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A Corporate Veto on Health Policy? Global Constitutionalism and Investor-State Dispute Settlement

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Abstract

The importance of trade and investment agreements for health is now widely acknowledged in the literature, with much attention now focused on the impact of investor-state dispute settlement (ISDS) mechanisms. However, much of the analysis of such agreements in the health field remains largely descriptive. We theorise the implications of ISDS mechanisms for health policy by integrating the concept of global constitutionalism with veto point theory. It is argued that attempts to 'constitutionalise' investment law, through a proliferation of International Investment Agreements (IIAs), has created a series of new veto points at which corporations may seek to block new policies aimed at protecting or enhancing public health. The multiplicity of new veto points in this global 'spaghetti bowl' of IIAs creates opportunities for corporations to 'venue shop'; to exploit the agreements, and associated veto points, through which they are most likely to succeed in blocking or deterring new regulation. These concepts are illustrated with reference to two case studies of investor-state disputes involving a transnational tobacco company, but the implications of the analysis are of equal relevance for a range of other industries and health issues.

Keywords

investor-state dispute settlement; bilateral investment treaties; tobacco control; tobacco industry; veto points; veto players; global constitutionalism

1. Introduction

The importance of international trade and investment for health is now widely acknowledged (McGrady 2011, Voon et al. 2014, Alemanno and Garde 2015). The stalling of the Doha Round of World Trade Organization (WTO) negotiations, and the enduring impasse within the multilateral trade regime, has led (principally industrialized) countries to pursue further liberalization of international trade and investment through other means, including Bilateral Investment Treaties (BITs) and Regional Trade Agreements (RTAs). The Trans-Atlantic Trade and Investment Partnership (TTIP) currently under negotiation between the US and the EU – the world's two largest economic blocs – and the Trans-Pacific Partnership Agreement (TPP) – a free trade agreement including the US and 11 countries in the Pacific Rim (Fooks and Gilmore 2013) – are of particular significance, given the size of the economies involved and the political power of the negotiating parties. TTIP and TPP

represent a fundamental shift in the scale and reach of agreements negotiated outside of the WTO framework, and their significance is likely to stretch far beyond the countries party to the agreements. If successfully concluded, these agreements – along with the Trade in Services Agreement (TISA) also currently under negotiation – will shape the norms and standards governing the entire international trade and investment regime. Following McGrady (2011) we use the umbrella term 'International Investment Agreements' (IIAs) to refer collectively to BITS, RTAs and other agreements between two or more contracting parties that include investment provisions.

Much of the controversy surrounding both TPP and TTIP (as well as other IIAs) focuses on their inclusion of Investor-State Dispute Settlement (ISDS) mechanisms, which grant corporations standing to bring legal action directly against signatory governments in order to guarantee the rights and protections they are afforded within the agreement. In many cases, criticisms levelled at ISDS have focused specifically on the health impacts of IIAs (Khan et al. 2015, Weiss 2015, Jarman 2014). Despite these concerns, the literature in this area remains largely descriptive in nature. The current article aims to investigate some of the key issues that ISDS raises for health policy, through an engagement with two bodies of literature from international law and political science. The application of these theories deepens our understanding of both the nature and the extent of the threat posed to public health by the proliferation of ISDS clauses in IIAs.

First, we place developments in the international trade and investment regime within the context of wider debates in international relations and international law about processes of constitutionalisation above the level of the state (i.e., at the international or global level) (Thompson 2012, May 2014, Schwöbel 2012, Schwöbel 2011, Cass 2001, Peters 2012). This literature offers both a conceptual framework through which to interpret and understand the current evolution of the international trade and investment regime, and the basis on which to critique the specific forms of constitutionalisation put in place by the agreements we identify. We argue that whilst adopting the procedural, technocratic language of constitutionalism and the rule of law, the global trade and investment regime now emerging furthers the interests of a particular set of actors. IIAs, and ISDS clauses in particular, institutionalise and embed the practices and assumptions central to neo-liberal forms of political economy, privileging the interests of transnational corporations (TNCs) over those of other actors.

Veto point theory in political science provides a second analytical lens (Tsebelis 2002, Immergut 1992). The concept of veto points allows us to fully comprehend the significance of ISDS, not just for health policy, but for public policy more generally. Veto point theory explains the inherent bias towards the status quo in policy-making by identifying the key points in a political system at which policy initiatives can potentially be blocked. Systems with more veto points experience greater policy inertia, whilst those with fewer veto points are more open to change. International trade and investment agreements place obligations on states to ensure national laws comply with the undertakings made in those agreements. In so doing, governments bind themselves and their successors to act in certain ways, and curtail their freedom to pursue certain policy agendas which may run counter to the tenets of these

agreements. The enactment of these agreements opens governments up to the possibility of legal challenges, should they fail to comply.

The WTO allows member states to bring cases against other states whose policies are deemed to infringe the principles of WTO agreements. WTO law acts as a potential veto point in the policy process. However, key differences exist between the WTO dispute system and ISDS, which make the latter a potentially far more significant hurdle for policy initiatives to surmount. Since ISDS clauses afford corporations the ability to challenge unfavourable policies directly through private arbitration panels, they signify a huge expansion in the number of potential veto points and the number of interest groups which may attempt to exploit these. Dispute initiation is no longer limited to the states which are party to an agreement, but now includes any private investor whose cross-border activities fall within the remit of the agreement. The expansion in the number of IIAs concluded has led to greater complexity in the international trade and investment regime, creating a 'spaghetti bowl' of overlapping agreements and treaties, any one of which may be a potential means through which to challenge the adoption of a particular law. This body of agreements reinforce the current business-friendly policy regime and represent a potential brake which corporations with vested interests can apply to any form of public health or social policy which appears to undermine their interests.

