

AN UNWELCOME SEAT AT THE TABLE: THE ROLE OF BIG FOOD IN PUBLIC AND PRIVATE STANDARD-SETTING AND ITS IMPLICATIONS FOR NCD REGULATION

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With the enshrinement of the private sector as a key actor in the Non-Communicable Disease ('NCD') and sustainable development agendas, there is a pressing need to control undue influence by Big Food in public health norm-setting and in the formulation and implementation of unhealthy diet regulation. In the absence of clearly established guidelines governing interactions between public health norm-setting bodies and private sector interests, such as those observed in tobacco control, the regulation of unhealthy diets threatens to be undermined by Big Food interference, ultimately impacting on public health. In addition, the weight attributed to international private standards that are heavily influenced by Big Food interests should be carefully considered in the application of international trade law to NCD regulatory measures under the dispute settlement system of the World Trade Organization ('WTO').

I INTRODUCTION

In 2012, Pan American Health Organization ('PAHO'), the specialized health agency of the Inter-American System and Regional Office for the Americas of the World Health Organization ('WHO'),¹ found itself dragged into a maelstrom after a Reuters investigation revealed it had accepted funding from some of the largest producers of unhealthy food and beverages, including Coca-Cola, Nestlé, and Unilever.² Revelation of the funding arrangement prompted staunch criticism from a number of prominent public health experts³ who stated that the funding from industry had compromised the interests of an organisation with the primary aim of promoting health in countries such as Mexico, where the rate of obesity and overweight ranks among the highest in the world. The Director-General of the WHO at the time, Dr Margaret Chan, responded to the Reuters report by clarifying that PAHO was a distinct legal entity from other WHO regional offices and that WHO would not take money from the food and beverage industry for work on NCD prevention and control, while also highlighting that 'the private sector plays an important role along with other key stakeholders in taking action to improve health'.⁴ Dr Chan noted that the Political Declaration of the High-level Meeting of the United Nations General Assembly on the Prevention and Control of NCDs, adopted by the

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¹ Pan American Health Organization, *About the Pan American Health Organization (PAHO)* (5 September 2017) <<http://www.paho.org/hq/>>.

² D Wilson and A Kerlin, 'Special Report: Food, Beverage Industry Pays for Seat at Health-policy Table', *Reuters* (online), 19 October 2012 <<http://www.reuters.com/article/us-obesity-who-industry-idUSBRE89I0K620121019>>.

³ World Public Health Nutrition Association. *PAHO. Partnerships With Transnationals: Open Letter to New UN Agency Chief: No More Deals with Nestle Please.* (March 2013) <http://www.wphna.org/htdocs/2013_mar_hp1_paho.htm>.

⁴ Margaret Chan, 'WHO Sets the Record Straight on Work With the Food and Beverage Industry.' (Statement by WHO Director-General, 19 November 2012) <http://www.who.int/mediacentre/news/statements/2012/nutrition_20121119/en/>.



UN General Assembly in 2011 ('2011 UN Political Declaration'), included a call for the private sector to promote measures to implement WHO recommendations to reduce exposure to NCD risk factors and referred to the WHO Global Strategy on Diet, Physical Activity and Health as committing WHO to hold discussions with the private sector.⁵

An increasing mandate has also been afforded to the private sector in the context of the broader global development agenda. The Sustainable Development Goals ('SDGs'), which entered into force in 2016, recognise the need for a multi-stakeholder approach to achieving the economic, social, and environmental dimensions of sustainable development and addressing the systemic causes of poverty, including partnerships encouraging private sector engagement. The 2030 Agenda for Sustainable Development contains goals pertaining specifically to the promotion of well-being through the reduction of premature mortality due to NCDs by regulating associated risk factors including tobacco, alcohol and overweight and obesity.⁶ The SDG Agenda and the Addis Ababa Action Agenda, which outlines the means for implementing the SDGs, both recognise that sustainable development cannot be achieved by governments, international organisations and civil society alone and requires the involvement of the private sector.

Yet particular caution must be exercised in relation to NCD risk factor regulation to ensure that the bodies responsible for developing applicable normative instruments and designing NCD regulatory measures are protected from the undue influence of commercial interests.⁷ There is a clear potential for conflict between the interests of organisations with a mandate of protecting public health and those with a primary mandate of ensuring profitable commercial enterprise. This conflict may compromise the authority of organisations tasked to establish normative public health values. There has been express recognition of the need to protect against this conflict of interest in the context of tobacco control. However the boundaries have yet to be defined clearly in unhealthy food regulation. Commentators have noted the influential role that representatives from the food industry, including the International Food and Beverage Alliance, played in the UN civil society hearings that ultimately shaped the 2011 UN Political Declaration. In addition, the sugar industry reportedly threatened to lobby the US to cut WHO financial support in response to calls contained in the WHO Global Strategy for reduced sugar intake.⁸ Careful consideration must therefore be given to managing any conflict of interest between the food industry and public health organisations responsible for unhealthy diet regulatory norm-setting and implementation.

