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Trade policy governance: What health policymakers and advocates need to know[☆]

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ABSTRACT

Trade policies affect determinants of health as well as the options and resources available to health policymakers. There is therefore a need for health policymakers and related stakeholders in all contexts to understand and connect with the trade policymaking process. This paper uses the TAPIC (transparency, accountability, participation, integrity, capacity) governance framework to analyze how trade policy is commonly governed. I conclude that the health sector is likely to benefit when transparency in trade policymaking is increased, since trade negotiations to date have often left out health advocates and policymakers. Trade policymakers and negotiators also tend to be accountable to economic and trade ministries, which are in turn accountable to economic and business interests. Neither tend to appreciate the health consequences of trade and trade policies. Greater accountability to health ministries and interests, and greater participation by them, could improve the health effects of trade negotiations. Trade policies are complex, requiring considerable policy capacity to understand and influence. Nevertheless, investing in understanding trade can pay off in terms of managing future legal risks.

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1. Introduction: making trade work for health

Trade flows have a profound impact on the wellbeing of societies, populations, and individuals. The flow of goods and services across borders can help or hinder healthy behaviors, affecting the availability, and therefore price and use of tobacco products, medicines, alcohol, food, chemicals and weapons [1–3]. A country's ability to manage and maintain its health system can be affected by trade and trade policies, which can impact cross-border contracting to deliver health services, the movement of patients and the licensing of foreign medical professionals [4–8]. Independent from trade flows themselves, some trade policies can have a positive or negative effect on health, such as intellectual property rules and their impact on the availability of cheaper generic medicines, or the use of investor protections to initiate international legal challenges against domestic health policies [3,9].

More indirectly, the health of an economy and the health of a population go hand in hand. Trade can potentially support economic growth and improve overall health in a country. Poverty and inequality, however, are social determinants of health that

can be strongly affected by both trade flows and trade policies. Trade affects not just a country's wealth, but how that wealth is distributed. 'How should trade be governed to promote health?' is therefore a vital question, and one that is just as important as 'how can trade flows be increased to raise overall prosperity?'

As the following analysis shows, despite some fairly recent moves towards increasing the transparency and accountability of trade governance (particularly within the European Union), much of trade policymaking remains comparatively secret and subject to being shaped by executive agencies in ad hoc ways. Not only does the governance of trade have many potential impacts upon health and healthcare, but by providing legal mechanisms designed to allow foreign governments and investors to challenge policy decisions through arbitration, trade governance opens up opportunities for third parties to scrutinize the governance of domestic policies. Negotiations for the latest generation of trade agreements, which include those for the Trans Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic Trade Agreement (CETA) among many others, continue to be highly controversial, drawing criticism from all sides.

For these reasons, there is a need for health policymakers and related stakeholders in all contexts to understand and connect with the trade policymaking process. Early consideration of trade governance during policy formulation and implementation can help

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to manage governments' exposure to legal risks, while ongoing engagement with debates around the formulation and reform of trade governance mechanisms has the potential to improve both trade and health outcomes.

1.1. Types of trade policymaking

Trade negotiations are the part of trade policymaking that feature most prominently in news headlines. Most trade policymaking, however, is much less high profile. We can categorize trade policymaking in the following way:

- *Trade and investment promotion* involves unilateral government action to promote trade with domestic businesses. It is sometimes known as trade facilitation. It can involve information exchange, the provision of legal aid, promotional tours by state officials, and the provision of subsidies to key exporters. Trade and investment promotion can negatively impact health where the goods or services promoted are detrimental to health, e.g. tobacco products, and where increased trade in the services promoted is not matched with awareness of potential impacts on health services capacity. In both cases, there may be a lack of awareness of trade activities across government, or inability of health officials to counteract the arguments of other executive agencies or the core executive.
- *Trade defense* describes government action to force other states to enforce mutually agreed upon trade rules, and/or actions taken to defend against the practices of foreign states and investors. It can involve the imposition of measures such as duties or temporary licensing restrictions, as well as state participation in trade disputes. Trade defense can impact health to the extent that governments defense actions alter markets. This may result in changes in the availability or prices of goods and services that are important for health.
- *Trade negotiation* occurs when two or more countries get together to negotiate a set of rules to govern trade. It includes everything from bilateral trade and investment agreements to plurilateral deals (such as the Trans-Pacific Partnership) and multilateral negotiations within the World Trade Organization (WTO). Trade negotiations can impact health by setting rules that govern markets. These impacts can be more direct, e.g. governing cross-border movement of medical professionals, or more indirect, e.g. the formulation of language describing non-tariff trade barriers that is later applied in a dispute involving public health regulations.