We first elaborate the relevant aspects of the literature on global constitutionalism and on veto point theory to provide a conceptual framework for understanding the implications of ISDS mechanisms for public health policy. We then describe and explain the emergence and operation of ISDS mechanisms within IIAs. Finally, we examine two case studies of the use of BITs by a transnational tobacco corporation (TTC) to oppose evidence based public health policies in Uruguay and Australia. While we focus on TTCs here, the analytical lens we develop is more widely applicable to TNCs in other sectors (e.g. the food and alcohol industries) and other areas of public policy which may affect health (e.g. employment law, social policy and environmental protection).

2. Global Constitutionalism

Scholars have paid significant attention in recent years to processes of constitutionalisation 'above' the level of the state (Thompson 2012, May 2014, Schwöbel 2012, Schwöbel 2011, Cass 2001, Peters 2012, Brown 2012). While the extent and the nature of the constitutionalisation processes occurring is contested within the literature, Cass (2001: 41) notes that:

> Common to all commentaries on the topic is an assumption that constitutionalisation includes a set of social practices, defined as law, and associated with Western industrialized democracies which structures the division of public power within a given community. So legal rules, principles, procedures, practices and institutions establishing the community, determining who has public power within it, and defining the scope of that power constitute the bulk of these practices on constitutionalisation. Beyond that provisional definition a range of variations are possible.

Global constitutionalisation thus refers to attempts to institutionalise and order governance processes above the level of the state through mechanisms analogous with state-level constitutions. This involves the implementation of legal norms and judicialised forms of dispute resolution outside of the core domestic institutions of government and located instead in international or global bodies of various kinds. These developments can be seen as a response to the political, economic, societal and technological changes which are described collectively as globalization. Notwithstanding the distinctions made between the concepts of 'constitutionalisation' and 'constitutionalism' in the existing literature (see for example Loughlin 2010, Thompson 2012), we define 'global constitutionalisation' here as the *process* of creating constitutionally based systems of law above the level of the state; whilst 'global constitutionalism' is the more general *approach* to governance which sees 'constitutionalisation' of the global sphere as a necessary and positive process.

Constitutions set out basic norms and principles which order the conduct of politics and attribute certain roles to specific actors and institutions, placing limits on their power and that of the state overall (Loughlin 2010, Schwöbel 2011). They define the rights afforded to, and responsibilities beholden of, the citizenry brought into being by those very constitutions. Constitutionalism is thus closely allied to liberal theories of politics, centred on human rights, individual autonomy and limited government (Loughlin 2010). Schwöbel (2012) identifies 'social idealism' as a further dimension of global constitutionalism, in that it sets out a shared ideal for the future of the political community based on a specific set of social values and norms.

It is impossible to discuss (global) constitutionalism without also engaging with the associated concept of the rule of law (Thompson 2012). Christopher May (2014) has described the rule of law as the 'grundnorm,' or founding principle, underpinning constitutionalism. Consequently, global constitutionalism can be seen, in part at least, as the extension of the principle of the rule of law to the realm above the state (May 2014: 137). At the global level, however, the absence of a sovereign power (i.e., a world government) to enforce the rule of law as at the state level has important implications. At the state level, constitutionalism is likely to produce constitutionalisation in a very concrete sense – through the implementation and enforcement of written, binding constitutions. At the global level it is necessary to speak of constitutionalism in a much looser sense: as a frame of mind or a particular approach towards governance based on the norms of the rule of law (May 2014: 139). Global constitutionalism tends to produce multiple forms of constitutionalisation via a series of overlapping international agreements, which set out governance mechanisms and provide for dispute resolution on the basis of legal principles.

The discourse of global constitutionalism is indicative of more fundamental shifts in the theorisation and conduct of international politics in recent decades. Thompson (2012: 36) describes this transition as being from an era of embedded liberalism to an era of neo-liberalism. What defined the era of embedded liberalism (Ruggie 1982) was a reliance on political compromise and diplomatic bargaining between (almost exclusively) state actors. Companies investing overseas would guarantee their property rights were respected and contracts enforced through the political representations of their home governments (i.e., national embassies and trade delegations) within the host country. The advent of neo-

liberalism, ushered in by structural changes in the global economy from the 1970s, saw a gradual decoupling of the state and private actors, and the rising importance of new decision making and dispute resolution mechanisms (Thompson 2012). Inter-state diplomacy was replaced by international institutions and new forms of public and private law as the primary means of dispute resolution.

These developments are reflected in the formation and development of the WTO. Designed as a multilateral system of trade commitments and an associated dispute resolution process, it aimed to undermine the mercantilist logic whereby states actively pursued the interests of their 'national champions', replacing this with liberal norms of free trade and dispute resolution through arbitration. Whilst the era of embedded liberalism saw the rise to prominence of the General Agreement on Tariffs and Trade (GATT), its supersession by the WTO – encompassing a more developed institutional architecture, expanded policy scope, and more robust forms of dispute resolution – represented a decisive shift towards neo-liberal forms of governance (Thompson 2012). The stagnation of the WTO and the emergence of IIAs as the dominant form of trade and investment agreement in the first decades of the 21 century represents a new stage in the decoupling of state and private actors in the form of ISDS mechanisms.

