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INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS: OPPORTUNITIES AND CHALLENGES FOR NONCOMMUNICABLE DISEASES

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Abstract

Four behavioural risk factors for noncommunicable diseases (NCDs) are tobacco use, physical inactivity, harmful use of alcohol, and unhealthy diet. In general, the liberalisation of trade increases the availability and lowers the cost of goods, which may create concerns with respect to harmful products such as tobacco and alcohol. Governments can address NCD risk factors through a range of regulatory responses, but as these regulations may lower or restrict trade in the relevant goods, they must be designed in accordance with international trade agreements. In this article, we argue that although poorly-designed regulatory responses to NCD risk factors may be inconsistent with international trade agreements, they include sufficient flexibility to accommodate evidence-backed measures that are well-adapted to their public health purposes. Specifically, in shaping regulatory responses to NCD risk factors, governments should bear in mind international trade rules, which include obligations not to discriminate against imported like products, and not to restrict trade, intellectual property rights or foreign investment more than necessary for public health purposes.

Keywords: *international trade agreements; international investment agreements; noncommunicable diseases; public health*

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I. INTRODUCTION

Over 60 percent of global deaths are due to noncommunicable diseases (NCDs), comprising mainly cardiovascular diseases, cancers, chronic respiratory diseases and diabetes.¹ These NCDs share four behavioural risk factors: tobacco use (or exposure), physical inactivity, unhealthy diet, and the harmful use of alcohol.² Many of the regulatory responses contemplated or adopted by domestic governments to address these risk factors have the potential to restrict or distort trade in relevant goods, most notably tobacco, alcohol, or

¹ World Health Organization (WHO), *Global Action Plan for the Prevention and Control of Noncommunicable Diseases: 2013-2020* (World Health Organization, Geneva, 2013), 7.

² UN General Assembly, Resolution Adopted by the General Assembly: Prevention and Control of Noncommunicable Diseases, A/RES/64/265 (20 May 2010), preamble.

energy-dense, nutrient-poor foods that are high in fat, sugar and/or salt. This impact raises the question of whether these regulatory responses are consistent with the obligations contained in international trade agreements.

In this article, we begin by considering the general ramifications of trade liberalisation for public health and NCDs. We then consider the consistency of measures taken to combat NCDs with some of the central obligations imposed by international trade agreements, including the multilateral rules overseen by the World Trade Organization (WTO) and the complex web of several hundred preferential trade agreements (PTAs) between two or more countries (PTAs are commonly referred to as free trade agreements). In this article, we mainly refer to the provisions of the WTO agreements, although equivalent or similar rules are found in most PTAs. We also examine a feature of many contemporary PTAs that has no equivalent in the WTO rules: obligations relating to the protection of foreign investors. Finally, we consider the possibility that harmful products, such as tobacco or alcohol, could be exempted from the scope of international trade agreements, to avoid ‘regulatory chill’ from the threat of potential inconsistencies.

II. THE GENERAL IMPACT OF TRADE LIBERALISATION ON PUBLIC HEALTH AND NCDs

International trade law seeks to liberalise trade by reducing or eliminating barriers to trade, for example, by limiting the use of tariffs (taxes levied on imports or exports of goods) or quantitative restrictions (such as import quotas). The fundamental economic proposition behind international trade law is that lowering barriers to trade will create more competitive markets, reducing the cost of goods and increasing the quantity, quality and range of products available to consumers, with consequential national and global welfare benefits.³ In pursuing this goal, international trade law does not distinguish between ‘good’ and ‘bad’ products.⁴ As a result, if unchecked by domestic regulation, trade liberalization could encourage consumption of products such as tobacco, unhealthy foods, and alcohol, contributing to the risk and prevalence of NCDs.⁵

³ See, generally, Allan O. Sykes, “Comparative Advantage and the Normative Economics of International Trade Policy,” *Journal of International Economic Law* 1, no 1 (1998): 49–82.

⁴ Tania Voon, “WTO Law and Risk Factors for Noncommunicable Diseases: A Complex Relationship” in *Research handbook on environment, health and the WTO*, Geert Van Calster and Denise Marie Prévost (eds), (Edward Elgar Publishing, 2013), 390, 393.

