/en/debates/debate/joint_committee_on_health_and_children/2013-12-05/3/)

<sup>18</sup> *Joint Committee on Health and Children Debate - Thursday, 5 Dec 2013*: [https://beta.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_health\\_and\\_children/2013-12-05/3/](https://beta.oireachtas.ie/en/debates/debate/joint_committee_on_health_and_children/2013-12-05/3/)

<sup>19</sup> *World No Tobacco Day 2016: Get ready for plain packaging* <http://www.who.int/campaigns/no-tobacco-day/2016/en/>

2015 and May of 2016 include manifestations that Ireland would not be intimidated by legal threats of corporations and that it knew how to defend itself in case a challenge was to arise<sup>20</sup>. Therefore, the study of the Irish case demonstrates that plain packaging adoption resembled a process of diffusion by learning that was affected by the uncertainty generated by the Australian case. More importantly, initial uncertainty about the potentially costly consequences of adopting the legislation was progressively reduced as: 1) the Australian case progressed and indicated that Australia had chances to be successful (interestingly, hearings on the jurisdictional claims of the case took place in February of 2015, one month before Ireland votes and adopts its own bill); 2) the case was effectively decided in favor of the State and the World Health Organization officially endorsed and promoted the policy.

The Irish case is representative of the pattern for *Risk-takers*. These are countries that have been effectively chilled by Philip Morris, who, by placing them in a world of uncertainty, prevented them from estimating the costs and benefits of promptly adopting the Australian policy. The counterfactual is that, if it were not for the arbitration claim, these countries would have adopted and effectively implemented plain packaging regulations earlier. It is difficult to estimate how earlier that would have been, but concern with legal challenges mentioned in parliamentary discussions and interesting timing concurrences between the case's development and governments' decision indicate that the arbitration claim against Australia delayed diffusion of plain packaging across these interested countries. From Philip Morris' standpoint (and from all tobacco manufacturers' that free rode on the claim), having eight developed countries delaying the adoption of costly policy was an effective way to save money.

Going back to Table 1, we can also find the second group of interest, the *Risk-Averse* group, who despite having demonstrated an interest in adopting plain packaging, has not effectively adopted the regulation until the end of period of analysis (and to be clear, not until this manuscript was being written in the Fall of 2017). The *Risk-taker* group is comprised by ten jurisdictions, and can be interpreted as a group for which the information revealed did not necessarily assuage the concerns about the costs of being sued.

I here report the case of **Singapore**, where members of the parliament inquired the Minister of Health about intentions to introduce plain packaging in January of 2013, while referring to the Australian process. The answer was: *“My Ministry is closely monitoring the developments in Australia and around the world on this plain packaging, with regard to the legal issues as well as its effectiveness. Tobacco control is and continues to be a public health priority in Singapore”*, which clearly indicates not only interest, but also attention and concern about legal challenges. The Minister of Health also makes more explicit references to the case brought by Philip Morris against Australia, citing the instrument that allowed it (the bilateral investment treaty signed between Australia and Hong Kong)

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<sup>20</sup> *D'ail Eireann Debate - Thursday, 26 Feb 2015*: <https://beta.oireachtas.ie/en/debates/debate/dail/2015-02-26/21/> and *Seanad Eireann Debate - Tuesday, 3 Mar 2015*: <https://beta.oireachtas.ie/en/debates/debate/seanad/2015-03-03/10/>

<sup>21</sup>. General concerns about suffering lawsuits because of anti-smoking policies were manifested in discussions within the context of the Trans-Pacific Partnership (TPP) negotiations. In that occasion, a member of the Parliament inquired the Minister for Trade and Industry about whether Singapore's tobacco control regulations could be at risk if Singapore were to adopt the TPP. The Minister answered that, unlike Australia, Singapore was not at risk because of its anti-smoking regulations since they did not include plain packaging. Nonetheless, the Minister continues: "*Singapore, together with several other countries, is watching this development closely.*"<sup>22</sup>.

Given this informational environment, perhaps it is not surprising that Singapore's first effective action towards plain packaging takes place in December of 2015, the month in which the Australian case was decided. The action was the launching of a public consultation, which was being prepared since March of 2015. The consultation ran until March of 2016, and new steps have not been taken so far. Concerns with lawsuits are also mentioned in more recent discussions<sup>23</sup>. The Ministry of Health has been restating its interest and commitment to implement plain packaging, though, following developments not only in Australia, but also in France and in the United Kingdom. Differently from these countries, though, for Singapore, the reduction of uncertainty was not enough to make them effectively adopt the legislation. Singapore has a GDP/per capita that is comparable to the ones of France, the United Kingdom and Australia. However, Singapore is much more reliant on FDI than any of these countries, which could be a source of concern making the country risk-averse. It is important to highlight that the costs of the Australian case have been redacted on the tribunal's decision, protected by confidentiality clauses applicable to investment arbitration in many cases. Therefore, from the government of Singapore's standpoint, the information that Australian won the case and did not have to pay compensation was not enough to make it prone to run the risk of suffering a lawsuit, because costs still seemed to high.

Finally, the *Impervious* group is formed by 23 countries, those who have demonstrated interest in the policy, have not adopted the regulation so far, but for which the evidence indicates that reasons other than concerns about international lawsuits caused them not to pursue the policy. Overall, the power of domestic constituencies that organize around tobacco-related activities seems to have been more decisive in stopping attempts of promoting the challenged anti-smoking policies for this group, which is manifested in Argentina, for instance, or by concerns about consistency with domestic law, like in the case of Sweden.

