Smoke screen? The globalization of production, transnational lobbying and the international political economy of plain tobacco packaging

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ABSTRACT

In 2012 Australia became the first country in the world to introduce plain tobacco packaging in an effort to reduce tobacco consumption. This move was vehemently opposed by the tobacco industry, which challenged it on several levels: nationally, bilaterally and multilaterally at the World Trade Organization (WTO). The political behavior of the tobacco companies in this case is puzzling both in terms of scale, operating at multiple levels at the same time and in terms of the countries mobilized in their defence. WTO litigation is typically the result of Multi National Enterprises (MNEs) lobbying their own government, but here third countries were mobilized. Lobbying in third country contexts, with the objective of accessing multilateral dispute settlement systems, has been little studied. We thus know very little about the driving factors behind such activities, how target governments are selected and what lobbying strategies are used. This paper draws on emerging research on transnational lobbying and a case study of the PP case to explore these issues in detail and, by doing so, aims to further our theoretical understanding of the political economy of international trade in the context of increasing regime complexity and globalization of production.

INTRODUCTION

In 2012 Australia became the first country in the world to introduce a legal requirement that cigarettes be presented in plain packaging (PP), as a public health measure to reduce tobacco consumption. This move was vehemently opposed by Transnational Tobacco Companies (TTCs). Their subsequent political behavior is puzzling for two reasons. For one, TTC political action took place at different levels of national and international law almost simultaneously: TTCs initiated and supported a complaint by Ukraine, Honduras, Dominican Republic, Cuba and Indonesia against Australia's plain packaging rules at the World Trade Organisation's (WTO) , while at the same time also pursuing investor state arbitration in the context of a Bilateral Investments Treaty (BIT) and a domestic court case in Australia. This multilateral approach runs counter to the traditional view in the literature that, as WTO litigation is a very costly affair, firms only resort to lobbying governments for WTO action after all other options have been exhausted (Bown 2009). What is more, the choice of the TTCs to engage in transnational lobbying and approach *host* governments to challenge third country legislation in the WTO is unusual. Multi National Enterprises (MNEs) usually lobby their *home* government when seeking redress at the WTO (Davis 2012; Zimmerman 2011). What is even more striking, is that none of the plaintiff countries in this case is a significant exporter of tobacco to Australia. They therefore seem unlikely to be strongly affected by the new restrictions and, as a consequence, subject to rather limited compensation, even if the case were to be ruled in their favour (Fooks and Gilmore 2013).

In this paper we engage in an in-depth analysis of the complex, resource intensive multilateral and transnational corporate political activity (CPA) of TTCs in their attempt to challenge the Australian PP laws. CPA is usually understood as '…corporate attempts to shape government policy in ways favorable to the firm' (Hillman et al 2004). We define 'transnational' CPA as engaging in CPA, which seeks to influence decision makers in a country other than the home state of the MNE. We focus on three questions: (i) what factors guide the choice of MNEs to rapidly move their political activities to the multilateral level? (ii) what explains the decision of MNEs to target non-home countries and on what basis do they choose certain target governments over others? (iii) how can we explain the decision of host governments to mobilize in the interests of foreign firms?

The key aim of the paper is to further our theoretical understanding of the political economy of international trade in general and transnational CPA by MNEs in particular. We hold that the fundamental questions that our case study raises, in terms of the choice of MNEs to seek to pursue disputes at the multilateral level, to lobby host governments and to seek to create common interests with these target states, have relevance well beyond tobacco. Existing literature increasingly

acknowledges that the globalization of production and the emergence of Global Value Chains (GVCs) expands the potential for CPA across markets and simultaneously raises the possibility to leverage political influence in certain host countries in order to pursue interests at a level above the nation state (see e.g. Curran, 2015; Eckhardt and de Bievre, 2015; Windsor 2007). However, in spite of the increasing globalization of economic activity, the focus of much research on trade policy has continued to be on domestic (i.e. home country) lobbying. Our findings for the PP case confirms a trend towards greater engagement by MNEs at the WTO level and help to identify which factors explain, and indeed drive, multilateral and transnational lobbying in the field of trade policy. We argue, that our understanding of the political economy of international trade regimes needs to evolve beyond the conventional two country, two industry models, where import protection is the key trade policy on which firms lobby governments and the home government is the key focus for MNEs seeking to influence policy (Baron 1997). We highlight the growing complexity of industry-government trade policy interactions in the age of GVCs and seek to better explain them. In doing so, we unravel the factors that explain the choice of MNEs to lobby certain host governments over others, as well as a governments' decision to mobilize at a multilateral level in the interests of foreign firms.

The paper also adds to our understanding of firm lobbying in the context of disputes about cross border challenges to domestic regulation. Such challenges have become increasingly common in the global economy and, despite growing scholarly attention (De Bièvre et al. 2014; Lawton et al 2009; Roemer-Mahler 2013; Young 2012; Young 2016), we know surprisingly little about the effect of this shift in lobbying by economic actors. In this endeavor, we not only aim to provide insights into firm lobbying on trade issues, but also on transnational lobbying more generally. There is a large body of literature on transnational advocacy by NGOs (e.g Bob 2013; Kastner 2014; Keck and Sikkink 1999; Rietig 2016), but transnational CPA has only received scant attention in the extant literature and very few studies have focused on the choice of target government in transnational lobbying that we study here (see Betzold 2014, for a notable exception).

EXISTING ACCOUNTS OF CORPORATE POLITICAL ACTIVITY AND TRANSNATIONAL LOBBYING

Work on trade policy is rather limited in the mainstream business studies literature. One of the first attempts to model the process of CPA in a trade policy context was by Baron (1995; 1997). He modelled the interaction between governments and companies involved in WTO disputes and illustrated his case with the Kodak-Fuji dispute, which started at national level in the US, before escalating to the multilateral level in the predecessor to the WTO, the GATT (Baron 1997). His model views government

policy as being related to domestic interests on the one hand and to national import and export practices with distributional consequences in the domestic economy on the other. Since Baron's early work, several studies in the business literature have looked at the process of lobbying for trade protection, which indicate that CPA in trade policy is more multifaceted. For example Lindeque and McGuire (2008) analysed Anti-dumping cases in the US, where they identify three key firm capabilities vital to a successful outcome: capacity to mobilise relevant information, capacity to build their case and capacity to adjust strategies to avoid action. Lindeque (2007) has also developed a theoretical model of company CPA in the US anti-dumping arena. Others have explored how non- governmental organisations have expanded their influence in the trade arena, acting as a counterweight to business (Farrand 2015).

