PETRA Network Briefing Paper

The Use of International Trade and Investment Law by Health-Harming Industries

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Introduction

Corporate strategy can be conceived as comprising two components – market and non-market (i.e. political) strategy – which are of equal importance in the success of businesses in their efforts to maximise their profits (Baron 1995). While market strategies focus on product development, pricing, distribution, marketing and promotional activity, political strategies are designed to bring about favourable regulatory environments for the company, or industry, in question. Consequently, any analysis of the potential impact of trade on non-communicable diseases (NCDs) which ignores the latter is necessarily incomplete. A now extensive literature exists on the political strategies of the tobacco industry (Savell et al. 2014; Smith et al 2013) and other health harming industries such as the alcohol (Savell et al 2016; McCambridge et al. 2018) and (processed) food and beverage industries (Sonntag et al. 2015). And there is substantial evidence of significant similarities in the policy-influencing strategies employed across different health-harming industries (Hawkins et al. 2016; Dorfman et al 2012; Miller and Harkins 2010).

Corporate political actors employ long-term relationship-building strategies with key decision-makers designed to keep unfavoured measures (such as labelling and packaging requirements, advertising restrictions or price/tax increases) off the policy agenda (Hawkins and Holden 2012; McCambridge et al. 2018). At times they will lobby also for specific policy approaches to be adopted, e.g. around the levels of taxation to be applied to their products, or support in promoting these as export products. The key political objectives for health-harming industries are often defensive in nature; designed to maintain the *status quo* and prevent further regulation promoted by public health advocates. They have a preference for voluntary codes and self-regulation over mandatory or legislative approaches and seek to position themselves as key stakeholders in the policy process, that is as partners to government in the development of policy solutions, as opposed to primary vectors of disease. These strategies are often effective in delivering public policy outcomes that promote industry interests over those of public health. However,

corporations are highly pragmatic political actors and where their efforts to manage the policy agenda break down and unfavoured measures are taken forwards, they are quick to shift to reactive and often highly confrontational measures to prevent their adoption. This includes legal challenges under international trade and investment law.

In this briefing, we examine the relevance of international trade and investment agreements for the corporate political strategies of health harming industries, particularly the tobacco and alcohol industries, and thus their impact on public health. We summarise previous cases brought by the global tobacco and alcohol companies under World Trade Organization (WTO) agreements and bilateral investment treaties (BITs) and trade agreements. While we do not focus on this explicitly, the development of the European Union (EU) single internal market (SIM) provides a useful point of reference for the discussion of the potential future relevance of the evolving international trade regime for corporations and health.

In the following sections we summarise how international trade and investment law has been used by corporations in the tobacco and alcohol sector to challenge the implementation of measures designed to regulate the use of their products with the aim of reducing consumption and thus harms. We conclude by reflecting on the relevance of these past experiences in the context of current and potential future developments in the international trade regime, and underline their relevance for policy makers in policy areas beyond alcohol and tobacco.

WTO Law

Established in 1995, the WTO includes a number of separate trade agreements of relevance for corporations that produce health-harming products:

- Under *the General Agreement on Tariffs and Trade (GATT)*, established in 1947 and incorporated into the WTO at its inception, the setting of tariffs must be implemented in a non-discriminatory way and imported products treated in a similar way to domestic goods.
- *The Technical Barriers to Trade (TBT) Agreement* and *The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)*, have implications for the regulation of products that may harm human, animal or plant health, and build on GATT's principles of non-discrimination.
- *The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, under which member states must enact national legislation to protect intellectual property rights, such as in trademark and patent law.

Under these agreements public policy measures designed to protect public health could be deemed to represent a barrier to trade or a form of protectionism for domestic producers from international competition. Of particular significance was the introduction of the WTO's dispute settlement process, which gave 'teeth' to the previously existing disputes system under GATT. While under the WTO system it is only member-states which have the ability to bring cases against other member-states over alleged breaches of WTO law, the often close relationship between governments and business within the political economy of global health means that companies or trade associations may be able to lobby governments to bring forward cases at the WTO on their behalf. At times, this will simply reflect the desire for governments to protect the interests of 'national champions' or key industrial sectors in their economy. At other times, however, it can reflect a degree of collusion between governments and industry actors in which the former take on the interests of the latter for reasons which have little to do with the national economic interest and which may actively undermine the health of populations. In such cases, it may be governments in low and middle-income countries (LMIC) that, despite their relative lack of legal capacity, act as surrogates for (particularly tobacco) corporations that are no longer able to rely on the support of their home governments (Eckhardt et al, 2016; Eckhardt and De Bievre, 2015).

A number of disputes lodged at the WTO illustrate the potential for member-states to launch disputes in the interests of 'their' corporations (for an overview of all disputes involving tobacco at the WTO see Eckhardt et al, 2016; McCabe Centre for Law and Cancer, 2020):

- The USA vs Thailand tobacco products dispute (see Vateesatokit et al, 2000; GATT 1990);
- The USA vs Indonesia cigarette flavourings dispute (see WTO, 2014);
- The dispute with Australia over 'plain packaging' of tobacco products (see WTO, 2018).