In **Argentina**, three plain packaging bills have been introduced to the Argentinian House of

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<sup>21</sup> *Plain Packaging for Cigarette Packs - 14-01-2013*: <https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00078453-WA&currentPub 4 T A&opiApicI 4 W A.1 ApicI -3-WA>

Representatives: one in August of 2015, another in May of 2016, and one more in July of 2016. All bills mention the regulatory processes ongoing in other countries, namely in Australia, the United Kingdom, France, Ireland and New Zealand, which reinforces the idea of diffusion by learning. However, we do not observe concern about the potential costs of adopting the policy, not even in the proposal that appears before the case against Australia is decided. The newest bills do not mention Philip Morris' legal challenge at all <sup>24</sup>. The oldest one alludes to the victory that Australia had against the tobacco industry, but it does not get specific about it. That is, unlike what we observe in Ireland or in Singapore, the Argentinian discussion around plain packaging does not seem to involve concern about being sued as a result of enacting plain packaging regulation. Therefore, Argentina was not subject to a chilling effect because the claim filed against Australia did not seem to affect actors' calculations in promoting the policy. As a matter of fact, the evidence points out to the strong role played by constituencies and representatives from the Northern provinces in the country, who heavily rely on tobacco-related activities. It is important to highlight that the strength of these constituencies prevented Argentina from ratifying the Framework Convention on Tobacco Control. The success of these groups' efforts rests on the argument that more anti-smoking regulations would contribute to the high unemployment rates and social unrest in the country, specially in its poorest region, which is precisely the North. It merits saying that Argentina has been the country that has responded to most investor-State disputes since the regime is in place. The country has adopted a singular method to deal with so many cases by establishing a government team that defends the State, instead of relying on foreign law firms. The years of a left-wing government that focused on domestic investment rather than on attracting foreign capital also made the government less concerned about the risk of being sued than we would have expected it for other countries <sup>25</sup>. Therefore, we have little evidence to believe that Argentina was chilled by Philip Morris' claims simply because the costs of a potential lawsuit were not relevant for the government.

These brief case studies illustrate the variation across countries' reactions to the claims filed against Australia and the effect it had in their calculations of promoting plain packaging policies. As expected, not all interested countries are vulnerable to a chilling effect, and among those who are, there are also differences in how uncertainty and more information affect their decision-making process of promoting a potentially costly regulation. To recap, in hypothesis 2, I state that the less experienced a country is with international arbitration, the more prone it should be to delay regulation until more information is revealed. Also, in hypothesis 3, I propose that developed countries should be more likely to promptly adopt a disputed regulation when they are moved into a world of risk, because they should estimate that running the risk of being sued is worth it given the benefits of enacting a welfare-enhancing policy.

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<sup>24</sup> *Bill Proposal No. 4608-D-2015*: <http://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=4608-D-2015&tipo=LEY> and *Bill Proposal No. 3084-D-2016*: <http://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=3084-D-2016&tipo=LEY>

<sup>25</sup> Interviews 10, 11, 12, 13 and 14 conducted in Argentina in July 2017. Notes available upon request.



The case studies suggest that hypotheses 2 and 3 are plausible, but we can also assess these claims more directly. Regarding hypothesis 2, I verify the number of international investment disputes each country in the sample has faced. The smallest the number of cases filed against a country, the less experienced with international arbitration it should be. It follows that less experienced countries should be the most uncertain about the costs that a unprecedented arbitration could impose. Thus, the *Risk-taker* group should display a lower average in the number of international arbitrations faced, followed by the *Risk-averse* countries. *Impervious* countries should display the highest number of cases on record, which reduces the marginal cost of an extra filed lawsuit. Then, once more information about the case is revealed and countries are able to calculate the costs and benefits of promoting plain packaging, we can observe whether they proceed with adoption or not. Then, according to hypothesis 3, countries that expeditiously follow through with procedures to enact plain packaging are those for which the costs of an eventual lawsuit by a tobacco company are smaller than the benefits of promoting a welfare-enhancing policy, and that these should be developed countries, measured by GDP per capita. Following this rationale, the group of *Risk-takers* should display a higher average GDP per capita than *Risk-averse* countries. For *Impervious* countries, GDP per capita should not be an informative factor, given that these countries are not affected by costs stemming from the threat of arbitration.

Table 2 displays the averages by subgroups of countries interested in plain packaging. Given the sample size and the nuanced nature of the outcome variable, performing a regression would be problematic, so I present descriptive statistics to reinforce the findings of the case studies. Albeit imperfect, this strategy represents a substantial improvement over other attempts to empirically assess the chilling effect. The numbers show that, as expected, the group of *Risk-taker* countries is much less experienced with responding international investment disputes than the other two groups: these countries, on average, have suffered 0.4 lawsuits since the first public investment dispute was filed in 1987 and up until December of 2016. Therefore, these are countries for which information would be particularly valuable for them to make an informed decision before taking further steps in the regulatory process. After the tribunal rules that it does not have jurisdiction to arbitrate the case against Australia, we observe these countries promptly adopting plain packaging. As expected, these countries also comprise the wealthiest group among interested countries (average GDP per capita of US\$ 55,590), meaning that they should have the resources to sustain the costs of an eventual arbitration. That is, *Risk-taker* countries are the ones that, after having proper information, see the benefit of promoting a welfare-enhancing regulation surpassing its potential costs, and assess that the risk of getting sued is manageable. Aware of how the case of interest has unfolded, these countries understand that they can afford a lawsuit that is expected to last a given time, and one in which they have good chances to win. For *Risk-takers*, the chilling effect operates in a way that it delays the adoption of the policy of interest, which is in the interest of investor-claimant.

