

# A public health guide to trade and investment agreements: Aesclepius meets Mercury

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*Aesclepius was the Greek god of healing and medicine. He carried a staff entwined with a single serpent.*



*Mercury was the Roman god of commerce. He carried a staff or caduceus entwined with two serpents beneath wings.*



*These two symbols are often confused.*

## Contents

Summary: The bottom line on trade for public health .....	4
1. Introduction .....	11
2. Factors influencing global trade .....	11
2.1 Current political landscape .....	11
2.2 Economic integration.....	12
2.3 The EU single market.....	12
3. About trade and investment agreements (TIAs).....	15
3.1 Aims and purpose .....	15
3.2 The World Trade Organization (WTO) .....	15
3.3 General Agreement on Trade in Services (GATS).....	16
4. Impacts of global trade.....	18
4.1 Tariffs .....	18
4.2 Intellectual property (IP) .....	19
4.3 Violations and dispute resolutions.....	19
4.4 Regulatory chill.....	21
5. Mitigations and defences .....	22
5.1 Technical barriers to trade (TBT) .....	23
5.2 International standards.....	23
5.3 Agreement on Sanitary and Phytosanitary measures (SPS).....	25
5.4 Human right to health.....	25
5.5 Trade defences .....	26
6. Trade and the devolved jurisdictions.....	27
6.1 Northern Ireland .....	27
6.2 Wales .....	28
6.3 Scotland .....	28
7. Public health issues .....	29
7.1 Background .....	29
7.2 Sustainability .....	30
7.3 Inequality.....	33
7.4 Tobacco .....	34
7.5 Alcohol .....	35
7.6 Food.....	37

7.7 Environment.....	42
7.8 Infectious diseases.....	44
7.9 Medicines.....	45
7.10 Gambling.....	46
7.11 Employment.....	47
8. Lessons from public health-related trade disputes .....	48
9. Conclusions: lessons learned.....	49
References .....	51

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## **About the UK Public Health Network**

The UK Public Health Network provides a unique forum for public health professionals in the UK to agree priorities for improving the health of the public and to speak with one voice. It works collaboratively and in partnership with the UK’s umbrella and membership public health organisations, including the statutory agencies across all four countries.

## **Disclaimer**

Readers should be aware that each item covered here is a large subject in its own right. The summaries presented in this paper do not do justice to the range and depth of analysis that is available.

Every effort has been made to retain a neutral position on Brexit and wherever possible views on both leaving and remaining in the EU have been taken into account.

Any unintentional bias or inaccuracy is the responsibility of the author.

## Summary: The bottom line on trade for public health

### INTRODUCTION

- Following the referendum in June 2016, the process of leaving the EU is both complex and the subject of much discussion.
- Since negotiations on new trade deals cannot formally start until Article 50 is triggered, there is a window of opportunity for the public health community to develop its understanding of how trade impacts health and establish a position on the kinds of protections it needs to see in order to protect and improve the health and wellbeing of the public across the UK.
- This paper is presented as a reference guide to trade, the considerations and the issues that can arise. It is intended to provide a basis from which the public health community in the UK can develop its position on how to protect and improve health and wellbeing in the UK through the current generation of trade and investment agreements.
- This paper identifies the factors affecting global trade, the nature of various current trade and investment agreements as well as the potential consequences of global trade. It provides high-level summaries on trade as it could affect tobacco control, alcohol, food, gambling, medicines, environment and employment. Finally, it will look at the potential mitigations that could be built into future trade and investment agreements.

### FACTORS AFFECTING GLOBAL TRADE

- International economic integration is a trade-off between opening markets with a resulting increase in choice and reducing costs against loss of national sovereignty over domestic regulations.
- Recent shifts towards bilateral and multilateral trade agreements rather than following World Trade Organization governance, indicate a more protectionist approach by wealthier nations.
- 63% of the UK's current trade is covered by EU trade agreements. If the UK signed an agreement with the EU, China and the US, then 81% of its trade would be covered. No agreement currently matches the level of integration with the EU.
- The model for leaving the EU is still to be determined, although the Government is unlikely to seek EU membership. The estimated economic impact ranges from a 2.2% fall in GDP to a 4.4% gain.
- There are likely to be three phases to leaving the EU: transition, signing an agreement with the EU, defining trading relations with the rest of the world. The UK Parliament is currently processing a bill to ensure that it has the authority to sign off future trade agreements.

## ABOUT TRADE & INVESTMENT AGREEMENTS (TIAs)

- TIAs exist to protect consumers, raise the standard of living, prevent the spread of disease, protect the environment and consider sustainability.
- The two basic principles to WTO agreements are trade without discrimination and national treatment of foreign imports. The WTO has the power to decide what constitutes trade discrimination.
- Public services cannot be excluded from TIAs unless they are not run competitively or on a commercial basis.
- Once a service has been opened up to the market it cannot be reversed without paying compensation to WTO members.
- Countries can be challenged on any measure considered restrictive to trade.

## IMPACTS OF GLOBAL TRADE

- Tariffs can be used to regulate trade, generate income, support domestic industry and protect consumers from potential safety issues.
- The UK will be free to renegotiate the level of its tariffs once it leaves the EU. However, the Brexit white paper states a commitment to tariff-free trade in goods with EU members.
- Regulatory chill arises where perceived or actual threats of legal action for violating a TIA are sufficient to deter a government from enacting health legislation. WHO advice still stands to governments not to make binding treaties on health services commitments until private investment can be regulated effectively.
- Intellectual property rights are frequently used as grounds for trade agreement violations. Trade agreements such as TPP are tending to strengthen IP rights beyond current international law. Substantial damages can be awarded to successful claimants for loss of profit and damage to reputation.
- Dispute resolution panels are unlikely to seek public health input and can apply necessity tests to determine whether a public health or environmental health measure is discriminatory or considered too costly to industry.
- Alternatives to Investor-state dispute settlement provisions would include conciliation and dispute prevention measures.

## MITIGATIONS

- Technical barriers to trade present many opportunities for trade disputes.
- Risk assessments based on available scientific evidence are more often used by dispute panels than the precautionary approach.
- International standards such as the Codex Alimentarius are preferred over domestic standards. Domestic standards can be set but should reflect available scientific evidence.

- The UK will need the authority to apply trade defences on leaving the EU.
- C€ marking may be recognised through a mutual recognition agreement but a method of dealing with future changes to products directives will be required.
- The Right-to-health obligations may provide a useful tool to challenge trade rules.
- According to the Doha declaration 2001 the responsibility should be with claimants to prove that a country does not have a public health emergency requiring regulation considered restrictive to trade.

## TRADE AND DEVOLVED NATIONS

- Future trading arrangements will be negotiated for the UK as a whole, unless a devolved nation gains independence.
- Trade in food and drink forms the majority of exports from Northern Ireland, Scotland and Wales.
- The EU provides a significant market for the devolved nations and new trading arrangements may have an unequal impact.
- Trading relations between Northern Ireland and the Republic of Ireland have the potential to result in greater economic and political instability.
- As Brexit raises fewer constitutional issues for Wales than for Northern Ireland or Scotland, there is concern that Wales may have less leverage over new agreements.

## PUBLIC HEALTH ISSUES

- Non-communicable diseases are a threat to global and domestic economies because of the impacts of ill-health on reduced workforce productivity, increased cost to employers of employee ill-health, and changes in consumer preferences for healthier foods.
- Trade in alcohol, tobacco, foods and medicines can impact policy-making, thereby affecting health outcomes, health determinants and vulnerable groups.
- Public health exceptions must prove that the measure is necessary because it is effective, no less trade-restrictive measure is available (however unfeasible) and it does not constitute discrimination.

## Sustainability

- Trade is referenced in the following SDG goals, 2, 3, 8, 9, 10, 14, 15, 17.
- The UN Addis Ababa Agenda in 2015 agreed a commitment to a framework for financial sustainable development and enable the implementation of SDGs.
- The WTO recognises the key role of trade in realising many of the SDGs.
- Monitoring the delivery of the UK's requirements on the SDGs may provide a way of monitoring TIAs.

- The EU procurement directive and the UK Social Value Act 2012 provide both the framework and legal requirement to consider how government contracts can be used to improve social, economic and environmental wellbeing. However, procurement is a growing target for TIAs in a move to restrict domestic preferences for awarding government contracts to national suppliers.

### Inequality

- As an “engine for economic growth,” health should be considered as a capital input into trade.
- TIAs may restrict the policy space for governments – although there is no guarantee that such space would be used to improve health and wellbeing.
- A country’s socioeconomic conditions affect the degree to which it is able to manage global trade.
- Trade and foreign direct investment have the potential to contribute to inequality by significant impacts on income distribution.

### Alcohol

- TIAs should allow unrestricted provision for domestic regulation to address harmful use of alcohol. This would include labelling with the potential to include labelling of ingredients and composition of alcohol products as well as any warning labels. Tariff levels would also need addressing to enable high-strength alcoholic beverages to carry higher taxation.
- TIAs should contain very specific wording around alcohol products in order to prevent potential disputes over labelling which may otherwise be seen as a barrier to trade or lead to regulatory chill.
- Taxation has been considered a less restrictive trade measure than product bans.
- Consider excluding alcoholic beverages, policies and regulations, including any investment and services related to alcohol marketing or promotion, from TIAs as being inappropriate to a trade treaty designed to improve the health of nation.

### Employment

- Estimates vary on the number of UK jobs related to trade with the EU but could be in the region of 3.25 – 3.6 million.
- New trading arrangements may not necessarily put jobs at risk and may increase employment opportunities if the UK improves competitiveness. However, trade liberalisation has been found to result in economic insecurity through increased competition.
- The UK currently has an economic advantage in trade negotiations because of its trade deficits in exports. EU partners may have more to lose in jobs than the UK.

- Regional shifts in job patterns are difficult to predict but some sectors may be more at risk than others – for instance, the automotive sector may find export difficult if the UK does not meet Euro 6 standards to reduce harmful pollutants from vehicle exhaust emissions.

## Environment

- Trade impacts the environment through scale, composition and technique of industrial processes.
- WTO recognised principle of sustainable development from the outset.
- UN Framework Convention on Climate Change (UNFCCC) is not intended to discriminate or restrict international trade.
- Few, if any, disputes directly relating to climate change have been raised to date. However, there are disputes over renewable energy laws, biofuels and “like” products which countries may regulate against on safety / public health grounds.
- The WTO has declared there is no inherent conflict between trade and environmental sustainability, considering this an essential goal. However, there are calls for greater collaboration between the UNFCCC and the WTO Committee on Trade and Environment.
- The WTO is currently negotiating an Environmental Goods Agreement.

## Food

- Global trade is fundamental to food and nutrition security and can be affected by oil prices, demand and climate change. However, the agri-food sector and trade is a complex relationship with divided opinions within the WTO on the need to protect the right to adequate nutritional food. By 2008 a third of all WTO disputes were food-related.
- UK food production is 60% lower than consumption. Farmers would not have been able to survive without CAP but it has led to overproduction and concentration on meat and dairy and concentration of land in the hands of the few at the expense of healthier foods produced more sustainably.
- Trade in fish also requires reform to address overfishing and to meet the sustainable development goals.
- Foreign direct investment and free trade agreements have been correlated with greater exposure to soft drinks and unhealthy foods and a shift in dietary consumption patterns.
- Lowering tariffs could result in increasing availability of unhealthy foods at reduced prices but could provide a disincentive for the EU to sign a deal with the UK.
- The UK’s voluntary front-of-pack traffic light labelling to indicate levels of salt, fat and sugar in products is currently the subject of infringement investigations by the European Commission for being discriminatory and a barrier to trade.
- Expiring sugar quotas in 2017 are likely to result in an increased supply and a reduction in consumer price, although the EC may withdraw quantities if there is an excess.

- The beef hormones and poultry disputes between the US, Canada and EU raise questions that are still to be answered over the extent to which current science can address food safety concerns.
- Public health policy will need to engage with trade over food and nutrition issues in particular.