⁵ Heather Wipfli, Douglas Bettcher, Chitra Subramaniam and Allyn Taylor, “Confronting the Tobacco Epidemic: Emerging Mechanisms of Global Governance” in *International Co-operation in Health*, Martin McKee, Paul Garner and Robin Stott (eds), (Oxford: Oxford University Press, 2001), 127–149, at 130; World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (Washington DC: World Bank 1999) 14–15; Corinna Hawkes, “The Influence of Trade Liberalisation and Global Dietary

International trade is not, however, a negative force in preventing or managing health problems, including NCDs. Protecting domestic industries that make unhealthy products such as tobacco and alcohol from international trade and competition (for example through tariffs) does not promote health objectives, because locally produced tobacco and alcohol is generally just as unhealthy as imported tobacco and alcohol. Moreover, products and services that make a positive contribution to wellbeing and to combatting NCD risk factors (such as physical exercise equipment and health services) will also benefit from lower tariffs and the removal of non-tariff barriers to trade. In addition, the WTO agreements and some PTAs restrict the use of subsidies, as government assistance may distort markets, undermining trade liberalization. Limiting the use of subsidies may help to promote health objectives, and international trade law has been used to challenge subsidies on unhealthy foodstuffs such as sugar⁶ and high fructose corn syrup.⁷ Thus, the general relationship between trade liberalization and NCD risk factors is multifaceted. One particularly important aspect of this relationship is the potential impact of international trade agreements on regulatory measures adopted to tackle NCD risk factors, which is discussed in the following section.

III. THE CONSISTENCY OF MEASURES TAKEN TO COMBAT NCD RISK FACTORS WITH CORE OBLIGATIONS OF INTERNATIONAL TRADE AGREEMENTS

Although promoting public health is not their principal aim, international trade agreements are relevant to many measures adopted in the fight against NCDs. The core obligations of both the WTO agreements and PTAs are *negative*, for example the requirement not to discriminate against imported goods in comparison with locally produced goods. This section examines three categories of regulation that have been used or suggested as tools to combat NCDs, and that have been challenged as inconsistent with international trade agreements: (i) taxes and restrictions on the sale of goods; (ii) measures that specify product characteristics, including labelling or packaging requirements; and (iii) measures that affect foreign investors. Each section examines international trade agreements' obligations and flexibilities with respect to regulatory

Change: The Case of Vegetable Oils, Meat and Highly Processed Foods in *Trade, Food, Diet and Health: Perspectives and Policy Options*, Corinna Hawkes, Chantal Blouin, Spencer Henson, Nick Drager and Laurette Dubé (eds), (West Sussex: Blackwell Publishing, 2010), 35–59, at 40, 49, 53–54.

⁶ See, generally, Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (circulated 28 April 2005, adopted 19 May 2005).

⁷ See, generally, WTO, *United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products: Request for the Establishment of a Panel by Canada*, WT/DS357/12 (9 November 2007) and WT/DS357/12/Corr.1 (16 November 2007).

measures to protect public health.

A. TAXES AND RESTRICTIONS ON THE SALE OF GOODS

Pricing mechanisms and restrictions on sale are common tools to curb the consumption of harmful products. For example, the World Health Organization (WHO)'s Global Strategy to Reduce Harmful Use of Alcohol promotes various techniques to lower harmful alcohol consumption, including taxation that may 'take into account, as appropriate, the alcoholic content of the beverage', and regulating the retail sale of alcohol through licensing systems or 'public health oriented government monopolies'.⁸ The crucial test for consistency with international trade agreements is whether these measures treat all like or comparable products in the same manner. The *General Agreement on Tariffs and Trade 1994* ('GATT 1994'), the main WTO agreement covering trade in goods, generally prohibits measures that discriminate against imported products in comparison with 'like' domestic products, or against products imported from one WTO Member in comparison to 'like' products imported from any other country.⁹