For the *Risk-averse* group, we also see the descriptive statistics behaving as expected. These are countries that are, on average, more experienced with arbitration (6.4 lawsuits from 1987 to 2016)

Indicator	Risk-Takers	Risk-Averse	Impervious
Average of Lawsuits (1987-2016)	0.4	6.4	7.8
Average GDP per capita (2011-2016)	U\$ 55,590	U\$ 19,508	U\$ 12,364
Number of countries	8	10	23

Table 2: *Indicators for groups' experience with arbitration and level of development*

I recall that these are countries that demonstrated interest in adopting the policy but which have not taken further steps in actually enacting it even after information about the Australian case was revealed. Having been in the shoes of a respondent-State more times in the past, the marginal value of revealed information is arguably smaller than it is for *Risk-taker* countries. After the case's decision, this group surely has a better idea of the distribution of costs and benefits, but it is not enough for them to forego to risk of being sued: these countries conclude that they still cannot afford potential costs derived from regulating the issue. This is observed by the fact that this group of countries has a much smaller GDP per capita in comparison to risk-takers (U\$ 19,508). That is, these are countries that believe they cannot afford a lawsuit expected to last a certain number of years, even if they have high probabilities of winning.

Finally, the *Impervious* group is the one for which qualitative evidence showed the lawsuit against Australia did not play a significant role in their calculations to promote plain packaging. As hypothesized, this is the group that is the most experienced with international arbitration (7.8 lawsuits), and thus, a group for which the marginal value of information is even smaller than the for the *Risk-averse* group. Basically, revealed information is less likely to effectively affect these countries calculations about enacting the policy, because they already know more than others. Also, the marginal cost of being sued is small for this group, as they are more likely to have internalized the process of being sued (as evidence from Argentina demonstrates). We can thus understand why these countries were not affected by the Australian claims, and why other factors seem to be the ones discouraging them from promoting plain packaging.

The findings described in this subsection highlight how countries differ in their vulnerability to the chilling effect generated by an international investment dispute. Developed countries who also happen to be less experienced with responding to international arbitration will have their regulatory ambitions delayed while the case is ongoing and until more information is revealed. Once they know the distribution of potential costs versus the benefits, they are more likely to proceed with the policy because they understand they are able to manage a potential lawsuit that could follow the policy's adoption. This scenario is advantageous for the investor-claimant because it can delay the global spread of a resource-demanding regulation for several years just by keeping this group of countries in a world of uncertainty for a while.

For *risk-averse* countries, who are more experienced with international arbitration but who are also less able and willing to deal with a future claim, the chilling effect seems to deter regulatory ambitions indefinitely. It could be hypothesized that these countries need more guarantees before

proceeding with their own regulations, and that such guarantees would entail more countries promoting the policy and not being sued for it. Clearly, this is also a favorable outcome for the investor-claimant. Finally, for the *Impervious* group of countries, we see that the chilling effect does not actually play a relevant role. For these countries, there would have to be strong pressure from the international community or other events that would alter their incentives to promote plain packaging. From the investors' standpoint, these are countries about which the firm is not exactly concerned with because are other issues preventing them from regulating.

The delay in adoption for developed countries and the related indefinitely postponement of the regulation for developing ones is a significant advantage for the investor-claimant. Scientific evidence from Australia shows that plain packaging has been responsible for 108.228 fewer smokers (people of

In general, questions focused on: (1) the process by which Uruguay became a reference in anti-smoking regulations; (2) how the Uruguayan government administered the claim filed by Philip Morris; (3) and the extent to which other countries interacted with Uruguay and were affected by the case; (4) how the case transformed the policy-making process in the country. Therefore, this section not only analyzes the depth of the chilling effect as it also provides more evidence to the causal mechanism advanced by the study. I use the obtained data from these interviews as causal process observations, which provide information about a context and a mechanism that helps to leverage causality (Mosley, 2013).

Subjects were recruited by e-mail, following the snow-ball method. In the first e-mail, I described the project and the applied Institutional Review Board procedures<sup>28</sup>. I contacted fourteen people, of which twelve replied. I was able to schedule an interview with nine subjects - the other three either did not reply to a follow-up contact or had scheduling issues. I estimate that nine individuals represent a high percentage of the key actors that were directly involved with the case, making the sample representative of the population for this case study <sup>29</sup>.

#### 4.4.2 Results

The small country of Uruguay became a world reference in anti-smoking policies because of a successful coalition formed between the government and the civil society starting around 2005. President Tabaré Vázquez took office in March of 2005 with a strong commitment to tackle the tobacco epidemic in the country, and specifically, the increasing smoking rates among young people <sup>30</sup>.