More extensive work on trade lobbying exists in the fields of International Economics and International Political Economy (IPE). The focus of this scholarship is mainly on the circumstances under which firms lobby for trade policy outcomes and how governments balance different interests in their trade policymaking. Within this body of literature, trade policy outcomes are usually seen as a function of political conflict shaped by the preferences of different domestic actors (Frieden and Rogowski 1996). Decision-makers are seen as political support-maximizers and have no explicit trade policy preferences of their own (Grossman and Helpman 1994). Under such assumptions they should lean towards the demands of those societal interests best able to overcome their collective action problems (Olson 1965). In the context of WTO disputes, litigation is typically seen as the result of lobbying by large domestic exporting firms pressuring their home government to bring a case in order to (self)enforce access to foreign markets, while import-competing firms in the defendant state are expected to lobby their government to refrain from market opening (Bown 2009; Davis 2012; Zimmerman 2011).

The key shortcoming of most of the existing scholarship summarized above is that trade policy outcomes are assumed to be the result of domestic CPA. What is more, much of this scholarship (in particular the work by economists) is, due to data availability (Hillman et al 2004), both US focused and models lobbying in terms of financial contributions to domestic political campaigns. However, as a result of the globalization of production and the emergence of GVCs (Gereffi 1994), many goods and services are no longer being produced in a certain country but are "made in the world." This has complicated the concept of what constitutes 'domestic interest.' In addition, although financial resources certainly matter to transnational lobbying, they are unlikely to be measurable solely, or even primarily, in terms of financial contributions to politicians or party structures, while the complex nature of many trade issues makes technical knowledge an important resource (Woll and Artigas 2007). At the same time, the establishment of the WTO in 1995 provides MNEs an additional level of governance to which they can

appeal for redress in cases of government action which threatens to undermine their profitability (Lindeque and McGuire 2007; Windsor 2007), while the WTO's DSB has more far reaching powers than its predecessors, making it a more attractive forum for challenging policy (Lawton et al. 2009). What is more, the trade regime has become increasingly complex, incorporating not just the WTO and its DSB, but also a wide web of bilateral trade and investment agreements, which provides companies with "the possibility of forum shopping similar to the practice in a public law context of choosing among court jurisdictions" (Davis 2009: 25).

There is increasing scholarship, which demonstrates that the emergence of GVCs can indeed change the political economy of trade policy (e.g. Curran 2015; Eckhardt 2015; Jensen et al. 2015; Kim 2015; Manger 2009). However, this work has still tended to focus on the national or regional level. Others have begun to explore the increasing attention paid by MNEs to the WTO, but focus mainly on the macro level and the structure of such lobbying – e.g. product-specific versus sector-wide lobbying (De Bièvre et al 2016) – or the choices MNEs need to make on the allocation of scare corporate resources across different levels of governance (Lawton et al 2009; Windsor 2007). This research provides little guidance on what factors are likely to predispose an MNE to engage multilaterally, rather than focusing efforts on domestic lobbying and what form the former political activity may take. In particular, lobbying in third country contexts with the objective of accessing the WTO dispute settlement systems has been subject to limited scholarship.

Some existing work on 'foreign' lobbying on trade policy does exist. However, the few existing analyses look at the US and tend to assume, rather intuitively, that the objective of such CPA would be market opening in the lobbied state (Destler and Odell 1987; Gawande et al 2006; Kee et al. 2007). A notable exception is recent research by Eckhardt and De Bièvre (2015), which highlights a growing trend for MNEs to lobby third countries (i.e. not their home country or the target market) with the specific objective of accessing the WTO. The authors provide some conclusions on the type of companies undertaking transnational lobbying and the circumstances under which they would do so, but do not explore in any detail the choice of target state or the decision by states to pursue cases.

Finally, there has been some work on transnational lobbying activities in policy fields other than trade like environmental protection (Betzold 2014; Eilstrup-Sangiovanni and Bondaroff 2014; Rietig 2016) investment (Lee 2016) and financial regulation (Kastner, 2014; Young, 2012). However, most of

this work focuses on non-government organizations (NGOs), rather than companies or business groups.[1] A recent analysis of such transnational advocacy defines it as '…non-state actors based in one country forming transnational advocacy networks (TANs) with similar entities in other countries…' (Bob, 2013: 72) and further clarifies that such advocacy targets international organizations and their members. Although the arena for our case study is such an international organization (i.e. the WTO), we do not focus on the coordination of lobbying across national contexts. Rather we are interested in the driving factors behind the conscious choice of MNEs to reorient their lobbying activities from their home context to a more supportive political environment, with the objective of accessing the multilateral governance system. This form of transnational advocacy has been very little studied. One exception is the work of Betzold (2014) who explored NGO's choice of target governments in climate change negotiations. One of her key findings was, contrary to expectations, that low income countries were relatively more likely to be subject to lobbying. The reason proposed was that that '[d]*elegations from low-income countries tend to be small and thus have only few experts; accordingly, their need for external support is relatively high, which may make them susceptible to NGO input*' (Betzold (2014: 51). Although Berzold's focus is on NGOs, some of her insights are pertinent to the kind of transnational CPA we address here.

THE ARGUMENT

Taking into consideration the fundamental changes in the global political economy and the shortcomings in the existing literature discussed above, we now present our argument. As indicated in the introduction, we focus on the conditions under which companies pursue CPA in the trade arena in countries other than their home country (i.e. transnational lobbying); the determinants of their choice of certain target governments over others; and why host governments would mobilize in the interests of MNEs.

The willingness to bring a challenge at multilateral level and capacity to lobby a host country

The attraction of bringing a case to the Dispute Settlement Body (DSB) of the WTO is that it reduces the chances of a dispute with a state being impacted by legal home advantage. It also brings the debate to international attention, a distinct advantage if the problem at issue is a generic one, likely to arise in other jurisdictions and contexts. Finally it enables the complaining companies to frame the dispute in legal terms – as an issue of coherence between international and national law. This could be expected to

[1] Notable exceptions are Young (2012), who looks at transnational efforts by banks and their organisations to impact on the Basle Committee and Lee (2016), who looks at how investors incorporate in a foreign jurisdiction to gain access to favourable investment protection treaties.

reduce the effectiveness of non-technical arguments (Bach and Blake 2016). However, WTO challenges are very complex for a company, or even a group of companies, to mount. The WTO is an inter-governmental institution, so only governments can challenge other governments' regulations in the WTO DSB. That is, '[f]irms do not have legal standing in the [WTO] disputes process. They rely on governments to act as their agents in Geneva' (Lawton et al 2009: 11). WTO action requires the mobilization, not just of a company's own resources, but also those of a plaintiff government, which needs to be willing to follow the case through the WTO procedures. In any given country only a small fraction of firms has such capabilities (Bown 2009). The number of firms which are willing and able to lobby a foreign government to bring a WTO DSB case would be expected to be even smaller. We suggest that there are several necessary conditions under which companies engage in such transnational lobbying.

