

How Free Trade and Investment Agreements can impact on NZ's alcohol policy

Professor Jane Kelsey, School of Law, The University of Auckland, May 2012

Framework for this presentation

Effect of traditional trade agreements on alcohol policy (Thailand)

New generation rules under FTAs

Implications of Trans-Pacific Partnership Agreement (TPPA)

What might be done?

WTO challenges to alcohol policies

Binding rules that governments must comply with:

- Technical Barriers to Trade - labelling, technical standards (eg alcohol levels) that is least restrictive to achieve goals
- Intellectual Property Rights – protection of trademarks and geographical indicators
- Services – not restrict wholesale & retailers, advertising, duty free stores, etc or use monopolies where government has made commitments

Eg. Thailand's alcohol policies to require rational of graphic health warnings



Drinking alcohol leads to sexual impotency

Date



Drunk driving causes disability or death

Date

WTO challenge to Thailand

Complaints by US, NZ and Australia at WTO

- not the least restrictive way to achieve the goal;
- not proportionate in balancing goals and impacts;
- interfered with trade marks.

(ironically, same arguments being used against Aust and NZ on plain packaging tobacco)

Thailand responded by

producing a report to support its position;

hosting a meeting of WTO members;

subcommittee to study the impact of the regulation ...

New Free Trade Agreements go further

- ✧ no longer about trade in goods across state borders, more about **commercial & economic integration**
- ✧ Removing obstacles to **foreign investment** (eg centralised ownership & marketing) & preventing re-regulation that reduces value
- ✧ cross-border **supply chains** (ie globally organised alcohol commodity supply chain of producers, importers, advertisers, distributors, etc)
- ✧ mutual recognition of **product standards** (same labelling, maximum alcohol levels etc)
- ✧ Targeting other **behind the border obstacles**, ie domestic policy and regulations (ie alcohol advertising & sponsorship restrictions)
- ✧ Empower market players and increase their influence over **government policy making** (ie alcohol lobby leverage)

TPP would add another layer

- ✧ Proposed Trans-Pacific Partnership(TPP) is promoted as a 'gold standard' benchmark for the 21st century
- ✧ Currently US, Australia, Singapore, Chile, Peru, Malaysia, NZ, Brunei, Vietnam ... Japan, Canada, Mexico in waiting
Aim is to achieve a US-led FTA across all 21 APEC countries to neutralise China
- ✧ Negotiations are secret and documents will remain secret until 4 years after negotiations end or collapse
- ✧ Huge political pressure to conclude in 2012, but slow

Influence over NZ policy decisions

By **states** require consultations and take disputes in private ad hoc tribunals;

By **investors** against states through a private ad hoc and secretive process, can award compensation for lost value or profit

Under TPPA:

✧ *Enforcement* could be directly by US corporations

✧ *Regulatory Coherence* chapter - new space for industry attacks on policy & information for disputes by requiring mandatory regulatory impact assessments, least restriction policy options, scientific proof, cost-benefit analysis, etc

✧ *Transparency* – mandatory consultation, feedback, reviews etc

Likely alcohol policy targets

- ✧ Large GHWs & **pictograms** that negate trademarks (as per plain packaging tobacco in Australia & GWH in Uruguay)
- ✧ **Retail restrictions** (location, quantity, purchase hours, minimum price to stop loss-leading) that severely reduces profits & share value
- ✧ New regulations **restricting flavoured and RTDs** which make the foreign investment unprofitable
- ✧ Strict regulation of **alcohol sales & marketing** in developing countries with minimalist rules

Some are far-fetched, but industry will threaten them because the aim is to deter regulation

Chilling effect on alcohol policy decisions

The goal of industry is to prevent or change policies.

The 'chilling' effect is preferable to an actual dispute:

- ✧ **States threaten** to lodge complaints or do so;
- ✧ **Commercial interests threaten** to lodge complaints or do so;
- ✧ **Governments' defensive interests** on similar issues;
- ✧ **Pressure from industry** during regulatory impact assessments and obligatory consultations;
- ✧ **Pressure on health officials** from trade ministries & Treasury
- ✧ **Self-censorship** by health ministries to avoid pressure.

Public health exceptions

Very unreliable at WTO, though that is improving
Totally unpredictable in FTAs cos ad hoc tribunals
Exception doesn't apply for investment chapters
New exception discussed in TPPA for tobacco
Won't apply to investment, mutual recognition,
transparency, regulatory coherence

1. Statements to trade ministers

AMA wrote to US Trade Representative on TPPA in Sept 2011, based on WMA Statement seeking:
exclusion or carveout of measures affecting the supply, distribution, sale, advertising, promotion or investment in alcoholic beverages from trade agreements without balancing the economic impact with health and social consequences.

2. Human rights impact assessment

Ask national human rights commissions to conduct impact assessment of proposed TPPA (or other FTAs) for international obligations.

Thailand's human rights commission report on Thai-US FTA in 2006 is an excellent precedent

NZ HRC said no resources to conduct scoping study into HR impact assessment

3. Collaborate with tobacco control & public health advocates

based on WHO's plan to give equal prominence to
alcohol,
tobacco,
unhealthy eating
as major contributors to NCDs.

Collaboration can be at national or regional level,
not only through international forums

A 'silo' approach of alcohol exceptionalism doesn't solve public health or broader problems

It is not enough to seek a carveout for alcohol and say it's OK for everything else

Many public health problems face the same challenge

eg. access to HIV/AIDS drugs, unsafe mining, tobacco controls

So do other legitimate policy objectives:

eg mining, sustainable livelihoods, indigenous rights, culture

More basically, TPPA threatens sovereignty and democracy

Precedent could affect all APEC countries and beyond.

National & international alliances need to change the paradigm, now ***before it is too late.***