The Executive's leadership was accompanied by an active and inclusive debate in the Parliament about the elaboration and implementation of anti-smoking regulations, with strong participation from academics and NGOs in the first years of Vázquez' term <sup>31</sup>. The 80% graphic health warnings and the single-presentation requirements were novel policies introduced by Uruguay that were born out of this elaborated policy-making process, which is particularly notable for reflecting a deep understanding of how the tobacco industry uses labeling and packaging to attract new consumers <sup>32</sup>. Uruguay was effectively anticipating the tobacco industry's next moves to overcome the effects of previous anti-

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<sup>28</sup>This study was approved by the Institutional Review Board in The University of Texas at Austin in April of 2017. Study number: 2017-03-0090.

<sup>29</sup>One important indication that the sample is representative is that I reached saturation with it. When the last respondents were asked to indicate more individuals that I could interview, the majority of them would refer to the ones I had already talked to.

<sup>30</sup>*Tabare Vazquez elected to preside the third leftist government in Uruguay*: <http://www.chicagotribune.com/hoy/ct-hoy-8425573-tabare-vazquez-electo-para-presidir-tercer-gobierno-de-izquierda-en-uruguay-story.html>

<sup>31</sup>Interviews 2, 3 and 7. The debate's richness can also be inferred from the extensive parliamentary records of the discussions within the Public Health and Social Services Committee : [https://parlamento.gub.uy/documentosyleyes/ficha-asunto/29308/ficha\\_completa](https://parlamento.gub.uy/documentosyleyes/ficha-asunto/29308/ficha_completa).

<sup>32</sup>Interview 3.

smoking regulations, alongside Australia with its push for plain packaging. Would governments follow these first-movers' lead? And, if not, what was the reason for not doing so?

Several of the respondents confirmed that officials from Latin American' governments contacted Uruguayan officials to learn about its novel policies. Contacts were also made after Philip Morris filed its claim, where officials in the region searched for information by discussing the matter with Uruguay's defense lawyers and officials involved with it. Ecuador is the country mentioned most frequently to have contacted the Uruguayan government to learn about its policies, and later on, to know about more details on the case<sup>33</sup>. The close cooperation between Ecuador and Uruguay is a clear example of diffusion by learning, which is confirmed by Ecuador's appraisal of Uruguay's assistance and example during the plenary meetings of the Conference of the Parties (COP) within the Framework Convention for Tobacco Control (FCTC) in its fourth, sixth and seventh editions<sup>34</sup>. Other governments that are reported to have contacted Uruguay about its novel policies and their consequences are the Dominican Republic, Nicaragua, Guatemala and Honduras<sup>35</sup>. One employee in the Pan American Health Organization confirmed that several governments were keeping an eye on Uruguay's developments and were concerned about Philip Morris' claims, but was not allowed to disclose specific information relative to member-States' communications<sup>36</sup>. Also interesting is the mention by Interviewee 7 of how information about policy adoption and the challenges associated with it diffused through different channels *"We (the NGOs) talk about this (anti-smoking policies and attempts by the industry to bring them down) in the region - we have a text group with the NGOs in the region and we are always updating each other on what is happening in our countries"*.

It is clear from these records that Uruguay's novel anti-smoking policies had potential for spreading quickly across the region, as governments were interested in learning from the Uruguayan experience. The evidence also points out that countries were attentive and concerned about the investor-State disputed filed by Philip Morris against Uruguay. To what extent can we infer that uncertainty was the causal mechanism impeding these countries from following through with their intentions of adopting Uruguay's novel policies? Again, the Uruguayan experience provides relevant insights about how governments process information from Investor-State disputes, and how firms can benefit from creating a world uncertainty by filing these claims.

Respondents were unanimous in affirming that Philip Morris' notice of arbitration was received with immense surprise. Given Uruguay's favorable reputation among foreign investors and the stability of its domestic institutions, getting hit by a claim brought by a foreign investor was unprecedented. Subjects also agreed that Philip Morris' intention with the lawsuit was to slow down the Uruguayan

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<sup>33</sup>Interviews 3, 5, 7, 8 and 9.

<sup>34</sup>*Conference of the Parties Documents*: <http://www.who.int/fctc/cop/documents/en/>.

<sup>35</sup>Interviewee 5.

<sup>36</sup>Interview 9.

process and to intimidate other governments from adopting the same policy. Some interviews clarified this perception by highlighting the strategic timing of the claim: the notice of arbitration was filed in February 19th of 2010, two weeks before a new president took office in the country, Pepe Mujica. Even though Vázquez and Mujica belonged to the same coalition, there were ongoing changes in ministries and staff in the transition of power. Philip Morris would have taken advantage of this hectic moment to file the case and have Uruguay withdraw from it<sup>37</sup>. Subjects brought up the fact that Mujica, a more left-wing president than Vázquez, considered to negotiate softer regulations with Philip Morris and even completely back down from the proposals<sup>38</sup>. Meanwhile, some members of the opposition pressed for Uruguay to negotiate or step back. One legislator who was in office during the case's period mentions that the opposition was in favor of letting other countries adopt these policies first so Uruguay could have the opportunity to see what would happen to them<sup>39</sup>.

Part of this uncertainty seems to have stemmed from the fact that the compensation asked by Philip Morris was not promptly available when the case was filed. One respondent highlights how the media disclosed several different values of compensation asked in the beginning of the case, with values ranging from U\$ 2 mi to U\$ 3 bi<sup>40</sup>. Therefore, it was not clear, from a completely inexperienced government's standpoint, how much the case could cost.