In the most recent of these, the decision by the government of Australia to introduce a requirement for tobacco products to be sold in standardised ('plain') packaging was challenged at the WTO by a coalition of states including Ukraine, Honduras, Dominican Republic, Cuba and Indonesia, claiming intellectual property rights violations. It was subsequently revealed that the legal expenses of some plaintiff countries were being paid by Philip Morris International (PMI) and British American Tobacco (BAT) (Eckhardt et al., 2016). Since lobbying and other forms of inducement may lead countries to act as proxies for corporate interests, the WTO disputes process must be seen as a key tool open to corporate actors seeking to oppose health policies (Eckhardt and De Bievre, 2015). While the case against Australia was ultimately rejected the costs involved infighting the case were significant and thus represent a barrier to states, perhaps those less well-resourced than Australia, from pursuing potentially controversial and challengeable health protecting policies even where their legality under WTO law it likely to be confirmed.

Investor-State Dispute Settlement

BITs have existed since the 1950s and almost since their inception have included so-called Investor-State Dispute Settlement (ISDS) mechanisms designed to protect the interests of companies investing overseas. The rationale for this is that such companies may be unable to enforce contracts and protect their property (e.g. from unfair expropriation by host governments) under relevant national laws and in national courts. Following the failure of the multilateral agreement on investment (MAI) in the late 1990s and the stymying of WTO negotiations since the launch of the Doha Development Round in 2001, recent decades have witnessed a proliferations of BITs with such ISDS mechanisms, as well as the incorporation of ISDS mechanisms into new regional trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Despite some exceptions, tariffs on the trade of manufactured goods between advanced economies have fallen to historically low levels in recent decades. Consequently, the pursuit of further trade liberalization among these states has therefore shifted its focus to indirect, non-tariff barriers to trade and investment, including national regulatory standards. This necessitates even greater engagement with domestic laws and public policies that may deliberately, or inadvertently, have trade-diversionary or discriminatory effects.

The advent of ISDS is a response to the increased importance of 'behind the border' issues in the international trade system (i.e. regulatory and environmental standards), and represents a significant strengthening of the position of corporations within the global political economy at the expense of national governments and citizens. Under ISDS mechanisms, investors are afforded a uniquely privileged position, able to challenge laws which affect their interests through channels not open to other entities such civil society organisations or individual citizens. Moreover, the procedures through which disputes are settled are opaque and are conducted in ways that are not amenable to consideration of health priorities compared to open court proceedings. Awards against defendants in ISDS cases can be substantial and past analysis has demonstrated that even well resourced, high-income countries have been forced to change policy or face substantial damages payments on the basis of such cases (Eberhardt and Olivet 2012). Even when successful, the legal expenses (and human capital required) for defending a claim can be prohibitive and may have a 'chilling effect' on governments, deterring them from introducing policies opposed by powerful business interests (Hawkins and Holden, 2016).

Unsurprisingly, ISDS mechanisms have been used by transnational tobacco companies (TTCs) to challenge the implementation of national laws, particularly those relating to cigarette packaging and labelling requirements in the following cases:

- *The Uruguay tobacco packaging case:* Following the decision by the government of Uruguay to increase the size of health warning on tobacco packaging and to ban multiple brand offerings, PMI, based in Switzerland, used the Switzerland-Uruguay BIT to challenge the measures on the basis that the proposed measures unfairly limited the companies' ability to use its trademarks and deprived it of its property rights. The tribunal found in favour of the Uruguayan government and dismissed all the claims made by PMI.
- *The Australia 'plain packaging' case*: In parallel with the WTO case against the Australian government's standardised packaging requirements, Philip Morris brought a case against the measures under the Australia-Hong Kong BIT. The case was dismissed on the grounds that the ownership of BAT's Australian subsidiary was transferred only to its Hong Kong based holding company after the Australian government's announcement of its intention to introduce the policy. As such there could be no reasonable expectation on the part of PM Hong Kong as an 'investor' in Australia that they would not be subject to the new policy.

While it is a positive development for public health that these cases, like the Australian case before the WTO, were dismissed, this must be tempered by two considerations. First, the Uruguayan government was able to fight the case partly because it received financial support from Michael Bloomberg's philanthropic foundation, but the case may still have had a 'chilling' effect on other LMICs (Hawkins and Holden, 2016). Second, the Australian case was decided principally on procedural grounds rather than substantive points of law, leaving the possibility for similar cases to be brought in the future, if not necessarily by the tobacco industry then by actors in other sectors such as alcohol, processed/fast foods and sugar-sweetened beverages, which are already facing calls for more robust labelling and packaging requirements. In addition, each individual BIT represents a separate agreement open to interpretation by arbitrators. The absence of a single body of investment law – a jurisprudence which arbitrators across agreements must follow as precedent –, means that future cases cannot be ruled out.