It can be helpful for health policymakers and policy influencers to be aware of these distinctions for several reasons. Although it can be hard for stakeholders to monitor what is happening during trade negotiations and gauge their likely impact on health, it may be useful to emphasize that much of trade policy is determined through unilateral or mostly unilateral government action. In many of these cases, stakeholders (including elected representatives, government officials and advocacy organizations) can argue that they should be afforded representation at least equal to that given to domestic businesses.

2. Materials and methods

This study applies the TAPIC governance framework developed by a team of researchers on behalf of WHO Europe and the European Observatory on Health Systems and Policies to assess governance mechanisms employed in the creation and implementation of recent trade policies with implications for health [10].

Specifically, this article examines two of the most globally influential models of trade governance used by two of the world's largest markets – the United States and the European Union. The evidence in this article is drawn from a close read of policy and legal documents and secondary literature in both jurisdictions and rests on the author's work in this area over the last decade. The US approach to trade governance, beginning in the mid-20th century and refined in subsequent decades to reflect the changing global trade agenda, has been diffused via international institutions to many other countries around the world. The EU variant, in turn heavily influenced by US trade governance, retains many of the core principles of American trade policy, but takes a distinct approach to stakeholder participation in line with its unique institutions. Together, these models are worth examining because they take place in high capacity political environments and can provide examples of dominant practice.

3. Results

This section analyses the main trade governance mechanisms used in the US and EU models as well as the challenges to good governance in each of the TAPIC areas: transparency, accountability, participation, integrity and capacity. Table 1 summarizes the analysis for each of these five factors. It is worth noting that the five factors unpacked by TAPIC are interrelated in practice. Hence, the analysis contains some overlap between the various sections.

3.1. T is for transparency

When governance is transparent, 'institutions inform the public and other actors of both upcoming decisions and decisions that have been made, and of the process by and grounds on which decisions are being made' ().

Historically, trade governance has been secretive by design. It has long been argued that a country's ability to negotiate well on behalf of its citizens is dependent upon the negotiations being largely confidential until the agreement in question has been concluded. For this reason, many of the documents used to negotiate trade agreements are considered secret or confidential, and few have been exposed to broad public scrutiny.

Prior to the commencement of negotiations on the Transatlantic Trade and Investment Partnership (TTIP), Ignacio Garcia Bercero (Chief EU Negotiator for TTIP) wrote to Assistant US Trade Representative Dan Mullaney to lay out the EU's intended approach to securing negotiating documents. Garcia Bercero's letter acknowledges that

'While the EU holds to the principles of transparency, a certain level of discretion and special care in handling these documents is in our view necessary in order to allow mutual trust between negotiators and for each side to preserve positions taken for tactical reasons against third countries with which we are or could be negotiating in the future' [11].

As this quote illustrates, the key challenge to making trade policy governance more transparent lies in simultaneously promoting confidence in the outcomes of the negotiations and being transparent as to the policy decisions being made and the motives behind those decisions.

Because of concerns about losing negotiating power, as well as fears that external criticism will lead to the unraveling of trade negotiations in process, access to key trade texts is tightly controlled. Scrutiny of draft trade agreements and related working documents by elected representatives (such as members of trade and economic committees) does routinely occur (see Accountability, below), but this access has not always been guaranteed. Elected

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