Respondents also presented additional perspectives to the issue of uncertainty that were not anticipated by this study. Specifically, the actors involved with the more technical aspects of the case and that had a legal background reported to be confident that Uruguay would win the case (although none of them believed in the absolute positive outcome where all claims against Uruguay were decided in favor of the respondent-State). Two lawyers who were technical witnesses in the case and one of the lawyers' from the American law firm responsible for the country's defense asserted their confidence in a favorable decision since the beginning<sup>41</sup>. Similarly, one public employee working in the Ministry of Foreign Affairs and directly involved with the case's coordination mentioned her confidence in winning the case, but stated that the Executive did not feel the same way<sup>42</sup>. That is, the actors involved with the political aspect of the case and directly committed with the anti-smoking cause reported apprehension.

It might seem puzzling that some of the actors were this apprehensive, after all, the legal experts were confident and communicating their perception to all parties involved. However, for the people

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<sup>37</sup>Interviews 3 and 6.

<sup>38</sup>Interviewees 3, 4, 6, 7.

<sup>39</sup>Interview 6.

<sup>40</sup>Interview 7.

<sup>41</sup>Interviews 1, 6 and 8.

<sup>42</sup>Interview 4

directly involved with the substantial and political aspects of the process, the experts' opinions were not enough. One doctor involved with anti-smoking NGOs clarifies: *“Well, experts would come to the Parliament to inform legislators. They had their opinions, but these were not the governments opinions, they were not necessarily reflective of the country’s position”*. He points out how the government had to be much more careful than those experts in having a position and in signaling opinion because the consequences could be really big and damaging for the global fight against tobacco<sup>43</sup>. Therefore, these records reflect that uncertainty around the costs of a investor-State dispute can be particularly salient for decision-makers with a political stake in the dispute, even when they have access to specialized opinions that foresee favorable outcomes.

The interviews also indicate that governments, as expected, treat important points in the case as mechanisms that reveal information and that affect their next steps. One of the interviewed doctors mentions that when the tribunal decided it had jurisdiction on the case, the first feeling in the Uruguayan government was that the *“things were not going so well for us”*<sup>44</sup>. The decision about jurisdiction came out in July of 2013, which coincides with reports that President Mujica considered to make regulations softer or to even completely give up on them to avoid the case. One lawyer that provided technical assistance mentions that she was first contacted by the defense team in the middle of 2013 but only actually started to work on the case in 2014, when the government decided to proceed with the case<sup>45</sup>. In interview 7, the subject mentions how it was necessary for Vázquez to step in and convince Mujica to stay on the case. She reports that NGOs were crucial in pressuring Vázquez to be involved in the case, even though he was not in office in that time. Their perception was that the Presidency at the time was not giving proper priority to the case, which worried activists. NGOs and the medical community were afraid of the harmful effect that Uruguay’s decision to concede to Philip Morris’ pressure could have in other countries’ regulatory ambitions<sup>46</sup>.

The data documented so far reinforces the idea that the informational environment around a case impacts governments decisions to delay the implementation of a disputed policy. The interviewed legislator notes that the Philip Morris case was extensively debated in the Parliament and that *“The claim against Uruguay in the WTO (sic) did not freeze policies against tobacco consumption, but made their adoption slower. The risk of losing the case made us advance very cautiously. It was a Damocles’ sword for our country”*<sup>47</sup>. However, these data also uncover another aspect of the chilling effect generated by investor-State disputes. More than just affecting the timing of adoption of a welfare-

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<sup>43</sup>Interview 3.

<sup>44</sup>Interview 7

<sup>45</sup>Interview 1.

<sup>46</sup>Interview 7.

<sup>47</sup>Interview 2

enhancing policy, investor-State disputes can make governments generally more careful and slower in their policy-making processes. In Uruguay, the claims disputing its 80% graphic health warnings and its single-presentation requirement for cigarettes' packaging seems to have affected the country's pursue for plain packaging (following Australia's lead), to have modified its process of negotiation of investment treaties, and to have sounded the alarm on the country's still incipient but serious intentions in regulating the excessive consumption of alcohol.

Given its notable expertise with anti-smoking regulations, Uruguay is convinced that adopting plain packaging *in addition* to the single-presentation requirement and to the enlarged graphic health warnings is the best practice to be pursued. However, the debate on following through with this policy has been ongoing at least since 2013. Respondents were categorical in saying that, if it were not for the threat of arbitration, Uruguay would have adopted plain packaging much earlier. One of the interviewed doctors mentions how the government has been extremely careful with designing the regulation for plain packaging to avoid any liabilities<sup>48</sup>. One of the lawyers who acted as a technical witness notes *"This claim braked the policy implementation process in Uruguay. The process now takes longer. A plain packaging policy would have been enacted in Uruguay three years ago, at least, but it is taking a long time now. We learned we have to be careful and document every single piece of evidence we can when developing a policy. The whole administrative process changed. Before the claim, we would just have three people in a room drafting a bill and presenting it to the Legislative."* The other technical witness also highlights the importance of scientific evidence backing up regulations to avoid litigation, since Philip Morris' case was built around the argument that Uruguay's regulations exceeded reasonable initiatives and lacked evidence regarding efficiency<sup>49</sup>. She mentions that collecting scientific evidence should be a trend in how Uruguay approaches regulations to tackle alcohol abuse, the next public health battle Vázquez (who has been elected again in 2015) has set to<sup>50</sup>.