Important questions arise in this context about political legitimacy and democratic accountability of the emerging, quasi-constitutional international trade and investment regime. Brown (2012: 209) argues that, without clear lines of accountability and processes of legitimization, we may be left with just the 'illusion' of legitimate global governance through the emerging constitutional order, which masks over structural abuses of power. Processes of constitutionalisation may simply lock in existing inequalities and power structures and undermine the possibility of challenging current social relations and political orthodoxies. For example, the emerging global trade and investment regime reflects the interests of the most powerful states and private economic actors (Brown 2012, Van Harten 2007) and locks in the flaws of the current system which has failed to address (and may be incapable of addressing) the myriad social and environmental issues facing the world.

Processes of global constitutionalisation afford a privileged role to certain groups of actors and their modes of thinking. For example, they create an extremely important role for lawyers, leading Thompson (2012) to stress the importance of differentiating the rule of law from what he terms 'rule by lawyers.' In the context of ISDS, enormous power has been granted to a small cadre of international trade and investment lawyers who sit on arbitration panels under the auspices of global forums such as the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank's International Centre for Settlement of Investment Disputes (ICSID). These forums lack both transparency and public oversight. In most instances there is no leave to appeal against decisions or to seek judicial review. Moreover, the emergence of international trade and investment arbitration regimes has led to the systematic privileging of economic liberalisation over other policy objectives. As with all legal texts, IIAs are open to interpretation and the law can be applied in different ways. However, the lawyers who populate these tribunals are trained to think in specific ways and to adjudicate narrowly on whether the issues arising from cases brought before them are in keeping with the fundamental tenets of the agreement in question, setting aside

other considerations. There is no obligation to balance trade and investment liberalisation against other competing social goods (e.g. the reduction of social inequalities). This means that economic liberalisation is placed in a privileged position over other policy objectives (Peters 2012). Whilst IIAs allow governments, at certain times, to take measures which demur from the principles of free trade – including in most instances in order to protect public health – these are exceptions to the rule which must be justified and may be challenged. The default setting is towards a maximalist interpretation of agreements, with the onus on governments to find the least trade-distorting policy tool available to achieve a given end.

Corporations may favour moves towards global constitutionalisation because of the status and associated rights that constitutions afford to private actors in their capacity as legal persons (Thompson 2012). Political strategy – the attempt to shape the regulatory environment in which a corporation is active in order to further its underlying commercial interests – has long been recognised as a key component of corporate strategy, of equal importance to market strategy (Baron 1995). Corporations have often used litigation to pursue their goals, but they have much to gain from going further than this by seeking to shape judicial structures themselves. Below, we link these developments in global constitutionalism to veto point theory, in order to draw out the implications of these trends for the making of health policy.

3. Veto Point Theory

Veto point theory offers an account of the policy-making process which focuses on the conditions necessary for policy change to occur by identifying the key points in the political and legal system where a policy may be blocked, i.e. legislative chambers, presidential offices, courts, etc. The veto of a policy at any one of these points is sufficient to prevent its adoption, so that the more veto points a system has the less likely it is to produce substantive policy change (Tsebelis 2002). The number and institutional position of veto points in a given polity will vary according to the specific constitutional arrangements which govern it (e.g. if it is a presidential or parliamentary system). The focus on veto powers underlines the difficulties which exist in attempting to bring about policy change, and the inherent bias towards the status quo which exists in complex political systems. Therefore, it makes more sense to think of veto point theory as an account not of policy change, but of policy stasis, although the degree of policy stability will vary between legislative contexts and policy areas depending on the range of different policy outcomes acceptable to key actors (Tsebelis 2002: 3).

The terms ‘veto point’ and ‘veto player’ are often used interchangeably in the literature, although they imply subtle differences in the conceptualisation of political agency and the identification of relevant actors, which are of significance for the argument presented in this article. Tsebelis (2002) uses the term veto *player* to refer to those actors who occupy key institutional positions that afford them formal veto power over policy initiatives, for example the President of the United States (an individual veto player) or the US Senate (a collective veto player). Others, such as Immergut (1992), refer to veto *points* in the institutional structure (see also Huber et al. 1993, Stone Sweet 2000, Coen 2007). Whilst Tsebelis’

(2002) account emphasises the role of individual and collective actors occupying key institutional positions within the policy process – the veto players with the power of decision – the concept of veto *points* facilitates a wider analysis of political agency around these key decision making junctures. It allows a focus on the ways in which interest groups may try to exploit the veto points in the constitution, for example through lobbying, litigation, the initiation of referenda and other means. As Immergut (1992: xii) puts it, institutions, including the veto points which exist within them, are important 'in explaining policy outcomes precisely because they facilitate or impede the entry of different groups into the policy-making process.' The analytical task is to map out the policy-making process, in order to identify the points at which a policy may be blocked and the key actors involved at each juncture. However, the focus is not only on the preferences and actions of the institutional veto players themselves, but also on the key interest groups who may attempt to influence these preferences and/or to initiate the process of potential veto through the activities identified above. Given our focus on corporations' ability to stymie policy decisions, we follow Immergut (1992) in deploying the concept of veto points.

Veto point/player theory has been applied to a range of policy issues from voter turnout (Carlin and Love 2013) to state capture and bureaucratic corruption in Ukraine (Bagashka 2014). The majority of these studies focus on legislative processes in national contexts (Madden 2014). Despite some exceptions (see Fink 2009 on the role of churches and societal veto players) much of the focus of this body of work is on the veto powers of what we might term the traditional institutions of government: the bureaucracy, legislature and executive. However, both Tsebelis (2002) and Immergut (1992) identify the importance of referenda, and there has been significant attention to judicial processes, particularly the development of processes of 'judicialisation' in liberal democratic polities (Stone Sweet 2000, Volcansek 2001). For Tsebelis (2002), the judiciary (at national level) can only be considered a veto player within the context of a constitutional court. Whilst interpretations of the law by lower order courts can be overturned by the legislature, 'for all practical purposes [constitutional courts] cannot be legislatively overruled' (Tsebelis 2002: 352).