Firstly, the evidence suggests that the firm in question must have a clear incentive to mobilize politically. We argue that such an incentive exists in particular when being confronted with a policy measure that poses a real and existential threat to the company or industry and involves high expected adjustment costs. The notion that a perceived threat to material interests, as a result of regulations or government initiated changes in market conditions, is a primary condition affecting a firm's decision to lobby is well established in the literature (Vernon, 1966), as is the fact that firms are much more likely to lobby when faced with potential losses in revenue, than in pursuit of a lucrative market opportunity (Dür 2010). The likelihood of political action is particularly high when firms face high costs of adjustment from new trade restrictions (Curran 2015). Or, as Aidt and Hwang (2014: 291) put it *'… foreign lobby groups seek influence on policy choices abroad only when they really have a stake in the policy choice*.'

Secondly, the companies in question need to have the capacity to overcome the classic collective action problems involved in such action. Lobbying to initiate and maintain a trade dispute is resource intensive, even when the target is the domestic context and the issue is well institutionalized – like anti-dumping (Lindeque, 2007). These problems are even more challenging when lobbying for WTO action. As demonstrated by Bown (2009), historically the driving force behind most WTO trade disputes have been large- and highly productive domestic exporting firms. These firms have enough resources to overcome, not only the fixed costs of exporting (e.g. establishing foreign networks and marketing products to foreign consumers), but also the additional high costs associated with WTO litigation. Not surprisingly, firms able to sustain such a prolonged collective action all the way to a WTO panel ruling in their favour, are mainly from advanced industrialized members. In case of trans-national foreign lobbying, firms need to maintain this resource intensive activity over a long period, outside of their home base. Only the most

internationalized firms, operating in well-endowed sectors, with a high concentration ratio and a high mobilization rate will be able to engage in such transnational lobbying (Eckhardt and De Bièvre 2015).

Thirdly, firms need to gain access to government officials. Being well connected to policy-maker with similar views on a certain policy goal and being able to built credibility by providing (critical) access goods to public officials, is pivotal for firms aiming to wield influence on policy outcomes (Baumgartner et al. 2009; Hattaway 1998; Pagliari and Young 2014). Such privileged access to decision-makers is much more prevalent at the national level. Thus mobilizing a firm's home country as their 'agent in Geneva' would be the most logical strategy for an MNE to take. Governments generally support companies which are based in their home state in trade disputes because of the assumed benefits that a firm's economic activity brings to the domestic economy in terms of jobs, taxes and foreign exchange earnings (Baron, 1997). In a case (such as that which we study here) where such support is not feasible, the challenge of gaining access to national officials in a foreign country is substantial, although it is a necessary condition for successful transnational lobbying. One route to secure such access is for the MNE to ally with local companies with shared interests (Aidt and Hwang 2014). In the absence of local allies, a strong impact on the local economy and perceived dependence on the company for employment and/or national income would appear to be vital to securing access and influence with foreign policy makers.

The logic of transnational corporate political activity

Our second research question focuses on why MNEs would decide to lobby a foreign government in the first place and the choice of target government when engaging in host country CPA for WTO action. As indicated above, an MNE would be expected to approach its 'home' government when seeking redress through the WTO. For firms to approach a foreign country, there needs to be good reason to believe that the home country will not be supportive. There are several reasons why this might be the case: governments may have ideological bias against certain sectors, especially 'sin' industries like gambling, tobacco and alcohol, or the firms in question may be considered less important for the domestic economy than more productive firms (retailers for example) (Eckhardt and De Bièvre 2015). In such a context, it is a rational strategy to target host governments to bring a complaint to the WTO instead.

Such a route is both diplomatically risky and administratively time consuming for the host state and shared interests are obviously a prerequisite for the success of such CPA. A company's contribution to the economy can be a powerful lever for political support and, given the extensive economic impacts MNEs have through their GVCs, MNEs increasingly have the option to leverage these impacts for political ends in countries other than their home state. However, we also consider that there is an ideological

component in seeking shared interests, especially in sectors which are controversial, like tobacco or gambling, where ideology has an important role in guiding government preferences (Cohen et al, 2000).
Finally, material resources are key to accessing the DSB. Indeed in their analysis Lindeque and McGuire (2007: 735) note that the two key countries that use the DSB regularly and pursue disputes all the way to appeal are the US and EU as "*Brussels and Washington have the capacity to see a dispute through to the bitter end.'* Similarly, Schaffer et al (2007) highlight that Brazil is one of only a few emerging countries to have developed the institutional capacity to successfully launch WTO cases. However the very basis of the WTO is that all members have equal rights and thus the legal possibility exists for any member to challenge another member. Trommer (2014) argues that WTO law has therefore provided the opportunity for ostensibly less influential actors to challenge powerful states, on multiple levels: '…global trade politics is a rules-based multi-level policy field in which state and non-state actors with many different goals, resources and strategies compete over policy outcomes' (op cit: 16). A gap therefore exists between the theoretical capacity of all states to use the WTO to address their grievances, and their actual capacity to do so. Given that this gap is, at least partly resource based, material support from non-state actors could help overcome the barriers to DSB access.

Finding common cause with MNEs - de-constructing political influence

On the final question of why certain countries find common interests with MNEs in such a situation, while others are reluctant to do so, it is important to understand that trade negotiations in Geneva essentially consist of a long drawn out iterative game. Supporting or challenging another country in a certain dispute or negotiation has implications for relations with that country in future negotiations or disputes (Alvarez 2002). On the other hand, taking a case in the WTO has costs, both in terms of administrative effort (often a major barrier for developing countries, see e.g. Kim 2008) and in terms of jeopardizing relations with the defendant state and reducing the chances of their support in future negotiations.

Based on earlier work, we can formulate some propositions on the factors guiding state's choices in bringing WTO disputes. The decision to formally challenge a fellow member clearly depends on the bilateral relationship and the nature of the two states. Lindeque and McGuire (2007) find that the US successfully rebuffs a disproportionately large number of WTO disputes at their initial stages. They consider this to be due to the powerful position of the US in such disputes: *'…with many smaller countries worried about angering trade lobbies in the US Congress and about losing access to the American market*' (p.742). Yet tiny Antigua took the US to WTO over its gambling legislation. The reasons

behind this decision were in part related to the importance of the gambling industry to the Antiguan economy (Eckhardt and de Bièvre 2015). Thus a very strong national interest can motivate even a small state to mobilise at the WTO.

From the analyses above, it seems reasonable to hold that only a state that believes, not only that a given measure is counter to WTO law, but also that it has a key national interest at stake and/or that the defendant country is either too small or too far away to be a useful ally, or potentially uncooperative in future negotiations in any case, is likely to jeopardize their bilateral diplomatic relations by taking a WTO case. However, in reality we know very little about the criteria countries may use when they choose to take cases in WTO. We seek to inform this question in our analysis below**.**

METHODOLOGY

To explore our research questions and test our argument we will analyse the transnational CPA of TTCs in the context of the plain packaging case. We are aware that some question the validity of theory building from case studies, yet an increasing number of scholars argue that social sciences have become too reliant on quantitative research and formal models and have shown the pivotal importance of qualitative case studies for theory building and testing (George and Bennett 2005). In addition, in the context of trade policy, case studies of past trade disputes, which we draw on in this paper, have provided rich raw material for theory building (Baron 1997; Curran, 2015; Eckhardt and de Bievre 2015; Kolk and Curran 2015; Lawton et al 2009). Only through an in-depth case study are we able to identify the behavior and preferences of multiple actors involved in the PP case, as well as unravelling the complex multilateral political approach taken by TTCs.