Based on these non-discrimination obligations, several WTO disputes have arisen regarding differential taxation rates applied to different categories of alcoholic beverage. In its decision in *Japan – Alcoholic Beverages II*, the WTO Appellate Body found that a Japanese measure that taxed vodka and other distilled spirits (which were mostly imported) at a higher rate than shochu (which was largely domestically produced) was discriminatory and 'afford[ed] protection to domestic production'.¹⁰ In finding that vodka and shochu were 'like' products, the Appellate Body applied four criteria: (i) the products' end-uses; (ii) consumer preferences; (iii) the properties, nature and quality of the products; and (iv) the tariff classification of the products. Within these criteria, the health impacts of the relevant products could be relevant to their properties or nature, and to consumer preferences.¹¹ In *Japan – Alcoholic Beverages II* and a subsequent similar dispute involving Chilean taxes on alcoholic beverages,¹² the respondent WTO Member did not clearly indicate

⁸ World Health Organization, *Global Strategy to Reduce the Harmful Use of Alcohol* (World Health Organization, Geneva, 2010), para. 28(a)(i) and (ii), 34(a).

⁹ Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 International Legal Materials 1125 (signed 15 April 1994, entered into force 1 January 1995), General Agreement on Tariffs and Trade 1994, arts. I and III.

¹⁰ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/ AB/R, WT/DS10/AB/R, WT/DS11/AB/R (circulated 4 October 1996, adopted 1 November 1996), p. 32.

¹¹ The Appellate Body has noted the potential relevance of the public health implications of products to the criteria for determining whether products are 'like' in the context of asbestos: Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (circulated 12 March 2001, adopted 5 April 2001) para. 114-116.

¹² See Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/ AB/R, WT/DS110/AB/R

that the differential tax rates were justified by public health considerations. However, an earlier GATT Panel Report, predating the WTO, held that high-alcohol beer was not like low-alcohol beer, in connection with a United States measure that aimed to raise revenue, as well as protecting public morals and public health.¹³

In relation to restrictions on the retail sale of goods, complaints are currently pending in the WTO regarding a scheme that restricts the sale of alcoholic beverages in supermarkets in the Canadian province of British Columbia. The United States and Australia allege that the British Columbia regulations discriminate ‘on their face against imported wine’, by allowing locally produced wine to be sold on regular grocery store shelves, while imported wine can be sold only in a separate ‘store within a store’.¹⁴ (Australia’s complaint also alleges that other provinces’ regulatory regimes for the retail sale of wine disadvantaged imports.¹⁵) As with taxation measures, the critical issue if either of these disputes is heard by a panel will be whether the regulations treat imported wine less favourably than ‘like’ domestic wine. If the Canadian schemes are found to disadvantage imported like products, then it is likely to be *prima facie* inconsistent with Article III:4 of the GATT 1994.¹⁶

A measure that appears inconsistent with a non-discrimination obligation in the GATT 1994 may nevertheless be justified under the general exceptions in Article XX. Paragraph XX(b) provides an exception for measures ‘necessary’ to protect human life or health. Determining whether a measure is ‘necessary’ requires a ‘weighing and balancing’ of the ‘relative importance’ of the interests or values furthered by the challenged measure, the contribution of the measure to its purpose, and the extent to which the measure restricts trade, as well as an examination of whether any reasonably available less trade-restrictive alternative could have been used to contribute equally to the specified purpose.¹⁷ The WTO Appellate Body is yet to consider this

(circulated 13 December 1999, adopted 12 January 2000), para. 53–55, 76.

¹³ GATT. *United States - measures affecting alcoholic and malt beverages: report of the panel adopted on 19 June 1992*. GATT document DS23/R-39S/206. 1992. para. 5.25e5.26, 5.74.

¹⁴ *Canada – Measures Governing the Sale of Wine in Grocery Stores (Second Complaint), Request for Consultations by the United States*, WT/DS531/1 (2 October 2017).

¹⁵ *Canada – Measures Governing the Sale of Wine in Grocery Stores, Request for Consultations by Australia*, WT/DS537/1 (16 January 2018).

¹⁶ A similar finding was reached in relation to a Korean scheme that required imported and locally produced beef to be sold separately. See Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (circulated 11 December 2000, adopted 10 January 2001).