### Gambling

- Online gambling services are considered open to trading rules.
- Exclusions on the grounds of public safety must be consistent with domestic legislation on gambling in order to avoid disputes on the grounds of discrimination against foreign suppliers.
- The Antigua-US dispute illustrates the lengthy nature of disputes and that compensation can be claimed in products or services unrelated to the dispute.
- There may be scope for the UK to exclude online gambling from TIAs on public health grounds, providing the measure is non-discriminatory.

### Medicine

- Pharmaceutical companies are gaining increasingly strong intellectual property protections.
- TIAs have the potential to prevent the development of generic equivalent and therefore less expensive drugs.
- TIAs may also provide protection for the industry on pricing, and increasing commercial confidentiality that will reduce transparency in clinical trials data.
- The Doha Declaration 2001 provides a public health clause to reserve rights for WTO members to interpret intellectual property flexibly in order to provide access to medicines for epidemics, and malaria, HIV, and TB in particular.
- Competition laws may be used to challenge anticompetitive practices.

### Infectious diseases

- Measures taken to restrict the movement of goods in order to contain the spread of an infectious disease would be covered by the Sanitary and Phytosanitary Agreement and unlikely to be contrary to WTO rules.
- However, any measures need to be:
  - Non-discriminatory – risks from a product should be treated the same regardless of country of origin.
  - Least restrictive – the measure must achieve the health objective with the minimum of impact on trade.
  - Time limited – the measure must be lifted when the threat no longer exists.

## Tobacco

- The provisions of the Framework Convention on Tobacco Control are considered consistent with WTO trading principles and have been used by dispute panels to test the reasonableness of tobacco control measures.
- Public health professionals should be consulted to create trade-consistent tobacco control measures.
- All UK jurisdictions have exceeded tobacco control measures specified in current EU directives.
- Intellectual property protections have provided the tobacco industry with numerous grounds for raising claims, including protection of trademarks and labelling.
- There would appear to be some scope for carving out tobacco products from TIAs to limit the potential for trade disputes.

## LESSONS FROM TRADE DISPUTES

- Online gambling is a recreational service and not subject to restrictive trade measures.
- Like-for-like products may lead to unexpected consequences for hazardous products.
- Scientific evidence outweighs precautionary principles.
- Intellectual property rights favour protecting product identification rather than consumer protection although there are indications that trademarks are considered subject to regulation by a state.
- Health can be prioritised over trade in certain conditions – specific advertising restrictions are more proportional than broad-brush bans.

## CONCLUSIONS

- Ensure transparency and openness in all trade negotiations and dispute resolution processes to allow for a full debate.
- Maintain the UK's right to regulate to protect and improve the health and wellbeing of the public, with no risk that health regulations will be subject to investor-state dispute settlement or any equivalent.
- No obstruction of the right to health in the UK.
- Exclude trade in health-harming products, especially tobacco and alcohol. Where this is not possible, trade provisions should be specifically and precisely defined. TIAs that note a domestic commitment to improving nutrition for example may manage investor expectations and provide a defence for the trade policy.
- Recognise the best standards available, especially on the environment and climate change.

## 1. Introduction

- On 23 June 2016 the United Kingdom voted to leave the European Union. Six months on, the details of the UK's exit and nature of future working relations with the EU are both still to be determined and the subject of much speculation. The current consensus is that the process of exiting will be complex and that it will start with the triggering of Article 50 of the Lisbon Treaty that allows a member state to withdraw from the Union.
- Oral evidence at the Select Committee on Exiting the European Union on 23 November 2016 suggested that Article 50 should be used to set out a framework for the UK's future relationship with the EU.<sup>1</sup> The Committee was reminded that legally the UK will not be able to sign any agreements until after the UK has left the EU. Despite that, there is much "stock-taking" that could be done now to look at the trading positions of different countries and what it is that the UK wants from its trade deals.
- Despite a vast wealth of literature on the subject of trade, much of which points to common ground between health and trade, it is not an area in which many UK public health professionals have been very active. Population health and wellbeing is not achieved in isolation but by assessing the impact of all policies. The health impact assessment of the Trans-Pacific Partnership Agreement (TPP) recommends that the public health community develops "clear criteria" for prioritising health.<sup>2</sup> There is currently an ideal opportunity, therefore, for the public health community to set out priorities for trade and investment agreements (TIAs) in order to protect and improve public health and wellbeing. This will require further development of understanding of what is a complex field. There is also an opportunity to establish links with the [Trade Policy Observatory](#) established in June 2016 in order to provide advice to government. The Observatory is a partnership between the University of Sussex and Chatham House
- This briefing paper takes a high-level look at the factors affecting global trade, the nature of various current trade and investment agreements as well as the potential consequences of global trade. The paper will summarise trade issues for tobacco control, alcohol, food, gambling, medicines, environment and employment. Finally, it will look at the potential mitigations that could be built into future trade and investment agreements in order to continue protecting and improving the public's health.

## 2. Factors influencing global trade

### 2.1 Current political landscape

- Trade and trade policies are shaped by both domestic political institutions and the international political map as well as by the strength of economic institutions. For example, following the banking crisis in 2008, the International Monetary Fund estimated that the volume of international trade in goods and services contracted by 11.9% in 2009.<sup>3</sup>

- Regional comprehensive trade and investment agreements such as TTIP and TPP indicate current preferences for moving away from World Trade Organization governance models. This has the potential to fragment the global trading system.
- The UK referendum on EU membership along with the 2016 US election and forthcoming elections across Europe have also led to concerns about more defensive trade policies and a position of protectionism rather than continuing liberalisation. Both the International Monetary Fund and the World Bank have cited the shift as a risk to international cooperation.<sup>4</sup> The European Commission's report on protectionist trends for 2015, notes that "the stockpile of trade-restrictive measures adopted since 2008 continues to increase." The EC calls for greater international cooperation because of the benefits to nations generated through "innovation, productivity, economic growth and prosperity."<sup>5</sup> However, the Brexit white paper declares the UK's commitment to trade liberalisation and its international governance.<sup>6</sup>

## 2.2 Economic integration

- Economic integration has some advantages, usually defined in terms of trade benefits that provide an increased choice and availability of goods at reduced cost, employment opportunities with a greater cross-border flow of skills and political cooperation that can improve stability.
- The WTO defines two principal reasons for economic integration<sup>7</sup>:
  - Countries cooperating with each other are less likely to be trapped in a trade war that could lead to high levels of protection and low trade flows.
  - Countries signing a trade agreement are then committing to specific policies and thus can resist pressures from domestic special interests.
- The downside, or trade-off, of economic integration can be seen in terms of a loss of national sovereignty, with trading partners having to agree to a set of international rules that may well be determined by a governing body outside national control.

## 2.3 The EU single market

- The single market was created in the 1980s, led by the UK Government under Prime Minister Margaret Thatcher. It works by treating all EU member states as a single economic area with the following benefits:
  1. No import duties (tariffs) or quotas between member states.
  2. A single customs union – removing paperwork attached to the movement of goods.
  3. Removal of non-tariff barriers to trade such as different regulations, standards and technical specifications to ensure all goods and services are treated equitably.
- At present the UK can take advantage of 33 trade agreements between the EU and 62 countries with the EU accounting for 49% of the UK's total trade. 63% of the UK's trade is covered by EU agreements. If the UK agreed a deal with the EU, China and the US then 81% of its trade would be covered by trade agreements.<sup>8</sup>

- There are many analyses of the models open to the UK on leaving the EU that would shape its future trade relationships<sup>9, 10, 11, 12</sup>. The 2017 Brexit white paper confirms that the UK Government will not be seeking membership of the EU but will aim for a “strategic partnership” that secures “the freest and most frictionless trade possible.”<sup>13</sup> The key options in brief are shown in [Table 1](#).
- No existing free trade agreement currently matches the level of integration of the EU single market. Many economists consider that softer exits that maintain access to the EU are likely to be less damaging economically to the UK than the hard exit. Research by the ESRC considers the WTO model to be twice as damaging to the UK economy as that of the EEA model.<sup>14</sup> Open Europe considers that the best case would be a free trade agreement between the UK and EU. This could see GDP 1.6% higher than if the UK had remained in the EU. Although the UK does not need a trade deal to trade with other countries, if the UK were to operate on WTO rules only, Open Europe estimates that GDP could be 2.2% lower than if the UK had remained in the EU.<sup>15</sup> However, Economists for Europe estimate that diverting trade away from the EU by adopting unilateral free trade will produce an economic gain for the UK of 4% in GDP and a fall of 8% in consumer prices.<sup>16</sup> A summary of a range of economic views is available from the Financial Times.<sup>17</sup>
- The UK is likely to leave the EU in three stages:
  - Transition / implementation: holding arrangements, for example to cover the rights of EU and UK citizens living abroad.
  - New EU trading relationship.
  - Trading relationship with rest of the world.

#### **Bottom line for public health: factors influencing global trade**

- International economic integration is a trade-off between opening markets with a resulting increase in choice and reducing costs against loss of national sovereignty over domestic regulations.
- Recent bilateral and multilateral trade agreements away from World Trade Organization governance indicate a more protectionist approach to trade.
- 63% of the UK’s current trade is covered by EU trade agreements. If the UK signed an agreement with the EU, China and the US, then 81% of its trade would be covered. No agreement currently matches the level of integration with the EU.
- The model for leaving the EU is still to be determined, although the Government is unlikely to seek EU membership. The estimated economic impact ranges from a 2.2% fall in GDP to a 4.4% gain.
- There are likely to be three phases to leaving the EU: transition, an agreement with the EU, defining trading relations with the rest of the world. The Westminster Parliament is currently processing a bill to ensure that it has the authority to sign off future trade agreements.

**Table 1: Brexit options as at 17 January 2017**

<b>Model</b>	<b>Known as</b>	<b>Economic impact</b>	<b>Regulatory impact</b>
Continental partnership	Bruegel proposal	<ul style="list-style-type: none"> <li>• Likely access to the single market with services and duty-free goods.</li> <li>• Probably need to make some contribution to EU budget.</li> <li>• Probably unable to negotiate own trade &amp; investment agreements.</li> </ul>	<ul style="list-style-type: none"> <li>• May need to adopt EU social &amp; employment rules.</li> </ul>
Customs union	Turkey model	<ul style="list-style-type: none"> <li>• Some access to the single market with duty-free goods.</li> <li>• No contribution to EU budget.</li> <li>• Negotiate own trade and investment agreements.</li> <li>• No access to services' market.</li> </ul>	<ul style="list-style-type: none"> <li>• No free movement of people.</li> <li>• No requirement to adopt EU social &amp; employment rules.</li> </ul>
EU	"Soft" Brexit	<ul style="list-style-type: none"> <li>• Belong to the single market.</li> <li>• Contribution required to the EU budget.</li> <li>• Not able to negotiate own trade and investment agreements.</li> </ul>	<ul style="list-style-type: none"> <li>• Observe EU social &amp; employment rules.</li> <li>• Free movement of people.</li> <li>• Continue with common agricultural policy.</li> </ul>
European Economic Area	Norway model	<ul style="list-style-type: none"> <li>• Belong to the single market.</li> <li>• Negotiate own trade and investment agreements.</li> <li>• Contribution required to the EU budget.</li> </ul>	<ul style="list-style-type: none"> <li>• Adopt EU social &amp; employment rules but without representation in EU policy-making.</li> </ul>
European Free Trade Area	Swiss model	<ul style="list-style-type: none"> <li>• Some access to the single market.</li> <li>• Negotiate own trade and investment agreements.</li> <li>• Opt in / out of EU programmes case by case.</li> <li>• Fee payable to participate in EU programmes.</li> <li>• Possibly no agreement on trade in services with EU.</li> </ul>	<ul style="list-style-type: none"> <li>• Adopt EU social &amp; employment rules but without representation in EU policy-making.</li> <li>• Freedom of movement of people unlikely.</li> </ul>
Free trade agreements	Canadian model	<ul style="list-style-type: none"> <li>• Some access to the single market, including services and duty-free goods.</li> <li>• Negotiate own trade and investment agreements.</li> <li>• No contribution to EU budget.</li> </ul>	<ul style="list-style-type: none"> <li>• No free movement of people.</li> <li>• No requirement to adopt EU social &amp; employment rules.</li> </ul>
WTO	"Hard" Brexit	<ul style="list-style-type: none"> <li>• Negotiate own trade and investment agreements.</li> <li>• No requirement to contribute to EU budget.</li> <li>• Tariffs and non-tariff barriers operate on "most-favoured nation" principle.</li> </ul>	<ul style="list-style-type: none"> <li>• No access to EU single market, including no free movement of people.</li> <li>• No requirement to adopt EU directives.</li> </ul>

The Government white paper on leaving the EU states that the UK will not be seeking to retain EU membership. This suggests that the greyed out options may be less likely.