In terms of data gathering, we have searched the scholarly literature on the PP case using Google Scholar, PubMed, EBSCO and JSTOR. Most existing analysis of the case we found consist of legal analysis of the potential merits of the challenges made (Marsoof 2012; Mitchell 2010; Mitchell and Wurzberger 2011; Voon and Mitchell 2011), as well as the likely effects of plain packaging on public health objectives (Germain et al. 2010; Wakefield et al. 2013). These analyses helped us to deconstruct the arguments of actors involved, but did not really help to resolve the puzzle of why the TTCs adopted such a multi-level approach, the choice of target countries and why the complainants would give in to the firms' demands.

Therefore, we also undertook a search of the Truth Tobacco Industry Documents archive at the University of San Francisco (https://industrydocuments.library.ucsf.edu/tobacco) using Boolean terms and a snowballing technique. The key words used were 'Plain Packaging', 'WTO', 'Australia' as well as all of the claimant countries, in English, Dutch and Spanish. We retrieved 15 documents relevant to the

case. We also searched the DSB database for relevant documents on the case (https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) and analysed the minutes from the WTO's Technical Barriers to Trade (TBT) Committee (http://tbtims.wto.org) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council (http://www.wto.org/english/tratop_e/trips_e/trips_e.htm#issues). In addition, we gathered press reports through the LEXISNEXIS database and statements released by the Australian government and the tobacco industry. Finally, we conducted a series of semi-structured interviews with public officials involved in the case, representatives of the industry (the International Tobacco Growers Association - ITGA) and tobacco control NGOs (the Smoke Free Partnership - SFP). The questions addressed the evolution of the case, the role of industry and the key arguments posed by each side. Due to the sensitive nature and the case being 'sub judice,' only the ITGA and SFP were willing to talk 'on the record'. We also requested interviews with the Embassies of all of the complainant states in Geneva and other representatives of the tobacco industry and their trade organizations, but none responded to our repeated requests.

AN EMPIRICAL ACCOUNT OF THE PLAIN PACKAGING CASE

Recent figures show that there are currently 6 million tobacco-related deaths annually (Eriksen et al., 2015). Plain packaging is considered a key tool in the fight against smoking and is actively promoted by the World Health Organisation, most recently on 'World No Tobacco Day' in May 2016 where the theme was 'Get ready for plain packaging.' It is argued that making the packaging of tobacco products less attractive reduces their appeal and encourages smokers to stop, while discouraging young people from taking up the habit (WHO, 2016). As part of a package of tobacco control measures, Australia was the first country to introduce PP legislation in 2011, requiring that tobacco be sold in standard olive green packs, which also carry large warning images. The name of the product is included in standard font, but trademarks and logos are banned.

The industry consistently argues that plain packaging will not reduce demand for tobacco, but will rather commoditize their product and push down prices, thus encouraging consumption, while facilitating illicit sales, with subsequent negative impacts on legitimate retailers (Department of Health 2013a+b; Jarman 2013; PJ Carroll and Co 2014; PMI, 2014). Recent analysis of the industries' arguments in the UK debate on PP noted both the huge volume of industry inputs and their selective use of evidence on impacts (Ulucanlar et al. 2014). Furthermore, the industry argues that banning the use of their trademarks amounts to illegal acquisition of their intellectual property (Jarman 2013; PJ Carroll and

Co, 2014; PMI, 2014). This is the argument which is most pertinent in the WTO case we study here. In 2009, Lalive, the international legal consultancy, provided PMI with a detailed argumentation on the possible inconsistencies between WTO law and PP legislation (Lalive, 2009). The arguments provided in that report have been widely used by the industry and the complainants in the WTO case.

The PP case was not the first WTO DSB case on tobacco: there have been thirteen such disputes, ten of which were brought after the establishment of the WTO in 1995. However, the five cases brought in 2012 and 2013 against Australia's PP legislation are the most important tobacco control cases in the history of the multilateral trading system. Table 1 provides an overview of the legal actions taken in relation to the PP case. After Australia introduced the legislation in 2011, the first legal challenge was taken at the national level, where the Australian High Court ruled that the law was not in breach of the constitution (Jarman 2013; Marsoof, 2012). The second level at which it was challenged was an ISDS case under the Australia-Hong Kong BIT, where Philip Morris' Asia claimed that the legislation barred them from using their intellectual property, with the consequent effect of diminishing the value of its investments in Australia. According to UNCTAD's Investment Dispute Navigator, this case was, not only the first case under the Australia-HK BIT, but the first to be taken against Australia by investors under any BIT.[2] In December 2015, the ISDS tribunal "deemed that PM Asia was "abusing" the investor-state arbitration process in the plain packaging case, and therefore rejected the company's claims and declined to exercise jurisdiction over the dispute" (Bridges 2016). Finally, Ukraine, Honduras, Dominican Republic, Cuba and Indonesia challenged the law in WTO. The WTO is hearing the cases together.

[Table 1 here]

The willingness and capacity of TTCs to bring a challenge at the multilateral level

In terms of the question of why this case emerged so rapidly at the WTO, challenging government legislation in its domestic courts is always difficult and research has confirmed that foreign companies are disadvantaged in lawsuits (Bhattacharya et al. 2007; Mezias 2002). The challenge under the HK-Australia BIT was problematic for jurisdictional reasons (as the outcome demonstrated). Philip Morris Hong Kong had only acquired Philip Morris Australia ten months *after* the plain packaging legislation was announced. The tribunal therefore judged that the corporate restructuring was undertaken mainly or solely to establish rights under the BIT and rejected the claim (Bridges 2016; Voon and Mitchell 2016).

[2] http://investmentpolicyhub.unctad.org/ISDS/CountryCases/11?partyRole=2

Although some authors hold that BIT context is more business friendly (Fooks and Gilmore; 2013), the WTO level nevertheless provided an international forum, divorced from the national level and a legalistic context (the panels that examine the complaints are largely made up of legal experts) to challenge the legislation (Princen 2007). In 1990, tobacco industry interests had prevailed in the first key challenge to international tobacco trade regulation, taken by the US against Thailand's ban on foreign cigarettes, in spite of the mobilization of public health arguments by Thailand (Brandt 2007; Princen 2007). This was also the case in the more recent Indonesian challenge to the US ban on clove cigarettes (Flett, 2013; Jarman et al. 2012). Although the substantive issues in both were quite different to the PP case, these successes indicated that the legalistic context in Geneva was not unfavorable to balancing legal requirements against public health objectives.

