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Reforming International Investment Treaty Practice: Comparing Policy Innovation in Australia and Uruguay

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ABSTRACT

The Philip Morris lawsuits against Australia and Uruguay in the early 2010s highlighted the need to reform international investment agreement (IIA) practices to ensure that governments do not give up their regulatory autonomy for foreign investment. We undertook a policy analysis to reveal how interests, ideas and institutions shaped reform in IIA treaty practice to protect health policy autonomy in Australia and Uruguay after the Philip Morris investor-state dispute settlement cases. Arbitration appears to have had different effects on how the two governments approach IIAs. Interest-based, ideational and institutional conditions at play in Australia and Uruguay help explain this phenomenon: differently perceived risks and benefits arising from the different economic contexts and consequently negotiating powers, varying policy paradigms that shaped domestic negotiations and distinct international institutional networks the two countries are members of and facilitated policy diffusion. These conditions shaped whether there was enough political will to overcome path dependency and adopt stronger health safeguards. We found that a power imbalance between negotiating countries may trump efforts to adopt health safeguards. It is vital that more powerful governments adopt a paradigm shift that frames investment policies as tools to drive progress in social and environmental dimensions in addition to economic domains.

1 | Safeguarding the Right to Regulate: Health and Investment Policy in Tension

International Investment Agreements (IIAs) have been a cornerstone of the global investment regime (UNCTAD 2019). There are currently over 3300 IIAs in place, which form part of government efforts to attract foreign investment. These agreements include bilateral investment treaties (BITs, solely focused on investment) and also, increasingly, free trade agreements with investment chapters. A key feature of most IIAs is that they include a dispute mechanism outside of national courts of law: investor-state dispute settlement (ISDS) enables investors to use private international arbitration to seek compensation if government measures impact their rights and profitability (Voon et al. 2012; UNCTAD 2019).

The ISDS mechanism has important implications for the regulatory autonomy of host states: it may be used to contest public-interest policies that impact the profitability of industry actors (Bonnitcha 2017; Ranald 2024). Case in point, the Philip Morris (PM) tobacco company used the ISDS mechanism under the Australia-Hong Kong Bilateral Investment Treaty and the Uruguay–Switzerland BIT to sue Australia and Uruguay in 2010–2011 for implementing tobacco control measures indicated in the World Health Organization (WHO) Framework Convention for Tobacco Control (Voon and Mitchell 2016; Ranald 2014). In Australia, the tobacco plain packaging legislation was challenged, which required all tobacco products to be sold in standardised packaging with large graphic health warnings and no branding (Voon and Mitchell 2016; Ranald 2014). In Uruguay, it was required

Policy implications

- Policymakers are encouraged to not to wait for investor-state dispute settlement cases to drive reform. Arbitration cases are important to question the legitimacy of dominant international investment policy paradigms and practices, but the review and renegotiation of current IIAs are recommended before arbitration. International organisations may help with providing the necessary technical expertise needed for these reforms.
- Assessing economic context, negotiating powers and dominant policy paradigms can help policymakers to develop strategies to adopt stronger health safeguards in IIAs.
- Governments need to invest in building technical capacity among treaty negotiators and public health policymakers to understand the nuances of treaty text drafting. Cross-sectoral collaborations can help maintain political momentum, and policymakers, civil society organisations and academics should coordinate advocacy efforts to ensure that the adoption of strong health safeguards remains a political priority.
- Countries with greater economic size and negotiating power should exercise leadership by championing the adoption of stronger health safeguards in international investment agreements. These countries have more responsibility for advancing strong health safeguards because their treaty practices set precedents and influence global norms.

that health warnings covered 80% of cigarette packages and that only one cigarette variant could be sold by brand family (Voon and Mitchell 2016; Ranald 2014). The Governments of Australia and Uruguay won the legal cases after years of arbitration. However, only Uruguay won on the merits of the case; here, the tribunal ruled that the Uruguayan government lawfully introduced its tobacco control measures without violating the treaty terms. For Australia, the judges ruled that PM abused the ISDS process by restructuring its companies purposefully so that it can use the Hong Kong–Australia BIT. This is important because the Australian tobacco control policies were not tested against the claims, so policymakers might not be reassured that any future claims against similar measures would be won (Voon and Mitchell 2016; Ranald 2014; Crosbie et al. 2018). Furthermore, these lawsuits delayed the introduction of tobacco control measures and cost millions in legal defence—costs that the Uruguayan government would not have been able to initially cover if not for the support of the Bloomberg Foundation (Ranald 2019; Crosbie et al. 2018). They also resulted in other governments hesitating to adopt these evidence-based measures ('regulatory chill') (Rimmer 2017). Tobacco control is just one example of public health areas constrained by IIAs; policies on nutrition, environmental health and access to medicines can also be targeted by investors through ISDS (Thow et al. 2022; Ranald 2015). These experiences highlighted the urgent need to reform IIA practices to ensure that governments do not compromise their regulatory autonomy, including for achieving public health objectives, in the pursuit of narrow and questionable economic objectives (i.e., attracting foreign investment) (Thow et al. 2023; Ranald 2024; Bonnitcha 2017).

The inclusion of health safeguards in IIAs has been recognised as a means to protect governments' regulatory autonomy with respect to public health (Mitchell and Hoang 2025). Faunce (2015) explains the reason why governments should protect their right to regulate with the idea of the social contract: the government is accountable towards the public (who put the government in place) to protect public interests and maintain public protection through regulation. When a foreign investor tries to enforce its investor rights for the sake of profitability over the government's regulatory powers, the social contract is in danger of being damaged if the government is not able to maintain its regulatory stance. Therefore, governments are responsible for adopting safeguards in IIAs that ensure that public health policy space is protected, even if it negatively impacts certain industries' profitability.

Health safeguards can take three forms. *Defensive* safeguards aim to protect the host state's right to regulate by defining exceptions, exclusions and clarifications about the circumstances under which a foreign investor can sue the host government (Thow et al. 2023). *Neutral* safeguards aim to strengthen the interface between health and investment policy to prevent the erosion of existing public health policies and to support coordination across the policy sectors of health and investment (Thow et al. 2023). *Progressive* safeguards aim to advance a public health agenda by prescribing the health-related responsibilities of foreign investors and by leveraging investment policy for public health (Thow et al. 2023). While there is a debate about which type of safeguards is the most effective, in the last decade, certain defensive safeguards, such as the carve-out (exclusion) of certain policy areas and the complete exclusion of ISDS from IIAs, have emerged as relatively effective mechanisms to reduce the likelihood of investors from bringing claims against governments for implementing public policies (Mitchell and Hoang 2025). Although the uptake of health safeguards has been steadily growing, the global IIA reform process has been slow (Thow et al. 2023; Uddin et al. 2024).

The evidence to explain when and why governments include health safeguards and what drives innovation (policy or treaty reform) in IIA practice remains limited (Tienhaara and Ranald 2011; Uddin et al. 2024; Alschner 2022). For example, governments may change their approach to IIA practices after being subjected to arbitration (Haftel and Thompson 2018; Poulsen and Aisbett 2013; Bonnitcha 2017), which has been suggested to be the case of the adoption of health safeguards (Alschner 2022). Others suggest that the technical capacity of trade and investment treaty negotiators or the governance mechanisms surrounding the development of the domestic standpoint are key (Bonnitcha 2017; Bonnitcha and Williams 2024). Furthermore, countries' socio-political and economic contexts shape governments' investment priorities, which in turn are likely to inform approaches for the adoption of health safeguards (Alschner 2022; Tienhaara and Ranald 2011; Ranald 2024; Uddin et al. 2024).

