

# Public health over private wealth: rebalancing public and private interests in international trade and investment agreements

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## Key points

- Trade and investment agreements provide greater access to, and influence over, national and international regulatory policy-making forums for private economic actors. Simultaneously, economic growth and higher living standards promised as a result of these agreements have not been distributed equitably
- Public health scholars, practitioners and advocates should explore novel opportunities to protect and promote public welfare in these agreements, such as those provided in this commentary, and build stronger coalitions with those working towards broader public interest goals to maximise benefits to human health

## Abstract

The emerging global trade and investment regime is a site of ongoing contestation between states, powerful industry actors and civil society organisations seeking to influence the formation of legal rules, principles, practices and institutions. The inclusion of major transnational tobacco, alcohol and ultraprocessed food companies seeking to influence governments in these processes has resulted in the expanded distribution and consumption of unhealthy commodities across the globe, overshadowing many of the positive impacts for health hypothesised from liberalised trade. The growing number of pathways for market actors to exert undue influence over national and international regulatory environments provided by agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, has given many cause to be concerned. In the context of continued commitment by states to international trade and investment negotiations, we present several avenues for public health scholars, advocates and practitioners to explore to rebalance public and private interests in these deals.

## Background

Forged in the aftermath of the two World Wars, the inaugural agreements on international trade were heralded as opportunities to develop peace between nations through greater economic prosperity and interdependence. Recent agreements, however, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), seem to be offering much less grandiose terms than earlier promises of peace and prosperity. Remarkably, the CPTPP is projected to boost Australia's real national income by a mere \$12 billion by 2030 – an annual growth rate of just 0.04%.<sup>1</sup> Some economists have called for a distinction to be made between 'free trade' and 'free trade agreements': the former may reflect optimal economic policy, but the latter is increasingly geared at boosting the profits of powerful interest groups, such as multinational corporations.<sup>2</sup> Given the current state of

affairs, we suggest in this commentary that, although trade and investment agreements currently prioritise the generation of private wealth over public health, there are opportunities to rebalance the scales of public and private interest in these deals.

## The (crumbling) justification for international trade agreements

Trade and investment agreements are negotiated on the premise that openness to international trade will promote economic growth and improve living conditions for all.<sup>3</sup> Yet many instances of liberalisation in places such as Latin America or Africa tell a very different story.<sup>4</sup> Three schools of thought exist on whether globalising processes, such as trade, increase economic growth: that the evidence for this relationship is either very strong, quite weak or highly dependent on complementary policies (see Samimi and Jenatabadi<sup>5</sup> for a brief review). Assuming the last of these is correct, the distribution of gains among individuals in different countries or sectors will be determined by factors such as education, innovation, infrastructure, institutional and regulatory frameworks, and financial development within a country.<sup>6</sup> Although understanding the distribution of trade gains among the public is vital, it is equally important to scrutinise the distribution of these gains between the general public and the private market actors with front-row tickets to the negotiation table.

## Tipping the scales towards market actors

The formative agreements of the World Trade Organization (WTO), along with a complex web of bilateral and regional trade and investment agreements around the globe, epitomise a process of global constitutionalisation: establishing the legal rules, principles, procedures, practices and institutions that determine both who has power and the scope of that power.<sup>7</sup> It has been suggested that the emerging global trade and investment regime reflects the interests of the most powerful states and private economic actors.<sup>8-9</sup> For example, it was striking that the US appointed approximately 600 corporate lobbyists as official advisers to the US Government during the negotiations for the Trans-Pacific Partnership (an earlier version of the CPTPP)<sup>10</sup>, thereby granting them privileged access to negotiators and negotiating texts.

One of the key aims of market actors in these agreements is regulatory harmonisation (i.e. the development of common standards across markets).<sup>11</sup> For example, the CPTPP includes a regulatory coherence chapter that indicates that each party should consider establishing a national or central coordinating body with the power to review national governments' regulatory measures for compliance with "good regulatory

practices". Although the language of this chapter is hortatory rather than legally binding, and has no recourse to dispute settlement, it has raised some concern among public interest advocates. It has been noted that civil society has limited capacity to effectively participate in various rule-making forums relative to industry associations and multinational corporations.<sup>12</sup> Some have concluded that the potential for a limited range of stakeholders to unduly influence the rule-making process "could not only curtail the regulatory autonomy of governments to act in the public interest, but also pose credible threats to both distributional justice and democratic legitimacy".<sup>13</sup>

Arguably, though, one of the most striking examples of the growing imbalance between public and private rights in trade and investment negotiations has been the continued inclusion of investor-state dispute settlement (ISDS). ISDS mechanisms "grant corporations standing to bring legal action directly against signatory governments in order to guarantee the rights and protections they are afforded within the agreements", thus privileging the interests of transnational corporations over those of other actors.<sup>14</sup> For example, when the Australian Government introduced tobacco plain-packaging legislation in 2012, Philip Morris invoked ISDS provisions under a 1993 agreement between Australia and Hong Kong to seek financial damages through international arbitration. Although the WTO has long offered a forum to resolve trade disputes, states have historically had strong deterrents to initiating spurious legal challenges, such as damage to diplomatic relations and a fear of retaliatory measures. Corporate actors, however, have much narrower interests and fewer disincentives to initiate legal challenges.<sup>14</sup>