However, there is another reason why WTO was an attractive forum for TTCs to highlight their grievances. Challenging legislation in WTO raises the profile of the issue and ensures that all members are aware of the challenge and informed of the debate. In the PP case, thirty five WTO members (both tobacco producing countries and those considering PP legislation) requested to join as third parties, an unusually high number. The widespread interest in the PP challenge is directly related to its capacity to create 'regulatory chill' elsewhere (Fooks and Gilmore, 2013). Both New Zealand and the UK were actively considering similar legislation when Australia passed theirs (Mitchell and Wurzberger, 2011), while Ireland subsequently launched similar proposals, following close contact with the Australian administration (Studlar 2015). As the case unfolded and further to heavy lobbying by the industry detailed in Peeters et al. (2013), the European Commission in Brussels decided not to include PP requirements in the revision of the Tobacco Products Directive, which would have applied throughout the EU[3]. Launching a high profile challenge is important if an underlining objective is to dissuade others from taking similar measures. In its input to consultations on draft legislation in other jurisdictions, TTCs have consistently used the existence of a WTO challenge to argue that PP is illegal and therefore potentially very costly for the country, in the event of a legal ruling going against them (see, for example in Ireland, PJ Carroll and Co 2014; PMI 2014). Thus bringing a WTO challenge ensures that governments across the world are fully aware of the risk of challenge and take this into account in their own policy making. The outcome if this case is thus vital to the capacity of national governments elsewhere to regulate tobacco packaging.

[3] That Directive was itself subject to a legal challenge in the European Court of Justice by PMI and BAT. The challenge failed, but held up the introduction of the Directive (ECJ, 2016).

However, launching the case required the agency of a state willing to mobilize in the WTO. As discussed below, home countries were not credible targets, thus a WTO challenge required the mobilization of a 'host' state. As suggested above, we expect that there are three necessary conditions for firms to be willing and able to engage in transnational/foreign lobbying and we will now analyze whether these conditions were met in case of TTCs in the PP WTO dispute.

First, we look at the whether the Australian legislation posed a severe threat to the material interests of TTCs and whether expected adjustment costs were high. All our empirical evidence suggests that plain packaging was seen by tobacco firms as a major threat to their profitability. Already in the 1990s, British American Tobacco (BAT 1995) indicated in an internal document that for this reason "every effort should be made to protect the integrity of the company's packs and trade marks." Since then, the tobacco industry has indeed done everything it could "to challenge government restrictions on cigarette marketing" (Porterfield and Byrnes 2011). All our interviewees underlined that, as Australia was the first country in the world to take the step of introducing PP legislation, the WTO case was absolutely key to the industry's future and the TTC's capacity to continue to operate their current business model. The tobacco growers association sees Australia's move as: *'…a key part of what some anti-tobacco activists call the 'end game', which aims to ruin basically the companies and the tobacco business'* (Author interview, May 2016). Standardising packaging removes the last marketing tool from the industry and essentially makes cigarettes commodities. The industry is very concerned about the impact of PP on the capacity to differentiate between products and fears a price war (Author interview, May 2016). This point was also underlined in the minutes of meetings in the UK between the Department of Health and both PMI and BAT on the UK's PP proposals (Department of Health, 2013a+b). Australia, commenting on the case in the Framework Convention on Tobacco Control (FCTC 2012) noted: *'…we understand why the opposition is as strong as it is from the tobacco industry – they see their very existence threatened…'*

Second, we assess the capacity of TTCs to undertake transnational lobbying by exploring the extent to which the industry has a global presence, whether they are well endowed and their concentration ratio. Just four MNEs control more than half of the global tobacco market outside China –[4] Philip Morris International (home economy: US); BAT (UK); Imperial Tobacco (UK); Japan Tobacco International (Switzerland) (Eriksen 2015) – and in many countries tobacco ranks among the most concentrated sectors. The most commonly accepted measure of market concentration is the Hirschman–

[4] The Chinese tobacco market is entirely dominated by the state-owned Chinese National Tobacco Corporation.

Herfindahl Index (HHI).[5] When a market consists of a large number of small firms the HHI is close to 0, while in the case of a single dominant firm the HHI is 10,000. A market with a HHI of 1,800 or more is considered highly concentrated. The HHI score for the tobacco industry in most countries in the world is 3,000 or higher (Hawkins et al. 2016). Furthermore, recent figures from UNCTAD (2016) show that tobacco companies are amongst the most transnational firms. Two tobacco firms feature in UNCTAD's "world's top 100 non-financial MNEs," which ranks firms according to their transnationality index (TNI)[6] and foreign assets. BAT and Imperial are ranked 9th and 25th on TNI and 81st and 68th on foreign assets, respectively. What is more, TTCs are also among the world's biggest and most profitable firms and rank high on corporate profitability rankings (Gilmore et al., 2010).

Given the high concentration ratio of the tobacco industry, TTCs have little difficulty overcoming collective action problems (Jarman 2013; Peeters et al 2013) and, with each of the TTCs being so profitable and large, tobacco companies also have the ability to engage in individual lobbying. As early as the 1990s the industry lobbied against efforts to initiate PP in Canada, framing their argument in legal terms, rather than as a public health issue. Relying on NAFTA's investment chapter, R.J. Reynolds Tobacco Company argued forcefully that PP would constitute an illegal expropriation of a protected trademark, requiring Canada to pay hundreds of millions of dollars in compensation. The mere threat of investment arbitration had a powerful impact on Parliament's deliberations and in 1995 Canada abandoned the PP legislation (Porterfield and Byrnes 2011; Shaffer et al 2005). Another, more recent, case of TTC lobbying was a dispute on Uruguay's legislation on the size of health warnings and limiting multiple versions of the same brand, which was challenged in 2010 by Philip Morris under the Uruguay-Switzerland BIT (Mitchell and Wurzberger 2011; PMI no date). This challenge also failed with the tribunal judging that: "the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market" (quoted in Voon and Mitchell 2016). Thus powerful TTCs have not hesitated to use all existing legal machinery to protect their marketing strategies and avoid regulatory interference in 'foreign' markets. The challenge to Australia's PP legislation is a logical extension of this strategy

[5] HHI is calculated as follows: square the market share of all the companies competing in a sector and sum the result. E.g., four firms have market shares of 35, 20, 15, and 10% respectively, the HHI is ($35^2 + 20^2 + 15^2 + 10^2$) = 1950.

[6] Which looks at: the ratio of foreign assets to total assets; the ratio of foreign sales to total sales; and the ratio of foreign employment to total employment.