We argue that dispute resolution panels convened under the auspices of ISDS mechanisms are more akin to constitutional courts, having effective primacy over national laws which must be compatible with the strictures of the treaty. With the absence of appeal or judicial review procedures, ISDS panels have significant power to declare national laws incompatible with treaty obligations, with little possibility for their judgements to be challenged or set aside. Whilst it is possible in principle to revise international treaties, just as it is possible to revise national constitutions, or for countries to withdraw from international agreements, in practice this rarely happens. Furthermore, the proliferation of IIAs means that even if one agreement were revised or annulled, many more potential opportunities to challenge any given policy are likely to remain.

Very few authors have previously examined the role of institutions and structures external to, or 'above', the state as potential veto points, with the exception of the European Court of Justice (Stone Sweet 2000, Coen 2007). In a global context, however, veto points may come in a number of different forms, and be located outside the core domestic institutions of government which have been the principle focus of the theory to date. Processes of global

and regional integration described above, as well as devolution at the sub-national level, have generated a complex system of multi-level governance in which activities and decisions taken at one level impact on and restrict those made at other levels (Jessop 2004, Hooghe and Marks 2003). The emergence of multi-level governance systems allows corporate political actors to engage in venue shopping; i.e., to attempt to shift policy decisions to the level of governance or the decision-making forum in which they are most likely to achieve a favourable outcome (Coen 2007, Mazey and Richardson 2006). The trend towards global constitutionalism, the increased complexity of the policy making process and the existence of multiple decision-making forums at different levels of governance, create new veto points at which policy actors can seek to halt forms of regulation they oppose.

4. The Global Trade and Investment Regime and the Emergence of ISDS

Whilst bilateral investment treaties have a long history, dating back to the Germany-Pakistan treaty of 1959, the last two decades have seen a steep increase in the number of these agreements concluded. Of the roughly 2400 BITs concluded by 2007, around 2000 date from the 1990s onwards (Van Harten 2007). The recent mushrooming of such agreements, must be seen within the longer history of attempts by capital exporting countries to put in place a general system of investor protections. These began with the Havana Charter of 1948 and the abortive attempt to create an International Trade Organization in the aftermath of World War Two. Proposals to incorporate investor protections within the WTO agreement and under the auspices of the Organisation for Economic Co-operation and Development (OECD) similarly failed (Van Harten 2007). The inclusion of ISDS clauses in IIAs established a mechanism through which TNCs could seek to guarantee their interests overseas, although they initially pertained to only agreements between developed countries and developing countries. The proliferation of ISDS mechanisms led to the emergence of a global regime of international investment treaty arbitration centred round ICSID, UNCTIRAL and other *ad hoc* tribunals and forums which have emerged to hear such cases.

The new breed of IIAs, such as TPP and TTIP, signal a shift in both the type and scale of the agreements being concluded. The economic strength and the political influence of the states involved in TTIP and TPP mean they will act as a reference point for future trade and investment agreements. These agreements create a powerful precedent that all subsequent trade agreements concluded by the parties to them should also include ISDS clauses. In addition, they may act as a blueprint for third parties pursuing similar agreements. This normative power to shape the terrain of the global trade and investment regime outside the structures of the WTO system means that the ramifications of TTIP will stretch far beyond Europe and North America. This represents a significant departure from the principles of the multilateral trade regime, and arguably from broader principles of international public law (see Von Bogdandy 2010).

Despite the shortcomings of the WTO process, the clear procedures and lines of accountability and the publication of materials related to WTO cases provides a stark contrast to recent developments in international arbitration under IIAs. Under the WTO agreement, powerful corporations may attempt to pursue their interests via the Dispute Settlement Body. However, they can do this only to the extent that a member-state (e.g. the

government of a country in which they have economic interests) is prepared to bring a case on their behalf. An example of precisely such an action is the case brought against the Australian government's introduction of generic packaging for cigarettes through the WTO's dispute settlement process by five member-states (WTO 2015). The economic rationale for such a challenge is questionable given the negligible exports of the disputing states to Australia (Eckhardt et al. 2015). It has been reported that the initiation of these proceedings followed extensive lobbying by TTCs (Jarman 2013), who are also covering some of the legal costs of the Dominican Republic, Ukraine and Honduras (Martin 2013).

Under ISDS clauses there is no need to enlist the support of client governments; corporations may bring cases directly against the state in question on a number of grounds relating to fair and equitable treatment of investors and their property rights (see McGrady 2012 for a detailed analysis of thr grounds on which corporations may challenge policies under ISDS). This removes a significant barrier to the challenging of domestic policies under international agreements and involves an enormous increase in the number of actors able to bring such challenges. Whilst the norms of international diplomacy, and the fear of retaliatory measures in other areas, may create a deterrent for states to pursue claims against other states, corporate actors, with much narrower interests, have fewer disincentives to avoid spurious legal challenges. The objectives of corporations may be served even by unsuccessful legal challenges, if they are able to delay the implementation of unfavourable measures or deter other governments from pursuing similar policies.

