The Federation's Pages

WFPHA: World Federation of Public Health Associations

www.wfp ha.org

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Journal of Public Health Policy (2016) **37**, 547–551.

doi:10.1057/s41271-016-0036-x

The Public Health Impact of Modern Trade Agreements

Designers of trade agreements of the past set out to reduce protective trade barriers, to open access to markets, and to improve opportunities for ordinary people. Modern trade agreements that are largely negotiated in secret¹ have reversed some of these intentions by introducing protections for large multi-national companies, ensuring a guarantee of pricing, and allowing decisions of governments to be challenged through an Investor State Dispute Settlement (ISDS) mechanism which is a tribunal system that operates under questionable legal processes that we discuss below.

Threats to health through modern trade agreements warrant action by public health associations globally. These threats include the potential to restrict the ability of governments to regulate health-damaging products and activities such as tobacco, alcohol, gambling, ultra/highly processed foods, and unsafe medicines. Within modern trade agreements are a range of devices such as price protection, intellectual property constraints, and extended patents for drug manufacturers that may further constrain public health action by restricting access to modern medicines. Broader public health areas of concern are also under threat, including equity of health care, capacity to legislate or regulate to protect the natural environment, and protection of other determinants of health (such as education, employment, and working conditions).

The Investor State Dispute Settlement (ISDS) mechanism is a tool designed to allow multi-national companies to over-ride decisions taken by

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foreign governments. Most modern treaties include ISDS provisions. In an attempt to over-ride the Australian government's plain packaging of tobacco products Philip Morris-Asia challenged the Australian Plain Packaging Legislation under an obscure 1993 Trade Agreement with Hong Kong² that contained an ISDS provision.³ The decision had already been tested in the Australian High Court. Tobacco giant Philip Morris, however, took extraordinary measures to evade Australian regulation, even moving assets to Hong Kong to facilitate using with the 1993 trade agreement with Hong Kong to launch a challenge to the Australian High Court decision⁴ and to Australian sovereignty.

The ISDS is even more insidious for its impact on government decision making. For example, it is conceivable that a local government considering a decision to restrict either alcohol sales outlets or times of sales would determine that it would not proceed because the risks of having to defend a challenge in an international court and the costs of doing so would be too high. This use of mechanisms to deter government action is sometimes referred to as 'regulatory chill'.

An OECD study found that ISDS cases have lasted for 3–5 years with average costs of US\$8 million per case, with some cases having cost up to US\$30 million.⁵ A tribunal in March 2015 overturned a local government decision (in Nova Scotia, Canada) in favour of a company (Bilicon of Delaware in the United States). The company was claiming damages because the local government refused its application for an environmental permit to develop a quarry. The locality based its permit denial on environmental risks and inconsistency with "community core values".⁶ In *Bilicon v Delaware*,⁷ the company's argument to the tribunal

"...chaired by Judge Bruno Simma concluded, over a prominent dissent, that Canada's conduct was in breach of the international minimum standard of fair treatment placing particular focus on the investors' reasonable expectations generated by the host State's repeated encouragements."⁶

Chief Justice French of the High Court of Australia launched a scathing attack on the ISDS process. He noted that the United Nations Conference on Trade and Development (UNCTAD) published its Annual Review of ISDS cases — reporting commencement of 57 new cases in 2013.⁸ That total was just below that of 2012, a record year with 62.⁹ Investors from developed countries, mainly from the European Union and the United States, brought most of the claims against States. They involved challenges to a range of governmental measures including those

- relating to renewable energy;
- allegedly effecting expropriation of assets;
- involving revocation of licenses and permits;¹⁰ and
- relating to regulation of energy tariffs, wrongful criminal prosecutions, land zoning decisions, invalidation of patents, and sovereign bonds legislation.¹¹

Regulatory cooperation is a new tool, developed in the XII round of Transatlantic Trade and Investment Partnership (TTIP) negotiations (Brussels, February 2016), and it has already been applied to the treaty with Vietnam of August 2015, and to the Comprehensive Economic and Trade Agreement (CETA) between Canada and Europe. The World Federation of Public Health Associations' (WFPHA) policy on Trade Agreements specifies that "...this new tool could spread to other treaties in the future, affecting not just how laws are applied (ISDS) but also how laws are created, by allowing stakeholders to participate in regulatory cooperation bodies (RCB) replacing the traditional role of national governments and parliaments".¹² Such RCBs will, according to Trade Europe fact sheet, "...circumvent parliaments, governments or stakeholders' roles in the regulatory process". The fact sheet explains "we want to create institutions to: help us ensure we put into practice the measures agreed in this part of TTIP".¹³

Intellectual property provisions that aim to expand and extend monopolies on medicines have the potential to delay the availability of affordable generic drugs. During negotiations on the Trans Pacific Partnership (TPP), international pharmaceutical and other global companies place significant pressure on negotiators. Some of the proposed measures include patent term extensions, monopolies on clinical trial data (known as 'data exclusivity'), and expanded scope of patentability (e.g. mandatory secondary patents for minor variations or new uses of existing products).

The World Trade Organization provides an oversight for international treaties and oversees dispute resolution processes.¹⁴ From a public health association perspective, there ought to be a much stronger role for the World Health Organization in promoting and protecting health during the negotiation of trade agreements and monitoring the effects on health of existing and proposed agreements.

The WFPHA calls on all public health associations in their policies to demand a much more open process for negotiations and to

"advocate for the full consideration of public health in trade negotiations, and promote inclusion in the agreements the importance of environmental sustainability, progress on social and health outcomes

and equity, and advancement of human rights including social, economic and cultural rights”.

One method of doing this is to demand that a Health Impact Assessment (HIA) be carried out as part of all trade negotiations at two points: first, when the treaty is under development, and then when countries determine whether or not they will ratify the treaty.

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