The logic of transnational corporate political activity

The logic of foreign lobbying by TTCs seems to be a result of their home states being unwilling or unable to support a WTO challenge. Tobacco, like other industries with negative social externalities (e.g. alcohol, arms production and gambling), is characterized as a 'sin' industry. Such industries face higher audit costs (Leventis et al. 2013) and are undervalued on stock exchanges (Fauver and McDonald, 2014), but they are also disadvantaged in terms of access to policy makers and mobilizing political support. Rather than facing competitor companies in disputes over policy, as in the classic view of trade disputes (Baron, 1997), morally suspect industries face counteractive lobbying from civil society actors like NGOs, doctors and academics. This 'epistemic community' militating against tobacco has had a significant impact on regulation, securing stronger domestic and international tobacco control policies, in spite of extensive efforts by tobacco companies to avoid them (Mukherjee and Ekanayake 2009).

One of the key outcomes of pressure from this epistemic community is that the industry is now in a situation where it has few political allies in the developed world. In 1997, the US Congress passed the Doggett Amendment, which barred personnel from the Departments of Commerce, Justice and State from promoting tobacco abroad. In 2001, this provision was extended to US executive branch agencies (Holden et al. 2010). In the European context, BAT complained in a 2002 letter to the President of the European Commission that: '*The industry continues to be frozen out of the regulatory debate'* (BAT, 2002). What is more, Article 5(3) of the UN's Framework Convention on Tobacco Control (FCTC), an inter-government agreement concluded in 2003 (Collin 2004), limits tobacco industry access to policy makers: "*In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.*" As a result, in most signatories, the industry has limited capacity to mobilize governments to take actions in their favour (Bero 2003; Fooks and Gilmore 2013). A representative from the International Tobacco Growers Association (ITGA) we interviewed put it this way: '*Its very easy to fight tobacco, for a politician, you know, it's almost a win-win situation. No-one is going to challenge you*' (Author interview May 2016). In this context, seeking a more supportive policy environment in low income countries is a rational strategy.

Motivations of TTCs and complainants

In order to better understand the motivations of the industry and the complainants in the PP case, it is necessary to explore the economic and political context in the countries in question. Table 2 provides an overview of the economic profile of the five complainants, prior experience with the WTO DSB and the

extent of tobacco and cigarette exports to Australia, as well as the importance of these exports to their total (merchandise) exports. Key Australian figures are included for comparison, together with figures for the two countries, which are most dependent on tobacco in terms of share of exports: Malawi and Zimbabwe. The complainant countries are listed in order of the filing of complaints on the PP case to the WTO, to give an overview of the evolution of the trade importance of the complainants over time.

[Table 2 here]

It is clear that, in economic terms, all complainant countries are considerably smaller than Australia (only Indonesia comes close to its size) and considerably poorer. Moreover, the low level of utilization of the DSB in the group is striking. Cuba and DR have never before used the DSB as complainant. Honduras has used it in seven other cases, three of which were in the long running dispute with the EU over its banana regime. All other cases were against neighbouring countries. Ukraine has not been a heavy user of DSB, however it only joined WTO in 2008. Up to the end of 2015, Ukraine had taken three other cases to WTO; all against neighbouring countries with whom trade flows are significant. Indonesia is distinct from all of the other complainants in this case for three reasons. First, it is the heaviest user of the DSB in the group, although most of the cases it took as complainant (8) concern antidumping or safeguard measures taken against its exports. Second, it does not target neighboring countries as a priority. In fact, most targets are geographically distant from Indonesia: the EU (2 cases), US (2 cases), Argentina, Korea, South Africa and Pakistan. Third, Indonesia has been involved in a DSB case on tobacco regulation. In 2010, Indonesian brought a complaint against the US, challenging a ban on clove cigarettes, and won the case on some key points. So the decision by Indonesia to pursue the PP case in September 2013 was significant, as it brought to the discussions a country that had already successfully challenged a large developed country on tobacco control legislation.

Given certain similarities with the PP case, it is worth commenting briefly on Indonesia's challenge to the US ban on clove cigarettes. Indonesia's complaint targeted a US ban on the sale of flavoured cigarettes, aimed at reducing tobacco consumption amongst young people, by eliminating flavorings, although importantly, menthol cigarettes were not banned. Indonesia argued that the legislation unfairly discriminated against their exports of clove cigarettes, compared to menthol cigarettes, which were primarily made in the US (Howse and Levy 2013). The core of this case was therefore, not the question of whether the US had the right to ban certain tobacco products, but whether menthol and clover cigarettes are 'like products' and thus should be accorded equal treatment

(Flett 2013). Although Indonesia did indeed supply the vast majority of clove cigarettes to the US market prior to the ban (Howse and Levy 2013), the market for clove cigarettes in the US was tiny (Jarman et al. 2012). At their peak in 2007, ITC figures indicate that US imports of clove cigarette from Indonesia were $16,6m, a rather low level of trade to justify such a costly undertaking as a WTO challenge. So why did Indonesia take such a path? Research on the Indonesian cigarette industry has highlighted, both its long-term political influence (Lawrence and Collin 2004) and the fact that TTCs (PMI and BAT) have recently expanded there through acquisition of two of the top four local companies (Hurt et al 2012). The same research highlights the influence of TTCs on the Indonesian government's launch of a 'roadmap' for the tobacco industry in 2007 which called for a 12% increase in tobacco production by 2020 and concluded *'…the TTCs influence on Indonesian policy is quite remarkable*' (Op cit p. 310). Probably as a result of this influence, Indonesia has not signed the FCTC.[7]

The PP case against Australia was atypical, not just because of its geographical distance from all of the complainants (except Indonesia), but also because of the universally low trading relationship between complainants and defendants in the product at issue. In terms of the importance of tobacco to trade, in Indonesia and Ukraine it is of minor importance and only in Cuba and the DR does it represent more than 5% of trade. In terms of the value of Australian imports at issue, it was only when Cuba and more so, Indonesia filed complaints, that the figures became in any way significant. Ukraine had not exported any tobacco to Australia in the previous 10 years, yet in 2015 it suddenly began exporting, with $0,73m of trade in cigarettes that year. Most Australian tobacco imports come from New Zealand, Korea and Singapore, who together accounted for 86% of imports in 2015. Yet none of these exporters, all of whom were early signatories of the FCTC, complained to the WTO about the PP legislation.