In addition, concerns have been raised in relation to the reliance on international private standards, heavily influenced by industry, in the interpretation and application of international trade law to NCD regulatory measures. These concerns include issues relating to conflict of interest and the lack of due process, representation, accountability and transparency in the development of these standards, and evoke questions regarding the legitimacy of relying on international private standards in the adjudication of public health disputes.

⁵ Ibid.

⁶ Division for Sustainable Development, UN Department of Economic and Social Affairs, *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Resolution A/RES/70/1 (25 September 2015), Goal 2, target 2.1, and Goal 3, targets 3.4, 3.5, 3.a <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>.

⁷ N Y Ng and J P Ruger, 'Global Health Governance at a Crossroads' (2011) 3(2) *Global Health Governance* 1.

⁸ D Stuckler, S Basu and M McKee, 'UN High Level Meeting on Non-communicable Diseases: An Opportunity for Whom?' (2011) 343 *British Medical Journal* 453.

This paper will commence (Part II) with an examination of the potential for conflict of interest between the food industry and public health bodies. It will then consider the implications of this conflict of interest in three areas. Part III of the paper looks at the governance frameworks regulating interactions between public health norm-setting bodies and private sector interests in relation to NCD risk factor regulation, highlighting the distinction between unhealthy diet and tobacco control. Part IV considers the involvement of the private sector in the design, development and implementation of unhealthy diet regulatory measures. Part V explores the role of international private standards in the application of international trade law to NCD risk factor regulatory measures, focusing specifically on the role of Codex Alimentarius in the application of the TBT Agreement to unhealthy diet regulatory measures. The paper considers to what extent, if any, considerations of private sector engagement in the development of international private standards should affect the weight attributed to these standards in the context of challenges under the international trade law dispute settlement system.

II CONFLICT OF INTEREST BETWEEN BIG FOOD AND PUBLIC HEALTH

The term ‘Big Food’ has been used to refer to the multinational food and beverage companies representing a ‘huge and concentrated’ market force, responsible for accelerating the global rise in the promotion, purchase and consumption of low-cost, highly-processed foods and sugar-sweetened beverages (SSB) that are poor in nutrition, high in sugar, salt, and saturated fats, and linked to overweight and obesity.⁹ As an example of this concentrated market power, it has been reported that only 10 companies — Nestlé, PepsiCo, Coca-Cola, Unilever, Danone, General Mills, Kellogg’s, Mars, Associated British Foods, and Mondelez — control the majority of large food and beverage brands in the world.¹⁰ The primary mandate for Big Food in the global food system is not to ensure optimal consumption of healthy diets, but rather to ensure maximum profits.

Conflict of interest has been defined by WHO as arising in circumstances where there is the potential for a secondary interest to unduly influence either the independence or objectivity of professional judgement or actions regarding a primary interest relating to member states’ work in public health. Conflict of interest does not necessarily mean that improper action has occurred, but rather that there is a risk of it occurring.¹¹ There is an inherent conflict of interest that arises between Big Food — primarily motivated and legally mandated to ensure a growth in profit for shareholders — and public health. It has been highlighted that since healthier foods are inherently less profitable, Big Food is motivated to preserve profit by both encouraging the consumption of more profitable unhealthy foods and beverages, and undermining regulation of these products, ultimately having a deleterious impact on public health.¹²

The conflict of interest between public health and private sector interests plays out in the control of tobacco, the only consumer product which, when used as directed, kills half of its

⁹ D Stuckler and M Nestle, ‘Big Food, Food Systems, and Global Health’ (2012) 9 *PLoS Medicine* e1001242, doi:10.1371/journal.pmed.1001242.

¹⁰ Kate Taylor, ‘These 10 Companies Control Everything You Buy’, *Business Insider* (28 September 2016) <<http://www.businessinsider.com/10-companies-control-the-food-industry-2016-9>>.

¹¹ Executive Board, World Health Organization, *Safeguarding Against Possible Conflicts of Interest in Nutrition Programmes: Draft Approach for the Prevention and Management of Conflicts of Interest in the Policy Development and Implementation of Nutrition Programmes at Country Level*, 142nd session, Provisional Agenda Item 4.6, EB142/23 (4 December 2017) <http://apps.who.int/gb/ebwha/pdf_files/EB142/B142_23-en.pdf?ua=1>.

¹² Stuckler and Nestle, above n 9.

users.¹³ WHO's 2012 report on tobacco industry interference identified six tactics deployed by the tobacco industry in order to undermine strong tobacco control policies: 'manoeuvring [sic] to hijack the political and legislative process; exaggerating the economic importance of the industry; manipulating public opinion to gain the appearance of respectability; fabricating support through front groups; discrediting proven science; and intimidating governments with litigation or the threat of litigation'.¹⁴ As an example, there is documented evidence of the tobacco industry having used normal scientific uncertainty to discredit scientific evidence in relation to the harms associated with tobacco use.¹⁵ In many ways, food is distinct from tobacco. While smoking of tobacco is harmful at any level of consumption, food is a necessary part of human existence. Even when confined to foods high in salt, fats and sugars and poor in nutritional value, comparisons with tobacco in relation to the associated public health risks are fraught. Nonetheless, the evidence is clear that unhealthy diets contribute to overweight and obesity, which increase the risk of a range of NCDs, including type 2 diabetes, cardiovascular disease and a number of cancers. Research has shown overweight and obesity increases the risk of 11 cancers, including oesophageal (adenocarcinoma), cardia (stomach), kidney, gallbladder, liver, advanced prostate cancer, ovarian, endometrial, pancreatic, colorectal, and postmenopausal breast cancer.¹⁶