## Implications for public health

International trade and investment are neither intrinsically good nor bad for health; rather, they reflect the interests of those most engaged in the system. The rise of large transnational companies in ultraprocesed food, alcohol, tobacco and pharmaceuticals has meant that the interests of these industry players in commodities that are harmful for health and intellectual property protections have overshadowed many of the possible gains for health from trade. Together, these industries have used trade and investment agreements to create what could be considered a 'triple-edged sword' for public health around the globe. First, increased consumption of these commodities has been supported through goods and services liberalisation provisions that reduce tariffs (i.e. border taxes) on goods or eliminate restrictions on foreign direct investment. This has generally increased both the volume of imports of commodities that are harmful to health and the local production, manufacturing and distribution of these products, alongside intensive marketing and advertising campaigns.<sup>15</sup>

Second, at the point when the rates of noncommunicable diseases (e.g. cardiovascular diseases, diabetes, cancers) start to climb due to increased consumption, expansive intellectual property rights in trade agreements, which include extending pharmaceutical monopolies, negatively affect access to treatment by keeping medicine prices higher for longer.<sup>16</sup>

Finally, the greater influence within regulatory environments afforded to corporations through harmonisation initiatives and ISDS may interfere with efforts to regulate the sale of these harmful commodities. Existing committees at the WTO, such as the Technical Barriers to Trade (TBT) Committee, which oversees regulation affecting food, alcohol and tobacco labelling, may offer insights into how a national or central coordinating body in the CPTPP may operate. Within the committee, members discuss regulations, laws and procedures relating to the TBT Agreement, and can raise specific concerns regarding measures that may affect their trade. A recent analysis demonstrated how public health measures in Thailand, Chile, Indonesia, Peru and Ecuador to introduce mandatory front-of-pack interpretive nutrition labelling as a means of addressing rising noncommunicable disease rates are being raised as a trade concern within the TBT committee.<sup>17</sup> Some Member States, acting on behalf of domestic industries, have requested that these countries provide greater justification for the measures and scientific evidence for their effectiveness, and have suggested that the measures are more trade restrictive than necessary, and that less trade-restrictive measures, such as education campaigns, could be implemented instead. Similar practices have been documented in reference to alcohol labelling.<sup>18</sup> Since the vast majority of concerns will not escalate to formal disputes<sup>19</sup>, this is a key venue to explore the impact of trade concerns on potential shifts in policy formulation.

In a more direct effort to influence regulation and/or receive compensation for associated financial losses, up until 2013 there were more than 40 instances of the ISDS system being used by private market actors to challenge governments' health or environmental protection measures<sup>20</sup>, including measures on chemical and mining bans, environmental restrictions, transportation and disposal of hazardous waste, health insurance, tobacco, and regulations to improve the economic situation of minority populations.<sup>21</sup> The success of these cases has been mixed to date (see review of ISDS cases involving public interest policies<sup>22</sup>). However, it has been observed that "[t]he objectives of corporations may be served even by unsuccessful legal challenges, if they are able to delay the implementation of unfavorable measures or deter other governments from pursuing similar policies".<sup>14</sup>

## Opportunities to rebalance the scales

The good news is that there are many ways in which these agreements could be improved for health and other public interest issues. In this section, we propose a series of actions to help rebalance public and private interests in future trade and investment agreements.

### Revising language in agreements

A number of reforms exist around revising the language of agreements. For example, newer trade agreements are increasingly making use of public policy general exceptions that allow measures otherwise prohibited by the agreement to be taken if they can be demonstrated to be "necessary to protect human, animal or plant life or health", provided that they are nondiscriminatory and not disguised protectionism. This language, borrowed from the General Agreement on Tariffs and Trade, has been heavily critiqued as prioritising trade liberalisation over regulatory autonomy in practice.<sup>23</sup> The United Nations Conference on Trade and Development (UNCTAD), in its Investment Policy Framework for Sustainable Development<sup>24</sup>, has suggested that, instead of providing that the measure must be *necessary* to achieve the policy objective, the text could require that the measure be *designed* to achieve or *related* to the policy objective, thus lowering the burden of proof for states. The trade and health community could support this approach in new agreements as one avenue for creating greater domestic regulatory autonomy.

### Reforming investor-state dispute settlement

Additionally, a series of reforms have been directed at ISDS. Recently, a 'carve-out' of tobacco measures from ISDS in the CPTPP emerged (the carve-out being an exception that allows members to exclude any tobacco control measure from an investment dispute), following the Philip Morris dispute over Australia's tobacco plain-packaging legislation. This reflects significant progress in getting health on the trade agenda, but ultimately is a narrow protection that applies only to tobacco, and only under this one agreement (leaving all previous agreements between members in play). It is a watered-down version of the original proposal from Malaysia for a complete carve-out of tobacco control measures from the Trans-Pacific Partnership agreement: this version merely allows states to opt in to an exception from ISDS for tobacco control measures. The broader implications of tobacco exceptionalism for other regulatory agendas, such as diet and alcohol, have been addressed elsewhere.<sup>25</sup> One opportunity moving forward would be to lobby for tobacco policy to be carved out from the scope of the treaty (rather than as an exception states can opt in to), and to expand the policy space to cover measures related to alcohol, and ultraprocessed food and beverages.