The PM ISDS cases present an opportunity to examine factors influencing treaty practice and policy innovation in two

different contexts. Both Australia and Uruguay have been global leaders in introducing strong tobacco control policies (FCTC Secretariat 2023). Although both countries are classified as high-income countries, they differ in population, area, economic and human development and inequality (Table 1). Foreign investment represents a similar share of the GDP of the two countries. However, unlike Australia, direct investment abroad is not relevant for Uruguay. This study generated new insights to understand the ways in which factors, such as country characteristics and context, shape governments' attitudes to when and how to adopt health safeguards.

To understand the conditions shaping governments' decisions on whether and how to adopt health safeguards, this study draws on Hall's theory of '3-i'. Hall (1997) explained that it is not enough to only investigate policy actors' interests; to fully appreciate their motivations and why and when those preferences change, it is vital to recognise the ways ideas, such as policy paradigms or programmatic, causal ideas, shape the ways they perceive policy problems, their cause and their solutions. However, institutional conditions, such as institutional structures, processes and attributes, tend to define not only the institutional values and norms, which are likely to heavily influence the ways actors think about policy alternatives; institutions also provide avenues and fora to exert actors' interests. Hence, it is vital to study interest-based, ideational and institutional conditions and the ways these interact and shape each other to fully grasp the political economy of states (Hall 1997).

Recognising that IIAs texts also represent the outcome of negotiations between countries, another theory that is helpful to understand what drives governments to adopt health safeguards in IIAs is Putnam's (1988) two-level game theory. Putnam explains that in international negotiations, the battle of consolidating interests and preferences happens at two negotiation 'tables': at the international or bilateral level, where the negotiator teams of governments negotiate with each other; and at the national level where the domestic policy actors, such as government agencies, private actors (e.g., industry representatives) and civil society, are likely to engage to formulate the country's formal standpoint that is to be presented at the bilateral negotiations. The negotiations at these two 'tables' are ongoing and often happen parallel to each other. Thus, for an innovative clause, such as a health safeguard, to be adopted, it must successfully pass at both negotiation 'tables'.

TABLE 1 | Comparison between Australia and Uruguay's economic context (ABS 2024; World Bank 2025).

Indicators	Australia	Uruguay
Population size (2023)	27.1 million	3.4 million
Land area (km^2)	7.74 million	176,215
GDP, US$ (2023)	1.724 trillion	77.24 billion
GDP per capita, US$ (2023)	64,711	22,565
Gini index (inequality)	0.611	0.408
Human development index (HDI)	0.949	0.809
Foreign direct investment, US$	780 million	38 million
Foreign direct investment as % of the GDP	41%	42%
Direct investment abroad (US$)	726.6 million	N/A

We undertook a policy analysis to reveal whether and how interests, ideas and institutions shaped policy reform and innovation in IIA treaty practice to protect health policy autonomy in Australia and Uruguay after the PM ISDS cases. We expand the global policy literature on countries' approaches to adopting innovative IIA practices by offering a nuanced explanation of why two countries reacted differently to arbitration cases, through the investigation of interest-based, ideational and institutional conditions shaping domestic and bilateral IIA negotiations. This study shows that governments' reaction to arbitration is heavily shaped by the differently perceived risks and benefits arising from the different economic contexts and consequently negotiating powers (interests), by the dominant policy paradigms (ideas) and the diffusion networks the countries are members of (institutions). The ways these conditions manifest and converge are likely to define whether there is enough political will to overcome path dependency and adopt innovative policy tools, such as health safeguards in IIAs.

The new knowledge generated by this study is particularly important at a time when the power of corporations and their influence on governments are increasingly evident (David-Barrett 2025). Understanding how policy instruments rooted in neoliberal ideologies, such as ISDS, allocate even more power to the already powerful, narrow interest groups and place short-term economic, private interests above broader societal issues, such as public health, is increasingly critical to protect governments' regulatory power to serve public interests. Innovative policy instruments, such as health safeguards, are likely to be useful in addressing the structural antagonism between public health and profitability (Mitchell and Hoang 2025). Recognising the conditions that drive policy reform is vital to support and encourage constructive engagement between policy sectors and further innovation to improve health safeguards in investment policy in the future (Mitchell and Hoang 2025; Alschner 2022).

2 | Methods

Our study design was based on a qualitative methodology, employing an empirical case study approach (George and Bennett 2004). We undertook a policy analysis to understand and compare how the governments of Australia and Uruguay changed their approach to adopting health safeguards after the PM ISDS cases.

2.1 | Analytical Framework

We developed an analytical framework (Table 2) drawing on Hall's (1997) theory of '3-i'—interests, ideas and institutions—and Putnam's (1988) two-level games theory. We used Putnam's theory (Putnam 1988) as a *heuristic device* to frame our account of governance dynamics, rather than with the intention of carrying out a detailed game-theoretic account. The analytical framework organises the research questions and the analytical constructs around three main areas. The first part focuses

TABLE 2 | Analytical framework.

Elements of the analytical framework	Domain of 3-i	Research questions	Analytical constructs
Part 1 The innovation: the trends in adopting health safeguards	*N/A*	What type of health safeguards were adopted and when?	The typology of health safeguards (Thow et al. 2023)
Part 2 National level negotiations	Interests	Who are the key stakeholders in this case on the national level and what were their priorities and mandates?	Government agencies, Civil society actors, Private actors and their interests, mandates, preferences, priorities
	Ideas	Why was this clause attractive to key domestic stakeholders?	Perceptions of the problem and innovation
			Underlying paradigms
	Institutions	What institutional structures and attributes enabled the adoption of the clause to the national agenda?	Legislative structure
			Government stability
			Institutional structures that enable change agent engagement/access to decision makers
			Diffusion networks
Part 3 Bilateral negotiations	Interests	How did the clause hurt the interests of the other party?	Interests, preferences, priorities of the parties
		How did the negotiations with the other party change the preferences?	Temporal changes in interests, preferences, priorities
		Was there a power imbalance between the parties? (size and skills of negotiating committee, etc.)	Sources of power, distribution power, shifts in power
	Ideas	What arguments did the parties use to fight against the inclusion of the clause?	Framing, discourse during negotiations
	Institutions	How did the negotiator team and the chief negotiator's characteristics shape the negotiations?	Experience, preferences, status in government, size of constituency
		How did international instutions, networks or former bilateral negotiations shape the current negotiations?	Diffusion networks, international organisations, learning from other countries
		What strategies/bargaining tactics were used?	Strategies, tactics

on the policy innovation: the health safeguards and the trends in Australia and Uruguay to adopt them. We adapted Thow et al.'s (2023) typology to categorise the health safeguards. To capture the potential impact of the PM ISDS cases on these countries' approaches to health safeguards, we have expanded this typology of explicit health safeguards by adding two implicit safeguard types to the defensive provisions that do not mention the word 'health' but are important specifically for tobacco control: the exclusion of ISDS mechanism from a treaty and the exclusions (carve-outs) of certain policymatters from ISDS provisions (Table 3). The detailed definition of each type of health safeguard is presented in Data S1. We also mapped the timeline of when the different types of health safeguards were adopted in relation to the PM ISDS cases in Australia and Uruguay.

Drawing on Putnam's (1988) two-level games theory, the second and third parts of the analytical framework focused on the domestic and the bilateral negotiations. Part 2 helped investigate the national level political economy drivers, across interests, ideas and institutions: we mapped the key domestic policy actors across government, private sector and civil society, and their interests, mandates, preferences, priorities relevant to formulating IIA policies, the ways these exerted influence over the domestic negotiation processes and how the

TABLE 3 | Typology of health safeguards (adapted from Thow et al. (2023)).