The case has also altered how Uruguay treats the design and negotiation of its bilateral investment treaties (BITs). The legislator asserts that Philip Morris' claims prompted the legislative to discuss the benefits and costs of BITs. The general conclusion though is that, despite the costs that investor-State disputes impose on small countries, BITs are necessary to attract investment. Legislators in Uruguay seem to be of the opinion that the country is reliant on foreign capital and need to offer the protections the market asks. However, this does not mean that the country has not taken any steps in protecting itself from future cases. Following the principles of bounded rationality (Poulsen and Aisbett, 2013), one official working in Ministry of Foreign Affairs reports that, before the Philip Morris' case, there was hardly any negotiation in the process of bilateral investment agreements. However, after the case, the country has become more aware and active in protecting itself. He mentions

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<sup>48</sup>Interview 3.

<sup>49</sup>Interview 6.

<sup>50</sup> *Tabare Vázquez will present a "total" bill to regulate alcohol this Monday (09.03.2017)*: <http://www.montevideo.com.uy/Noticias/Tabare-Vazquez-presentara-este-lunes-proyecto-de-ley-total-para-regular-el-alcohol-uc353607>



the current treaty negotiation with Japan, which has been taking more than two years and eighteen rounds of negotiation. The process has become more complex, and the same applies to re-negotiations of BITs that were already in force.

The findings from this section indicate that the informational mechanism advanced by this study to explain the chilling effect phenomenon is accurate to a great extent. Additionally, the analysis of this original and comprehensive qualitative data adds new information that was not anticipated by the presented argument, but that is highly compatible with the narrative I propose. In a nutshell, Uruguay's decision to implement stringent anti-smoking policies were the consequence of both the Executive's legitimate concern with high smoking rates among Uruguayans, the involvement of the civil society and the openness and commitment of its Legislative. Philip Morris' notice of arbitration hit the Uruguayan government with immense consternation, and a high degree of uncertainty haunted the government as the case developed. Interestingly, while investment lawyers and government officials that occupied technical legal positions were confident that Uruguay would be successful in its defense, subjects that were exclusively involved with the political aspect of the case demonstrated great concern about the odds of an adverse outcome.

Uncertainty about the amount of the costs of proceedings of a potential compensation almost made the government retract from the proposed regulations. However, confident legal experts and the resolution of civil society actors were key in convincing the Executive to keep Uruguay in the case until the tribunal decided that all claims filed against the State-respondent were dismissed. The astounding Uruguayan victory did not offset the benefits that Philip Morris derived from the case, though. First, it is clear that several other Latin American governments were on track to follow Uruguay's anti-smoking policies and ended up deciding to wait for more information before taking more steps. Therefore, the chilling effect that investor-State disputes can trigger seems to operate through an informational mechanism based on uncertainty, and at least some of its effects might be more persistent than what it has been argued by the literature so far (Bonnitcha et al., 2017). In particular, respondents asserted that the policy-making process in public health in Uruguay has become slower due to the precautions taken to avoid a new case similar to the Philip Morris' one. This arguably buys time for companies to adjust to costly regulations and, in the meantime, effectively save money. On the other hand, the case also made Uruguay more cautious about how it devises its investment treaties in order to prevent new cases similar to the Philip Morris' one. If countries are taking action to avoid new claims that can affect their regulatory ambitions, it could be the case that the potential of Investor-State disputes to generate a chilling effect could be getting increasingly constrained.

## 5 Conclusion

In this article, I argued that Investor-State disputes can be efficient strategies employed by multinational corporations to slow down the global spread of costly regulations to their businesses.

Unprecedented disputes filed by a foreign investor place governments in a world of uncertainty, and prevent them from estimating the costs and the benefits of promptly adopting a welfare-enhancing policy that has been challenged in an international tribunal. Inexperienced governments with these disputes will be more likely to wait for more information on the case. The observational implication of this decision-making process is that disputed policies will show a different pattern of diffusion relative to comparable undisputed ones, while cases are ongoing. I show that this is the case in the context of anti-smoking regulations, where novel policies promoted by Uruguay and Australia were disputed by Philip Morris. These policies either diffused at very slow rates or did not diffuse at all while cases were ongoing, that is, while countries were in a world of uncertainty.

Once more information about the cases was revealed, countries were moved into a world of risk, where they were able to perform the risk-reward calculations of adopting the regulation. I demonstrate that developed countries tended to estimate they could bear the risk of suffering a costly lawsuit, and thus promptly adopted one of the disputed regulations right after they had more information about the case. On the other hand, developing countries kept delaying policy adoption, despite their interests in promoting anti-smoking regulations. It could be speculated that these countries require more time and more countries taking the risk of adopting the policy before doing so themselves. These findings implicate that Philip Morris' disputes were effective in creating a chilling effect across countries, but that such effect is not uniform. Regardless, for Philip Morris, the benefits of delayed regulation are tangible: the lawsuits braked the advances of costly regulations that can effectively reduce their mass of consumers for several years.