¹⁷ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (circulated 21 December 2009, adopted 19 January 2010), para. 239-242; Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (circulated 3 December 2007, adopted 17 December 2007), para. 143; Appellate Body Report, *European Communities — Measures Prohibiting the*

exception with respect to a measure relating to tobacco, alcohol, or unhealthy foods. However, an earlier GATT Panel Report found that certain Thai restrictions on the importation of cigarettes were not justified under Article XX(b) because Thailand's public health objective could have been achieved through less trade restrictive means, such as banning cigarette advertising.¹⁸

If a measure is 'necessary' for the purposes of the Article XX(b) public health exception, it must also not be applied in a manner that 'would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' (pursuant to the Article XX 'chapeau'). A WTO panel or the Appellate Body will closely scrutinise a challenged measure under the chapeau, identifying whether any discrimination in its application is consistent with legitimate policy objectives.

B. SPECIFICATIONS OF PRODUCT CHARACTERISTICS AND LABELLING OR PACKAGING REQUIREMENTS

A second category of measures adopted to address NCD risk factors that have been alleged to be inconsistent with international trade rules are regulations specifying product characteristics (such as banning certain additives or flavourings from being added to cigarettes),¹⁹ and requirements for the labelling or packaging of particular products.²⁰ Like differential rates of taxation or retail sales restrictions, these measures may violate the general non-discrimination requirements of the GATT 1994 if they disadvantage goods imported from a WTO Member, relative to like domestic products or like imports from a third country.

In addition, the WTO *Agreement on Technical Barriers to Trade* ('TBT Agreement') sets out specific rules that apply to these measures, which fall within the concept of 'technical regulations'.²¹ Article 2.1 of the TBT Agree-

Importation and Marketing of Seal Products, WTO Docs WT/DS400/AB/R, WT/DS401/AB/R (circulated 22 May 2014, adopted 18 June 2014), para. 5.214.

¹⁸ GATT. *Thailand - restrictions on importation of and internal taxes on cigarettes: report of the panel adopted on 7 November 1990. GATT document DS10/R-37S/200. Geneva: GATT 1947. 1990, para. 67, 77-78, 81.*

¹⁹ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R (circulated 2 April 2012, adopted 24 April 2012).*

²⁰ Panel Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (circulated 28 June 2018).* Complaints regarding alcohol labelling have not yet proceeded to formal dispute settlement, but have been raised in the TBT Committee of the WTO. See Paula O'Brien and Andrew D Mitchell, "On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement," *QUT Law Review* 124, no. 18(1) (2018).

²¹ Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 International Legal Materials 1125, signed 15 April 1994, (entered into force 1 January 1995), Agreement on Technical Barriers to Trade, Annex 1, para. 1.

ment prohibits technical regulations that discriminate against like imported products. Unlike the GATT 1994, the TBT Agreement does not contain general exceptions to justify discriminatory measures that are necessary to protect public health.²² In light of this omission, the Appellate Body has interpreted Article 2.1 to allow WTO Members to impose measures that have a detrimental impact on like imported products, if that detrimental impact stems exclusively from a ‘legitimate regulatory distinction’.²³

In *United States – Clove Cigarettes*, Indonesia challenged a United States ban on cigarettes with characterising flavours (including clove cigarettes, which were largely imported from Indonesia) that exempted menthol cigarettes (which were largely produced in the United States). The Appellate Body found that clove and menthol cigarettes were like products and that the exemption of menthol cigarettes did not stem exclusively from a legitimate regulatory distinction, such as a health-based distinction between the two kinds of products.²⁴ This decision demonstrates the importance of ensuring that any exemptions or discriminatory aspects of a technical regulation are justified on public health grounds.

Article 2.2 of the TBT Agreement prohibits technical regulations that create ‘unnecessary obstacles to international trade’ or that are ‘more trade-restrictive than necessary to fulfil a legitimate objective’. The United States’ ban on characterising flavours of cigarettes and Australia’s requirements for the standardised packaging of tobacco products were both challenged under Article 2.2. (The Australian case has been determined by a WTO panel but is expected to be appealed.) In these decisions the complainant WTO Members were unable to prove that any less-trade restrictive alternative that was reasonably available would have contributed as much to the challenged measure’s public health objectives.²⁵ Importantly from the perspective of public health and the management of NCD risk factors, the WTO panel in *Australia – Plain Packaging* noted that it had to evaluate the impact of the Australian measures as part of a comprehensive suite of regulations designed to lower tobacco

²² However, the preamble to the TBT Agreement states that ‘no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health’. Ibid.

²³ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (circulated 2 April 2012, adopted 24 April 2012), para. 174.

²⁴ Ibid. para. 225.