Regulatory Cooperation

While ISDS measures introduce a mechanism through which investors can seek *post hoc* remedies to unfair or discriminatory practices which contravene the principles of agreements, trade agreements such as the CPTPP and the now stalled Transatlantic Trade and Investment Partnership (TTIP) include more robust, *ex ante* measures to ensure national laws remain in accordance with a state's obligations under the agreement, known as "regulatory coherence" or "regulatory

cooperation" processes. These are a form of monitoring and oversight of proposed domestic legislation which occur *before* its adoption. Here, parallels between the emerging international trade regime and the EU are informative. The creation of the SIM required the 'harmonization' or mutual recognition of national production and safety standards to facilitate the free exchange of goods – and in a more limited way services – across previously restrictive national boundaries. The EU technical standards directive includes consultation measures, whereby proposed laws, which may impact on the SIM must be notified to the European Commission in advance to give member states an opportunity to comment on their effects and raise any objections. For example, the decision by the Scottish Government to introduce minimum unit pricing (MUP) for alcohol in 2012, in an attempt to reduce the heavy burden of alcohol-related harms experienced in Scotland, had to be notified to the Commission at the pre-legislative phase. While this did not prevent the introduction of the measure, it led to formal opposition being raised by member states and significant effort by the Scottish Government to assuage this (Hawkins and McCambridge in press). Like the SIM project, regulatory cooperation mechanisms in other trade agreements are designed to ensure that proposed laws do not undermine the objectives of the agreement and that a regulatory 'level playing field' is constructed.

Criticisms of regulatory cooperation are similar to those made of ISDS mechanisms in terms of their impact on public health and policy, but the former are uniquely problematic for public health since they allow laws to be scrutinized prior to their adoption. This has clear implications for democratic accountability and legislative sovereignty and affords corporate actors, acting in collaboration with their home governments, a potentially powerful mechanism through which to influence policy. The ability to set agendas and shape legislation at the very earliest juncture has long been identified as a key aspect of the exercise of political power (Bachrach and Baratz, 1962). Similarly, scholars of behavioural economics have long understood the importance of initial proposals in 'anchoring' subsequent negotiations (Tversky and Kahneman, 1974). The existence of regulatory cooperation mechanisms creates an additional series of 'veto points' in which it may be possible to block, or at least water down, proposed measures before they come into force (Hawkins and Holden, 2016; Holden and Hawkins, 2020). This represents a significant increase in corporate power to the potential detriment of public health.

Current Issues and Future Directions in the International Trade Regime

The international trade regime is at a point of great uncertainty at present. In its one term in office, the Trump administration articulated consistent hostility to the institutional architecture that has governed trade (and wider international relations) since the aftermath of the Second World

War. Incoming President, Joe Biden, has committed to re-engage with multilateral bodies and traditional US allies, and to reassert American leadership on the international stage. However, the future shape of global trade relationships remains uncertain, given the more widespread scepticism towards open trade now prevalent in the US and many other countries, as well as the continued grievances of many US businesses about certain practices of the Chinese government, which are seen as trade distorting. The Biden administration will have to take account of these issues in formulating its trade policy. Furthermore, given the underlying strategic and economic shifts that have accelerated in the interim – particularly the emergence of China as an increasingly assertive geopolitical as well as a global economic actor – it is unclear precisely what capacity the US has to shape developments in the international trade system in the context of a multipolar world. During the Trump administration, the WTO disputes process faced an unprecedented challenge to its viability through a prolonged stalemate over the appointment of arbitrators to its Appellate Body. The incoming Biden administration will likely attempt to overcome this impasse, but a return to the pre-Trump era or to 'business as usual' is less likely than the negotiation of a reformed WTO system to reflect the changes in the global trade context outlined above.

Depending on the outcome of WTO-level negotiations, there may be attempts to resurrect or further consolidate mega-regional trade agreements which, until recently, looked to have stalled with the withdrawal of the US from the forerunner of the CPTPP and the mothballing of negotiations on the TTIP (Holden and Hawkins, 2020). The latter agreement between the US and the EU was a key focus of the Obama administration, in which many Biden appointees also served, and already the European Commission has made overtures to the incoming administration to reassert their shared strategic interests in trade and beyond. The decision by the UK to leave the EU and instead seek a bilateral trade agreement with the latter – as well as with the US and other states across the globe – is likely to lead to new forms of dispute resolution, and questions of regulatory alignment are likely to be ongoing issues. Given that some of the most aggressive uses of ISDS mechanisms have been on the part of American tobacco companies, there are significant grounds to be concerned about the inclusion of ISDS mechanisms in any agreement between the UK and the US. Similarly, agreements concluded by the UK with other countries will allow UK-based companies the opportunity to challenge policies elsewhere, including in LMICs. Diageo (the world's second largest alcohol company), BAT, as well as important subsidiaries of global food and beverage consortiums, are based in the UK. For this reason, governments in LMICs – which may lack regulatory capacity and adequately funded healthcare systems – should thus proceed with great care in concluding trade agreements with the UK that include ISDS mechanisms.

Such developments indicate the continuing importance of the health and trade research agenda. Future research therefore needs to pay close attention to negotiations for the reform of the WTO and to the range of innovative disputes mechanisms and proposals for regulatory alignment that are likely to be features of continuing bilateral and regional trade negotiations.

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