Additionally, my findings reveal that the chilling effect can have more pervasive and deeper consequences for countries' policy-making processes than what has been anticipated by the literature so far. Evidence from Uruguay shows that Investor-State disputes can make countries more cautious and slower in their overall policy-making process because they take measures (such as looking for scientific evidence to back up their policy choices) to avoid new claims by foreign firms. This means that firms can affect governments' autonomy in setting welfare-enhancing regulations, in particular regarding the timing of their implementation. If Investor-State disputes are unlikely to fully deter countries' regulatory ambitions, the evidence points out that that they can be effective in delaying policy implementation.

As governments look for scientific evidence to back up their policy choices and avoid litigation, they arguably take more time to adopt regulations. A global trend of slower policy implementation can be damaging for the regulatory process of pressing issues, such as public health and environmental protection. On the other hand, this "depth" of the chilling effect might be also prompting governments to elaborate more effective regulations by consulting scientific sources and by engaging more with public policy experts. This is a trade-off that cannot be evaluated for now, given how recent these developments are. However, there is a promising research avenue to be addressed in the near future.

Overall, this study contributes to the current literature by establishing the presence, the scope

and the depth of the chilling effect under a limited, but helpful context, which is possible by the implementation of a multi-methods strategy. The set of statistical models demonstrate that the diffusion of policies is affected by Investor-State disputes. The case studies indicate that governments' decision-making process is affected by dynamics of uncertainty and risk, and that a country's assessment of the costs and benefits of adopting a disputed regulation are largely associated with its level of development. The in-depth analysis of the Uruguayan case reveals more information about such decision-making process, and points to broader effects of Investor-State disputes. The main takeaway is that multinational corporations can affect the timing and pace of global regulatory processes by creating uncertainty regarding the benefits and costs of policy adoption. The filing of Investor-State disputes that challenge regulations with a potential to spread quickly is an effective instrument to achieve these goals.

Some of the questions that remain for future research are: what kinds of firms have an interest in disrupting global regulatory processes? Does the phenomenon require a privileged actor able and willing to provide the public good of delayed regulation to its competitors, like it is the case in the tobacco industry? And for what kind of policies are firms interested in delaying diffusion? Do they choose between domestic and international strategies to deter policies with different potentials for diffusion? Finally, can disputes and other strategies chill the regulatory ambitions of international organizations and non-state actors? Some evidence from this study points out that the World Health Organization became explicitly vocal about plain packaging only once the favorable outcome for Australia was known. If organizations have a potential to legitimize norms and foster countries to adopt certain policies, a chilling effect that affects their capacity of doing so is particularly worrisome. All of these questions are still in the open, and could be explored under the theoretical and empirical frameworks developed by this study.

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## 6 Appendix

### 6.1 Sample of countries

Sample				
Algeria	Comoros	Ireland	Namibia	Singapore
Argentina	Costa Rica	Israel	Nepal	South Africa
Armenia	DRC	Italy	New Zealand	Spain
Australia	Djibouti	Jamaica	Niger	Sri Lanka
Bangladesh	Ecuador	Japan	Nigeria	Suriname
Belarus	Egypt	Jordan	Northern Ireland	Sweden
Benin	England	Kazakhstan	Norway	Taiwan
Bhutan	Ethiopia	Kenya	Oman	Tanzania
Botswana	France	Kosovo	Pakistan	Thailand
Brazil	Gabon	Laos	Palestine	Togo
Brunei Darussalam	Gambia	Lebanon	Panama	Turkey
Burkina Faso	Germany	Macao	Peru	Turkmenistan
Cambodia	Ghana	Madagascar	Philippines	Uganda
Cameroon	Guatemala	Malaysia	Poland	Ukraine
Canada	Honduras	Mali	Romania	United Arab Emirates
Chad	Hong Kong	Mauritius	Russia	Uruguay
Chile	Iceland	Mexico	Scotland	Venezuela
China	India	Moldova	Senegal	Viet Nam
Colombia	Indonesia	Myanmar	Seychelles	Wales

### 6.2 Regression outputs for speeds of diffusion

Table 3 brings the following information regarding each estimated model of diffusion: the month and year in which the policy was adopted by the first-mover (*1st Adopt*) and the month and year when it was adopted for the last follower (*Last Adopt*), with 1 representing March of 1973 and 526 being December of 2016; the period of diffusion, in number of months (*Time*); the number of States that adopted the policy by the end of the period of analysis (*States*); the estimated coefficient for speed of diffusion, which is equivalent to the scale parameter in event-history analysis models (*Coef*); the standard error of this coefficient (*SE*); and the rescaled coefficient for speed of diffusion to between 0 and 1, with 0 being the slowest and 1 the fastest *Res. Coef*. The *Single-Presentation* policy has been adopted by the first-mover only within the period of analysis and thus, it was not possible to estimate a coefficient for it.