²⁵ Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (circulated 28 June 2018), para. 7.1730-7.1731; Panel Report, Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (circulated 2 September 2011, adopted 24 April 2012), para. 7.423-7.427.

use,²⁶ rather than considering the other complementary measures that had also been implemented by Australia as alternative means of discouraging tobacco use.²⁷

The *Australia – Plain Packaging* dispute also demonstrates the potential for packaging requirements on products such as tobacco or alcohol to infringe intellectual property rights. As well as being incorporated into the WTO regime through the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (‘TRIPS Agreement’),²⁸ obligations regarding protection of intellectual property rights are a common feature of contemporary PTAs.²⁹ In the *Plain Packaging* dispute, the complainant WTO Members argued, *inter alia*, that Australia’s tobacco packaging restrictions ‘unjustifiably encumbered’ the use of trademarks (such as design features and colours associated with tobacco brands), in violation of Article 20 of the TRIPS Agreement. The panel concluded that although the Australian measures did affect the use and economic value of certain trademarks, they were not ‘unjustifiable’ encumbrances because they were supported by evidence that they contributed to the public health objective of ‘reducing the use of, and exposure to, tobacco products’.³⁰ This finding once again shows that the obligations imposed by international trade agreements allow space for regulatory measures that contribute to public health objectives.

C. MEASURES AFFECTING THE INTERESTS OF FOREIGN INVESTORS

Although the WTO agreements contain only limited rules applying to foreign investment,³¹ many PTAs contain a chapter regarding the treatment of investors of the other treaty party/ies, typically including obligations to accord

²⁶ In taking this approach, the panel referred to: Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (circulated 3 December 2007, adopted 17 December 2007), para. 172.

²⁷ Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (circulated 28 June 2018), para. 7.1384.

²⁸ Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 International Legal Materials 1125 (signed 15 April 1994, entered into force 1 January 1995).

²⁹ See, eg, European Union – Canada Comprehensive Economic and Trade Agreement (CETA), signed 30 October 2016 (provisionally applied from 21 September 2017, not yet entered into force), Chapter 20; Korea – United States Free Trade Agreement, signed 30 June 2007 (entered into force 15 March 2012), Chapter 18.

³⁰ Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (circulated 28 June 2018), para. 7.232; 7.2604.

³¹ Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 International Legal Materials 1125, signed 15 April 1994 (entered into force 1 January 1995), Agreement on Trade-Related Investment Measures.

foreign investors ‘fair and equitable treatment’ and requiring compensation for expropriation or nationalisation of property (or measures with an equivalent effect to the seizure of property).³² Typically, the investment chapter of a PTA allows investors to enforce these requirements through *ad hoc* international arbitration, known as ‘investor-state dispute settlement’ (ISDS). Philip Morris used the ISDS mechanisms of bilateral investment treaties (which contain comparable provisions to the investment chapters of PTAs) to challenge Australia’s tobacco plain packaging requirements³³ and Uruguay’s packaging and labelling requirements for cigarettes.³⁴ Other NCD-related measures might also be contested through ISDS.³⁵

Philip Morris’ efforts to use international investment rules to challenge tobacco regulations were ultimately unsuccessful. Its claim against Australia was dismissed on jurisdictional grounds, meaning that the tribunal in that case did not have to determine whether Australia’s plain packaging scheme was consistent with its investment obligations.³⁶ In *Philip Morris v Uruguay*, the tribunal found that the economic impact of the measure was not significant enough to be equivalent to expropriation, that the measures could alternatively have been justified by their public health purpose, and that the measures did not violate the fair and equitable treatment requirement because they were reasonable and proportionate to the harmful effects of tobacco.³⁷ However, one of the three arbitrators dissented from the latter finding with respect to one of Uruguay’s two challenged measures. In his view, Uruguay’s ‘single presentation requirement’ (which prohibited marketing more than one product under each brand name) did not meet the standards of ‘rationality or proportionality’, because limiting the number of products under each brand name was not related to the objective of protecting consumers against deceptive uses of trademarks.³⁸ Although Uruguay prevailed, these comments by the dissenting arbitrator reiterate the importance of ensuring that all aspects of regulatory

³² See, eg, Peru -Australia Free Trade Agreement, signed 18 February 2018 (not yet entered into force), Chapter 8, art. 8.6 and 8.8.