Furthermore, there are extensive commonalities between Big Tobacco and Big Food in relation to conflict of interest, the potential for undue influence and similarity in tactics used by the industries to undermine public health regulation. Food companies also use legal, regulatory and societal mechanisms to protect the promotion of their products including lobbying for favourable laws, regulations and trade agreements; arrangements made with food and nutrition experts to obtain evidence to support the health benefits of food; personal connections through sponsorship of research and educational activities; public relations to create positive reputational benefits; and legal action against unfavourable public health regulation.¹⁷ Similar tactics to those adopted by the tobacco industry to undermine public health regulation have been adopted by the baby food industry including lobbying, financing and communications to high-level policy makers to promote voluntary self-regulation instead of legally binding legislation, and engaging front groups. During the 2011 session of the Codex Committee on Nutrition and Foods for Special Dietary Uses,¹⁸ which discussed nutrient reference values for labelling foods for NCDs, and a proposal to review the Codex Standard for Follow-up Formula, all five delegates in the Mexican delegation represented the private sector. This example has been used to highlight the need to safeguard against conflicts of interest between public health and Big Food.¹⁹

¹³ First Conference of the Parties, WHO Framework Convention on Tobacco Control, *Facts and Issues About Tobacco* (World Health Organization, 6 February 2006) <<http://www.who.int/tobacco/fctc/tobacco%20factsheet%20for%20COP4.pdf>>.

¹⁴ World Health Organization, *Tobacco Industry Interference: A Global Brief* (2012) <<http://www.who.int/iris/handle/10665/70894>>.

¹⁵ N Oreskes and E M Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues From Tobacco Smoke to Global Warming* (Bloomsbury Press, 2010).

¹⁶ World Cancer Research Fund International, *Weight & Cancer* <<http://www.wcrf.org/int/cancer-facts-figures/link-between-lifestyle-cancer-risk/weight-cancer>>.

¹⁷ M Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (University of California Press, 2007).

¹⁸ Codex Committee on Nutrition and Foods for Special Dietary Uses, Codex Alimentarius Commission, *Report of the Thirty-third Session, Bad Soden am Taunus, Germany, 14–18 November 2011*, REP12/NFSDU, Joint FAO/WHO Food Standards Programme (2012) <<http://www.fao.org/fao-who-codexalimentarius/meetings/archives/en/?y=2012>>.

¹⁹ S I Granheim et al 'Interference in Public Health Policy: Examples of How the Baby Food Industry Uses Tobacco Industry Tactics' (2017) 8 *World Nutrition* 288, doi:10.26596/wn.201782288-310.

With the need for guidelines and boundaries to manage conflict of interest established, Part III now examines the existing frameworks governing interactions between the private sector industry and public health standard-setting bodies in the context of NCD risk factor regulation, drawing comparisons between tobacco control and unhealthy diet regulation.

III FRAMEWORKS GOVERNING INTERACTIONS BETWEEN PRIVATE INDUSTRY AND PUBLIC HEALTH STANDARD-SETTING BODIES IN THE CONTEXT OF NCD RISK FACTOR REGULATION

In the realm of global public health governance, there are a number of instruments that govern the interaction between private industry and public health standard-setting bodies in the context of NCD risk factor regulation. This section examines governance frameworks regulating the interaction between private industry and two principal public health standard-setting bodies: the WHO, tasked with establishing normative values in global public health governance, and national governments responsible for developing and implementing public health regulation at a domestic level.

As the ‘directing and coordinating authority on international health work’²⁰ there is a clear need to protect the WHO from undue interference by industry in the formulation of NCD risk factor regulatory norms, particularly when the industry in question consists of well-resourced food, beverage and tobacco companies with a vested interest in thwarting regulation that threatens to impact on their profit margins. The Framework of Engagement with Non-State Actors (‘FENSA’) was adopted at the 69th World Health Assembly in May 2016. The document provides a framework for WHO’s engagement with non-state actors, including private sector entities,²¹ with reference to factors such as conflict of interest, reputational risks, and undue influence. FENSA states any engagement must ‘protect WHO from any undue influence, in particular on the processes in setting and applying policies, norms and standards’,²² and points to the risk of engagement from undue or improper influence exercised by a non-state actor on WHO’s work.²³ FENSA indicates that the means of engagement can include the provision of resources, both financial and in-kind, influence through meetings, provision of evidence, advocacy and technical collaboration. Yet while FENSA makes specific reference to non-engagement with the tobacco industry and non-state actors that ‘work to further the interests of the tobacco industry’,²⁴ the framework makes no explicit reference to engagement with Big Food. It does state that WHO will exercise ‘particular caution’, especially while conducting due diligence, risk assessment and risk management, when engaging with private sector entities and other non-state actors whose policies or activities are negatively affecting human health and are not in line with WHO’s policies, norms and standards, in particular, those related to NCDs and their determinants.²⁵ However, the framework does not specify how this particular caution should be exercised, nor does it identify how to determine whether the actors’ policies or activities are ‘negatively affecting’ human health or not in line with WHO’s policies, norms and standards. The framework is also limited to the operations of WHO itself rather than

²⁰ *Constitution of the World Health Organization*, Chapter II — Functions, art 2, adopted by the International Health Conference, New York, signed 22 July 1946, entered into force 7 April 1948.