### 3. About trade and investment agreements (TIAs)

#### 3.1 Aims and purpose

- In its annual report for 2000, WHO stated that “The harm caused by market abuses is difficult to remedy after the fact”<sup>18</sup> and that stewardship is required to ensure consistency of health messages across public policy.
- “First generation” TIAs focussed on removing or reducing tariffs. As import duties declined, markets opened up and now include a wider range of services as well as goods. “Second generation” TIAs now cover goods, services, investment, public procurement among others. In many respects, international trade agreements now replace government decision-making in various areas of public service, including health and environmental protections.<sup>19</sup>
- Trade and investment agreements are often aspirational, stating the intention of maintaining health or environmental standards and retaining the right to regulate. At a macro level, such aspirations seem to align health and trade objectives. However, there can be significant divergence in the detail with much potential for conflict.<sup>20</sup> Care is needed to ensure these statements do not restrict growth or hinder the desire to build on present standards,<sup>21</sup> particularly as powers over protections in these areas now rest with trade tribunals whose interests are generally commercial.
- Trade negotiations are conducted in secret and, despite attempts at clarification of issues by the WTO in its agreements, the process is still perceived as tantamount to “chasing a black cat in a dark room, blindfolded.”<sup>22</sup> Texts of the proposals are rarely made available for public discussion and often shared only with industry-dominated trade advisory committees.<sup>23</sup>
- There are three stages to establishing trade deals:
  - Mandate: to open talks between governments.
  - Negotiation: on the terms. A basic agreement averages four years to negotiate with comprehensive TIAs taking up to a decade to complete.
  - Decision: on the final treaty. Final texts of trade deals are frequently 1500-2000 pages long.
- The UK International Trade and Investment Agreements (Ratification) Bill 2016-17 is currently going through Parliament, with its second reading on 16 December 2016. This bill is designed to require Parliamentary approval before any such agreement is implemented, including arrangements for any investor-state dispute settlement<sup>24</sup>.
- A dictionary of trade terminology can be found in [Appendix C](#).

#### 3.2 The World Trade Organization (WTO)

- The WTO was created at the Uruguay round of trade negotiations from 1986-1994, when the decision was taken to formalise international trade arrangements made under the previous General Agreement on Tariffs and Trade.

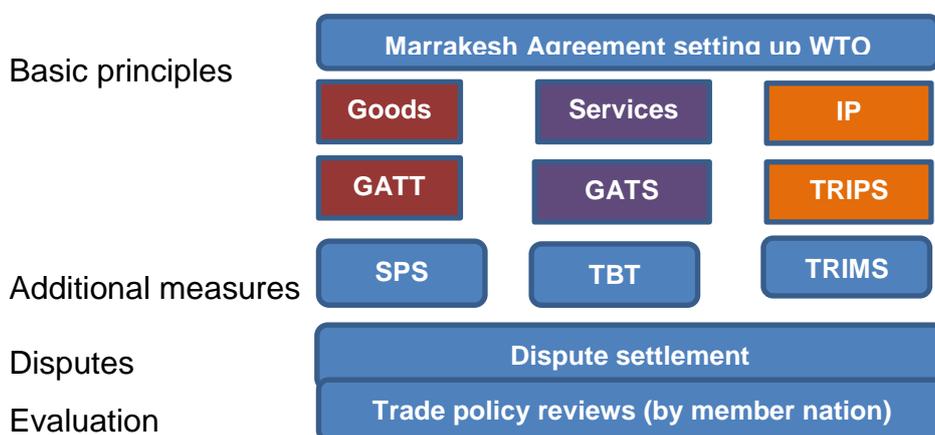
- A comprehensive set of rules and regulations applies to all WTO members. See [Figure 1](#) to see how the agreements fit together. Bilateral and regional TIAs are often based on the agreements negotiated during WTO trade rounds. Each successive round of negotiation is expected to build on the last by adding to the list of services that are subject to trade protocols.
- The WTO defines itself as the “forum for governments to negotiate trade agreements ...settle trade disputes [and operate] a system of trade rules.” The aim is not just to open trading between nations but to “protect consumers or prevent the spread of disease” as well as to “make optimal use of the world’s resources” and “protect and preserve the environment.”<sup>25</sup>
- The WTO’s two principles are:
  - Trade without discrimination – using most-favoured nation status to ensure all members treat each other equally.
  - National treatment – treating imported and domestic goods equally once they have entered the market.
- The WTO has the power to decide what constitutes trade discrimination.
- WTO membership comprises 164 countries (as at 16 July 2016). It has a secretariat of over 600 staff, based in Geneva, Switzerland and its budget in 2014 was SFr 197m (~ £155m). The UK is a founding member of the WTO.
- Since the General Agreement on Tariff and Trade was set up in 1947 there have been eight rounds of negotiations. The Doha Development Agenda forms the ninth round of negotiations; it began in 2001 and has still to be concluded.

### 3.3 General Agreement on Trade in Services (GATS)

- The General Agreement on Trade in Services came into effect when the WTO was established. This treaty extended trade in goods to include trade in services with the goal of progressive liberalisation – that is, increasing market access to services in all member countries. In the meantime, WTO members have the option of signing up to the following:
  - 1: Cross-border delivery of services.
  - 2: Provision/consumption of services abroad (eg: medical tourism).
  3. Commercial presence (eg foreign investment).
  4. Movement of people.
- GATS sets out a code of conduct that applies to all measures affecting trade, including law, rules, procedures, administrative action etc. It prevents countries favouring domestic companies over foreign ones by requiring both foreign and domestic suppliers to operate under the same terms. It also ensures that domestic regulations are the minimum necessary to ensure quality and that technical standards, including licensing, are not a barrier to trade.

- GATS rules allow WTO members to challenge countries on measures considered restrictive to trade or investments, such as national advertising bans, with dispute panels appearing to favour trade over health.<sup>26</sup>
- GATS appears to be contradictory. Although it states that the treaty's terms are not intended to undermine domestic measures to protect human, animal or plant health, it also warns that such measures must not discriminate against foreign suppliers.
- GATS treats services such as health care, water, sanitation, energy and education as commodities and therefore subject to trade rules. It excludes public services that are not supplied on a commercial basis or are not run competitively with more than one supplier, although it does not define "competition" or "commercial." Commitments to open health services to GATS rules have been limited to date, partly because reversing an investment decision if outcomes are not achieved would require compensation to other WTO members.<sup>27</sup>

**Figure 1: The WTO and its key agreements**



(based on diagram on WTO website at: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm))

See: [Appendix A](#) for a dictionary of trade terms and abbreviations.

### Bottom line for public health: about trade and investment agreements

- TIAs exist to protect consumers, raise the standard of living, prevent the spread of disease, protect the environment and consider sustainability.
- The two basic principles to WTO agreements are trade without discrimination and national treatment of foreign imports. The WTO has the power to decide what constitutes trade discrimination.
- Public services cannot be excluded from TIAs unless they are not run competitively or on a commercial basis.
- Once a service has been opened up to the market it cannot be reversed without paying compensation to WTO members.
- Countries can be challenged on any measure considered restrictive to trade.

## 4. Impacts of global trade

- The American Public Health Association warns that just five TIAs currently being negotiated or awaiting ratification cover more than 60 countries and account for around 60% of global gross domestic product. These TIAs therefore have huge potential for affecting public health and health care around the world.<sup>28</sup>
- Some of the greatest impacts of global trade are felt in a few key areas, including increasingly strong intellectual property protections, regulatory development restrictions, and trade disputes. The impacts have an often hidden effect on population health and wellbeing.

### 4.1 Tariffs

- A tariff is a duty or tax that is paid on an imported product. They are defined by the type of product and its valuation. There are two main types of tariff:
  - *ad valorem*, where the amount paid is a percentage of the value of the goods being imported.
  - *Fixed*, where the amount paid per item is fixed in monetary terms, often based on weight.
- Tariffs provide a source of income for governments.
- Tariffs can make imported products more expensive, thereby protecting a domestic industry and employment. For example, the US imposed a tax of 30% on imported steel in 2002 to counteract an unexpected surge in imported steel that threaten its domestic market.
- Tariffs can be applied on products as retaliation, for example labelling domestic wines as Champagne when this is restricted to sparkling wines of the Champagne region in France may lead to a tax on other goods from that country until the labelling is corrected.
- Tariffs may be used to protect consumers if there are concerns over product safety.
- The EU is considered to be protectionist in its approach to protecting its agricultural and manufacturing sectors, with one analyst suggesting that this keeps prices about 20% higher than world prices.<sup>29</sup> Outside the EU, the UK would be free to renegotiate the levels at which it sets its tariffs to fit UK circumstances. However, the Brexit white paper states a commitment to tariff-free trade in goods with EU members.<sup>30</sup>
- An alternative to imposing tariffs as a way of regulating a market is to use voluntary restraint mechanisms. For example, a country might voluntarily agree to reduce exports without a trading partner needing to impose trade controls such as quotas or tariffs.

## 4.2 Intellectual property (IP)

- The Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) set out, for the first time, the minimum global standards for the protection of trademarks, patents, designs and copyright.
- Under this agreement, trademark holders have the exclusive right to prevent others from using a trademark or anything similar; businesses have the right to maintain trade secrets, and judicial processes can award substantial damages for loss of profit and damage to reputation.
- TRIPS provides health-harming industries with much scope for taking out claims. Tobacco companies, for example, argue against plain packaging on the grounds that it infringes trademarks and therefore confuses products and damages customer “goodwill” towards the products.<sup>31</sup>
- TRIPS also established a minimum period of 20 years for patents. Pharmaceutical companies argue that such protection is needed in order to recoup huge development costs but the effect has been to drive up the price of medicines, particularly for developing countries. It is leading to “evergreening,” where new patents are awarded for minor alterations to an existing drug, thereby preventing the development of cheaper, generic versions almost indefinitely. The US, for example, has challenged attempts by South Africa, Brazil, Thailand and India to make generic antiretroviral drugs that are needed to manage HIV/AIDS.<sup>32</sup>
- Médecins sans Frontières (MSF) has warned that current trade negotiations such as the Trans Pacific Partnership are tending to produce agreements with “TRIPS Plus” or “TRIPS Plus Plus” measures that provide ever stronger IP protection. MSF cites seven TRIPS Plus measures that go beyond international law; these include patenting of surgical and diagnostic methods, patent linkage, and new powers of enforcement, for example in detaining shipments.<sup>33</sup>
- The UK Government has confirmed that current mechanisms for protecting IP will remain until the country leaves the EU. As at November 2016, the Intellectual Property Office is open to views on, and issues with, protecting IP once the UK leaves the EU. Contact: [EUenquiries@ipo.gov.uk](mailto:EUenquiries@ipo.gov.uk).

## 4.3 Violations and dispute resolutions

- Dispute resolution is itself a contentious issue within TIAs because of the damages that can be awarded to successful claimants. These can be monetary, regulatory or sanctions that restrict trading – not necessarily in the products under dispute.
- Figures from the UN<sup>34</sup> show the extent of trade disputes:
  - In 2014 the total number of cases raised through the ISDS process reached 608, 356 of which have been concluded.
  - 42 new claims were raised in 2014, down from a peak of 59 in 2013.