Category		Main types of inclusions
Defensive	Clarifications of definitions, relevant to public health	Health measures shall not be considered discriminatory for the purposes of national and most-favoured-nation treatment
		Health conditions not performance requirement (to foreign investors)
		Market access subject to domestic laws
		Non-discriminatory health measures are not indirect expropriation
	Preserving the right to adopt and enforce health measures (Exceptions)	Health-related general exceptions to the dispositions of the IIA
		Exclusions (carve-outs) from ISDS provisions
		Health-sector reservations
		Right to regulate investment to achieve health objectives
		ISDS exclusion from the IIA
Neutral	Preventing erosion of existing levels of health protection	IIA objectives to be achieved without relaxing health measures
		Health-related measures shall not be relaxed
	Coordination across the policy sectors of health and investment	Recognition of health as a purpose for lawful expropriation
		Definition of environmental and labour laws to include health
		Tribunals can appoint health experts
Progressive	Health-related responsibilities of investors	Compensation by investor for loss or damage to public health
		Investors to comply with health law and not undermine it
	Leveraging investment policy for public health	Cooperation and investment in public health

adopted health safeguards may have served their interests. We also explored the policy paradigms, values and norms shaping these actors' preferences and ideas about the purpose and role of IIAs and their relation to broader societal objectives, such as public health. The institutional conditions were examined by focusing on the government and legislative structures and attributes, and the administrative procedures surrounding the domestic formulation of IIA practices, such as adopting health safeguards. Part 3 of our analytical framework focused on the factors relevant during the bilateral negotiations; interest-based conditions were investigated by exploring the parties' interests and preferences, power dynamics and how these might have changed due to the PM ISDS cases and other events. Ideational conditions were analysed by exploring the arguments, frames, discourse and strategies used during the bilateral negotiations. Institutional conditions were assessed by exploring the characteristics of the negotiator teams and their strategies used, and the potential impacts of international organisations and networks.

2.2 | Data Collection and Analysis

We conducted a policy and documentary analysis of all the IIAs signed by the governments of Australia and Uruguay, obtained from the Electronic Database of Investment Treaties (Alschner et al. 2021). In Australia, we also collected the publicly available submissions to relevant government consultations (Data S2). We did not collect similar documents in Uruguay, as the country has not had public consultations on these matters since 2010.

We collected interview data between February and October 2024, by conducting 17 in-depth, semi-structured interviews with participants who had work experience related to IIAs in Australia ($n=7$) and Uruguay ($n=10$). Besides government officials ($n=15$), we interviewed representatives of civil society organisations in Australia ($n=2$), as these were known to influence Australia's governments' approach to adopting health safeguards (Calvert and Tienhaara 2022). Participants were identified through an active snowball recruitment process.

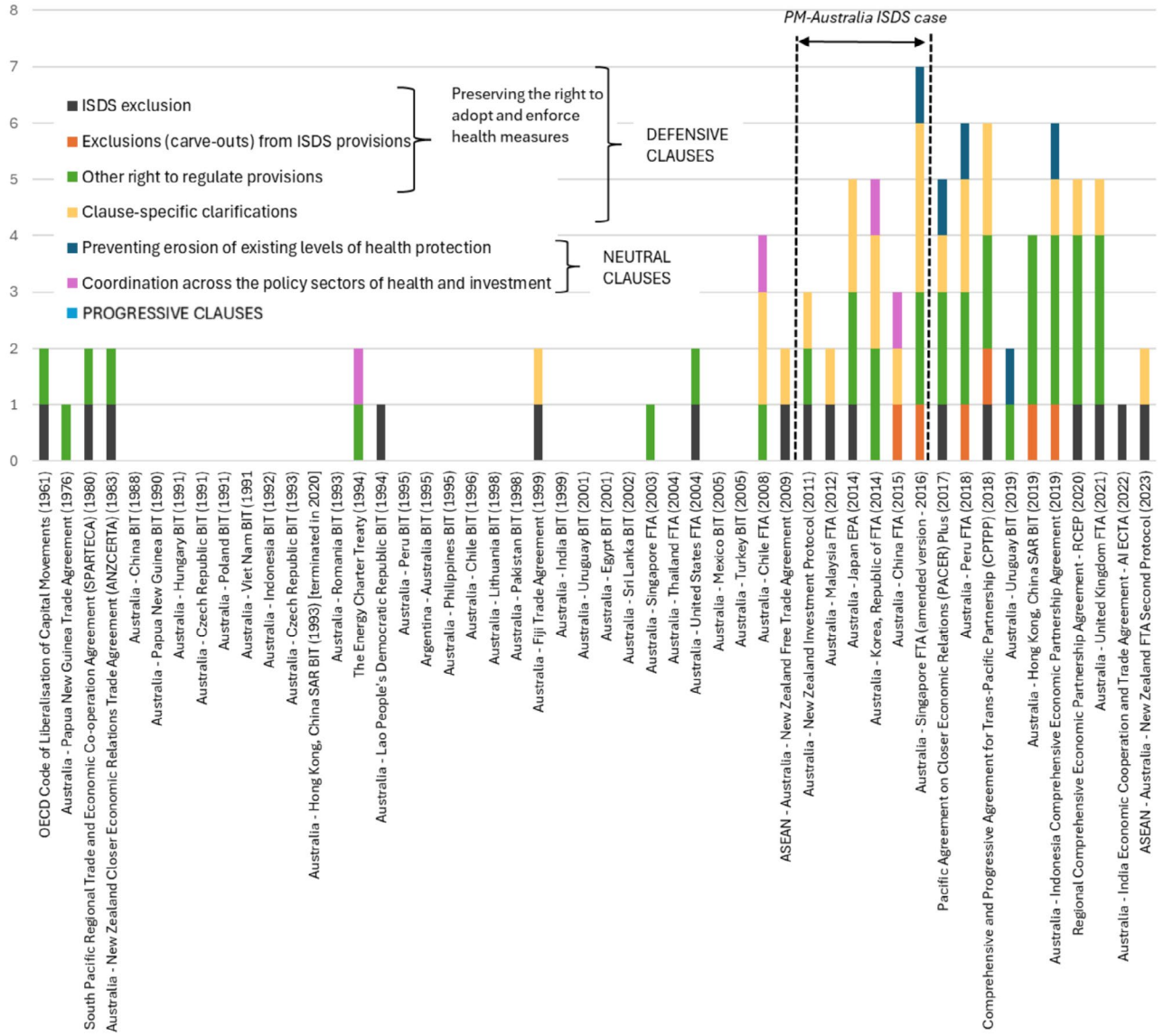

FIGURE 1 | Number of health safeguard types adopted by Australia.

Interviews lasted between 30 to 60 min, undertaken online or in person in English or Spanish. The interview guide is presented in Data S3. After receiving informed consent, the interviews were recorded and transcribed.

To analyse the trends of using health safeguards over time, we undertook a textual analysis of the IIA texts of Uruguay and Australia between 1960 and 2023. We manually searched the text of all IIAs for health safeguards and extracted the relevant sections into an Excel table. Furthermore, to understand the ways interests, ideas and institutions shaped the approach to adopting health safeguards in Australia and Uruguay, we thematically analysed the interview data and relevant documentary data, guided by the theory-informed analytical framework (Table 2). The interview transcripts were coded with a combination of deductive and inductive coding in NVivo (for Australian interviews) and Taguette (for Uruguayan interviews). The thematic analysis also included the submissions to the relevant government consultations in Australia. We manually searched all submissions for references to health safeguards and ISDS to identify what stakeholders advocated for and the arguments used. To enhance the quality of the analysis, four researchers analysed, reviewed and discussed the data and findings (Patton 1999).

3 | Results

To understand and compare the extent of policy reform in Australia's and Uruguay's IIA practice post the PM ISDS cases, first, we examined the trends of adopting health safeguards in the two countries' IIAs. Figures 1 and 2 summarise the number of health safeguard types included in all the IIAs signed by Uruguay and Australia. The number of agreements including health safeguards and the number of safeguards per agreement have increased over time in both countries. The adoption of safeguards started before the PM ISDS cases, reaching 100% of the treaties signed since 2008 in Australia and 2010 in Uruguay.