²¹ World Health Assembly, *Framework of Engagement with Non-state Actors*, WHA 69.10, Agenda Item 11.3 (28 May 2016) Annex [10]. Private sector entities are defined in para 10 of FENSA as ‘commercial enterprises, that is to say businesses that are intended to make a profit for their owners’.

²² *Ibid* [5(e)].

²³ *Ibid* [7(b)].

²⁴ *Ibid* [44].

²⁵ *Ibid* [45].

exploring broader regulation of corporate activities, providing little incentive for private actors to improve practices in order to protect public health.²⁶

In December 2017, WHO developed a draft approach for the prevention and management of conflicts of interest in the policy development and implementation of nutrition programmes at country level,²⁷ which was presented for consideration to the WHO Executive Board at its 142nd session in January 2018. The paper outlines a six step decision-making process for member states to use in relation to conflict of interest in the area of nutrition, to be followed by an assessment by the national authority of whether the engagement should continue or stop. The six steps are: (1) rationale for engagement; (2) profiling and performing due diligence and risk assessment; (3) balancing risks and benefits; (4) risk management; (5) monitoring and evaluation and accountability; and (6) transparency and communication. The approach will be piloted at a national level in the six WHO regions.

There is also a need for governments to exercise caution when devising and implementing measures to protect public health to ensure that laws, norms and standards for the prevention of NCDs are developed with due consideration of any undue influence by industry. The WHO's Framework Convention on Tobacco Control ('WHO FCTC'), the first international treaty negotiated under the auspices of the WHO, provides express recognition of the need for governments to limit interactions with the tobacco industry. The treaty, aimed at protecting 'present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke'²⁸ requires parties to the Convention, currently 181, to implement tobacco control measures at national, regional and international levels in order to reduce the prevalence of tobacco use and exposure to tobacco smoke.

Article 5.3 of the WHO FCTC stipulates that, in setting and implementing public health policies, parties to the Convention shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law. At the third session of the Conference of the Parties (COP) of the WHO FCTC, parties adopted guidelines for the implementation of Article 5.3 to address tobacco industry interference in public health policies including: limitations on interactions with the tobacco industry and ensuring the transparency of those interactions that do occur; rejection of partnerships and agreements with the tobacco industry; avoidance of conflicts of interest for government officials and employees; requirement for transparency and accuracy in relation to information provided by the tobacco industry; de-normalisation of 'socially responsible' activities by the tobacco industry and the avoidance of preferential treatment to the industry.²⁹

In addition, the WHO Global Action Plan for the Prevention and Control of NCDs encourages, as a policy option for member states, the forging of multi-sectoral partnerships among governmental agencies, intergovernmental organizations, nongovernmental organizations, civil society and the private sector, to strengthen efforts for the prevention and control of NCDs,

²⁶ K Buse and S Hawkes, 'Sitting on the FENSA: WHO Engagement With Industry' (2016) 388(10043) *The Lancet* 446.

²⁷ Executive Board, World Health Organization, above n 11.

²⁸ *WHO Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005) ('WHO FCTC') art 3.

²⁹ Conference of the Parties, WHO Framework Convention on Tobacco Control, *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control*, FCTC/COP3(7) (22 November 2008) [17] < http://www.who.int/fctc/guidelines/article_5_3.pdf>.

while safeguarding public health interests from undue influence, explicitly recognising the fundamental conflict of interest between the tobacco industry and public health.³⁰

In contrast to these express provisions governing the interaction between the tobacco industry and governments in public health policy formulation, there are no binding international treaty obligations or clearly established guidelines for governments to follow in terms of engagement with Big Food. The Global Strategy on Diet, Physical Activity and Health, endorsed by the World Health Assembly in 2004, contains a number of references to the role of the private sector in fulfilling the Strategy. It encourages governments to consult with stakeholders on policies, calling for the establishment of mechanisms to promote participation of stakeholders, including the private sector, in activities related to diet, physical activity and health³¹ and stating that the private sector can be a ‘significant player’³² in promoting healthy diets and physical activity. The Strategy states that actors, including the food industry, could become partners with governments and nongovernmental organizations in implementing measures to encourage healthy eating and physical activity.

In the absence of express and/or binding guidelines outlining the parameters of engagement with Big Food in the design, development and implementation of unhealthy diet regulatory measures, it is evident that the effectiveness and legitimacy of the developed measures may be undermined. This will now be explored.