The reasoning behind Ukraine's withdrawal of its complaint also yields interesting lessons. The challenge had always been very controversial in the country, where the health ministry complained that they were not consulted in the decision (Jarman 2013). It seems to have been made by the Economics Ministry on the basis of the economic importance of tobacco to Ukraine. PMI has a factory there employing 1400 people (Fooks and Gilmore, 2013) and Imperial tobacco (no date) noted *'…importance of a legal tobacco industry is confirmed by the fact that the top ten largest taxpayers in Ukraine include three tobacco companies*.' Thus Ukraine's position as a host to large TTCs made it part of their GVC, fostering common interests. However, the true extent of these interests was questionable. Withdrawing the complaint, the trade minister stated in a press conference: "*First, now we have restricted resources*

[7] Details of signatories and ratification of the FCTC for this paper were accessed here: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en on 30th may 2016

and we would like to send them to the direct trade interest of Ukraine. Second, economic logic is absent in this dispute, and third, the dispute has negative consequences for our country," (Bridges, 2015). Thus resources, economic logic and lack of negative consequences can be seen to be key factors in initiating and pursuing a dispute

Finally, a brief look at the situation in the two most tobacco dependent countries – Malawi and Zimbabwe – provides some indication of why they did not bring a WTO case. The importance of the issue at stake is not in doubt: both depend very heavily on tobacco exports. One key factor explaining their failure to mobilize is obviously their lack of financial and administrative resources. The ITGA, of which Malawi and Zimbabwe are founder members, put it this way: 'I*t's a very technical thing…It's a highly sophisticated case and on the other hand its costly and these countries are poor*' (Author interview, May 2016). In addition, they had no prior experience of such challenges. Although this did not stop Cuba in the PP case, Malawi and Zimbabwe are considerable poorer. They are also much more dependent on the goodwill of the larger countries in the world trading system. According to World Bank figures (2010-14), development aid accounted for an average of 23% of Malawi's GDP and 7% of Zimbabwe's. In terms of the FCTC, Zimbabwe has been a signatory since 2014, although Malawi is not and thus, in theory, is not bound by the need to support tobacco control. The tobacco industry has acknowledged funded the legal fees of at least three of the complainants (Ukraine, Honduras and Dominican Republic) (Jarman 2013; Scott Kennedy, 2014), so material support would have been available for a challenge from a very poor country. However the country would still have had to undertake the administrative tasks involved in the challenge and accompanying follow up meetings and briefings. Given that the embassies of such countries are generally small and sparsely staffed, this would have been a considerable draw on their resources. Both countries have joined the case as third parties. Even that relatively 'light' involvement is something they have very rarely done in the WTO.

The discussion above gives us some insights into why certain countries challenged the PP legislation and why these countries would have been seen by TTCs as potentially 'friendly' states in terms of CPA. The tobacco industry documents, which we accessed through the "Truth" Tobacco Archive, do not provide conclusive evidence that the industry directly lobbied the countries in question. They do indicate, however that, in the course of 2011, representatives from Philipp Morris Benelux (who have production facilities in Holland), the Dutch smoking tobacco association (VNK) and the association of the Dutch Cigar industry (NVS) lobbied public officials from the Dutch ministries of Economic Affairs, Agriculture and Health on several occasions urging the Dutch Government to bring the PP case to the attention of the EU authorities, with a view to complaining at the WTO TBT committee (NVS 2011;

Philipp Morris Benelux 2011; VNK 2011). In parallel, the European Smoking Tobacco Association (ESTA) also directly lobbied officials of DG Trade in the European Commission requesting them to raise the issue at the WTO (ESTA 2011). These efforts were clearly unsuccessful. However, minutes of the WTO's TBT and TRIPS committees suggest that the efforts of TTCs were successful elsewhere, as they show that (i) PP has rapidly become one of the most discussed topics within the WTO; and (ii) the arguments put forward by countries critical of PP are strikingly similar to the arguments used by TTCs in their communications (Eckhardt et al 2015; Lencucha et al 2016). Although there are no records in the database of exchanges with the complainants, this does not mean that such exchanges did not take place. Rather it indicates that if they did take place, they have not been made public through legal action.[8] However the fact that TTCs are paying the legal fees of the first three complainants indicates that there were extensive discussions and that these culminated in the provision of important material support by the TTCs to these countries. As discussed above, such support is vital to small developing countries seeking to access the DSB. Indeed the work of Betzold (2014) in the context of NGO advocacy, indicates that low income countries may be more susceptible to lobbying influence because of their relative lack of own resources.

The role of TTCs in the challenges of Indonesia and Cuba is more difficult to gauge. As discussed above, the tobacco industry has historically had strong political influence in Indonesia and the TTCs are very present there. It seems likely that the role of TTCs was important, but not vital. Indonesia has a history of challenges in WTO, including in tobacco and is not a signatory to the FCTC. In Cuba, a strong role for the TTCs seems unlikely, given the government monopoly on production. However since 1994, Imperial Tobacco has had a joint venture with the state owned Tobacco Company to sell Cuban cigars overseas and since 2000 has a 100-year agreement with the government to be its exclusive partner (Habanos no date; Mickle 2016). The company is thus likely to have some political influence. For Cuba a key factor in the challenge is likely to be the fear of spillover into the cigar sector. As the ITGA noted, origin is a huge part of the value of a cigar '*…the brand name in cigars is much more important than in cigarettes.*' (Author interview, May 2016). Fear of loss of their ability to distinguish Cuban brands was certainly a key-motivating factor.

[8] The Truth archive mainly relies on documents made public through court cases. This makes it particularly unlikely that recent exchanges will be archived.

CONCLUSIONS

In this paper we have looked at multilateral and transnational CPA by MNEs and sought to answer three key questions. First, what factors explain the choice and ability of MNEs to politically target multilateral institutions? Overall, our analysis of the PP case indicates that challenging the legislation at the WTO was, for TTCs, both a strategy to increase the profile of the dispute and dissuade other governments from taking similar action (i.e. regulatory chill) and an effort to avoid domestic legal bias by moving to the multilateral level, while shifting the framing of the discussion from a public health issue to a legalistic and technical level. One of our interviewees indicated that '*the main driver of the tobacco market now is regulation, by far'* and that in this context a multilateral challenge by TTCs to national legislation that risked spillover to other markets, is a logical step (Author interview, May 2016). As such, our analysis provides new insights into MNE lobbying in international trade disputes over domestic regulations and complement the emerging scholarship on the political economy of international regulation and "regulatory capture" (De Bièvre et al. 2014; Lawton et al 2009; Roemer-Mahler 2013; Woll and Artigas, 2007; Young 2012; Young 2016). The findings presented here also confirm earlier research (Eckhardt and de Bievre 2015), which indicates that in order to undertake transnational CPA, companies need to be facing a real and existential threat, that they need to be highly globalized, concentrated, well- organized and endowed. In the PP case, TTC indeed faced major threats to their business model and, as the tobacco industry is highly concentrated and TTCs are very large internationally coordinated companies, adopting a multilateral strategy appeared to be relatively straightforward.