The IIA text analysis showed that defensive health safeguards have been the most included in the IIAs of Australia and Uruguay (Figures 1 and 2). Neutral health safeguards have been adopted less frequently in both countries, and progressive

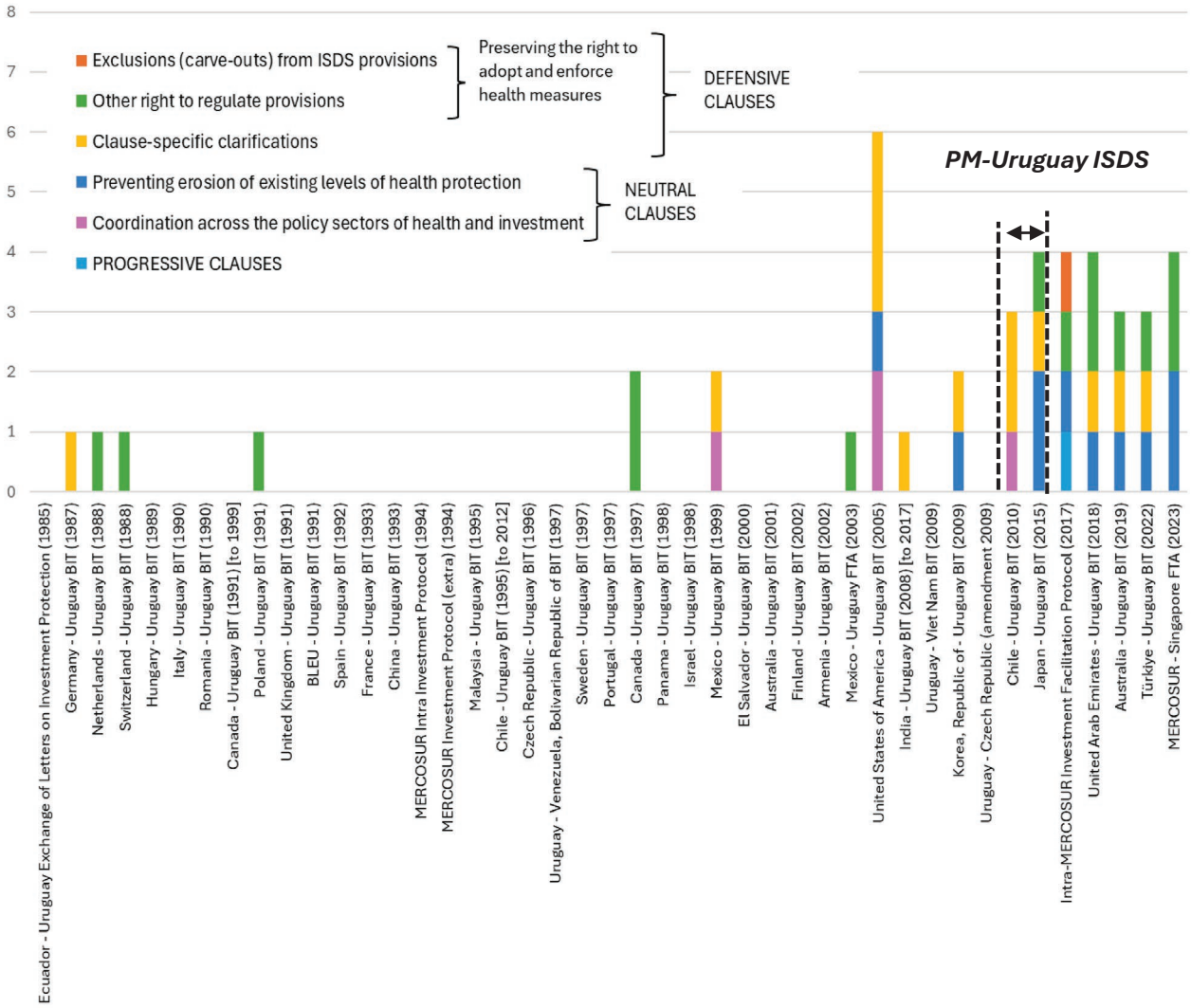

FIGURE 2 | Number of health safeguard types adopted by Uruguay.

clauses have not been adopted by the Australian government at all and Uruguay had one treaty that included one such provision. These trends show that defensive health safeguards focusing on host states' rights to regulate have been prioritised over progressive and neutral health safeguards by Australian and Uruguayan IIA negotiators. Improving the interface between health and investment also seemed to have been important for the two countries.

The documentary data and the interviews indicated that the PM ISDS cases appear to have had different effects on IIA practices in Australia and Uruguay. The Australian government showed a considerable shift in its approach to health safeguards after 2010 by: (i) adopting health safeguards in *all* of its IIAs; (ii) excluding ISDS in several IIAs; (iii) increasing the number of health safeguards; and (iv) often combining different types of safeguards. In Uruguay, although health safeguards were adopted in all IIAs implemented after the PM ISDS case and often combined, the interviewees stated that this was not a result of the ISDS case and reflected an existing trend. ISDS has not been excluded, and stronger health safeguards, such as carve-outs, have not been included in the IIAs signed by Uruguay after the PM case.

Once the PM ISDS cases were launched in 2011, the Australian government (led by the left-wing Labor Party) made a policy to exclude ISDS in all future IIAs (DFAT 2011). In 2013, this policy was repealed when the right-wing Liberal-National Coalition came to power, and ISDS was adopted in IIAs on a case-by-case basis. In 2022, the Labor Party returned to lead the government and reinstated its policy to exclude ISDS from all future IIAs and to seek the renegotiation of current ones. Participants explained that the Australian government was cognisant of and participating in global changes to ISDS: Countries worldwide were slowly cancelling or renegotiating IIAs with ISDS and adopting new IIAs without ISDS, such as the United States, the European Union and several Southeast Asian countries. In contrast, Uruguay's approach to ISDS did not change with the government party.

Although not all safeguards carry the same strength of protection, interviewees expressed different opinions about which health safeguards can be considered 'stronger'. In Australia, some perceived that carve-outs from ISDS are more robust than the right-to-regulate clauses, because the former stops companies from starting an ISDS case, while the latter allows

companies to do so, but they provide protections to the governments during the litigation. With respect to a 'carve-out' approach, interviewees had different perspectives on whether a broader exclusion on public health or more narrowly defined exclusions specific to areas like tobacco control are more beneficial:

> You have to be careful to differentiate between different health safeguards. [...] A carve-out of tobacco regulation [...] is a more powerful exclusion, because it prevents cases from being brought at all. The other references in the ISDS chapter about health [...] don't actually prevent cases from being brought in those areas. [...] The government still has to spend the time and effort defending it and arguing that those protections apply in that particular case.
>
> (AU01_civil_society)

Thus, while Uruguay adopted health safeguards in all of its IIAs post-2010, the types of health safeguards included provide potentially less robust protection than those adopted in Australian IIAs. Interestingly, Uruguayan negotiators did not perceive this to be the case, and they stated that the health safeguards used in Uruguayan IIAs are sufficient to protect public health policies.

The inclusion of carve-outs can be considered a policy innovation, not just in Australia's bilateral IIAs but in regional agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which Australia is a party. Australian government officials perceived the innovation of carve-outs to be the direct result of the experience of the PM ISDS cases:

> There are these very explicit links to carve-outs, which clearly can be explained in terms of very specific concern – outrage, frankly – about the Philip Morris Tobacco Plain packaging case.
>
> (AU06_government)

In Australia, carve-outs were used in almost all IIAs that had ISDS provisions. The only exceptions were the Korea-Australia Free Trade Agreement and, interestingly, the Australia-Uruguay BIT, which was renegotiated after the PM ISDS cases. Uruguay adopted a carve-out in only one of its IIAs.