IV INFLUENCE OF THE PRIVATE SECTOR ON PUBLIC STANDARD-SETTING: THE DEVELOPMENT OF NCD RISK FACTOR REGULATORY MEASURES

The lack of express guidelines and/or binding treaty obligations governing the relationship between private industry actors and public health norm-setting bodies in relation to unhealthy diet regulation has resulted in numerous examples of industry interference in the development and implementation of regulatory measures and norms. Examples abound of private food industry representatives and/or interests being offered a critical seat at the decision-making table for regulatory measures at international and domestic levels. In the context of international norm-setting, WHO’s Nutrition Guidance Expert Advisory Group (‘NUGAG’), established in 2010, meets biannually to provide ‘evidence-informed nutrition guidance’ and advise WHO on matters such as the priority questions to underlie systematic reviews of evidence, interpretation of evidence and recommendations.³³ The 2012 Reuters investigation uncovered that at least two members of the NUGAG had direct financial ties to the food industry including funds provided to enable research to be undertaken by the member or their academic institution.³⁴ In addition, the advisory steering group of PAHO’s Pan American Forum for Action on NCDs (‘PAFNCD’) — designed as a multi-stakeholder platform to address the prevention and control of NCDs/chronic diseases, and promotion of health —

³⁰ World Health Organization, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020* (2013), 96 <http://www.who.int/iris/bitstream/10665/94384/1/9789241506236_eng.pdf?ua=1>.

³¹ World Health Organization, *The Global Strategy on Diet, Physical Activity and Health* (2004) [44] <http://apps.who.int/iris/bitstream/10665/43035/1/9241592222_eng.pdf?ua=1>.

³² *Ibid* [61].

³³ World Health Organization, *Eleventh Meeting of the WHO Nutrition Guidance Expert Advisory Group (NUGAG)* (3–6 July 2017) <http://www.who.int/nutrition/events/2017_11th_NUGAG_meeting_3to6Jul/en/>.

³⁴ Wilson and Kerlin, above n 2.

included a representative from the International Food and Beverage Alliance,³⁵ whose members represent the global leaders of the food and non-alcoholic beverage industry with combined annual revenues in 2016 of approximately US\$410 billion,³⁶ enabling industry to play a critical participating role in the development of PAFNCD's strategic policies, practices and initiatives.

On a domestic level, it is evident that Big Food has played a role to ensure the adoption of weaker, less-effective regulatory measures. During the design of a SSB tax in Chile, the SSB industry undertook intense lobbying, resulting in opposition to the regulation by the Ministry of Finance based on claims the regulation would have a negative impact on economy and trade in the country, resulting in internal conflict within the government. The tax was passed but was set at 5 per cent as opposed to the WHO recommendation of 20 per cent. The design of the tax reportedly had a severe impact on its potential effectiveness,³⁷ and its implementation was dependent on industry self-reporting to the Internal Revenue Office, with no mechanisms for independent or formal monitoring of industry self-reported data. A case study on SSBs and self-regulation in Fiji has shown that a 2009 initiative allowing the food industry to work with government on policy development and implementation ultimately resulted in heavy lobbying by the food industry of the Ministry of Industry and Trade. As a result of this heavy lobbying, there were no reductions in SSB marketing or availability in Fiji, with the case study highlighting the challenges resulting from the conflict of interest in this public-private initiative.³⁸

The obstructive influence of industry in the development and implementation of NCD regulatory measures was evident in the case of Denmark's saturated fat tax legislation. Denmark introduced a tax in October 2011 based on the weight of saturated fat in foods and the weight of saturated fat used for food production (the 'Fat Tax Bill'). A review of the development and implementation of the tax indicated that the process was hampered throughout by industry interference. During consultation processes with stakeholders in the development of the regulatory measure, 13 of the 15 consultation responses to the Bill were provided by food industry and trade associations, unsurprisingly highly critical of the tax, with threats of lawsuits, predictions of welfare losses, doubts cast on evidence supporting the Bill and requests for postponement.³⁹ The fat tax was ultimately adopted in October 2011. However, post-implementation, and pursuant to a concerted effort by industry to undermine the effectiveness of the tax, it was reconsidered shortly after implementation. The consultation period for this reconsideration process lasted four days, and out of 10 consultation responses received, six of them were from the food and trade association, all expressing support for the abolition of the fat tax. The tax was abolished in January 2013.⁴⁰

³⁵ Pan American Health Organization, *Pan American Forum*, <http://www.paho.org/hq/index.php?option=com_docman&task=cat_view&gid=4369&Itemid=1639&lang=en>

³⁶ International Food & Beverage Alliance, *Our Members* (2017) <<https://ifballiance.org/about/members/>>.

³⁷ C Cuadrado, M Valenzuela and S Peña, 'Conflicting Goals and Weakened Actions: Lessons Learned From the Political Process of Increasing Sugar-sweetened Beverage Taxation in Chile' in UK Health Forum *Public Health and the Food and Drinks Industry: The Governance and Ethics of Interaction: Lessons from Research, Policy and Practice* (2018).

³⁸ N Sharma and M Mialon, 'Sugar-sweetened Beverages, Non-communicable Diseases and the Limits of Self-regulation in Fiji' in UK Health Forum, *Public Health and the Food and Drinks Industry: The Governance and Ethics of Interaction: Lessons from Research, Policy and Practice* (2018).