In many cases, IIAs allow plaintiffs (corporations) to bring cases against parties to the agreement (states) without first pursuing local remedies (i.e. under domestic laws through national courts) (Voon and Mitchell 2012a). Pursuing claims under an IIA presents corporations with a number of advantages over national remedies. The vast array of parallel and overlapping BITs and RTAs which have emerged in recent years creates a range of different forums in which corporate actors are able to challenge unfavourable laws (Van Harten 2007). In some instances, a policy may be challenged simultaneously under multiple trade and investment agreements. There is also no right to appeal under ISDS clauses. The lack of judicial review, and the fact that damages awarded to successful plaintiffs are also enforceable in courts across the globe, leads to fragmentation in the arbitration regime (Van Harten 2007). Disparate judgements in multiple tribunals precludes the emergence of a unified and coherent body of trade and investment law. Consequently, the outcomes of arbitration processes are often inconsistent and highly unpredictable making it hard for governments to assess the compatibility of proposed laws with their treaty obligations (Van Harten 2007).

Whilst the exact provisions of different IIAs vary, a decision in favour of the disputing corporation usually results in compensation rather than a legal requirement to change the law. However, the underlying objective for corporations bringing claims against states will in many instances not be financial, but to bring about repeal of the unfavourable law. Furthermore, the scale of potential awards against governments found to be in breach of their treaty obligations are extensive. In one ruling against the Czech Republic, for example, compensation demanded was equivalent to the country's annual health budget (Van Harten 2007: 7). Faced with such awards, governments may have no alternative but to change their

laws rather than contest the claim and risk a tribunal award against them. The significant financial costs and the drain on government resources involved in contesting such a case create a further incentive to avoid litigation. Germany, for example, agreed to dilute the environmental protections it placed on coal fired power stations in order to settle a case brought against it by Swedish Energy conglomerate Vattenfall 'out of court' (Eberhardt and Olivet 2012: 13).

At times it may not even be necessary for corporations to initiate disputes in order to achieve their objectives. Their perceived willingness to challenge laws may be enough to deter governments from enacting controversial laws. The mere threat of litigation creates a 'chilling effect' on policy makers. In considering any new law, governments will consider the potential for a legal challenge, and may moderate, or even reject, proposed laws before they are passed (see also Volcansek 2001). Stone Sweet (2000: 202) notes how the constitutional judicialisation of policy making at the national and European Union levels generates 'powerful pedagogical – or feedback – effects'. Legal decisions thus shape future legislation, by determining what are and are not acceptable policy avenues to pursue (Bouwen and McCown 2007).

The proliferation of IIAs is especially significant for low and middle-income countries (LMICs), which can ill afford to engage in (potentially multiple) long, drawn out and expensive legal battles. The German case cited above underlines the power of ISDS procedures to effect policy change even in the most powerful states. The threat of such a case was enough to lead the government of the world's 4th largest economy to amend a key aspect of public policy, despite widespread public support. Given the imbalance of resources which exists between LMICs and TTCs the ability of countries to shape policies in these increasingly important strategic markets will be extensive.

IIAs may thus be regarded as creating a series of *de facto* veto points, even if their specific *de jure* provisions cannot require governments to overturn laws. The multiple avenues available for legal challenges in the current trade and investment regime present an enormous advantage for corporations. It allows them to cherry pick the most favourable regime under which to bring a claim, or to fight governments on multiple fronts, eating up their human and financial resources. The proliferation of IIAs, and the creation of further potential veto points, thus increases the bias towards the status quo, and towards a business friendly agenda in national policy making.

The acceptance of state liability for harms, and the binding commitment to submit to arbitration processes under ISDS clauses in IIAs, means that states and corporations occupy very different positions within the dispute resolution regime. States are the perennial defendants; corporations the plaintiffs. The lawyers, many of whom act as advocates as well as arbitrators in these lucrative cases, are not permanent appointees with security of tenure as is the case with national judges, and those in other supranational tribunals such as the European Court of Justice (ECJ). They are dependent for their work on cases brought forward by companies against states and thus they have a vested interest in interpreting the provisions under a IIA as widely as possible to facilitate the emergence of subsequent cases (Eberhardt and Olivet 2012). Recognising the issues posed by the current tribunal system

and the lack of tenure for judge-advocates, proposals have been put forward by the European Commission (2015) to establish a permanent TTIP dispute resolution tribunal (either independently or within the context of existing multilateral structures) and to create a clear set of rules and principles for the appointment of arbitrators.

Given the ability of ISDS mechanisms to force the amendment, and even prevent the enactment, of national laws, IIAs may thus be regarded as creating *de facto* veto points in the policy process, even if their specific *de jure* provisions cannot formally require governments to overturn laws. The key insight from veto point/player theory is that new policies cannot be adopted unless they satisfy the preferences of those who hold veto power. ISDS mechanisms contain an inherent bias towards corporate preferences. Just as in domestic political systems in which '[t]he mere possibility of a referendum introduces the preferences of the population in the policymaking process' (Tsebelis 2002: 116), so the possibility of an investor dispute introduces the preferences of corporations and investment lawyers into the deliberations of governments.

5. Bilateral Investment Treaties and Tobacco Control Policy

In this section we use the foregoing discussion as a basis to analyse two examples of ongoing cases brought by TTCs under BITs, which highlight the importance of these agreements for tobacco control and wider health policy. Corporations actively seek to shape the regulatory environment in which they operate (Baron 1995). There is now an extensively documented history of tobacco industry tactics employed to fend off regulation (Holden and Lee 2009). The latest phase in TTC strategy is to use legal challenges under international trade and investment agreements (and other avenues) to prevent further limitations on their ability to brand and market their products. BITs create mechanisms through which TTCs and other corporations can challenge policies which allegedly undermine the guarantees they are afforded as investors. In the cases discussed here, TTCs have claimed that regulation of cigarette packaging constitutes expropriation of their trademarks.