At the beginning of this study, we hypothesised that the PM ISDS cases generated a drive to adopt stronger health safeguards in Australia and Uruguay; however, the analysis presented in this section showed that this was not the case in Uruguay. In the following, participants' perceptions about the direct influence of the PM ISDS cases on reforming Australian and Uruguayan IIA practice are presented. Then, the interest-based, ideational and institutional conditions that explain the two countries' different responses to the PM ISDS cases in terms of protecting health in IIAs are revealed.

3.1 | The Role of the PM ISDS Cases in Shifting Interests, Ideas and Institutions

The PM ISDS cases helped to draw attention to the interface between health and investment agreements in Australia and Uruguay, particularly on the domestic, political level, and thus facilitated a shift in how policy actors perceived risks and interests and shaped programmatic ideas about the role of IIAs and health safeguards. These cases were also identified by interviewees as significant in terms of their potential implications for health policy.

Australian participants across the government and civil society explained that the PM ISDS cases created significant political and public attention over the threats of IIAs, being the first ISDS case against Australia, making the protection of public health policies a highly political issue:

> It was a very politically salient issue. There were a number of independents in parliament who were very anti-ISDS, and it was very much the subject of media attention following the Philip Morris case.
>
> (AU01_civil_society)

The PM-Australia ISDS case also contributed to institutional learning about interests and ideas, more specifically, it changed the perception of risks and benefits, and shaped programmatic ideas surrounding IIA practices in the Australian government. Several policymakers explained that the Department of Health was the greatest advocate of health safeguards and excluding ISDS from IIAs, as the regulatory constraint was specific to health policy, and in addition, impacted the adoption of a best-practice measure recommended in a treaty that Australia is party to. Partially as a result of the PM-Australia ISDS case, by 2022, no major government agency advocated for ISDS:

> Obviously [Department of] Health is the biggest one saying 'never do this again' in all our conversations. [...] There was no big stakeholder within government who was pushing that 'ISDS is a good thing, and we want it'.
>
> (AU03_government)

Australian participants also reflected on learning at a personal level, shaping their ideas about ISDS and the potential use of health safeguards. Government officials and negotiators who worked on the PM-Australia ISDS case learned from this experience about the risks and (mis)use of the ISDS system by industry actors. However, 'old school' negotiators were more likely to push for including ISDS, particularly if they had not worked on defending Australia in the PM ISDS case. This personal learning was important because at the bilateral level, the lead negotiators' beliefs could shape the outcome of IIA negotiations despite high-level government policies and thus, significantly impact institutional approaches to adopting health safeguards.

In Australia, the PM ISDS case also generated increased advocacy efforts of civil society and academics, creating more support for health safeguards at the domestic negotiation 'table'. Using the PM-Australia ISDS case as an example of the threat posed by IIAs, civil society actors not only raised awareness about the

need to protect public health policies in IIAs but also lobbied for the adoption of stronger safeguards, such as excluding ISDS or including carve-outs (see, e.g., submissions from Public Services International, Grail in Australia, Australian Capital Territory Law Society in Data S1).

In contrast, the threats of IIAs to health policy and the need for health safeguards were already on the radar of Uruguayan negotiators before the PM ISDS cases. Participants explained that this was a result of the growing number of ISDS cases worldwide, increasing awareness at the international level, which contributed to more recommendations from international organisations and foreign countries suggesting their inclusion in BITs. A few government participants specifically mentioned the numerous ISDS cases brought against Argentina in the early 2000s as a key factor that raised awareness of the risks associated with BITs.

Responding to this shift in international spaces, at the time of the PM-Uruguay ISDS case, Uruguayan negotiators had already started to include health safeguards in BITs. According to the interviewees, this was one main reason why the case did not have a large impact on the inclusion of health safeguards. However, the arbitration contributed to increasing awareness at the political level:

> Our negotiators were already aware [of the risks of old generation BITs] but until you get the first shot, there was no political decision to change the course, to be more careful. You need concerns [about the potential negative impacts of BITs] to rise to the political level to ensure that at the final stage of negotiations you won't lose.
>
> (UY10_government)

The PM ISDS case was the first instance of arbitration against the Uruguayan government because of its public health policies, even though in 1998, policymakers successfully defended their policies against Stephane Benhamou. Although the influence of the PM-Uruguay ISDS case on IIAs was marginal, interviewees recognised its implications for the country's health policies. The PM ISDS cases highlighted that governments need to design and implement health policies in a way that leaves the least amount of vulnerability to legal attacks from corporations. A Uruguayan interviewee from the government explained that policymakers need to consider the coherence of the health policy with trade and investment policies, the type of policy instrument that gives the necessary legal strength against potential arbitration (e.g., an act provides stronger protection than a regulation), and the language used in the description of the policy:

> I don't think it really had an impact on the format [of the BITs, referring to the health safeguards and ISDS]. It did have an impact on health policy, of course.
>
> (UY06_government)

The interview data from Australia and Uruguay reflect that the political salience of the PM ISDS disputes was similar in both countries but led to different conclusions about whether to reform IIA practices to increase the protection of health in IIAs. The interest-based, ideational and institutional conditions that may have shaped the two countries' different responses are explained in the following. Another key difference between Uruguay and Australia concerned the role of civil society. While Australian civil society organisations have actively advocated for the inclusion of stronger safeguards, in Uruguay civil society has not engaged in specific advocacy efforts aimed at promoting such safeguards or calling for the removal of ISDS provisions from BITs, despite their support for the country's tobacco control policies.

3.2 | The Interests, Ideas and Institutions Shaping the Response to the PM ISDS Cases in Australia and Uruguay

3.2.1 | Interests: Considerations of Risks and Benefits

Reflecting on the interest-based conditions that shaped the bilateral negotiations, there were different perceptions of the potential risks and relevant benefits of changing the approach to health safeguards in Australia and Uruguay after the experience with the PM ISDS cases, which influenced the negotiators' responses to the disputes. Two key points of difference between the countries were evident in this context, which related to (i) the perceived risk (and benefit) of changing the approach to IIAs and (ii) more specifically, the perceived benefit (and potential risk) of including new health safeguards or excluding ISDS. These perceptions of benefits and potential costs or risks appear to have been shaped by the different economic contexts and perceived negotiating power of the two countries.

In Uruguay, potential risks for the economy of changing the approach to IIAs were perceived as high. In a context in which foreign direct investment is understood to be important to economic growth and the country has a relatively small economy with limited outward investment, there was a perceived risk related to loss of inward investment. Interviewees also described a perception that marked changes to the investment policy approach would be interpreted by other governments as indicating reduced stability in the macro-economic policy environment. This was related to a perception of economic policy instability in the region more broadly, in which Uruguay has been noted for its consistency in creating a predictable regulatory environment. Moreover, Uruguayan participants described having limited negotiating power, with reference to the relatively small size of the economy and the government's priority for attracting investment.

In contrast, Australian participants explained that the perceived risk in changing the approach to IIAs seemed to be tempered by the growing scepticism about the role of IIAs in fostering investment:

> That's a completely different politics to saying investment treaties are wonderful and we need them for the economy, but we also need to be careful for policy space, right? This framing gets reproduced a lot among lawyers. But one of the things that was really influential in 2011, is to what extent is there is a sound underlying economic case for these agreements in the first place?
>
> (AU06_government)

Nevertheless, interviewees in Australia noted that negotiators are also conscious that any carve-out will also apply and restrict their own investors' claims as well, which in some cases led to a reluctance to change agreements. However, in situations where the perceived threat of arbitration was particularly pronounced, like when IIAs are negotiated with states where companies often restructure, such as Hong Kong or Singapore, the willingness to promote change may have increased following the PM dispute. For example, this is how Australian participants explained why ISDS was kept in the renegotiated Uruguay–Australia BIT (where limited risk of dispute was perceived), while a tobacco carve-out was adopted to the renegotiated Australia-Hong Kong BIT.