³⁹ M Bødker et al, 'The Rise and Fall of the World's First Fat Tax' (2015) 119 *Health Policy* 737.

⁴⁰ *Ibid.*

Clearly defined policies and guidelines are required to ensure that regulatory measures designed, developed and implemented by public health norm-setting bodies are not unduly influenced by industry. While tobacco control regulation benefits from expressly agreed guidelines pursuant to a binding international treaty, regulation of unhealthy food continues to lag in the face of uncertainty. In the absence of clear obligations outlined in a binding treaty provision such as Article 5.3 of the WHO FCTC and its guidelines, the extent to which governments should consult with Big Food in the development of NCD regulatory measures remains undefined. This poses a risk of industry reliance on this ambiguity to overstate obligations to consult with it in the development of NCD regulatory measures. One area where this could be witnessed is in relation to International Investment Agreements ('IIAs'). IIAs comprise a variety of agreements including bilateral investment treaties ('BITs'), investment chapters in free trade agreements ('FTAs') and investment contracts between the state and investors that aim to promote and protect foreign investment. Whilst variations exist, IIAs generally provide a broad range of protections to investors and their investments to which host states can be held accountable before an arbitral tribunal, including provisions providing protection to investors against unfair and inequitable treatment by the host state. While there is divergence among tribunals as to the exact standard required for the 'Fair and Equitable Treatment' ('FET') provision, arbitral tribunals have broadly interpreted the provision as requiring governments to observe the following conditions: procedural due process; non-discrimination; freedom from harassment and coercion; freedom from arbitrary or unreasonable action by the state; maintenance of a stable and predictable regulatory environment; and the protection of legitimate expectations. Governments seeking to keep unhealthy food producing investors at arm's length to avoid conflict of interest in the development and implementation of NCD regulatory measures may face allegations that they have failed to provide adequate opportunities to industry for consultation and breached IIA provisions in relation to FET. The absence of binding treaty provisions and/or clear guidelines in relation to Big Food interference in the development of public health policy leaves governments with limited defence in the event of such a claim.

The paper will now examine the impact of international private standards in the interpretation and application of international trade law to NCD risk factor regulatory measures.

V IMPACT OF INTERNATIONAL PRIVATE STANDARDS ON THE APPLICATION OF INTERNATIONAL TRADE LAW TO NCD RISK FACTOR REGULATORY MEASURES

The WTO is the central multilateral body dealing with the rules of trade between nations, also known as international trade law. These rules take the form of WTO Agreements. One of these, the *Agreement on Technical Barriers to Trade* ('TBT Agreement'),⁴¹ aims to ensure that technical regulations, standards, and conformity assessment procedures do not discriminate against or between imported products and do not create unnecessary obstacles to trade. WTO members use the TBT Committee to discuss specific laws, regulations or procedures that affect their trade known as Specific Trade Concerns ('STCs') and to strengthen implementation of the TBT Agreement.⁴²

'Technical regulations' are measures laying down product characteristics or their related processes and production methods, compliance with which is mandatory for WTO members,

⁴¹ *Agreement on Technical Barriers to Trade* ('TBT Agreement'), opened for signature 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995).

⁴² World Trade Organization, *Technical Barriers to Trade* (2018) <https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm>.

including terminology, symbols, packaging, marking or labelling requirements.⁴³ NCD risk factor regulatory measures such as mandatory packaging and labelling requirements may fall within the definition of a technical regulation. Therefore, a country implementing a NCD regulatory measure in relation to packaging, labelling or product contents may be the subject of a STC before the TBT Committee or be formally challenged under WTO's formal dispute settlement mechanisms if it is alleged that the measures are technical regulations and are discriminatory and/or create unnecessary restrictions on trade. One example is Chile's Law of Food Labelling and Advertising (Law 20.606) known as the 'Super 8 Law', which restricts marketing of energy-dense, nutrient poor foods to children, and has been raised as a STC at TBT Committee meeting discussions. Entering into force in June 2016, Chile introduced regulations requiring products that exceeded specified threshold limits of saturated fats, sugars, sodium, and energy to use one or more black stop sign shaped labels stating the products are 'high in' salt, sugar, energy or saturated fat according to its nutritional composition. Products bearing these labels are prohibited from being sold, marketed, promoted or advertised in preschool, primary school, or high school institutions; advertised on media or other means of communication directed to children under 14 or where more than 20 per cent of the audience is children under 14; or given freely to children or advertised in conjunction with items that appeal to children such as toys.⁴⁴ A review of TBT Committee minutes reveals that countries that have raised STCs in relation to Chile's marketing restrictions have alleged that Chile's measures are more trade restrictive than necessary and contravene the TBT Agreement, as they are not based on 'relevant international standards'.