Philip Morris and the Switzerland-Uruguay BIT

Uruguay is noteworthy within the context of Latin America for implementing far reaching tobacco control policies, including high levels of taxation and a ban on public smoking, which have led to a significant decrease in smoking prevalence and associated mortality and morbidity (Jarman 2015). Following bans on advertising, promotion and sponsorship, the Uruguayan government enacted a tobacco control law in 2008 to require cigarette packaging to carry health warnings and graphic images covering 50% of their surface area, which was increased to 80% of the packs by a subsequent Presidential Decree (Jarman 2015, Tobacco Tactics 2015, McGrady 2012). This made the Uruguayan health warnings the largest in the world at the time. In 2010 the sale of multiple variants of a cigarette brand was banned in an attempt to eradicate attempts by TTCs to imply incorrectly, through descriptors or colour branding, that certain variants are safer alternatives for smokers (Tobacco Tactics 2015, McGrady 2012). Under the new regulations it would be impossible for Philip Morris, for example, to offer its 'Marlboro' brand for sale in their standard variety (sold in the brand's signature red and white packs) alongside other brand variants such as 'Marlboro Menthol'

(sold in green and white packs) or Marlboro 'Lights' (sold in gold and white packs and rebranded as 'Marlboro Gold' after the banning of the 'light' descriptor). A ban on multiple presentations of a given brand would curtail the marketing strategies of all TTCs, but may pose a particular threat to Philip Morris's global marketing strategy, which has been based around Marlboro as its core premium brand (Holden et al. 2010).

The new packaging requirements were challenged by affiliates of Philip Morris International (PMI) in the domestic courts in 2009 on the basis that they violated the Uruguayan constitution, but the claims were summarily dismissed by the Uruguayan Supreme Court in November 2010 (Tobacco Labelling Resourcer Centre 2010). Whilst the Supreme Court ruling was still pending, two Swiss-based PMI holding companies – FTR Holdings and Philip Morris Products – which own Uruguayan subsidiary Abel Hermanos and the 'Marlboro' trademark respectively, initiated investment arbitration procedures against the Government on the basis that their policies violated obligations entered into under the 1988 Switzerland-Uruguay Bilateral Investment Treaty (SUBIT) (FTR Holding S.A. (Switzerland) et al. 2010). The PMI case centred on three principle claims: 1) that the ban on multiple brand offerings, and the size of warning labels required, unfairly limited the company's ability to use its legally established trademarks; 2) that graphic warning images mandated were not designed to warn of smoking related harms but to invoke repulsion and disgust amongst consumers, thereby undermining goodwill and trust towards established brands and demeaning consumers; 3) that the measures deprived the company of their property rights, undermining the value of the company (Philip Morris International Undated-c, Jarman 2015, Sabahi and Duggal 2014, McGrady 2012). In July 2013, the ICSID panel ruled that it had jurisdiction to hear the case (ICSID 2013). At the time of writing, there has been no adjudication in the case and no clear indication of when such a ruling will be forthcoming, although the plaintiffs suggest a decision is expected late in 2015 or early 2016 (Philip Morris International Undated-c).

A number of aspects of this case are of relevance to the present article. Uruguay is one of the few cigarette markets in the world which is not dominated by the major TTCs. As a country of 3 million people with declining smoking prevalence it is a small tobacco market of limited economic importance for TTCs. However, the policies put in place by the Uruguayan government would have enormous ramifications if implemented elsewhere in larger markets dominated by brands such as Marlboro. As such, opposing these measures in Uruguay became of key strategic importance to TTCs, fearing policy contagion (Weiler 2010).

However, PMI's decision to initiate legal action under the SUBIT cannot be seen simply as a defensive measure in response to a specific policy challenge, and the potential for a domino effect of similar measures across the region and beyond. As with previous and ongoing actions to challenge tobacco control policies under the WTO dispute resolution process, invoking SUBIT in this way is an attempt to re-define tobacco control as a trade issue, rather than a public health issue. Uruguay's experience was to serve as a deterrent to other countries considering interventionist tobacco control policies (Weiler 2010). This point is made explicitly by TTCS themselves. It has been reported that at least four African countries — Namibia, Gabon, Togo and Uganda — have received warnings from the tobacco industry that their proposed laws run afoul of international treaties; the implication being that they

too may also be the subject of legal proceedings such as those brought against Uruguay (Tavernise 2013). It is hard to measure the 'chilling effect' of the Uruguay case on other countries, but cases such as this impose extraordinary costs on LMICs faced with the economic might of tobacco corporations (Fooks and Gilmore 2013, Côté 2014). In 2009, the GDP of Uruguay was $32 billion compared to PMI's global revenue of $64 billion (Tobacco Tactics 2015). The reliance of the Uruguayan government on the financial support of former Mayor of New York City, Michael Bloomberg, to cover the exponential legal costs of a case now in its 5th year, underlines the enormous economic ramifications of challenge such as this for an economy the size of Uruguay (Davies 2015).

Philip Morris, Plain Packaging and the Australia-Hong Kong BIT

Australia has been at the forefront of developments in tobacco control policy in recent decades, becoming the first country in the world to pass laws to ban the branding of cigarette packets in 2012. Under the *Tobacco Plain packaging Act (2011)*, cigarettes must be sold in standardised pack sizes, shapes and textures with the brand name and variant given in a uniform typeface and font size. Those areas of the pack not covered by health warnings and graphic images must be in a uniform colour. Banishing all forms of branding from the cigarette box removed one of the last avenues of branding and marketing activity open to tobacco manufacturers in an already highly-regulated market. The measures were vehemently opposed by the tobacco industry. As in the Uruguay case, TTCs initiated unsuccessful legal challenges in domestic courts citing violations of the Australian constitution (Philip Morris International Undated-b, Liberman 2013).