The second question we wished to address was the factors that explain MNE's choice of government when seeking to mobilize action at the multilateral level? The PP case suggests that companies with a low perceived contribution to the domestic economy and/or involvement in morally suspect sectors are likely to experience difficulties mobilizing their home state. This difficulty is particularly notable in the case of tobacco because of the existence of an international convention (the FCTC), which binds states to limiting TTCs access to the policy making process. In this context certain third countries seemed likely to provide a more favorable political context. Although, when mounting a WTO challenge it may be preferably that complainants have exports to the defendant country, this was clearly not a necessary condition in the PP case. From the TTCs point of view, the most likely candidates to approach with a view to mounting a challenge would be countries strongly linked to their GVCs, especially those with strong dependence on tobacco cultivation or cigarette production. It is evident that TTCs would be more likely to get a favourable hearing in states where they have important production facilities and indeed, in all complainants but Cuba, this was the case. We argue that the potential for

such GVC linkages to impact on government policy is not sufficiently taken into account in current models of trade policy making (Baron 1997; Bown 2009; Davis 2012; Lindeque and McGuire 2007; Woll and Artigas 2007; Zimmerman 2011). The emergence of GVCs – in combination with the increasingly complex international trade regime – provides possibilities for MNEs to act well beyond the classic CPA, which was aimed primarily at ensuring domestic market protection.

Finally, why would governments make the choice to mobilize in the interests of foreign firms? In other words, what factors explain successful transnational CPA? The answer to this question is of course interlinked with that of the previous one. MNEs target countries that they believe share their interests. For the countries that did pursue the case (Ukraine, Honduras, Dominican Republic, Cuba and Indonesia) the direct economic effect of the Australian legislation was not the key motivator for the cases. However, given the long term trend towards more extensive tobacco control measures and especially the possibility of PP gaining ground in several other jurisdictions, regulatory chill was a key interest shared between the TTCs and target governments where tobacco was important to the economy. However, the main suppliers of tobacco products to Australia, as well as those that are most dependent on tobacco exports, are conspicuously absent from the list of complainants. We argue that the absence of the former is due to the ideological bias of the governments in question against tobacco, as evidenced by their membership of the FCTC. In the case of the latter, it is more likely due to a lack of capacity, but perhaps also fear of negative impacts in terms of the wider (development) support provided by Western governments. Such very poor developing countries have little incentive to undermine their wider diplomatic relations with supportive governments (Bown and Hoekman 2005).

We find that the countries that did mount challenges i) were all developing countries, but not extremely poor ones, and hence had a certain level of resources (and could rely on the TTCs for legal support); ii) dependent on tobacco, but not overwhelmingly so; and iii) were, apart from Indonesia, far enough away from Australia to have little to lose in trade terms from rising bilateral trade tensions. Beyond the economic factors, the ideological stance of the government on tobacco seems to have also been a key factor (see also Cohen et al. 2000). Our findings shed further light on foreign lobbying and the political interactions between MNEs and host governments. Existing research on host country lobbying has looked almost exclusively at investment disputes (e.g. Lee 2016) and the work on trade policy has focused on tariffs and in particular on "the costs and benefits of foreign lobbying" (Aidt and Hwang 2014: 272). By unraveling the choice of target states for foreign lobbying and the decision by states to pursue WTO cases, we offer a more explicit IPE analysis.

Our in-depth case study of the PP case has shown how the breath of MNE's GVCs creates shared interests across several states, while the WTO and other international bodies provide a state centered governance system which opens up the possibility for novel interest-based alliances between states and non-state actors. These factors will undoubtedly continue to open new avenues of CPA beyond the traditional focus on the home state, not only in trade policy, but in other arenas and will require theory to expand its coverage to incorporate such transnational action. Although the multilateral context of the WTO is quite specific, there is reason to believe that similar factors could explain government mobilization in favor of foreign MNEs present in their territory (i.e. transnational mobilization) in other multilateral fora, such as those which address environmental protection or international tax avoidance. The emergence of inter-governmental organizations which impact on the governance of the global economy creates opportunities for transnational lobbying in many issue areas beyond trade, however existing studies of transnational advocacy have tended to focus on NGOs, rather than business and have tended to view transnational lobbying in terms of international coordination (Dür and Mateo 2014; Farrand 2015; Kastner 2014; Rietig 2016). Few have addressed the question of the choice of target government (Betzold, 2014). Our analysis indicates that the factors explaining successful transnational lobbying at WTO level are; access to MNE's own resources to counteract domestic resource shortcomings, high perceived dependence of the economy on the sector in question and low exposure to retaliatory action by the targeted state. More work is needed in a wider range of fora to better understand whether similar factors can be identified in other arenas of transnational CPA.

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Table 1 – Timeline of key actions taken against Australia's PP legislation

Date	Action	Level	Current situation
July 2011	PP legislation introduced to Australian parliament	National	Approved. Entered into force December 2012
2012	BATA and JIT challenge law in Australian court	National	Rejected by 6-1. August 2012
November 2011	Request for arbitration under HK-Australia BIT	Bilateral	ISDS tribunal upheld Australia's argument (detailed in Daley, 2011) that they don't have jurisdiction as PM Australia was owned by Swiss arm of PM prior to 2011 (The Guardian, 2015; Bridges 2016).
March 2012	Ukraine challenge law in WTO	Multilateral	Reportedly suspended in June 2015 (Bridges, 2015)
April 2012	Honduras challenge	Multilateral	Panel constituted in May 2014. Preliminary report due first half of 2016
July 2012	Dominican Republic challenge	Multilateral	ditto
May 2013	Cuba challenge	Multilateral	ditto
September 2013	Indonesian challenge	Multilateral	ditto

Source – various and website of WTO

Table 2 – The five complainants: economic profile, prior experience with DSB and tobacco trade figures

Country	GDP (2014)	GDP/Cap	Year of membership of WTO (or GATT)	Other WTO cases (complainant)	Other WTO cases (defendant)	Tobacco exports to Australia ($) 2015	% of total domestic tobacco exports (2014)	Cigarette exports to Australia ($) 2015	% of total domestic cigarette exports (2014)	Tobacco % of total exports (2014)	Member of FCTC
Ukraine	$89bn	$2,081	2008	3	3	$0,73m	0	$0,73	0,1	0,6%	Yes
Honduras	$13bn	$1,662	1994	7	none	$0,05m	0	0		3%	Yes
Dom. Rep.	$55bn	$5,250	1950	None	7	$0,37m	0,01	0	0	6%	No
Cuba	$60bn*	$5,306*	1948	None	None	$4,3m	0**	0	0	10%	Not ratified
Indones.	$472bn	$1,853	1950	9	13	$12m	0,5	$7,6m	1,4	0,6%	No
Australia	$889bn	$37,834	1948	7	10	$721m		$546m			Yes
Malawi	$4,2bn	$274	1964	0	0	$0,06m	0	0	0	48%	No
Zimbabwe	$14,2bn	$458	1948	0	0	0	0	0	0	27%	Yes

* 2013 figures, **2006 figures

Sources: World Development Indicators[9]; WTO[10]; ITC Trapemap[11]

[9] http://databank.worldbank.org/data/home.aspx
[10] https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm
[11] http://www.trademap.org