Standards refer to those guidelines that are voluntary, in contrast to the mandatory nature of technical regulations.⁴⁵ In the pursuit of reducing unnecessary obstacles to trade, the TBT Agreement encourages the principle of harmonisation. Use of international standards is encouraged to promote harmonisation with a view to improving efficiency and reducing trade restrictions.⁴⁶ Standards are defined in Annex 1 of the TBT Agreement as a 'document approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory'.⁴⁷ Article 2.4 of the TBT Agreement states that WTO member states shall use 'relevant international standards', or relevant parts of them, where they exist or their completion is imminent as the basis of technical regulations, unless those standards or their parts would be an ineffective or inappropriate means of fulfilling the legitimate objective pursued. Under Article 2.5 of the TBT Agreement, a technical regulation that is developed in accordance with a relevant international standard is presumed not to create an unnecessary obstacle to trade. An international standard has been interpreted as one adopted by an international standardising body,⁴⁸ which in turn has been interpreted to be a body whose membership 'should be open on a non-discriminatory basis to relevant bodies of at least all WTO members' and must have recognised activities in standardisation.⁴⁹ Yet international

⁴³ *TBT Agreement*, above n 41, Annex 1.1.

⁴⁴ World Cancer Research Fund International, *NOURISHING Framework* (2017) <<http://www.wcrf.org/int/policy/nourishing-framework>>.

⁴⁵ Food and Agriculture Organization, *Private Standards: Relevant Definitions and a Typology* <<http://www.fao.org/docrep/013/i1948e/i1948e02.pdf>>.

⁴⁶ Food and Agriculture Organization and World Trade Organization, *Trade and Food Standards* (2017) <https://www.wto.org/english/res_e/booksp_e/tradefoodfao17_e.pdf>.

⁴⁷ *TBT Agreement*, above n 41, Annex 1.2.

⁴⁸ *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*. ('US–Tuna II') WT/DS381/AB/R (16 May 2012) [356].

⁴⁹ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2013) 880.

standard-setting bodies are increasingly becoming driven by private actors.⁵⁰ The rationale is that the state does not have the resources or technical expertise to regulate in these areas, and therefore delegates the role of setting standards to non-state bodies.

The provisions of Articles 2.4 and 2.5 of the TBT Agreement therefore effectively grant presumptive value to voluntary standards developed by self-regulated standard-setting bodies whose composition includes industry representatives, and deems these standards to be WTO compatible. The fact that NCD regulatory measures adopted by sovereign states are then examined through the lens of these industry-influenced standards raises a number of questions in relation to the legitimacy of the process.

A review of TBT Committee minutes reveals that countries that have raised STCs in relation to Chile's marketing restrictions have alleged that Chile's measures contravene Article 2.4 of the TBT Agreement for failure to base the measures on 'relevant international standards'. Countries have alleged that Chile's measures deviate from Codex international standards, including the Codex Guidelines on Nutrition Labelling which states that labelling should not lead consumers to believe that there is exact quantitative knowledge of what individuals should eat in order to maintain health, but rather convey an understanding of the quantity of nutrients contained in the product.⁵¹

Codex Standards have been developed by Codex Alimentarius Commission, a joint Food and Agriculture Organization ('FAO') and WHO international food standard-setting body.⁵² While determination of whether Codex Standards would be a 'relevant international standard' will depend on the facts of the relevant case, they have been considered as relevant international standards for the purposes of Article 2.4 of the TBT Agreement in a previous WTO dispute concerning sardines.⁵³ While some argue that Codex Standards reflect 'international consensus that is reached through rigorous scientific evaluation and a robust discussion of relevant regulatory, policy and trade issues',⁵⁴ others argue that their development processes are heavily influenced and overly represented by private industry interests, particularly compared to representation by consumer groups and developing countries that are unable to participate adequately in the development of the standards due to lack of resources.⁵⁵ National delegations in Codex meetings increasingly reflect industry influence on Codex decisions.⁵⁶ At previous meetings of the Codex Nutrition Committee, a number of countries' delegations, including those of Mexico and the US, included officials from Coca-Cola.⁵⁷ This justifiably raises serious concerns as to the weight that should be attributed to standards, which have been heavily influenced by Big Food interests, in the application of international trade law to regulatory measures targeted at unhealthy diets.

⁵⁰ P Delimatsis, 'Relevant International Standards and Recognized Standardization Bodies under the TBT Agreement' (TILEC Discussion Paper No 2014-031, September 2014) <<https://ssrn.com/abstract=2489934>>.

⁵¹ TBT Committee, World Trade Organization, *Minutes of the Meeting of 9–10 March 2016*, G/TBT/M/68.

⁵² Codex Alimentarius Commission, *Codex Standards* (2016) <<http://www.fao.org/fao-who-codexalimentarius/standards/list-of-standards/en/>>.

⁵³ *Peru and European Communities — Trade Description of Sardines*, WT/DS231/AB/R (26 September 2002) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm>.

⁵⁴ NT Crane, R Nalubola and BO Schneeman, 'The Role and Relevance of Codex Nutrition Standards' (2010) 110 *Journal of the Academy of Nutrition and Dietetics* 672, 675.

⁵⁵ E Lee, 'The World Health Organization's Global Strategy on Diet, Physical Activity, and Health: Turning Strategy into Action' (2005) 60 *Food and Drug Law Journal* 569; M A Livermore, 'Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation and the Codex Alimentarius' (2006) 81 *New York Law Review* 766.