The case brought before the High Court in Australia in April 2012 by five tobacco companies (British American Tobacco Australasia Ltd, Imperial Tobacco Australia Ltd, Japan Tobacco International SA, Nelle Tabak Nederland BV and Philip Morris Ltd) centred on the protection of property rights in the Australian Constitution(Chapman and Freeman 2013). The tobacco industry's claim was that the legislation to introduce generic packaging constituted an unjust acquisition of their intellectual property by the state – in the form of their registered, legally protected trademarks – for which they sought significant compensation (McCabe Centre for Law and Cancer 2016). These claims were swiftly and widely dismissed by a range of leading constitutional and intellectual property lawyers (Chapman and Freeman 2013). Against the claim of expropriation from the tobacco industry, it was highlighted that the measures proposed by the government did not affect the ownership of the trademarks, which remained with companies. Nor did the government seek to use the trademarks, or profit from them, or to facilitate the use of (or benefit from) them by third parties. Instead the generic packaging requirement simply removed TTCs' right to use the trademarks they own. The High Court verdicts agreed with the public assertions of legal scholars that restrictions on use, which did not alter the ownership of trademarks, did not equate to an acquisition of property and the case was dismissed (Liberman 2013, McCabe Centre for Law and Cancer 2016).

In addition to domestic challenges, dispute procedures were initiated against the Australian government by Ukraine through the WTO, on the grounds that it violated the country' commitments under several WTO agreements (i.e. TRIPs, GATT, TBT) (WTO 2012).

Ukraine was subsequently joined by The Dominican Republic, Honduras, Cuba and Indonesia as disputing parties (Voon and Mitchell 2012b), with British American Tobacco and Philip Morris International paying the legal expenses of some states engaged in the WTO process (Chapman and Freeman 2013, Martin 2013). At the time of writing, Ukraine had suspended its dispute proceedings, but the case was being pursued by the other four countries and was ongoing. TTCs have persisted in supporting this action despite receiving legal advice that WTO treaties do not offer a robust legal basis on which to challenge measures of the kind implemented by Australia (Crosbie and Glantz 2012).

In parallel with the challenges made to the plain packaging laws under the Australian constitution and the WTO agreement, Hong-Kong based Philip Morris Asia (PMA), which wholly owns PMIs' Australian subsidiary, initiated investor dispute processes against Australia under the Australia-Hong Kong Bilateral Investment Treaty (Australia-Hong Kong BIT) (Philip Morris International Undated-a, Allens Arthur Robinson 2011, Voon and Mitchell 2012a). As with the related WTO dispute, PMA's case centres on the importance of branding to cigarette companies. It claims the Australian law 1) is disproportionate and unnecessary in order to guarantee public health in an environment in which there are already significant tobacco control policies in place; 2) enacts protectionist measures which fail to guarantee fair and equitable treatment of non-domestic producers; 3) deprives it of its intellectual property rights and represents a form of indirect expropriation for which compensation is due; 4) undermines the legitimate expectations which investors would have of the business environment in which they would operate, despite the long history of progressively more stringent tobacco control policies introduced in Australia (Philip Morris International Undated-a, Jarman 2015, Liberman et al. 2013, Voon and Mitchell 2012a).

On 18 December 2015 the Permanent Court of Arbitration (working under UNCITRAL arbitration rules) announced that it had rejected Phillip Morris' claim under the Australia-Hong Kong BIT (Permanent Court of Arbitration 2015). The Court accepted the argument of the Australian government that PM Asia only acquired its shareholding in PM's Australian undertaking after the announcement of the proposed legislation to introduce plain packaging (Chapman and Freeman 2013). This undermined any claims by PM Asia to have suffered materially from the decision, and that it had reasonable or legitimate expectations of a different regulatory environment at the time of investing in the country (Jarman 2013, 2015). Critics had argued that this represented a cynical attempt by PMI to reorganise the structure of its holding companies solely to exploit Hong Kong-Australia BIT to its commercial advantage (Chapman and Freeman 2013), which was clearly out of keeping with the underlying objective of the agreement to protect legitimate investments, made in good faith. Whilst Philip Morris' challenge proved unsuccessful on this occasion, the ruling provides only partial succour to public health campaigners. The case was rejected not on the grounds that public health goals override those of investment protection but on the basis of a procedural issue around the timing of policy announcements and company decisions. The substantive point of law – whether tobacco control measures such as generic packaging contravene the tenets of IIAs such as this – remains to be tested. Consequently, legal challenges under ISDS clauses are an avenue which TTCs will continue to exploit. In the meantime, the mere threat of such actions may continue to have a chilling effect on governments elsewhere considering similar measures.

PMA's actions relating to the Australia-Hong Kong BIT constitute a sophisticated form of venue shopping, whereby they identified a favourable IIA and attempted to restructure the company in such a way that relevant parts of the business become subject to that agreement. It is possible to identify additional example of such sophisticated venue shopping. The decision to locate key PMI holding companies in Switzerland, which at the time of writing has signed 108 BITs, may be seen as a deliberate attempt to take advantage of the protections offered by this web of agreements for PMIs' businesses across the world. The apparent willingness of TNCs to engage in such practices, and the complex structure of their holding companies which enables this to occur, underlines the potential dangers of creating an expanding web of trade and investment agreements.

Policy Responses: Carving out Tobacco?