³³ *Philip Morris Asia Ltd and Commonwealth of Australia (Notice of Arbitration, 21 November 2011, PCA Case No. 2012-12)*.

³⁴ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, (Request for Arbitration, 19 February 2010, ICSID Case No. ARB/10/7) (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*).

³⁵ See, generally, Anne Marie Thow and Benn McGrady, “Protecting Policy Space for Public Health Nutrition in an Era of International Investment Agreements,” *Bulletin of the World Health Organization* 92(2), (2014): 139.

³⁶ *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility) (UNCITRAL, Permanent Court of Arbitration, Case No 2012-12, 17 December 2015)*.

³⁷ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016)*, paras. 286, 306, 409-410 and 420.

³⁸ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay (Dissent of Arbitrator Gary Born) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016)*, paras. 172 and 176.

measures taken to combat NCD risk factors are justified by their public health objective, as supported by reliable evidence. In addition, the dissenting arbitrator felt that there had been a denial of justice to the investors, because there had not been any avenue of recourse after two domestic judicial bodies had issued contradictory decisions about the same question of domestic law. This aspect of the dissenting opinion demonstrates the importance of ensuring that measures adopted for public health purposes follow appropriate procedural steps in their adoption and implementation.

IV. REGULATORY CHILL AND CARVE-OUTS FROM THE SCOPE OF INTERNATIONAL TRADE AGREEMENTS FOR HARMFUL PRODUCTS

The preceding review has shown that, while measures taken to combat NCD risk factors may appear inconsistent with obligations in international trade agreements, these agreements incorporate flexibility to accommodate well-designed regulatory measures that contribute to a public health purpose. However, even where a measure is found by the relevant tribunal to be consistent with international trade rules, or when no formal dispute settlement proceedings have been commenced, the threat of such action through informal complaints or media statements may be enough to deter countries from adopting public health measures (known as ‘regulatory chill’).

One option to give treaty parties greater certainty that measures to lower consumption of tobacco, alcohol or unhealthy food will not be challenged under international trade agreements (even if the challenge is unlikely to succeed) is to ‘carve out’ these products from the scope of the PTA or from a particular chapter. The recently concluded *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (‘CPTPP’) contains a provision that allows any of the eleven treaty parties to exclude claims challenging ‘tobacco control measures’ from the scope of ISDS.³⁹ This provision removes the threat of litigation being brought by tobacco companies to enforce investment obligations of the CPTPP. This approach may reduce the risk of regulatory chill as well as the potential cost in time and human and financial resources of defending an ISDS claim.

A more comprehensive approach to safeguarding regulatory autonomy for tobacco control measures would be to exempt tobacco and related measures from the entire agreement. However, such an approach is likely to be

³⁹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018 (entered into force 30 December 2018) art. 29.5.

resisted by many countries. Furthermore, removing tobacco, alcohol or other unhealthy products from the scope of international trade agreements would mean that domestic industries for these products could be supported by measures such as tariffs and subsidies without being subject to the international trade agreement, which would be contrary to health objectives.

V. CONCLUSIONS

International trade agreements have a critical and complex relationship with the fight against NCDs. Liberalised trade reduces market distortions, which if left unchecked by health-based regulation could lead to increased consumption of tobacco, alcohol, and energy-dense, nutrient poor foods. In designing regulatory responses to NCD risk factors, governments should bear in mind international trade rules, which include obligations not to discriminate against imported like products, and not to restrict trade, intellectual property rights or foreign investment more than necessary for public health purposes. Tribunals adjudicating disputes under international trade agreements have found sufficient space within these rules to accommodate public health objectives through well-tailored regulation.

BIBLIOGRAPHY

Journal and periodicals

- O'Brien, Paula and Mitchell, Andrew D. "On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement." *QUT Law Review* 124, no. 18(1) (2018): 1-32.
- Sykes, Allan O. "Comparative Advantage and the Normative Economics of International Trade Policy." *Journal of International Economic Law* 1, no.1 (1998): 49–82.
- Thow, Anne Marie and McGrady, Benn. "Protecting Policy Space for Public Health Nutrition in an Era of International Investment Agreements." *Bulletin of the World Health Organization* 92(2), (2014): 139-145.