With respect to the perceived benefits of including new health safeguards and/or excluding ISDS, more specifically, there was also a notable difference between the countries following the dispute. Australian participants explained that overall, there was a perceived benefit to changing the approach to health safeguards, in which a lack of safeguards had clearly led to an undermining of health policy. This was fostered by civil society activism stressing the importance of protecting health policy and the previous lack of awareness about the need for health safeguards:

> We've continued to argue that there should be stronger protections for public health in agreements generally, apart from ISDS, and we've continued to argue against ISDS, so that it can't apply to public health or any other areas.
>
> (AU01_civil_society)

However, there was also a recognition among the interviewees of potential risks in prioritising health safeguards over other provisions, in the context of negotiations across the text of the agreement as a whole. Requesting a provision that is considered less of a priority for the other party will likely incur a compromise or concession for the other party's position (potentially on a completely different issue) during negotiations. Therefore, while the benefits of health safeguards led to their increasing inclusion, considerations related to the agreement as a whole might have resulted in opting for less robust options in some situations.

In Uruguay, the perceived benefit of adopting new health safeguards was more limited, and as a result, there was no decision to change the type of health safeguards usually adopted following the dispute—for example, by including more progressive safeguards or excluding ISDS. This was largely because Uruguay had already shifted to include health safeguards in IIAs prior to the dispute, and negotiators felt that these were sufficient and that there would be limited additional benefit from exclusions or 'progressive' safeguards. In addition, as the use of health safeguards became more common after the PM ISDS cases, other countries more frequently suggested including health safeguards in their IIAs, which enabled Uruguay to adopt them without facing any opposition during negotiations.

3.2.2 | Ideas: Policy Paradigms Relating to Investment Treaties and Health Safeguards

The Australian and Uruguayan governments' responses to adopting health safeguards after the PM ISDS cases reflected the differences in dominant policy paradigms. Two distinct sets of paradigms emerged from the data that were highly relevant at the bilateral negotiation 'table': the first set shaped how the role of IIAs in the countries' economic development is thought about; the second referred to the need for including health safeguards in IIAs.

In Uruguay, government participants explained that the role of IIAs was perceived by negotiators as the means to attract foreign direct investment, in line with the country's economic priorities:

> The first thing we analyse is whether there is a real interest in negotiating these agreements. In general, Uruguay is a country that receives investments, so what we analyse is whether there are investments here by the counterpart or potential investments.
>
> (UY03_government)

In Latin America, the Uruguayan government has been careful to formulate an image of a stable economy with a reliable investment protection regime while avoiding making any sudden changes in its IIA practice, such as excluding ISDS. Interviewees stated that changing the approach to ISDS could negatively impact its reputation as a Latin American country that offers stable conditions for foreign direct investment, which could result in capital flight. This would explain why the trends of adopting health safeguards after the PM ISDS case in Uruguay do not reflect attempts to change current IIA practices:

> If Uruguay, after decades of accepting a form and a certain scope for dispute settlement, decided to take a step backwards [...] would be very bad for the country in terms of stability.
>
> (UY10_government)

Furthermore, ISDS was also seen by Uruguayan participants as a tool for preventing conflict with other states, important for signalling the country's investor-friendly climate:

> For us it is important that when disputes arise, they are encapsulated in the procedure they have and that they do not become a conflict between states.
>
> (UY05-government)

In contrast, Australian participants discussed a perception of the changing role of IIAs in the economy. The first major shift in the policy paradigms related to ISDS displayed by the Australian government was in 2010, when the Productivity Commission, a legitimate and well-respected federal agency focusing on the country's economic development, questioned the value of ISDS in attracting foreign direct investment. This contrasted with previous perceptions of IIAs as a tool to protect the interests of their investment exporting industries, such as fossil fuel and

mining companies operating overseas, not just for attracting foreign investment. The Productivity Commission's arguments against ISDS were not made on the basis of public health but argued that ISDS does not make sense from an economic perspective (Productivity Commission 2010). As a civil society participant stated:

> The fact that the Productivity Commission, which is not any kind of radical body, is an economic research organization that looks at the hard economics of things, also made the point that there was no real evidence that having ISDS in trade agreements or investment agreements actually increased foreign investment.
>
> (AU01_civil_society)

The PM-Australia ISDS case was filed around the same time when this questioning of the traditional paradigms about the role of the IIA regime for Australia became prominent. The political and public attention this case generated was likely important to facilitate the paradigm shift that happened about the role of IIAs and the state, resulting in the Labor's government radical decision in 2011 to exclude ISDS altogether.

The PM ISDS case was described as a shock to the public, politicians and public servants in Australia, as it was the first ISDS case against the country. Thus, potentially, this prompted questions about the paradigm underpinning the IIA regime. On the contrary, Uruguayan negotiators recognised the threats posed by IIAs (and ISDS in particular) to regulatory space before the PM case:

> It was already quite clear to us that these agreements could have consequences and that we had to be a little careful to know whether they could have any economic benefits.
>
> (UY04_government)

The second set of policy paradigms shaped how negotiators perceived the need for and role of health safeguards in protecting health in IIAs. Despite the potential risk of IIAs for the regulatory space, health safeguards were not described by Uruguayan governmental officials as a tool to protect public health, as the country has other legal mechanisms to achieve this objective. Participants perceived the Uruguayan state as a strong welfare state with a social contract to protect its population's health. Two participants did not perceive the need to introduce further health safeguards in BITs, because foreign investors must comply with local regulations:

> In our own conception of the state, we tend to have that vision of the Batllista State [in reference to José Battle y Ordóñez, president in the early 1900s], of the State that intervenes, of the welfare state. We cannot think that someone could limit the capacity of the State to act in certain areas through an agreement of this nature.
>
> (UY10_government)

The Australian Labor government reflected a similar idea of the role of the state in its 2011 Trade Policy Statement; although emphasising that foreign businesses should not have more rights than domestic ones and that this needs to be clearly reflected in the country's IIAs through the removal of ISDS (DFAT 2011).

3.2.3 | Institutions: International Diffusion Networks for Investment and Health Policies

The different responses of the Australian and Uruguayan governments may also be understood by examining the different international institutional (policy diffusion) networks the two countries were part of. This may help explain why Australia was less responsive to the rise in ISDS cases. Responding to the perceived global need to rethink IIA practices, civil society organisations, international organisations and transnational bodies acted as knowledge brokers and have increased their activities on raising awareness and building technical capacity since the early 2000s. Two types of diffusion networks emerged in the global space: a health diffusion network, including organisations working in the public health space, such as the WHO, and an investment diffusion network, with agencies included, such as the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD). The audience of these networks greatly differs: The former engages with health policymakers, while the latter connects with negotiators. These networks facilitated the sharing of technical assistance and policy tools, such as the UNCTAD investment reform package or advice on formulating legally strong health policies.

The interviewee data suggest that Australian and Uruguayan policymakers were particularly active in different policy diffusion networks, which could have influenced the effect of the PM ISDS cases on the adoption of health safeguards. As a leader in tobacco control with its plain packaging policy, Australian policymakers participated more in the health diffusion network, while Uruguayan policymakers were very engaged with the UNCTAD, resulting in a technical capacity on health safeguards that was likely ahead of Australia's before the PM ISDS cases. Uruguay's membership of the investment diffusion network thus could have contributed to the adoption of health safeguards before the start of the PM ISDS case in the country. For example, a government participant stated that:

> There was more awareness, there was training. In 2004, I went to an investment course from UNCTAD, and someone had started to think about what they implied.
>
> (UY02_government)

Australia's participation in the health diffusion network may explain why negotiators had limited concerns about the rise of ISDS cases; the public health policymakers were likely aware of the danger, but they were more engaged in public health policymaking rather than considering IIA inclusions.