	1st Adopt	Last Adopt	Time	States	Coef.	SE	Res. Coef.
Single-Presentation	444	444	1	1	NA	NA	NA
Size of Warning 80%	444	518	74	6	6.92	1.13	0.00
Bans on Restaurants and Pubs	1	526	525	38	6.38	0.05	0.44
Bans on Misleading Packaging	1	526	525	62	6.28	0.04	0.51
Bans on Transport	1	526	525	45	6.26	0.04	0.53
Bans on Physical Branding	1	526	525	66	6.24	0.04	0.55
Pictures Required	91	519	428	65	6.05	0.03	0.70
Bans on TV/Radio	1	526	525	91	6.03	0.03	0.71
Plain Packaging	476	519	43	5	6.00	1.05	0.74
Size of Warning 50%	334	521	187	34	5.68	0.12	1.00

Table 3: Regression results of the intercept-only survival models estimated for each policy (Weibull Distribution)

### 6.3 Standard errors and confidence intervals

One important point merits consideration regarding the estimation of the coefficients for speeds of diffusion. Data on adoption varies across the policies being considered because some policies have precisely been adopted by many more countries than others. This means that some of the resulting coefficients representing speed of diffusion will have larger confidence intervals than others. In order to check which estimates can be interpreted with more confidence than others, I plot the survival curves for each policy (except for “*Single-Presentation*” since it has not diffuse at all) and their 95% confidence intervals to compare the magnitude of uncertainty around each estimate. Figure 3 shows these plots.

As expected, confidence intervals are narrower for the policies that have been adopted by more countries so far, which obviously coincides with the policies that were started the earliest by first-movers and thus comprise a first generation of policies. On the other hand, the curves for the novel policies promoted by Uruguay and Australia, Size of Warnings 80% and Plain Packaging display wider confidence intervals, given the small numbers of countries that emulated these policies so far. Despite the high level of uncertainty around these estimates, it is worth pointing out to what the curves of the novel and challenged policies look like in comparison to Size of Warnings 50%. As mentioned before, this is the most similar policy to the challenged ones. If we compare the first 50 months since the first-movers enactment for these three policies, we can see that Size of Warnings 50% diffused faster. That is, this piece of evidence enhances the suspicion that the policies targeted by arbitration had their adoption delayed. At this point, we could speculate that, if it were not for arbitration claims, Size of Warnings 80% and Plain Packaging would have followed a similar pattern to Size of Warnings 50%.

Despite the aforementioned issues, the standard errors for the disputed policies are actually not as large as to invalidate the analysis. Furthermore, in survival analysis, the number of events (here, the number of countries adopting a given policy) is relevant for power purposes, but not for the validity of the actual analysis (Clark et al., 2003). Given that the models employed are intercept-only, the



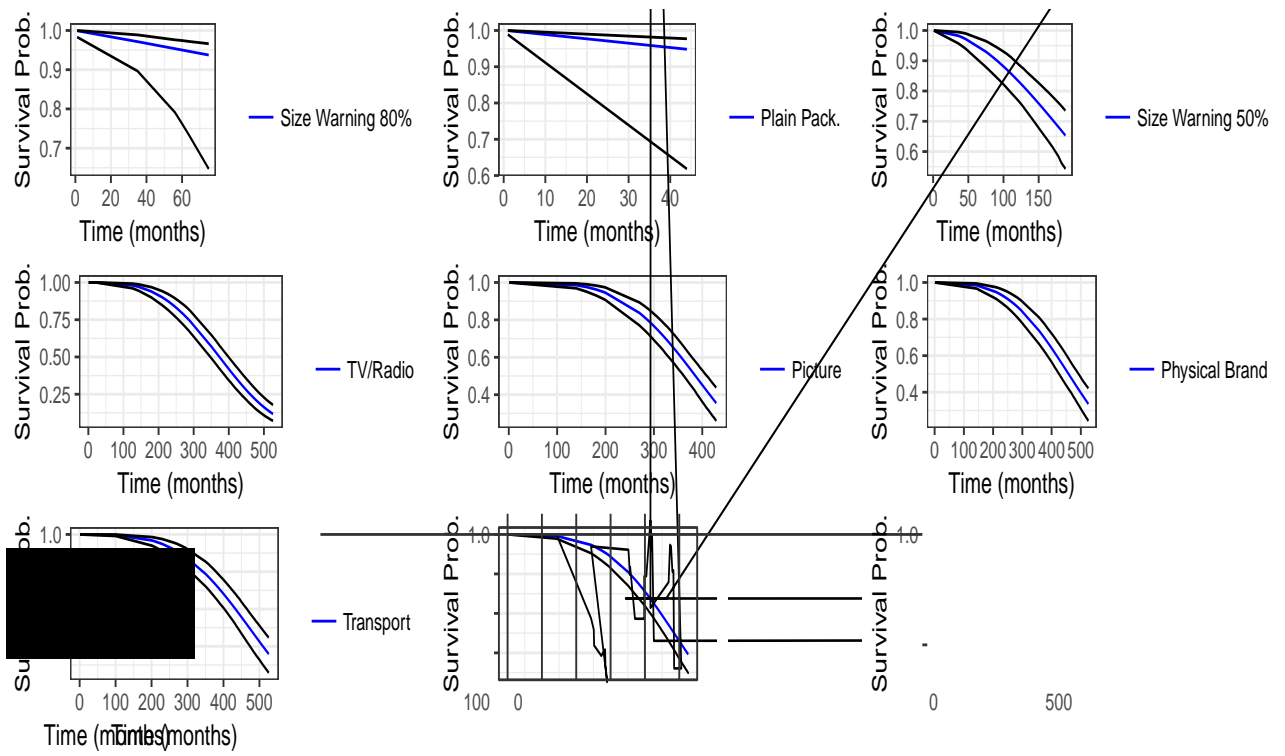


Figure 3: Survival curves of the rate of adoption of anti-smoking policies and their 95% confidence intervals

estimates and standard errors are valid despite the small number of events for *Size of Warning 80%* and *Plain Packaging*.