Books and book chapters

- Hawkes, Corinna. "The Influence of Trade Liberalisation and Global Dietary Change: The Case of Vegetable Oils, Meat and Highly Processed Foods" in *Trade, Food, Diet and Health: Perspectives and Policy Options*, edited by Corinna Hawkes, Chantal Blouin, Spencer Henson, Nick Drager and Laurette Dubé, 35–59, at 40, 49, 53–54. West Sussex: Blackwell Publishing, 2010.
- Voon, Tania. "WTO Law and Risk Factors for Noncommunicable Diseases: A Complex Relationship" in *Research handbook on environment, health and the WTO*, edited by Geert Van Calster and Denise Marie Prévost, 390, 393. Edward Elgar Publishing, 2013.
- Wipfli Heather, Bettcher Douglas, Subramaniam Chitra and Taylor Allyn, "Confronting the Tobacco Epidemic: Emerging Mechanisms of Global Governance" in *International Co-operation in Health*, edited by Martin McKee, Paul Garner and Robin Stott, 127–149, at 130. Oxford: Oxford University Press, 2001.

Legal documents

International Agreements

- Marrakesh Agreement Establishing the World Trade Organization. (signed 15 April 1994, entered into force 1 January 1995).
- Korea – United States Free Trade Agreement. (signed 30 June 2007, entered into force 15 March 2012).
- European Union – Canada Comprehensive Economic and Trade Agreement (CETA). (signed 30 October 2016, provisionally applied from 21 September 2017, not yet entered into force).
- Peru -Australia Free Trade Agreement. (signed 18 February 2018, not yet entered into force).
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership. (signed 8 March 2018, entered into force 30 December 2018).

Appellate Body Reports

- Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/ AB/R, WT/DS10/AB/R, WT/DS11/AB/R (circulated 4 October 1996, adopted 1 November 1996).
- Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/ AB/R,

- WT/DS110/AB/R (circulated 13 December 1999, adopted 12 January 2000).
- Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (circulated 11 December 2000, adopted 10 January 2001).
- Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (circulated 12 March 2001, adopted 5 April 2001).
- Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (circulated 28 April 2005, adopted 19 May 2005).
- Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (circulated 3 December 2007, adopted 17 December 2007).
- Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (circulated 21 December 2009, adopted 19 January 2010).
- Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (circulated 2 April 2012, adopted 24 April 2012).
- Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/AB/R, WT/DS401/AB/R (circulated 22 May 2014, adopted 18 June 2014).
- Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (circulated 2 September 2011, adopted 24 April 2012).
- Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (circulated 28 June 2018).

Other Cases

- Canada – Measures Governing the Sale of Wine in Grocery Stores (Second Complaint), Request for Consultations by the United States*, WT/DS531/1 (2 October 2017).
- Canada – Measures Governing the Sale of Wine in Grocery Stores, Request for Consultations by Australia*, WT/DS537/1 (16 January 2018).
- Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, (Request for Arbitration, 19 February 2010, ICSID Case No. ARB/10/7) (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay).
- Philip Morris Asia Ltd and Commonwealth of Australia* (Notice of Arbitration, 21 November 2011, PCA Case No. 2012-12).
- Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (UNCITRAL, Permanent Court of Arbitration, Case No 2012-12, 17 December 2015).
- Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016)

Others

Official Publications

GATT. *Thailand - restrictions on importation of and internal taxes on cigarettes: report of the panel* adopted on 7 November 1990. GATT document DS10/R-37S/200. Geneva: GATT 1947. 1990.

GATT. *United States - measures affecting alcoholic and malt beverages: report of the panel adopted on 19 June 1992*. GATT document DS23/R-39S/206. 1992.

World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (Washington DC: World Bank 1999).

World Health Organization, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases: 2013-2020* (World Health Organization, Geneva, 2013).

World Health Organization, *Global Strategy to Reduce the Harmful Use of Alcohol* (World Health Organization, Geneva, 2010).

WTO, *United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products: Request for the Establishment of a Panel by Canada*, WT/DS357/12 (9 November 2007) and WT/DS357/12/Corr.1 (16 November 2007).

UN General Assembly, *Resolution Adopted by the General Assembly: Prevention and Control of Non-communicable Diseases*, A/RES/64/265 (20 May 2010).