3.3 | The Convergence of Interests, Ideas and Institutions: Political Will to Overcome Path Dependency

The analysis suggests that in Australia, a convergence of interests, ideas and institutional conditions in the national and bilateral spaces appears to have generated enough political will among high-level government officials to overcome path dependency—that is, that policy practice tends to follow past decisions. The interplay between these conditions in Uruguay played out differently, potentially explaining the country's lack of adoption of stronger health safeguards.

Australian and Uruguayan participants explained that concerns related to path dependency were raised, particularly when considering policy reform in IIAs, such as the adoption of more innovative health safeguards, such as excluding ISDS or including carve-outs. Negotiators are rarely inclined to radically change treaty language because, on the one hand, it is easier to negotiate with the other party to accept a provision that was already used in another treaty, so there is a precedence for its use. On the other hand, once a new provision is adopted in a treaty, there will be an expectation to replicate its use in future IIAs, which makes negotiators particularly careful in introducing innovation to treaty texts. Therefore, a higher degree of political will (e.g., from the head of the government) to support innovation in IIA practice is vital to overcome path dependency. As an Uruguayan government participant explained:

> If you are negotiating these agreements and the last issue you have left to do is dispute settlement, right to regulate, or others and your technicians have put a more protected position for the state, but the other side demands that you use the same wording that you used in an agreement that you signed in the mid 90's that says absolutely nothing, that gives you guarantee of nothing, ministers or other political authority have to intervene. So you need to raise awareness at the political level to ensure that you do not lose your position at the final stage of a negotiation.
>
> (UY10_government)

The main difference between Australia and Uruguay in this regard was that in the former, the political pressure rooted in the shift in perceived risks and benefits—which was generated by the PM-Australia ISDS case and the undergoing paradigm shift—may have contributed to a momentum for institutional change and thus, may have helped overcome path dependency, which appears to have led to the adoption of stronger health safeguards. This momentum seemed sufficient to overcome resistance from domestic business interests that benefited from ISDS provisions. Documentary analysis of consultation submissions revealed that some industry representatives argued for retaining ISDS provisions, emphasising their importance for protecting Australian investments abroad, though these pro-ISDS voices were less prominent in public discourse following the Philip Morris case. In Uruguay, the interest-based conditions and programmatic ideas were quite different due to the country's economic and political context and its perceived power to attract investment and shape bilateral negotiations. This combination of interests and ideas has not generated a momentum to shift institutional approaches to health safeguards in comparison with those adopted before the PM ISDS cases:

> There is a level of conservatism within the bureaucracy, [...] there doesn't seem to be a big appetite at that level for radical change. [...] That bigger change is we can explain those because of political level involvement. [...] In Australia again, that's a political-level decision to exclude ISDS from future investment treaties.
>
> (AU06_government)

4 | Discussion

We undertook a policy analysis to reveal how interests, ideas and institutions shaped policy reform and innovation in IIA treaty practice to protect health policy autonomy in Australia and Uruguay after the PM ISDS cases. Based on our analysis, the PM ISDS cases appear to have helped shape interest-based and ideational conditions by drawing attention to the interface between health and investment agreements, particularly on the national, political level and thus created a shift in these countries' political economy. However, our study found that the Australian and Uruguayan governments' responses differed to these ISDS cases and that the experience of arbitration weighed in differently in their approach to adopting health safeguards in IIAs. The Australian government showed a considerable shift in its approach to health safeguards compared to the years before the PM-Australia ISDS case. In Uruguay, although health safeguards were adopted in all IIAs implemented after the PM ISDS case, this reflected an earlier trend. These results show that, in contrast to the notion that governments change their approach to ISDS after being subjected to arbitration (Haftel and Thompson 2018; Poulsen and Aisbett 2013), states' responses are likely to vary. Our findings suggest nuances to the assumption that states are more likely to revisit their approach to ISDS when a more left-wing government takes power (Haftel and Thompson 2018), which was true in Australia but not in Uruguay after the PM ISDS cases. However, our results about the Uruguayan government's paradigms of ISDS reflect the explanation by Calvert and Tienhaara (2022) that ISDS is seen as a means to signal a commitment to maintaining a foreign investor-friendly domestic regulatory space. International institutions, such as the World Bank, have promoted IIAs and ISDS as key to attracting foreign direct investment (Poulsen 2015). As our findings show, this policy paradigm continues to shape IIA practices despite the growing literature proving the lack of evidence that investment treaties significantly increase foreign direct investment (Brada et al. 2021; Reiter and Bellak 2021). Our study suggests that the regional institutional stability perceived by foreign investors may influence a country's ability to modify its approach to ISDS. Uruguayan interviewees perceived changes to the ISDS framework as a potential signal of instability for foreign investors,

which could adversely affect investment levels. This regional dimension of IIA practice warrants greater scholarly attention than it has received to date. While Poulsen and Aisbett (2013) and Calvert and Tienhaara (2022) explore how country characteristics shape ISDS reform, our findings suggest that governments of developing regions may face unique constraints when their perceived stability relative to regional peers becomes a key component of their investment attraction strategy.

This study expands the current policy literature on countries' approaches to adopting innovative IIA practices (Bonnitcha and Williams 2024; Bonnitcha 2017; Ranald 2024, Moehlecke and Wellhausen 2022) by offering a more nuanced explanation of why two countries reacted differently to arbitration cases, though investigating interest-based, ideational and institutional conditions. The responses of the Australian and Uruguayan governments to the PM ISDS cases may be explained by the differently perceived risks and benefits arising from the different economic contexts and consequently negotiating powers (interests), the varying policy paradigms that shaped domestic negotiations (ideas) and the distinct international institutional networks the two countries are members of and facilitated policy diffusion (institutions). The convergence of these interest-based, ideational and institutional conditions across the national and bilateral negotiation spaces may have shaped the degree of political will to overcome path dependency and adopt health safeguards.

Our findings contribute to the literature explaining the domestic drivers that shaped the Australian government's approach to ISDS over the last few decades. Path dependence—in terms of including ISDS—certainly characterised the Australian approach to IIAs until the PM ISDS case (Kurtz 2012), with the exception of the US–Australia FTA signed in 2002, which did not include ISDS (Nottage 2013). Similarly to the domestic influences on the government during the PM-Australia ISDS case, this 2002 precedence of overcoming path dependence was described as the result of significant public debate (Ranald 2015), which contributed to the strong lobby of the Labor, Greens and Democrat politicians who held the majority of the Senate seats at the time, and who blocked the Howard (Liberal-National Coalition) Government's efforts to include it in the agreement (Calvert and Tienhaara 2022; Dickson-Smith and Mercurio 2018). The primary argument used by the opposition was the danger that well-resourced American companies could pose to Australia (Calvert and Tienhaara 2022). In the following years, however, the government has returned to a preferential approach to including ISDS in its trade and investment agreements, as demonstrated by the ASEAN-AU-NZ FTA (AANZFTA) and the Chile-AU FTA (Calvert and Tienhaara 2022). The Australian government's approach to ISDS started to shift again during the Rudd (Labor) Government (2007–2010) and then Guillard (Labor) Government (2010–2013), which, in 2011, resulted in the decision to exclude ISDS from all future trade and investment agreements (Calvert and Tienhaara 2022; Capling and Ravenhill 2015). Our study contributed to this literature by explaining the interest, ideas and institutional drivers behind this shift.

Interestingly, coinciding with the Guillard Government's Trade Policy Statement against ISDS, in the same year, the first Australian company won an ISDS case against India, which showcased the benefits of ISDS for Australian investors exporting their capital (Kurtz 2012; Voon and Merriman 2022). The statement and this successful ISDS case have galvanised the pro-ISDS actors' opposition in Australia to exclude ISDS (Kurtz 2012). Peak industry groups (e.g., Australian Chamber of Commerce and Industry) called for the reconsideration of the Statement (Kurtz 2012). Foreign investors had been already lobbying to include ISDS in Australia's trade and investment agreements—despite the country's robust legal system, which argument is often used to exclude ISDS—because in 2010 the Rudd (Labor) Government introduced a 'super-profits tax' on mining companies (Nottage 2013). Our document analysis of government submissions confirmed that business actors have continued to lobby for the inclusion of ISDS.