Growing awareness of the use of ISDS and similar forms of global trade law by TTCs have led to calls by tobacco control advocates to 'carve out' tobacco from trade and investment agreements (McGrady 2007, Sy and Stumberg 2014). Partly in response to the disputes reviewed here, Malaysia proposed a full 'carve out' of tobacco from the TPP (Sy and Stumberg 2014). The negotiating parties ultimately agreed a text that included a 'carve out' of tobacco from the ISDS provisions of the agreement, although not from the agreement as a whole. Furthermore, the TPP text requires states to opt in to the tobacco 'carve out', rather than it applying automatically to all parties to the agreement. In other words, states will have to elect whether to exclude the tobacco sector from the protections provided by ISDS clauses in relation to investments within their territory. From an industry perspective this offers significant advantages over a uniform 'carve out' across the baord. TTCs will be able to lobby individual governments not to apply the 'carve out', thereby expanding the range of potential venues in which TTCs are able to bring cases. Whilst the TPP falls some way short of the agreement sought by tobacco control advocates, it represents an important step forwards in recognising the harms caused by tobacco use and the way in which ISDS mechanisms are being used to impede effective tobacco control measures. Yet, as McGrady (2007) notes, the exclusion of tobacco from one trade or investment agreement may be undermined by its inclusion in other agreements. This is particularly true of IIAs which include ISDS clauses, given the proliferation of such agreements and the capacity of TNCs to venue shop. Freeman (2015) further notes that other important areas of health are unlikely to be excluded from such agreements. The tobacco 'carve out' from the TPP's ISDS provisions is a tacit acknowledgement that existing public health exceptions in IIAs are not sufficient to prevent TNCs from using ISDS mechanisms to impede government measures to protect health, including via the 'chill factor'. This raises the question about why other areas of health and social policy should be left with the protection of only existing public health exceptions whilst tobacco control is carved out. In this context, policy makers should consider whether the wider interests of public health are better served by the repeal ISDS mechanisms across the board.

6. Conclusion

This article builds on the existing scholarship on international trade, investment and health, adding a new analytical depth to the critique of current trade and investment negotiations,

through an engagement with relevant theories and concepts from political science, international relations and international law. More specifically, it uses the concepts of global constitutionalism and veto points to deepen our understanding of the ways in which the emerging international trade and investment regime appears to lock in the current neo-liberal orthodoxy at the global level, undermining the ability of national governments to legislate to protect the health of their populations. ISDS clauses in IIAs create a powerful tool through which corporations can take legal action against governments which implement policies that potentially undermine their interests. Since all laws enacted by national governments must be consistent with their obligations under international agreements, with significant financial penalties for non-compliance, the existence of ISDS clauses within these agreements creates *de facto* veto points within the policy making process, which may be exploited by powerful corporations seeking to ensure favourable regulatory environments. This may be especially true in LMICs which lack the resources to fight legal challenges under ISDS and to pay compensation to investors in cases they lose.

Furthermore, the increasing constitutionalisation of the global trade and investment regime has created a multiplicity of potential veto points at which policy may be challenged by TNCs. Given the expansion in the number of IIAs in recent years, countries may be signatories to multiple agreements under which a given policy could be challenged, in addition to potential challenges under WTO and domestic laws. The global reach of TNCs, together with the complex system of multi-level governance in which they operate, creates the possibility for corporations to venue shop in their pursuit of favourable policy outcomes. In addition, the PMI-Australian case discussed above suggests that TTCs are willing to engage in highly proactive forms of venue shopping in which they use the internal organisation of their businesses via a series of holding companies to take maximum advantage of the treaty obligations entered into by their host governments.

TNCs may try to stymie new laws through a strategy of simultaneous challenge in multiple venues. This point is well illustrated by the actions of TTCs in challenging tobacco control legislation in both the domestic courts and via BITs in both Uruguay and Australia, and additionally by supporting multiple countries to pursue WTO disputes against Australia. The failure of domestic litigation to secure its aims in no way deterred Philip Morris from continuing to pursue these via ISDS mechanisms within IIAs. Whilst the creation of new veto points does not entail a right of veto for corporations in any narrow sense, the creation of new institutional structures in which policy may potentially be blocked, which afford corporations, *qua* investors, with a privileged status versus other actors through which to secure their rights, militates strongly in favour of the status quo and of a pro-business environment. It creates a substantial disincentive to seek stronger health-protecting regulations, since any government considering new regulations must weigh the benefits of these against the chances of success in multiple disputes and the potentially huge costs of engaging in litigation, or settling awards made by the arbitration panel against the state in question. The disincentives for action are multiplied by the fragmentary nature of the investment arbitration system, and the inconsistent nature of panel rulings, which mean it is hard for governments to predict whether they will be able to successfully defend their policies against such claims.

The threat of legal challenges creates what has been termed a ‘chilling effect’ on governments proposing legislation, especially those in LMICs. This is the real significance of the Uruguayan case set out above. Whilst the economic interests for TTCs in the country itself are insignificant in the context of their global businesses, the case serves as a deterrent for other LMICs considering similar policies, regardless of the outcome. Even a panel ruling in favour of the Uruguayan government would in no way prevent TTCs from initiating disputes under other IIAs with other governments considering similar policies. As significant as the dispute cases discussed here, are the largely invisible cases involving Namibia, Gabon, Togo, Uganda, and potentially other unidentified countries, where no dispute has been initiated because the governments in question have backed away from potentially health-enhancing legislation under the threat of litigation. Whilst the current article focuses on health policy and the example of the tobacco industry, the analysis is relevant to other areas of public policy. It is perhaps in the areas of health, social and environmental policy that laws are most likely to be challenged and this chilling effect be felt, with significant implications for the well-being and living conditions of citizens across the globe.

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