- Dispute resolution panels decided 43 cases during 2014, 79% of these have been made public.
- As at 2014, 25% of cases were found in favour of the investor, 37% in favour of the State and 28% settled.
- 99 governments around the world have been involved in a claim. However, claimants from the US, EU and Canada accounted for 80% of all ISDS cases as at the end of 2014.
- Where GATT relied on consensus to resolve disputes, the WTO incorporates a dispute resolution process that defines the procedures and timetables for resolving a dispute, beginning with the encouragement to settle out of court. Where this does not happen, disputes are heard by an Appellate Body comprising seven experts in international law.
- Increasingly, TIAs are including forms of investor-state dispute settlement (ISDS) processes. ISDS enables investors to bring a claim against a country in front of an independent panel that usually comprises three experts as arbiters, few of whom are ever likely to have public health expertise. Consequently, when trade restrictions conflict with health standards, dispute settlement panels often decide that the former take priority.<sup>35</sup>
- Necessity tests are often used in dispute resolution to determine whether domestic regulation is discriminatory or likely to be too costly for industry.
- The UN Conference on Trade and Development highlights a number of issues with ISDS:<sup>36</sup>
  - Whether three arbiters have sufficient legitimacy to rule on a State's measures.
  - Proceedings can be kept confidential, even if they involve the public interest.
  - Impartiality, given that arbiters are appointed by the parties involved.
  - Cost.
  - Contradictions between damages awarded and difficulty in altering decisions.
- There are concerns that ISDS has become “a political and financial weapon.”<sup>37</sup> Removing these or equivalent mechanisms from TIAs could provide greater protection of domestic public health and environmental health measures. Alternative measures could include:<sup>38</sup>
  - Conciliation.
  - Setting time limits to bringing claims.
  - Increasing transparency in dispute settlement procedures.
  - Binding joint party interpretations of TIAs.
  - Early discharge of claims without merit.
- The Comprehensive Economic Trade Agreement (CETA) provides for a new method of dispute resolution called the Investment Court system. A two tier system is

proposed to create a “first instance tribunal” and an appeal tribunal that would operate on a similar basis to the WTO Appellate Body. Proceedings will be transparent with a narrow scope of acceptable claims. The Court will also maintain a distinction between international and domestic law. Concerns have been raised about the financial incentives and independence of the judges appointed to the Court without fixed tenure or salary and the fact that the system is still likely to be weighted in favour of the investor.<sup>39</sup>

- Proposals raised about dispute resolution during TTIP negotiations have prompted the EU to undertake further [consultation](#) in early 2017 on a multilateral rather than bilateral dispute settlement process.

#### 4.4 Regulatory chill

- Regulatory chill describes the impact of trade agreements on domestic regulatory policy. Perceived or actual threats of a trade dispute can deter a government from enacting legislation that might have the potential to be challenged as a barrier to trade. For instance, in 1994, the Canadian Government backed down on a commitment to introduce plain packaging following the threat of action.
- It is suggested that the broad nature of trade agreements leads to many public health measures being viewed as a contravention of those agreements. The complexity of the rules negotiated in trade agreements do not allow for easy legal interpretation. Combined with the fact that dispute resolution panels can impose extremely costly penalties, countries can be very cautious and self-censor. As a result trade tends to outweigh health in most governments.<sup>40</sup>
- The effect is more extreme in developing countries which do not have the resources to stand up to powerful multinational corporations. Bilateral agreements also prevent countries from working together.
- An evidence review by the London School of Economics in 2015 found limited instances of regulatory chill and finds that it can be difficult to establish causal links between regulatory caution and the perceived or actual threat of legal action.<sup>41</sup>
- Advice from the WHO Committee on Social Determinants of Health in 2008 still stands: *“Until governments have demonstrated their ability to effectively regulate private investment and provision in health services in ways that enhance health equity, they should avoid making any health services commitments in binding trade treaties that affect their capacities to exercise domestic regulatory control.”*<sup>42</sup>

### Bottom line for public health: impacts of global trade

- Tariffs can be used to regulate trade, generate income, support domestic industry and protect consumers from potential safety issues.
- The UK will be free to renegotiate the level of its tariffs once it leaves the EU. However, the Brexit white paper states a commitment to tariff-free trade in goods with EU members.
- Regulatory chill arises where perceived or actual threats of legal action for violating a TIA are sufficient to deter a government from enacting health legislation. WHO advice to governments is not to make binding treaties on health services until private investment can be regulated effectively.
- Trade agreements are tending to strengthen intellectual property rights beyond current international law. Substantial damages can be awarded to successful claimants for loss of profit and damage to reputation.
- Dispute resolution panels are unlikely to seek public health input and can apply necessity tests to determine whether a public health or environmental health measure is discriminatory or considered too costly to industry.

## 5. Mitigations and defences

- A declaration made at the Doha round of trade negotiations in 2001 focussed on public health, stressing “*it is important to implement and interpret the TRIPS Agreement in a way that supports public health.*”<sup>43</sup> It goes on to confirm that governments should not be deterred from acting to protect public health.
- The declaration also stated that it should be up to the claimant to prove a public health emergency that is responsible for trade or service restrictions does not exist, noting that public health emergencies may be short-term (such as Ebola) or long-term (such as obesity).
- Although the Doha Declaration represents binding ministerial decisions, the implications appear not to be at the forefront of dispute resolution processes.
- Useful checks to TIAs comprise: the technical barriers to trade, international standards, agreements on both trade in services and sanitary measures, trade defences such as safeguards and anti-dumping measures, human rights obligations and the UK’s regulatory approaches – including the Public Services (Social Value) Act 2012.
- A potential checklist for screening trade and investment treaties for health implications is provided at [http://heapro.oxfordjournals.org/content/29/suppl\\_1/i29.short](http://heapro.oxfordjournals.org/content/29/suppl_1/i29.short)

## 5.1 Technical barriers to trade (TBT)

- The European Commission defines technical barriers to trade as “the mandatory technical regulations and voluntary standards that define] specific characteristics” of a product.<sup>44</sup> TBT are therefore a means by which human health and safety, animal (and plant) health as well as environmental health is afforded some protection from negative impacts of TIAs.
- TBT also includes the procedures to check compliance with such standards, such as certification or product testing.
- The WTO published its Agreement on Technical Barriers to Trade in 1995 to set out a code for good practice to prevent a myriad of highly variable standards whilst recognising countries’ rights to adopt the standards they consider appropriate<sup>45</sup>.
- Although TBT can be used to protect health, any measures must be no more restrictive to trade than is necessary to achieve the health objective. For example, Spirits Europe challenged Thailand’s wish to introduce warning labels on alcoholic drinks believing that “more sophisticated prevention campaigns” would be appropriate.<sup>46</sup>
- TBT have the potential to be discriminatory and can affect competitiveness in the export market. As a result they are often a source of trade disputes.
- The WHO has observer status in discussions relating to the TBT.

## 5.2 International standards

- Although trade dispute settlement panels rarely, if ever, consult even the most international of health bodies such as the WHO, TBT contains advice to use international agreements on minimum standards. The aim is to reduce regulatory variance and achieve harmonisation between countries.
- The WTO encourages national governments to agree on a wide variety of issues that have potential relevance to public health. These include: pesticides, product labelling, pharmaceutical testing and health and safety issues. However, there have been calls for the WHO to act as a “counterweight” to the WTO with the ability to establish and enforce global public health standards that are independent of trade law.<sup>47 48 49</sup>
- International standards can work both ways. They may restrict a country from setting standards above those supported by currently available evidence but they may also improve matters in countries that would otherwise lack the resources to attain such standards. The UN calls for greater convergence on regulatory standards, believing this to better serve both policy objectives and reduce the impact on trade.<sup>50</sup>
- One standard commonly used to help resolve trade disputes is the [Codex Alimentarius](#) - a joint initiative by the WHO and the Food and Agriculture Organization of the United Nations. The code deals with issues such as nutrition labelling, food safety and food hygiene and began work on antimicrobial resistance in November

2016. 188 nations are currently members of the Codex Alimentarius Commission. The EU has adopted some Codex standards, for example around definitions of nutrition claims. However, UK standards generally exceed those of the Codex.

- Many types of products can only be traded within the European Economic Area (EU plus Norway, Iceland and Liechtenstein) with **CE** marking – an abbreviation of “Conformité Européene” or European conformity. There are two key benefits:
  - Consumers know that products comply with European health, safety and environmental requirements.
  - Businesses know that these products can legally be sold in EEA countries. Products requiring **CE** marking are listed in over 20 European Product Directives and cover a wide range of goods, including electrical equipment, machinery, toys and medical devices.
- Although there is potential for the UK to leave the **CE** scheme, in practice there may be little change. Manufacturers outside the EEA would have the option of appointing an authorised representative within the EEA to take responsibility, assigning responsibility for compliance to the importer, or selling direct to the end-user who is then responsible for customs checks. The UK is anticipated to maintain the scheme through a mutual recognition agreement.
- Of more concern is how the UK would respond to subsequent changes in EU Product Directives to avoid the possibility of having to make two versions of any products, one for the EU market, and one for the wider market.
- **CE** marking does not cover foods, cosmetics, chemicals or medicines. The latter are covered by the REACH and the Classification, Labelling and Packaging Regulations. REACH legislation is far advanced in the UK but is considered to be among the most burdensome of EU regulations to industry. The UK is second only to Germany in the number of its REACH registrations, making this area of particular concern to UK industry. In December 2016, the Environmental Audit Select Committee began an [inquiry](#) into the regulation of chemicals following Brexit and is focusing on REACH.
- If REACH was no longer to apply to the UK, substances would need to be registered within the EU via importers or “appointed only representatives” – as is the case for Swiss-produced substances. The UK also currently acts as an appointed only representative for many non-EU products and its REACH regulatory authority would need to relocate within the EEA in order to maintain this position.
- Leaving the EU creates uncertainties around the validity of existing REACH registrations for UK produced substances. However, if the authorisation, evaluation and restrictions of REACH were no longer in force in the UK, it would create the potential for substances no longer traded in the EU to be reintroduced. Safety concerns may make this unlikely.<sup>51</sup>

- Legal opinion suggests that any potential lessening of the burden of REACH would be offset if industry were to operate in an environment not fully compatible with the EU.
- There are currently around 190 organisations in the UK who are registered with the EU as notified bodies, including a number of county and city councils in England. These notified bodies are authorised to assess the conformity of designated products with current EU Product Directives. Notified bodies are licensed by competent authorities. Within the UK, the Medicines and Healthcare Regulatory Authority acts as the competent authority for medicines and medical devices. In order to continue in this position, the MHRA would either need to relocate outside the UK or operate through a mutual recognition agreement, as happens in Norway, Switzerland and Turkey.

### 5.3 Agreement on Sanitary and Phytosanitary measures (SPS)

- Alongside the Agreement on Technical Barriers to Trade, the WTO published an Agreement on Sanitary and Phytosanitary Measures (SPS) in 1995.<sup>52</sup> The SPS was designed to deal with food safety and animal and plant health in order to prevent agricultural trade being affected by potential disputes on specified public health measures.
- Measures covered include the need for products to come from a disease-free area, the use of specific food additives, and maximum residual amounts of pesticides.
- The SPS allows countries to set their own standards, providing these are based on defensible scientific evidence and they do not discriminate unjustifiably against another country.
- Dispute panels are often regarded as interpreting SPS rules narrowly, preferring a risk assessment on the available evidence rather than use the precautionary principle that is more acceptable to public health.<sup>53</sup>
- The WHO has observer status on discussions relating to the development of SPS.

### 5.4 Human right to health

- Government recognition of the human right to health creates obligations that should be considered in negotiating TIAs.<sup>54</sup> These obligations cover:
  - 1) respect for the right to health.
  - 2) protection of the right to health.
  - 3) fulfilling the right to health.