Policy coherence is at the heart of the discourse about safeguarding health in IIAs. These agreements create privileges for foreign investors to maintain their profitability; this is in stark contrast to governments' commitments to regulate corporations that impact broader societal outcomes, including population health, such as food manufacturers or pharmaceutical companies (Mitchell and Hoang 2025; Thow et al. 2022). The findings of this study reflect the growing global interest in reforming IIA practice to protect host states regulatory space and balance broad public interests with narrow, private, economic interests—especially in relation to regulating industry behaviour (Tissaoui et al. 2024; UNCTAD 2019; Bonnitcha and Williams 2024). Our results suggest that global awareness about the interface of trade and investment agreements and health is growing, confirming the findings of previous studies (Thow et al. 2023; Mitchell and Hoang 2025; Uddin et al. 2024; Bonnitcha and Williams 2024). We found that health objectives are routinely considered during the formulation of IIAs, and the adoption of health safeguards as an innovative policy tool is increasingly seen as standard practice. However, a multitude of IIAs are still in place that were negotiated before the rise of awareness over the need to protect domestic policy space (UNCTAD 2019; Alschner 2022). While the current Australian government is reviewing older IIAs to potentially remove ISDS clauses from them (Calvert and Tienhaara 2022), it remains part of thousands of IIAs in force, and the majority of old IIAs do not contain any health safeguards (Thow et al. 2023), continuing to pose a threat to public health and other public welfare objectives. The different health safeguard types provide varying protections to governments (Mitchell and Hoang 2025), and thus, more advocacy for adopting stronger health safeguards is warranted. However, there is little agreement between legal practitioners about which health safeguards are the most needed and which ones provide the strongest protection (Mitchell and Hoang 2025; Voon and Merriman 2022; Ranald 2015). Progressive health safeguards may provide an option to complement domestic commitments to regulating harmful industries with investor obligations in IIAs, but their uptake remains low, and there is limited evidence about their implementation and impact (Thow et al. 2023; Mitchell and Hoang 2025). Thus, there is a need for more research into understanding which health safeguards provide the most robust protection and how they can be used to regulate foreign investors so that their products and activities do not undermine public health and other welfare objectives.

This study highlights the interplay between power, capacity and institutional agency, and the pivotal role that governments with greater negotiating power have in driving reform in global IIA practice (Bonnitcha and Williams 2024). Sudden and relatively rare events that generate major public and political attention—that is, focusing on events (Kingdon 1995), such as the PM ISDS cases—have been critical to the prevailing investment policy paradigm, highlighting the need for balancing interests and multiple policy objectives (Moehlecke and Wellhausen 2022, Bauerle Danzman 2019). Yet, our findings also suggest that focusing on events alone is not enough, and nor is it sufficient to have the technical capacity to understand the nuances of treaty text drafting, because smaller economies, like Uruguay, are likely to adopt cautious, low-conflict treaty negotiations due to the perceptions of limited negotiating power rooted in the country's small economy. Building legal technical capacity among treaty negotiators and health policymakers is important because it sets 'investment taker' countries up to negotiate IIAs better (Bonnitcha 2017). However, meaningful reform heavily depends on economically and politically more powerful countries, whether they use their influence to adopt strong health safeguards in IIAs, especially when negotiating with less powerful states (Bonnitcha and Williams 2024; Bonnitcha 2017). In addition, stronger recommendations and initiatives from international organisations may help challenge existing power asymmetries by supporting emerging countries in advancing reforms in their investment regimes (UNCTAD 2019; Skovgaard Poulsen and Gertz 2021).

This study faces limitations in terms of the participants included: market and commercial actors—the potential beneficiaries of ISDS—were not represented in the interviews. These actors, through lobbying efforts, could influence governmental decisions on the inclusion of health safeguards in IIAs. To address this limitation, a document analysis was conducted, which, in the case of Australia, contained submissions from private sector actors, thereby providing some insights into their perspectives.

5 | Conclusions

This study compared the interest-based, ideational and institutional conditions that shaped policy reform in Uruguay and Australia following the PM ISDS disputes. Although international arbitration has been identified as a potential influence on treaty drafting, we observed markedly different responses in relation to subsequent inclusion of innovative health safeguards in IIAs. The ISDS case raised political awareness of the risks of IIAs for regulatory autonomy in both countries. However, our findings indicate that the inclusion of health safeguards was shaped by each country's unique economic context and resulting negotiating power, differing policy paradigms and the distinct institutional networks to which they belong. Our analysis supports previous findings that ISDS cases may challenge the legitimacy of dominant investment policy paradigms, but indicates that these are insufficient to drive reform. Similarly, technical capacity is necessary yet not sufficient. This study suggests that path dependency and the power imbalance between negotiating countries may override efforts towards policy innovation to safeguard health. We also identified a new paradigm that frames investment policies as a tool to drive progress in social and environmental dimensions in addition to economic domains. These findings provide new insights regarding the considerations of negotiators regarding the inclusion of health safeguards and point to an important role for global policy agencies and governments with greater negotiating power in supporting the inclusion of strong health safeguards.

Understanding the motivations and underlying paradigms shaping governments' policy practices is crucial for developing effective advocacy strategies around health safeguards in IIAs. In Uruguay, the concerns about health were not sufficient to drive the adoption of stronger health safeguards, because negotiators believed that existing inclusions adequately protected public health through the country's strong welfare state tradition. This perspective, combined with the Uruguayan government's prioritisation of maintaining an investor-friendly reputation, seems to have created a context where health considerations alone could not overcome path dependency. Advocacy efforts might have been more strategic by framing health safeguards not solely as protections against regulatory chill, but as tools that enhance rather than threaten the country's reputation for legal stability. Notably, Uruguay did win the PM ISDS case, demonstrating for countries worldwide that strong public health policies—particularly when backed by international policy tools, such as the Framework Convention on Tobacco Control, and sufficient funding to cover the legal expenses—can ultimately withstand ISDS challenges without the strongest health safeguards.

The Australian experience demonstrates that coordinated advocacy, civil society organisations and academic institutions can play a vital role in driving policy reform. Following the PM-AU ISDS case, these actors strategically leveraged the political salience of the dispute to raise public awareness and lobby for stronger protections, helping to generate momentum for institutional change. This highlights that pressure from civil society and other non-government actors can contribute to the shift in political will, leading to overcoming path dependency.

Finally, our findings reveal the influence of international organisations and policy diffusion networks on governments' approaches to health safeguards. There is an important opportunity for strategic collaboration between governments and international organisations to accelerate the uptake of strong health safeguards, particularly in contexts where smaller economies face power imbalances in bilateral negotiations.

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Ethics Statement

Research ethics approval was granted for this study by the Ethics Committee of the School of Chemistry of Universidad de la República, Uruguay (#101900-000149-23), and the University of Sydney Human Research Ethics Committee (#2024/096).

Consent

Informed consent was received from all participants to be involved in the study as per the approved ethics protocol.

Conflicts of Interest

The authors declare no conflicts of interest.

Data Availability Statement

The data presented in this study are available on request from the corresponding author. The data are not publicly available due to privacy and ethical restrictions, and particularly the risk of identification of participants.

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Supporting Information

Additional supporting information can be found online in the Supporting Information section. **Data S1:** gpol70146-sup-0001-DataS1.docx. **Data S2:** gpol70146-sup-0002-DataS2.docx. **Data S3:** gpol70146-sup-0003-DataS3.docx.