⁵⁶ Lee, above n 55.

⁵⁷ Wilson and Kerlin, above n 2; Livermore, above n 55.

The Code of Good Practice for the Preparation, Adoption, and Application of Standards (the 'Code'), in Annex 3 of the TBT Agreement, does incorporate obligations regarding standard development, adoption and application. However, the Code has been criticised for failing to focus on process issues such as ensuring fair and non-discriminatory access to standardisation activities and participation.⁵⁸

In the TBT Committee's second triennial review of the operation and implementation of the TBT Agreement in 2000, the Committee adopted a Decision on 'Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3' of the TBT Agreement ('2000 TBT Committee Decision'). The 2000 TBT Committee Decision sets out principles and procedures that standardising bodies should observe when developing international standards: transparency; openness; impartiality and consensus; effectiveness and relevance; and addressing the concerns of developing countries.⁵⁹ In the WTO case of *US–Tuna II (Mexico)*, the 2000 TBT Committee Decision principles were applied in the determination of whether a standard was a 'relevant international standard' for the purposes of Article 2.4 of TBT.⁶⁰ *US–Tuna II (Mexico)* involved a US measure that established the conditions under which tuna products in the US could be labelled as 'dolphin-safe'. In this dispute, the WTO Appellate Body was required to consider whether the definition and certification of 'dolphin-safe' in the Agreement on the International Dolphin Conservation Program ('AIDCP') was a 'relevant international standard' within the meaning of Article 2.4 of the TBT Agreement.

In reaching its decision, the WTO Appellate Body found the 2000 TBT Committee Decision was a 'subsequent agreement' between the parties regarding the interpretation and application of the TBT Agreement, within the meaning of section 31(3)(a) of the Vienna Convention on the Law of Treaties.⁶¹ The WTO Appellate Body found that the 2000 TBT Committee Decision bore directly on the interpretation of the term 'open' in Annex 1.4 to the TBT Agreement, as well as on the interpretation and application of the concept of 'recognized activities in standardization'. In light of this, the Appellate Body stated in *US–Tuna II* that an international standardising body 'must not privilege any particular interests in the development of international standards' noting, in particular, that the 2000 TBT Committee Decision statement provided that 'all relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of international standards so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s'.⁶² The Appellate Body stated that the 2000 TBT Committee Decision, when read with other elements of the TBT Agreement, reflected the intention of WTO Members to ensure the development of international standards takes place 'transparently and with wide participation'.⁶³ The Appellate Body ultimately determined that the AIDCP 'dolphin-safe' definition and certification did not constitute a 'relevant international standard' within the meaning of Article 2.4 of the TBT Agreement, as invitations to accede to the AIDCP

⁵⁸ Delimatsis, above n 50 [16].

⁵⁹ TBT Committee, World Trade Organization, *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement* ('WTO TBT Committee Decision'), G/TBT/9 (13 November 2000).

⁶⁰ *US–Tuna II*, above n 48.

⁶¹ *Ibid* [372].

⁶² *WTO TBT Committee Decision*, above n 59 [8].

⁶³ *US–Tuna II*, above n 48 [379].

had not been shown to occur automatically once a WTO Member expressed interest in joining and therefore the AIDCP was not open to the relevant bodies of at least all WTO members.

It remains to be seen whether a WTO member state regulating unhealthy diets through packaging and labelling measures, and facing claims that the measures do not conform to Codex Standards, could argue that the Codex Standards in question have not been formulated in accordance with the principles and procedures outlined in the 2000 TBT Committee Decision, due to heavy influence and over-representation of private industry interests. It could be argued that the development of Codex Standards has not occurred in a manner that enables wide participation, but rather effectively privileges private industry interests, and therefore Codex guidelines have not been developed by an international standardising body, and are not 'relevant international standards' for the purposes of Article 2.4 of TBT.

VI DISCUSSION

Caution must be exercised to ensure that the role afforded to private sector interests in the achievement of the NCD and Sustainable Development Agenda does not unduly compromise the development, implementation, and interpretation of unhealthy diet regulatory measures. An overview of the regulatory frameworks governing interactions between the private sector and public health norm-setting bodies in the context of NCD risk factor regulation reveals that clearly established parameters and binding guidelines are necessary to counter industry interference from Big Food industry sectors. Without clear frameworks governing the interaction between private industry and public health standard-setting, as in tobacco control, regulation of unhealthy diets remains exposed to the risk of interference due to conflicts of interest that threaten to undermine the formulation and implementation of regulatory measures and norms.

Furthermore, the presumptive value accorded to industry-influenced standards, such as Codex Standards, in the application of international trade law to unhealthy diet regulatory measures like packaging and labelling, reveals an inherent tension and need to manage risks of conflict of interest. Such standards should be scrutinised to ensure adherence to principles outlined in the 2000 TBT Committee Decision — that is, transparency; openness; impartiality and consensus; effectiveness and relevance; and addressing the concerns of developing countries. Failure to adhere to these principles may enable member states to deviate from the standards, thus affecting the weight attributed to them in the context of challenges under the dispute settlement system of the WTO.