Trade dispute panels that follow a risk-based approach may undermine the right to health, for example in lowering existing employment protections.<sup>55</sup>

- The right to health includes the provision of core medicines considered essential to health that cannot be traded to promote growth of the domestic economy. This is of particular importance when it comes to medicines to treat such global diseases as HIV/AIDS, malaria, and TB. Although human rights can be difficult legally to enforce, trade disputes initiated by pharmaceutical companies over antiretroviral drugs have

been dropped because of international pressure that would have resulted in significant reputational damage.<sup>56</sup>

- Success with access to medicines from a right-to-health approach has led to some shift in the implementation of TRIPS and therefore may present an under-used tool for challenging trade rules.

## 5.5 Trade defences

- The use of trade defences provides governments with a means to take action against imports that it believes are unfairly damaging its domestic industry – most frequently in the form of a temporary tariff on the imports concerned.
- There are three most commonly used types of trade defence, all of which are regulated by WTO mechanisms:
  - **Safeguards:** Governments may place temporary restrictions on imports where these threaten to cause serious harm to domestic industry in order to allow its own products time to adjust or restructure. Provisional measures can last from 200 days to four years but if they exceed three years, there is potential for safeguards to remain in place for up to eight years.
  - **Subsidies and countervailing:** Subsidies can be used legitimately to support emerging markets in developing countries. The WTO defines several types of subsidies to make it clear which are legal and which are prohibited. Where subsidies are found to be damaging a country's domestic industry, a claim can be made through the dispute settlement process. Claims can either result in the subsidy being withdrawn or countervailing measures being applied by those countries that are affected. Such measures can last from four months to five years.
  - **Anti-dumping:** Products exported at either less than production cost or at prices lower than domestic are held to be dumped. Where governments can demonstrate material harm to a domestic industry, anti-dumping measures can be taken. Typically this takes the form of an additional tariff on the offending product. Such measures can last from six months to five years.
- At present, trade defences are handled by the European Commission. This means that the UK will need the ability to apply trade defences as soon as it leaves the EU in order to ensure that UK producers are not put at risk. The Institute for Government points out that this will require new legislation giving Parliament the authority to act as situations arise.<sup>57</sup> However such authority could be acquired through the proposed "Repeal Bill" if it includes the contentious 1539 "Henry VIII clause," giving government the powers to legislate by proclamation rather than full legislative process.

### Bottom line for public health: trade mitigations

- Technical barriers to trade present many opportunities for trade disputes.
- Risk assessments based on available scientific evidence are more often used by dispute panels than the precautionary approach.
- International standards such as the Codex Alimentarius are preferred over domestic standards. Domestic standards can be set but should reflect available scientific evidence.
- The UK will need the authority to apply trade defences on leaving the EU.
- C€ marking may continue to be recognised through a mutual recognition agreement but a method of dealing with future changes to products directives will be required.
- REACH is considered a burden to the chemical industry but weight of opinion suggests that substances that have been phased out are unlikely to be reintroduced because of continuing safety concerns. It would also be of limited value to the UK if it were to trade with the EU without recognition of REACH.
- The Right-to-health obligations may provide a useful tool to challenge trade rules.
- According to the Doha declaration 2001 the responsibility should be with claimants to prove that a country does not have a public health emergency requiring regulation considered restrictive to trade.

## 6. Trade and the devolved jurisdictions

- In 2015, the EU accounted for 44% of UK exports of goods and services and 53% of imports, with an overall trade deficit of £30 billion.<sup>58</sup>
- Unless either Scotland, Wales or Northern Ireland become independent, future trading arrangements are likely to be arranged for the UK as a whole. However, new TIAs may not have an equal impact across all four nations of the UK.
- Public procurement is one area in particular which may lead to divergence between the nations. As a devolved function, it is the responsibility of the separate governments in Wales, Scotland and Northern Ireland. The need to promote local growth may result in differing national procurement legislation. This could create a degree of complexity when it comes to opening this market to foreign suppliers.<sup>59</sup>

### 6.1 Northern Ireland

- Northern Ireland is at particular risk of seeing greater change in its trading patterns because of its shared border with the Republic of Ireland. The current daily flows of people over the border suggest that Northern Ireland in particular could experience greater economic instability on leaving the EU.<sup>60</sup> In its Brexit white paper, the UK Government recognises that the ability to move freely across the border is “an essential part of daily life” and aims to continue with as “seamless” a border as possible.<sup>61</sup>

- Northern Ireland is currently a net exporter to the EU with 55% of its exports in 2013 going to the EU (£3.5 billion).<sup>62</sup> 37% of these exports are to the Republic of Ireland. Future trading arrangements in food and agriculture form some of the greatest concerns to Northern Ireland. For example, 26% of its milk supply is imported by the Republic of Ireland.
- A review from the Northern Ireland Assembly identifies the agri-food sector as being a key driver of the nation's economic growth.<sup>63</sup> Impacts could be felt if there were tariff changes on foodstuffs as well as changes in protection for foods based on their geographic origin – Northern Ireland has three products currently protected through EU legislation.<sup>64</sup>

## 6.2 Wales

- Wales currently exports 41% (£5 billion) of its products to the EU and £7 billion to non-EU countries.<sup>65</sup>
- Outside the EU, the US accounts for the single largest export market for Wales, with 23% of Welsh goods being imported by the States.
- As with Northern Ireland, changes to food and agriculture policies have the potential to affect the competitiveness of Welsh products in the open market.
- As leaving the EU raises less constitutional issues for Wales than it does for Northern Ireland or Scotland, there is concern that Wales will have less leverage on the UK's trade discussions.<sup>66</sup>

## 6.3 Scotland

- Scotland currently exports 39% (£6.7 billion) of its products to the EU<sup>67</sup> and has a GDP per head that is currently higher than the UK.
- The EU is Scotland's most important market for food and drink exports. The industry employs around 116,000 people with an annual turnover of £14.4 billion.
- Scotland's government has declared its preference for the UK being part of the European Economic Area on leaving the EU as being the least damaging to Scotland. Scotland's First Minister has also raise the potential for a further vote on independence.<sup>68</sup>
- Foreign direct investment is highlighted as being of particular importance to Scotland's economy with estimates suggesting that 40,000 jobs have been created in Scotland over a ten year period.

### Bottom line for public health: devolved nations

- Future trading arrangements will be negotiated for the UK as a whole, unless a devolved nation gains independence.
- Trade in food and drink forms the majority of exports from devolved nations.
- The EU provides a significant market for the devolved nations and new trading arrangements may have an unequal impact.
- Trading relations between Northern Ireland and the Republic of Ireland have the potential to result in greater economic and political instability.
- As Brexit raises fewer constitutional issues than for Northern Ireland or Scotland, there is concern that Wales may have less leverage over new agreements.

## 7. Public health issues

### 7.1 Background

- Non-communicable diseases are considered a threat to global and domestic economies because of their impact on the effectiveness and efficiency of trade policies<sup>69</sup>: For example, through:
  - Reduced workforce productivity through ill-health – economic losses to low and middle income countries for the four top NCDs are estimated at US\$7 trillion from 2011-2015.
  - Increased cost to employers because of workers' ill-health.
  - Effect on consumer preferences with an increased demand for healthier foods.
- The extent to which trade impacts on policy-making in health and the way in which governments can implement new policy has been called "trade creep."<sup>70</sup>
- A health impact assessment of the Trans Pacific Partnership agreement found that trade in four areas (alcohol, tobacco, medicines, food) could have significant impacts in policy-making, health outcomes, impacts on vulnerable groups and health determinants.<sup>71</sup>
- Food, alcohol and tobacco are key contributors to the growing burden of non-communicable diseases. Foreign investment through free trade agreements has also been found to be strongly correlated with greater exposure to unhealthy foods, alcohol and tobacco.<sup>72</sup> Trade in these products is of particular concern because increasing availability and accessibility results in increased consumption.
- However, currently the burden is on the nation attempting to implement a public health measure to prove that the health or environmental measure:
  - is effective and that no less trade restrictive measures to achieve the same public health purpose are available, however unfeasible; and

- does not constitute a “disguised restriction on international trade” or “arbitrary or unjustifiable discrimination.”<sup>73</sup>

### Bottom line for public health: public health issues

- Non-communicable diseases are a threat to global and domestic economies because of the impacts of ill-health on reduced workforce productivity, increased cost to employers of employee ill-health, and changes in consumer preferences for healthier foods.
- Trade in alcohol, tobacco, foods and medicines can impact policy-making, thereby affecting health outcomes, health determinants and vulnerable groups.
- Public health exceptions must prove that the measure is necessary because it is effective, no less trade-restrictive measure is available (however unfeasible) and it does not constitute discrimination.

## 7.2 Sustainability

- **Sustainable development goals (SDGs)**
  - The United Nations adopted the 2030 Development Agenda in September 2015, a major component of which is the SDGs. The 17 goals are designed to generate action in five areas: people, planet, prosperity, peace and partnership. Trade is referenced nine times in the SDGs. [Table 2](#) provides a summary.
  - The Addis Ababa agenda (the Third UN Conference Financing and Development) was attended by 193 UN member nations in August 2015. The conference agreed “a global framework for financing sustainable development” with a commitment to develop international trade according to sustainable development principles and enabling the implementation of the SDGs.<sup>74</sup>
  - The WTO recognises the key role it has to play in realising many of the SDGs. However, the UN points out that it is uncertain what actions WTO members will take to ensure WTO rules help deliver the SDGs.<sup>75</sup>
  - Using the UK’s requirement to deliver SDGs may provide the public health system with a way of monitoring TIAs.
- **Procurement**
  - Procurement has been the focus of recent efforts both within the EU as a whole and the UK as a social policy tool and not just another target for the competition market. The [EU Procurement Directive](#) provides minimum standards across all EU member states with the aim of improving transparency and fairness in government procurement activities. It encourages member states to use procurement as a strategic tool to create a “greener, more socially-inclusive economy.”
  - The UK has extended this Directive to place a legal obligation for government contracts (above the European Commission’s [procurement thresholds](#)) to consider how these can be used to improve wellbeing in the following areas:

Economic: local employment, workforce skills, innovation.  
Environmental: carbon reduction, sustainability, increases biodiversity.  
Social: equality and diversity, social inclusion, fair trade.

- The [Public Services \(Social Value\) Act 2012](#) came into force on 31 January 2013 and applies to England and some of Wales. Social value criteria used in contracts must be: proportionate to the value of the contract, relevant to the project, and stated in the tender document in order to maintain transparency and fairness in procurement processes.<sup>76</sup>
- Although the UK will have the option to carve out procurement from its future TIAs, international trade is moving to restrict domestic preferences for awarding its government contracts nationally.<sup>77</sup>
- The Trans-Pacific Partnership agreement is the first international comprehensive TIA to include government procurement. It requires technical specifications to be based on international standards and defined in measures that can be objectively assessed, such as performance and functionality, rather than subjective measures such as design.
- The WTO Government Procurement Agreement (GPA) was updated in 2014 and unlike other WTO Agreements, it is voluntary. It is also up to each trading party to determine what markets it will include with no commitment to provide the same level of access to all trading partners. The EU, US, Canada and Japan are all signatories to the GPA, although the UK would need to reapply once it leaves the EU. Procurement activities covered by the GPA are defined by the value of the contract and through a list of the government bodies included in the agreement. Environmental measures to protect human, animal or plant life are among procurement activities excluded from the GPA.

#### **Bottom line for public health: Sustainability**

- Trade is referenced in the following SDG goals: 2, 3, 8, 9, 10, 14, 15, 17.
- The UN Addis Ababa Agenda in 2015 agreed a commitment to a framework for financial sustainable development and enable the implementation of SDGs.
- The WTO recognises the key role of trade in realising many of the SDGs.
- Monitoring the delivery of the UK's requirements on the SDGs may provide a way of monitoring TIAs.
- The EU procurement directive and the UK Social Value Act 2012 provide both the framework and legal requirement to consider how government contracts can be used to improve social, economic and environmental wellbeing. However, procurement is a growing target for TIAs in a move to restrict domestic preferences for awarding government contracts to national suppliers.