In the absence of achieving broader carve-outs from dispute settlement, other opportunities may exist to enhance regulatory autonomy during disputes. For example, UNCTAD has suggested measures that empower states to decide on the application of general public policy exceptions. That is, if a state invokes a public policy exception during a dispute settlement procedure, the matter could be referred to the parties to the agreement for a joint binding determination of whether or not a measure falls within the scope of the exception. This would assist in returning public policy debates to the domestic political arena, where some level of democratic oversight and accountability exists. This option may also be perceived more favourably by states as achieving a better balance between trade and health objectives than carve-outs, which could prevent challenges to protectionist public policy measures.

### Governing private actor participation

Governing private actor participation in trade and investment negotiations is another essential step in rebalancing public and private interests in concluded deals. The Framework of Engagement with Non-State Actors (FENSA) developed by the World Health Organization (WHO) could serve as a template for governments to define their own terms of engagement with non-state actors during trade negotiations, such as the risks of engagement, conflicts of interest, the types of interactions and required transparency. It could also provide a channel to mitigate the influence of selected industries. For example, FENSA stipulates that WHO does not engage with the tobacco industry or non-state actors that work to further the interests of the tobacco industry. Expanding this provision to include the alcohol, and ultraprocessed food and beverage industries could serve as a powerful precedent for governments to similarly exclude such actors from trade and investment negotiations, should they develop their own terms of engagement in the future. Likewise, this strategy could be used to target a wider range of industries that have vested interests that can be demonstrated as inconsistent with the public interest, such as pharmaceutical (lobbying for extended medicine monopolies) or fossil fuel companies.

### WHO-led initiatives

Similarly, WHO-led initiatives can be important levers for influencing the dispute settlement system. For example, in the recently concluded WTO dispute over Australia's tobacco plain-packaging legislation, in finding in favour of Australia, the dispute panel acknowledged that the Framework Convention on Tobacco Control (FCTC) and its guidelines form a comprehensive and interrelated set of obligations and policy recommendations, and that rules on tobacco control measures need to be read in the context of other FCTC obligations and guidelines. The dispute panel also used the FCTC to support its

findings on the purpose, outcomes and effectiveness of tobacco plain-packaging measures, as well as the health consequences of tobacco use and exposure, the need for a comprehensive approach to tobacco control, and the effectiveness of other tobacco control measures.<sup>26</sup> Sadly, the panel concluded that the FCTC did not constitute an international standard, which could have guaranteed "necessary regulatory space for WTO Members when it comes to tobacco control measures" in the future<sup>27</sup> – although the report from the dispute panel will likely be appealed<sup>26</sup>, which could reopen this discussion. Regardless, the panel signalled the importance of the FCTC in dispute settlement and supports further exploration of additional WHO frameworks, such as those targeted at other products (e.g. Framework Convention on Alcohol Control) or corporate practices (e.g. Framework Convention on Marketing and Advertising).

### Addressing the wider social determinants of health

Beyond actions targeted directly at commercial determinants of health such as tobacco, alcohol, and ultraprocessed food and beverages, the health community could seek to achieve more structural-level changes through agreements that address the wider social determinants of health. This is reflected in the trend towards including chapters on labour, sustainability or gender, as examples. Although a review of these chapters is outside the scope of this commentary, they represent opportunities to 'think big' about the kind of world our economy should be fostering. For example, if an investment is going to receive protection from the ISDS system, how can we demand more from that investment for society? Here, again, UNCTAD's framework<sup>24</sup> offers some direction about opportunities to tailor the definition of investments to those that are conducive to sustainable development or those that generate decent employment in the host country. These strategies are about public health moving from defence to offence within trade and investment negotiations.

### Conclusion

Each change proposed in this commentary is, at its core, designed to rebalance the protection of public and private interests in trade and investment agreements. Consequently, each change will present an uphill battle for scholars, advocates and practitioners working towards these reforms. Previous work from the authors has demonstrated that public interest arguments in trade and investment negotiations sit well outside the dominant discourse and thus offer very little discursive power.<sup>11</sup> In light of this, we should be strengthening and expanding our networks, and building coalitions around the broader public interest. Action on the commercial determinants of health in trade and investment agreements is required, and will help tip the scales in the right direction. However,



in the long run, securing protections for labour, the environment and human rights will be instrumental in protecting and promoting human health.

## Peer review and provenance

Externally peer reviewed, invited.

## Competing interests

None declared.

## Author contributions

AS prepared the initial draft. All authors provided critical feedback and contributed to the final manuscript.

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