**Table 2: Trade-related SDGs**

<b>Goal</b>	<b>Trade related requirement</b>
SDG 2:	End export subsidies to address hunger, food security, nutrition and sustainable agriculture
SDG 3:	Provide affordable medicines and vaccines to all to ensure healthy lives and wellbeing at all ages.
SDG 8:	Provide increased aid for trade for developing countries to Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
SDG 9:	Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
SDG 10:	Reduce inequality within and among countries
SDG 14:	Prohibit certain forms of fisheries subsidies and end export subsidies contributing to overfishing, illegal and unreported fishing to Conserve and sustainably use the oceans, seas and marine resources for sustainable development
SDG 15	Combat the poaching and trafficking of protected species to Protect, restore and promote the sustainable use of terrestrial ecosystems [...] and halt biodiversity loss
SDG 17	Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, significantly increase the exports of developing countries and enable the timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries to strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

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Razzaque M, Vickers B, Goel P (2016) *Global trade slowdown, Brexit and SDGs: issues and way forward* London: Commonwealth Secretariat

### 7.3 Inequality

- TIAs often begin with the aspiration of using trade liberalisation to “raise living standards, promote economic growth and stability, create new employment opportunities and improve the general welfare”<sup>78</sup> However, the WHO Commission on Macroeconomics and Health found that although health is often accepted as being an important goal of economic growth, actual improvements in health and wellbeing are not inevitable. In fact, the Commission underlined the converse that “a healthy population is an engine for economic growth” and, as such, is a capital resource in the economic process.<sup>79</sup>
- TIAs have been associated with increasing inequalities both within a country and between developed and lower / middle income countries. For example, in 2007, tariffs were found to account for 25-50% of revenue in 53 of the world’s poorer countries. However, the UK Sustainable Development Commission argued that a new model of global economic growth would be required in order to reduce poverty and redress the balance between over- and under-consumption.<sup>80</sup>
- Restraints imposed by barriers to trade affect national ability to develop policy to improve public health and wellbeing – although even if policy space is available to use there are no guarantees that a government will do so.<sup>81,82</sup>
- TIAs have the potential to affect health services through fragmentation and greater geographic variation in access and quality.
- The World Trade Report 2013 examines socioeconomic factors in trade, identifying demographics, education, technology, employment and income among the factors affecting a nation’s ability to manage trading relationships equitably. The WTO finds that trade and foreign direct investment have the potential for a significant impact on income distribution within a country.<sup>83</sup>

#### **Bottom line for public health: inequality**

- As an “engine for economic growth,” health should be considered as a capital input into trade.
- TIAs may restrict the policy space for governments – although there is no guarantee that such space would be used to improve health and wellbeing.
- A country’s socioeconomic conditions affect the degree to which it is able to manage global trade.
- Trade and foreign direct investment have the potential to contribute to inequality by significant impacts on income distribution.

## 7.4 Tobacco

- Since the introduction of the 2003 WHO Framework Convention on Tobacco Control (FCTC) there have been concerted international efforts to tackle the “health, social, economic and environmental consequences of tobacco consumption and exposure to tobacco smoke”.<sup>84</sup> However, clauses that were intended to give the FCTC priority over trade agreements were unsuccessful and the FCTC now exists outside most TIAs. However, in September 2016 the dispute panel in Philip Morris vs Uruguay found that the FCTC proved the “reasonableness” of protective public health measures.
- All UK governments, including the devolved jurisdictions, have not only incorporated EU tobacco directives but exceeded these, for example by prohibiting all domestic tobacco advertising, promotion and sponsorship.<sup>85</sup> The UK also currently maintains higher excise duties than required by the Tobacco Tax Directive and in accordance with World Bank recommendations.<sup>86</sup> The UK has introduced plain packaging for tobacco products over and above the packaging standards set out in the Tobacco Products Directive.
- A joint report by the WHO and WTO in 2002 found that none of the (then proposed) provisions of the tobacco control framework were inherently inconsistent with WTO principles. The report stated the need for “proper coordination” between trade and health officials at both national and international levels to establish a trade-consistent tobacco control framework<sup>87</sup>. By extension, the same need would seem to apply to other public health issues.
- TIAs provide industry with strong counter-measures through wide-ranging protection of intellectual property. Tobacco companies in particular have demonstrated that they have the extensive financial and legal resources to support lengthy legal challenges in defence of their rights.
- Challenges by Philip Morris over the introduction of plain packaging in Australia were made on the grounds that this infringed the company’s trademarks and would breach the “fair and equitable” treatment of foreign investors that is protected by TIAs. Indonesia’s claim against the United States in 2010 over its ban on flavoured cigarettes for example was upheld by the WTO Appellate Body because the ban applied to clove cigarettes (mainly imported from Indonesia) and not to menthol cigarettes (mostly produced within the US).<sup>88</sup>
- Claims have also been made by Philip Morris that banning the use of terminology such as “light,” “mild” etc on tobacco products is a violation of the Technical Barriers to Trade Agreement. The company argues there are less restrictive means of ensuring smokers are not misled into believing such products are healthier.
- Protections around trade secrets also mean that product ingredients do not have to be listed – potentially of concern around the contents of e-cigarettes and flavoured cigarettes.

- Free trade agreements are designed to remove as many tariff and non-tariff barriers to trade as possible. As such, these could be considered incompatible with tobacco products and therefore excluded from TIAs, in the same way that some military products are not open for trade.
- Although TIAs open the way for disputes, several dispute settlement rulings have found in favour of public health protections (eg: US vs Thailand in 1990, Philip Morris vs Uruguay 2016). These confirm the right of states to protect public health through regulation, provided that measures are non-discriminatory.
- Legal experts in international trade suggest that the “strongest options for states to safeguard their autonomy to implement tobacco control measures are to exclude such measures either from the scope of the relevant TIA entirely ... or from the scope of ISDS.”<sup>89</sup> However, such a “carve out” is unlikely to be popular in countries with an influential tobacco industry.

#### **Bottom line for public health: tobacco**

- The provisions of the Framework Convention on Tobacco Control are considered consistent with WTO trading principles and have been used by dispute panels to test the reasonableness of tobacco control measures.
- Public health professionals should be consulted to create trade-consistent tobacco control measures.
- All UK jurisdictions have exceeded tobacco control measures specified in current EU directives.
- Intellectual property protections have provided the tobacco industry with numerous grounds for raising claims, including protection of trademarks and labelling.
- There would appear to be some scope for carving out tobacco products from TIAs to limit the potential for trade disputes.

## **7.5 Alcohol**

- TIAs have the potential to affect alcohol control measures in at least three ways: alcohol availability including taxation and licensing, alcohol marketing, and labelling. A health impact assessment of the TPP identified risks to alcohol control measures in all three categories.<sup>90</sup>
- Current EU directives do not provide for taxation according to alcohol content, meaning that high-strength alcoholic beverages do not carry any higher taxes. Import tariffs on wines and spirits have also been the subject of a number of trade disputes. Scotland’s decision to implement minimum unit pricing to address the pricing issue has been delayed by the extensive efforts from a consortium of alcohol producers to challenge the introduction. However, following a ruling from the European Court of Justice that minimum unit pricing would not contravene EU law, the Scottish Court of

Session has also ruled it legal.<sup>91</sup> The Comprehensive Trade and Economic Agreement (CETA) between the EU and Canada will also eliminate all import tariffs on wines and spirits<sup>92</sup> with the potential for increasing the supply of cheaper products.<sup>93</sup>

- Taxation has been considered a less restrictive measure to achieve a public health measure than more far-reaching measures such as minimum pricing.
- Under the EU Food Information Regulation, alcohol is exempt from having to provide a list of allergens or ingredients. Eurocare points out that this means consumers have more information about a bottle of milk than a bottle of wine.<sup>94</sup> An independent review in Australia in 2009 recommended warning labels about drinking in pregnancy but did not pursue this because of, among other reasons, international trade implications.
- A ruling by the WTO Appellate Body on online gambling maintained that even if advertising bans were non-discriminatory in applying to foreign and domestic suppliers equally, this would still violate market access unless countries had declared specific advertising bans at the time of making the commitment to market liberalisation. The fact that rules are open to varying interpretation is illustrated by a ruling in France on its advertising bans that was supported whilst a ruling on Sweden vs EU went against Sweden because such restrictions, although non-discriminatory, would lead to a greater negative effect on foreign companies trying to introduce new products.<sup>95</sup>
- TTIP contains clauses in the cross border services chapter that could be used by alcohol producers to challenge attempts to limit the number of alcohol outlets in any particular geographic area, as well as any potential restrictions on alcohol marketing.
- Research suggests that free trade policies promote alcohol consumption through lowering prices, increasing competition and challenges to restrictive measures such as controls on marketing and promotion.<sup>96</sup> At least one commentator has warned of the likelihood for a rise in the number of alcohol-related trade disputes, as alcohol producers prioritise the liberalisation of factors seen as restricting availability or advertising.<sup>97</sup>

### Bottom line for public health: alcohol

- TIAs should allow unrestricted provision for domestic regulation to address harmful use of alcohol. This would include labelling with the potential to include labelling of ingredients and composition of alcohol products as well as any warning labels. Tariff levels would also need addressing to enable high-strength alcoholic beverages to carry higher taxation.
- TIAs should contain very specific wording around alcohol products in order to prevent potential disputes over labelling which may otherwise be seen as a barrier to trade or lead to regulatory chill.
- Taxation has been considered a less restrictive trade measure than bans.
- Consideration could be given to excluding alcoholic beverages, policies and regulations, including any investment and services related to alcohol marketing or promotion, from TIAs as being inappropriate to a trade treaty designed to improve the health of nation.

## 7.6 Food

- Trade is crucial to food and nutrition security; increasing consumption of high sugar, salt and fat foods reduces nutrition security by affecting the intake of nutrients needed to live a healthy life. Global supplies of food ultimately reflect availability in the UK as well as spreading the risk, creating diversity and keeping prices competitive with the aim of healthy foods being affordable to everyone. Global demand, oil prices, and climate change are all potential risks that can also be affected by trade.
- The agri-food sector and trade is a complex relationship, illustrated by the fact that a third of all WTO disputes food-related. Trade issues around food that are likely to affect the UK include: availability and accessibility of high sugar, salt and fat foods, food production, including agricultural and fisheries policies, nutritional claims, food labelling and food safety. A good overview is provided by Hawkes et al.<sup>98</sup>
- Unhealthy, often processed, foods are attractive to the market because of their low production costs and long shelf life. Evidence suggests that higher intake of such foods also correlate with high levels of alcohol and tobacco sales.<sup>99</sup> Foreign direct investment and free trade agreements have also been correlated with greater exposure to soft drinks and unhealthy foods.<sup>100</sup>
- Food and beverages are currently well protected within the EU and there is a high risk of initial disruption on leaving the EU. The UK could lower tariffs which would benefit consumers in terms of lower prices. However, removing tariffs opens up the domestic industry to competition with the risk that UK producers look for cheaper ingredients that result in a change in food composition as well as the potential for pricing domestic

producers out of the market.<sup>101 102</sup>. Whilst removing tariffs may provide the EU with a disincentive to sign a trade deal, it should be noted that food exports outside the EU have increased by 12%.<sup>103</sup> Lowering tariffs could result in increasing availability of unhealthy foods at reduced prices.

- The food and beverage sector is subject to a number of non-tariff barriers, covering product labelling, definition, and taxation. Although the UK would be a party to any international changes, it will no longer be able to influence further changes within the EU. The Agriculture and Horticulture Development Board has investigated potential impacts of new trading arrangements on various sectors of the food industry.<sup>104</sup>
- Currently, the UK's main food imports are: fruit and vegetables, spirits and beverages, and cereals and grains such as maize and soyameal. The UK's current main exports are mostly processed products such as chocolate products, soft drinks and breakfast cereals but also includes whisky, cheese, salmon, and lamb.
- **Food production**
  - A briefing from DEFRA underlined the need for food security to ensure consumers have access at all times to sufficient, safe and nutritious food for an active and healthy life at affordable prices. Food needs to be produced in an environmentally-friendly manner and to be resilient to crises.<sup>105</sup> In 2009, the UN Special Rapporteur on the Right to Food highlighted the need for greater international collaboration by WTO members to address food security and protect the right of every individual to adequate food and nutrition. However, a number of WTO members felt that such protectionist strategies were against WTO policies.<sup>106</sup>
  - Whatever the model of exit, the UK will need to establish a new agricultural policy. Currently, the UK contributes nearly €4 billion per annum to the Common Agricultural Policy (CAP). EU farmers benefit in subsidies to the tune of £40 billion per annum – representing 35% of the EU budget.
  - CAP has provided some measure of food and nutrition security and UK farmers would be unable to compete in the market without such subsidies. However, CAP was responsible for creating over-production – leading to the infamous wine lakes and butter mountains until quotas and set-aside subsidies reduced surpluses. One investigation of CAP has shown that it has resulted in less trade within the EU and greater trade outside.<sup>107</sup>
  - The Food Research Collaboration<sup>108</sup> highlights the fact that UK food production is 60% below that of consumption. The UK is reliant on imports for many fruit and vegetables – amounting to a trade gap of £21 billion. 27% of UK food comes from the EU with 40% of the UK's fruit and vegetables being imported from the EU.
  - Historically CAP provided subsidies to farmers particularly for beef and dairy production and has been aided by imports of cheap cattle feed. The use of agricultural land to produce fruit and vegetables has generally not been supported in the same way, made worse by subsidies for the destruction of highly perishable

goods such as fruit. This has contributed to the UK's dietary issues by making foods higher in saturated fat more affordable to those on lower incomes than fruit and vegetables. Reform of CAP could redirect subsidies from dairy and meat production to a more sustainable diet that is both healthier and less carbon-intensive for the environment.<sup>109</sup>

- The Common Fisheries Policy presents an equally contentious issue. Fish is one of the most traded commodities with developed countries generally being the key importers. Most UK fish is exported to the EU. The CFP has been amended to address overfishing and the practice of discarding fish. The need to fish sustainably is included in the sustainable development goals and includes the need for subsidies and quotas to prevent overfishing occurring.
- A review of sustainable fishing by the UN Conference on Trade<sup>110</sup> makes a number of calls to improve trade in fish. These include: improved coordination between fish governance bodies, improving the market by clarifying the real price for fish, eliminating harmful subsidies that contribute to overfishing, facilitating the use of certification schemes and restoring fish stocks and marine eco-systems.

- **Food labelling**

- The EU Food Information Regulation currently dictates food and nutrition labelling on both pre-packaged and non-packaged foods. However, it stopped short of mandatory front-of-pack “traffic light” labelling to indicate levels of sugar, fat and salt. The UK has introduced voluntary “traffic light” labelling but the European Commission issued a letter of notice to the UK in October 2014 as a precursor to infringement proceedings. Italy, with 15 other member states, claim such labelling is a barrier to trade, does not provide nutritional information based on science and is discriminatory against products that are labelled red for high salt and fat levels.<sup>111, 112</sup>
- Although a voluntary scheme and permitted under the EU food information regulations, there are industry concerns that in fact the traffic light labelling has been so widely adopted it is possible that food businesses not following the scheme are being left out of the market. The European Commission is also concerned that a growing use of domestic nutritional labelling schemes among EU members is affecting the free movement of goods.<sup>113</sup>
- Although the UK will have the option to change its regulatory approach to front-of-pack labelling on leaving the EU, this could result in further trade disputes unless a solution to the technical barrier to trade can be found. Continuing engagement with the Codex Alimentarius Commission and a “pro-active policy engagement between trade and health”<sup>114</sup> will be required.
- In an apparent contradiction, it is worth noting that labelling to distinguish hormone and non-hormone-treated beef products was proposed as a solution to the extended dispute between the EC and the US/Canada.<sup>115</sup>

- **Nutrition**

- The defensibility of national nutrition policies may be strengthened by documenting a commitment to investment in health and nutrition.<sup>116</sup> This would help manage expectations of investors and minimise the potential for regulation being seen as an unnecessary barrier to trade.
- Outright bans on foodstuffs on nutritional grounds have been penalised by the WTO. For example, Samoa banned imports of turkey tail imports because of its concern over fatty meats and its perception of low quality food being dumped on the market. However, the ban had to be lifted when Samoa joined the WTO. Instead of the ban, Samoa was allowed to place a 300% import tariff for two years, falling to 100% for a further year.
- High income countries often benefit from tariff scales from lower income countries that provide for value-added products; for example there is a lower tariff on raw cocoa and a higher tariff on the end product of a chocolate bar.
- Trade is associated with a shift in dietary consumption (“nutrition transition”) particularly in lower/middle income countries that is resulting in greater levels of obesity.
- Transnational food companies and supermarkets change food availability, often increasing access to and affordability of processed foods.

- **Sugar**

- The EU is the largest producer of beet sugar and one of the largest importers of cane sugar. Production of 13.5 million tonnes of sugar is divided between 19 member states, including the UK. The EU sugar market is regulated by quotas, minimum pricing and trade mechanisms.
- A quota was first introduced in 1968. Because the EU is seen to be effectively subsidising the sugar industry, the WTO placed a limit on the amount of sugar the EU can export to the world market. Quotas are due to expire in September 2017. Estimates suggest this will result in a 5-6% increase in beet sugar production. EU sugar prices are anticipated to fall by 23% in 2017 as stocks are dispersed and settle at a 15% decrease by 2020. However, the EU’s minimum price has kept its sugar price above that of the world rate and these forecasts expect the price to come nearer to those of the world market.<sup>117</sup>
- The European Commission has said it will withdraw some quantities if there are “signs of an excess of sugar on the EU market”<sup>118</sup> but has not defined a threshold for intervention.

- **Food safety**

- Trade in food has been at the centre of a number of health issues, including contamination of animal feed that affected food products, the widespread use of antibiotics in animal husbandry are contributing to antimicrobial resistance in

humans, the spread of BSE in cattle which can result in the neurological disease vCJD in humans, and horsemeat in beef products.

- The Sanitary and Phytosanitary Agreement applies to any measure designed “to protect human life or health from risks arising from additives, contaminants, toxins, veterinary drug and pesticide residues, or other disease-causing organisms in foods or beverages.”<sup>119</sup> National measures taken in addition to the SPS agreement will be to be consistent with the SPS.
- Countries signing up to the Codex Alimentarius are considered to be meeting an agreed set of standards on food safety.<sup>120</sup> In 2005 the Codex Alimentarius Commission was asked to consider its role in preventing non-communicable diseases, leading to recommendations on mandatory nutrition labelling.<sup>121</sup> Although the UK’s recommendations often exceed those of the Codex, expanding the Codex would be a route to achieving further health protections in TIAs.
- The WTO reports that the only food safety case to have progressed through the complete dispute settlement process was the EC vs US and Canada on the use of growth hormones. The EC’s ban on the use of growth hormones in animals was found to be in breach of the SPS because it was not based on a risk assessment and that the scientific evidence did not support the ban. The Appellate Body confirmed the EC’s right to impose the measure and that the burden of proof lay with the claimant. However, it upheld the claim and in July 1999 awarded US\$116.8 million per annum and CAN\$11.3 million per annum in suspension of tariffs as compensation. The ban is still in place but the dispute finally ended in 2012 with a change in EU rules over tariffs.

### Bottom line for public health: food

- Global trade is fundamental to food and nutrition security and can be affected by oil prices, demand and climate change. However, the agri-food sector and trade is a complex relationship with divided opinions within the WTO on the need to protect the right to adequate nutritional food. By 2008 a third of all WTO disputes were food-related.
- UK food production is 60% lower than consumption. Farmers would not have been able to survive without CAP but it has led to overproduction and concentration on meat and dairy and concentrations of land at the expense of healthier foods produced more sustainably.
- Trade in fish also requires reform to address overfishing and to meet the sustainable development goals.
- Foreign direct investment and free trade agreements have been correlated with greater exposure to soft drinks and unhealthy foods and a shift in dietary consumption patterns.
- Lowering tariffs could result in increasing availability of unhealthy foods at reduced prices but could provide a disincentive for the EU to sign a deal with the UK.
- The UK's voluntary front-of-pack traffic light labelling to indicate levels of salt, fat and sugar in products is currently the subject of an infringement notice by the European Commission for being discriminatory and a barrier to trade.
- Expiring sugar quotas in 2017 are likely to result in a reduction in consumer price because of increased supplies, although the EC could withdraw quantities if there is an excess.
- The beef hormones and poultry disputes between the US, Canada and EU raises questions that are still to be answered over the extent to which current science can address food safety concerns.
- Public health policies will need to engage with trade over food and nutrition issues in particular.

## 7.7 Environment

- Trade is considered to have three impacts on the environment:
  - Scale: increases in level of consumption, production and transport all have potential impacts on the environment. The WTO has recognised the need for change in all three areas.
  - Composition: pollution increases either if price changes favour a more heavily polluting industry with a resulting increase in trade or if there is a constant level and no change in industry emissions.

- Technique: pollution will reduce if there is a reduction in pollution intensity in individual manufacturers. A pollution tax could encourage cleaner technologies.
- In setting up the WTO, members agreed that trade relations should be conducted *“while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”*<sup>122</sup>
- Regulations covering environmental protections are included in the technical barriers to trade.
- Article 3.5 of the UN Framework Convention on Climate Change states that any measures taken to combat climate change “should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”<sup>123</sup>
- As of October 2016, climate-related issues only formed a small proportion of disputes. However, tensions have been reported between countries’ national renewable energy laws, biofuels and international trade rules. For example, the EU’s Renewable Energy Directive requires a 35% saving on greenhouse gas emissions from biofuels in the EU market, favouring rapeseed oil producers in France and Spain over those from Asia.<sup>124</sup>
- One analysis suggests that regional trade deals such as TTIP and TPP have the potential to observe climate change agreements, provided all parties work to the same goals. There are also calls for greater transparency in proceedings by increasing the coordination between the WTO Committee on Trade and Environment and the UN Framework Convention on Climate Change.<sup>125 126</sup>
- Another issue of particular relevance to environmental protection is the need for trading partners to treat “like products” from foreign and domestic suppliers without discrimination. Carcinogenic substances like asbestos have been the subject of a much publicised dispute between Canada and France. On appeal, the decision found in favour of France’s public health protection but the process by which the Appellate Body made the decision was heavily criticised for not accepting expert evidence.<sup>127</sup>
- As of 2010, there has been no clear statement from the WTO on when or how international law as it relates to the environment will be used to clarify interpretations of TIAs. However, the WTO has stated that there is no inherent conflict between environmental sustainability and open trade – policies in both fields should work together for improvement with sustainable development and environmental protection being considered “essential goals” of multilateral trade arrangements<sup>128</sup>
- In recognition of the role that trade needs to play in protecting and preserving the environment, the WTO is currently pursuing an [Environmental Goods Agreement](#). This aims to lower tariffs to improve access to greener technologies, including renewable

energies, waste management and air pollution control technologies. Negotiations began on the agreement in 2014.

#### Bottom line for public health: environment

- Trade impacts the environment through scale, composition and technique of industrial processes.
- The WTO has recognised principle of sustainable development from the outset.
- UN Framework Convention on Climate Change (UNFCCC) is not intended to discriminate or restrict international trade.
- Few if any disputes relating to climate change have been raised to date. However, there are disputes over renewable energy laws, biofuels and “like” products which countries may regulate against on safety / public health grounds.
- The WTO has declared there is no inherent conflict between trade and environmental sustainability, considering this an essential goal. However, there are calls for greater collaboration between the UNFCCC and the WTO Committee on Trade and Environment.
- The WTO is currently negotiating an [environmental goods agreement](#).

### 7.8 Infectious diseases

- Trade negotiators need to be aware of the health risks for the spread of infectious diseases that arise through greater movement of people between countries as well as trade in foods and biological products.
- Public health practice focusses on managing the transmission of the infection but sometimes this extends to travel restrictions or quarantines that have the potential to impact on trade.
- Measures taken by a country to restrict the movement of goods in order to halt the spread of an infectious disease would come under the Sanitary and Phytosanitary Agreement. The WTO believes such measures would be unlikely to be contrary to these rules, thus minimising the potential for disputes.<sup>129</sup>
- However, such measures need to be:
  - Applied fairly. For example, the risks attached to a product from one country would need to apply to other countries with similar risks.
  - Least restrictive. For example, considering whether the health objective could be met through increased checks rather than through a complete ban.
  - Time limited. For example, any restrictions would need to be lifted as soon as the threat to health had been resolved.

### Bottom line for public health: infectious diseases

- Measures taken to restrict the movement of goods in order to contain the spread of an infectious disease would be covered by the Sanitary and Phytosanitary Agreement and unlikely to be contrary to WTO rules.
- However, any measures need to be:
  - Non-discriminatory – risks from a product should be treated the same regardless of country of origin.
  - Least restrictive – the measure must achieve the health objective with the minimum of impact on trade.
  - Time limited – the measure must be lifted when the threat no longer exists.

## 7.9 Medicines

- The pharmaceutical industry believes that trade agreements such as TTIP will increase jobs, align regulations, and improve patient access to medicines.<sup>130</sup> However, the ability to produce generic equivalents of medicines can be challenged by trade treaties because of the extensive protections provided on patents.
- Prior to TRIPs, it was not unusual for pharmaceutical products to be excluded from patent protection. This led to the creation of a strong pharmaceutical industry in India that currently supplies the majority of antiretrovirals to developing countries. However, a move by developing countries in the late 1970s to establish greater flexibility on patenting was defeated by the pharmaceutical industry in developed countries. The result has been ever-increasing protections in subsequent trade negotiations.<sup>131</sup>
- As well as patents, other concerns include the transparency of clinical trial data if this was to be viewed as commercially confidential and pricing. Although the European Federation of Pharmaceutical Industries and Associations has called for TIAs to include a pharmaceutical annex to ensure predictable pricing,<sup>132</sup> the competitiveness of the European pharmaceutical industry is likely to be a priority in trade agreements.
- A warning note from a study of the Australia-US Free Trade Agreement suggests that trade arrangements in the pharmaceutical sector have the potential to shift regulatory environments from the “public good” to one that “encourages private investment and profit-making.”<sup>133</sup>
- The Doha Declaration in 2001<sup>134</sup> was intended to alleviate some of the issues around patents by confirming WTO members’ rights to provide access to medicines for public health reasons and for HIV/AIDS, tuberculosis, malaria and other epidemics in particular. Although not been widely incorporated, there is potential for TIAs to be consistent with the Declaration.
- Competition law has been used to challenge anti-competitive practices from the pharmaceutical industry as provided for under Article 31(k) of TRIPS.<sup>135</sup>

### Bottom line for public health: medicines

- Pharmaceutical companies have been gaining increasingly strong intellectual property protections.
- TIAs have the potential to prevent the development of generic equivalent and therefore less expensive drugs.
- TIAs may also provide protection for the industry on pricing, and increasing commercial confidentiality that will reduce transparency in clinical trials data.
- The Doha Declaration 2001 provides a public health clause to reserve rights for WTO members to interpret intellectual property flexibly in order to provide access to medicines for epidemics, and malaria, HIV, and TB in particular.
- Competition laws may be used to challenge anticompetitive practices.

### 7.10 Gambling

- Gambling is a commercial activity that can have both moral and social impacts. The European Commission estimates the number of online gamblers in the EU to be more than 6 million with annual revenues for 2015 estimated at €13 billion. Online gambling is a fast developing pursuit. Services operate across borders and are often outside a nation's individual control. There is currently no EU legislation to regulate gambling to protect consumers.<sup>136</sup>
- Gambling is considered subject to trade rules and therefore requires careful handling in a TIA in order to ensure 1) no discrimination against foreign suppliers and 2) restrictions on public health grounds are consistent with domestic regulations.
- A long-running dispute between Antigua and the US over online gambling indicates that the WTO sees gambling as a recreational service and therefore not open to any restrictive trade measures. Antigua has been awarded retaliatory compensation to the value of \$21 million pa which it proposed to take in copyright-free access to US films.
- The lack of harmonisation across the EU on gambling services may make it easier for the UK to establish controls in future TIAs, provided lessons are learned from disputes.

### Bottom line for public health: gambling

- Online gambling services are open to trading rules.
- Exclusions on the grounds of public safety must be consistent with domestic legislation on gambling in order to avoid disputes on the grounds of discrimination against foreign suppliers.
- The Antigua-US dispute illustrates the lengthy nature of disputes and that compensation can be claimed in products or services unrelated to the dispute.
- There may be greater scope for the UK to exclude online gambling from TIAs on public health grounds, providing the measure is non-discriminatory and consistent with domestic regulations.

## 7.11 Employment

- Estimates vary over the number of UK jobs either directly or indirectly linked to the EU, ranging from 3.25 million from the Centre for Economics and Business Research<sup>137</sup> to 3.6 million by Civitas.<sup>138</sup> Trade with Germany, for example, currently accounts for an estimated 2.4% of UK jobs and 3.2% of German jobs.
- UK exports to the EU fell from 50% in 2005 to 42% by 2015 with projections estimating a fall to 38% by 2020.<sup>139</sup> This gives the UK an economic advantage in its trade negotiations but makes it less competitive for importers to the UK. Exports from the UK will also benefit from a more competitive exchange rate. EU partners may therefore have more to lose in jobs than the UK, not helped by continuing economic and political difficulties with the Eurozone.
- A loss in GDP from new trading arrangements will be seen in a slower economy although economists note that jobs currently connected to the EU are not necessarily at risk. Regional shifts in job patterns are difficult to predict and some sectors may be more at risk than others.<sup>140</sup> For example, car manufacturers may find it more difficult if the UK does not meet Euro 6 standards for reducing harmful vehicle exhaust emissions. However, it is equally likely that new trading arrangements could improve competitiveness in other sectors with a resulting increase in jobs.
- Estimates vary hugely over potential changes to employment with the CEBR suggesting job losses through lower exports to the tune of 487,000 to 794,000<sup>141</sup> to the potential for 60,000 new jobs estimated by Business for Britain if current social and employment legislation were to change on leaving the EU<sup>142</sup>.
- The UN draws attention to the fact that a number of regional trade agreements include provisions on labour with the potential for TIAs to be used to improve sustainable employment.<sup>143</sup> However, some research finds that economic insecurity rises in line with trade liberalisation with increased competition leading to a reduction in employment or revenues. Economic insecurity and ill-health are closely linked.<sup>144</sup>

- In reviewing the relationship between employment and trade agreements, the WTO concluded that simple generalisations were not possible. Technological change, new markets, relocation of production and changes in demand for labour are all influencing factors.<sup>145</sup>
- The UK Government's Brexit white paper sets out the protection of worker's rights as one of 12 principles it will use to establish a new relationship with the EU.<sup>146</sup> Protection of employment rights will be considered in line with the [government review](#) begun in October 2016 to investigate rights, security and under-representation.

### **Bottom line for public health: employment**

- Estimates vary on the number of UK jobs related to trade with the EU but could be in the region of 3.25 – 3.6 million.
- New trading arrangements may not necessarily put jobs at risk and may increase employment opportunities if the UK improves competitiveness. However, trade liberalisation has been found to result in economic insecurity through increased competition.
- The UK currently has an economic advantage in trade negotiations because of its trade deficits in exports. EU partners may have more to lose in jobs than the UK.
- Regional shifts in job patterns are difficult to predict but some sectors may be more at risk than others – for instance, the automotive sector may find export difficult if the UK does not meet Euro 6 exhaust emission standards.

## **8. Lessons from public health-related trade disputes**

- Dispute settlement decisions have decided, for example:
  - Online gambling is a recreational service and therefore cannot be subject to restrictive trade measures.
  - Like for like products may lead to unexpected consequences for products such as asbestos and its alternatives.
  - Precautionary principles can be of less value than the sum of scientific evidence – particularly over food safety issues.
  - Intellectual property rights often favour protecting product identification rather than consumer protection, despite the original aim of trademarks being for the benefit of both producer and consumer. However, recent the ruling in Philip Morris vs Uruguay showed that trademarks were still subject to regulation.

- Domestic actions (eg front-of-pack “traffic light” labelling) may be considered a barrier to trade even where these are voluntary because of the potential to be discriminatory and against the free movement of goods.
- Health can be prioritised over trade in certain conditions. For example, specific restrictions on targeted alcohol advertising have been upheld whilst broad-brush policies have not met the proportionality criteria.
- [Appendix B](#) provides a summary of some of the key disputes related to maintaining the public’s health.

#### **Bottom line for public health: trade dispute lessons**

- Online gambling is a recreational service and not subject to restrictive trade measures.
- Like for like products may lead to unexpected consequences for hazardous products.
- Scientific evidence outweighs precautionary principles.
- Even domestic voluntary actions can be considered a barrier to trade and become the subject of a potential trade violation.
- Intellectual property rights favour protecting product identification rather than consumer protection, although there are indications that trademarks are considered subject to regulation by a state.
- Health can be prioritised over trade in certain conditions – specific advertising restrictions are more proportional than broad-brush bans.

## **9. Conclusions: lessons learned**

- Trade is a political choice and for that reason is managed either overtly or implicitly both by governments and powerful vested interests.
- Trade and investment agreements are complex, highly political and commercially-focussed deals that are usually conducted in secret with little chance for public debate.
- Non-communicable diseases can affect trade because of ill-health of the workforce and employers’ resulting costs which should provide industry with incentives to improve health.
- Lessons from tobacco show that increased trade is likely to lead to increased consumption. Health impact assessments of TIAs will be required.
- Despite aspirational aims of maintaining health and environmental standards, TIAs can impede the development of domestic policy and regulation because measures must be the minimum required in order not to be considered a barrier to trade. UK

consumers would be protected through precautionary approaches but this would potentially open door to disputes as a restrictive practice.

- Increasing intellectual property protections provide industry with the means to challenge restrictions on labelling, licensing, marketing and promotion. Dispute settlements tend to favour industry rather than the public good. This is of particular concern for public health in managing harms caused by tobacco, alcohol, unhealthy foods and gambling.
- Synergy between trade and health policies can be improved through leadership knowledgeable in areas of common concern and interest alongside cross-sector working groups at national level.<sup>147</sup>
- *“My dear ministers of health, if you are not at the table, you are on the menu”* was the warning from Margaret Chan, Director-General of the WHO, to health ministers in 2013, advising them that the only way to ensure that trade agreements did not hamper efforts to provide health and wellbeing protections was to be part of the discussion.

#### **Bottom line for public health: general position**

- Transparency and openness in all trade negotiations and dispute resolution processes to allow for a full debate.
- Maintaining the UK’s right to regulate to protect and improve the health and wellbeing of the public, with no risk that health regulations will be subject to investor-state dispute settlement or any equivalent.
- No obstruction of the right to health in the UK.
- Exclusion of trade in health-harming products, especially tobacco and alcohol. Where this is not possible, trade provisions should be specifically and precisely defined. TIAs that note a domestic commitment to improving nutrition for example may manage investor expectations and provide a defence for the trade policy.
- Recognition of the best standards available, especially on the environment and climate change.
- Public health representation in trade negotiations.
- Health impact assessments of trade and investment agreements before they are ratified.

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