

How the Trans-Pacific Partnership Agreement can impact on alcohol policy

**Professor Jane Kelsey, Faculty of Law,
The University of Auckland, June 2015**

This presentation will discuss ...

- What's new about the Trans-Pacific Partnership Agreement (TPPA)?
- How might it affect the 5+ Solution policies
- Myths about TPPA safeguards
- What might be done?

These agreements are not about trade!

- ✧ Today's 'trade' agreements are no longer about trade in goods across state borders, more about **commercial and economic integration**
- ✧ Removing obstacles to **foreign investment** (eg centralised ownership and marketing) and 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 and sponsorship restrictions)
- ✧ Empower market players and increase their influence over **government policy making** (ie alcohol lobby leverage)

Existing rules affect alcohol policies

Binding rules at WTO and free trade agreements that governments must comply with, for example:

- **labelling**, technical standards (eg alcohol levels) that is least restrictive to achieve goals (“Technical Barriers to Trade”)
- protection of trademarks and geographical indicators from plain **labels or large GHWs** (“Intellectual Property Rights”)
- not restrict **wholesale and retailers, advertising, duty-free** stores etc or use monopolies where government has made commitments (“services”)

eg challenge to Thailand GHWs

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 trademarks

(ironically, same arguments being used against Australia 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 ...

TPPA would add another layer

- Proposed Trans-Pacific Partnership (TPPA) goes further '**behind the border**' than any existing agreement
- **12 countries**: Canada, US, Mexico, Peru, Chile, Australia, NZ, Singapore, Malaysia, Brunei, Vietnam, Japan
- Negotiations are in **secret** and documents, except final text, remain secret for four more years so rely on leaks
- Technical work done, waiting for **political trade-offs** (eg dairy access for Pharmac rules for affordable medicines)
- Held up by US Congress process but **could happen any time**

Risk for 5+ Solution policies

1. Raise alcohol prices (least risk)
2. Raise the purchase age (relatively low risk)
3. Reduce alcohol accessibility (high risk)
4. Reduce advertising and sponsorship (medium-high risk)
5. Increase drink-driving counter-measures (low risk)

Highest risk alcohol policies

- Large GHWs and **pictograms** that negate trademarks (as per plain packaging tobacco in Australia and GWH in Uruguay)
- **Retail restrictions** (location, quantity, purchase hours, minimum price to stop loss-leading) that significantly reduce profits and share value
- New regulations **restricting flavoured RTDs** which make the foreign investment unprofitable
- Tighter regulation of **alcohol sales, sponsorship and marketing**

Influence over NZ alcohol policy

States can require NZ to consult, bring dispute in offshore trade tribunal

Investors guaranteed input and influence

Regulatory Coherence chapter – formalises RIA process requiring choice of least restrictive policy options, scientific proof, cost-benefit analysis etc

Transparency – mandatory consultation, feedback, reviews etc

Enforce special rights directly against government in offshore ad hoc tribunals

Controversial: pro-investor, conflicts of interest, no precedents, no appeal,

Compensation awards for lost value and future profits

Use 'consultative' processes to compile evidence portfolio

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
- ✧ **NZ government has defensive interests**
- ✧ **Pressure from industry** during RIA and consultations
- ✧ **Pressure on health officials** from trade ministries and Treasury
- ✧ **Self-censorship** by health ministries to avoid pressure.

Warning!

Often looks like lots of protections for right to regulate for health but that is subject to the TPPA rules

Devil is in the legal detail!

Myth 1: Public health exceptions

Government can take measures necessary to protect human health

- Defence that has to be argued and satisfied by government
- Multiple steps, very hard test to meet
- eg least restrictive option to achieve health goal
- Has succeeded in only one of 41 cases in WTO
- Totally unpredictable in TPPA because ad hoc tribunals
- Probably won't apply to investment, mutual recognition, transparency, regulatory coherence
- NZ not supporting Malaysia proposed carve out for tobacco, concern about flow on to alcohol

Myth 2: Health measures are protected

NZ has a list of 'non-conforming measures' that protects right to keep existing laws and policies and sometimes new ones

- But only applies to some rules (eg not special investor rights)
- Does not affect transparency and consultation processes
- List is currently secret and subject to negotiation with other parties

Assume similar to NZ Korea FTA

The 'reservations'

'NZ reserves the right to adopt or maintain any measure with respect to health ... to the extent they are social services established for a public purpose' (limited scope - could be treatment)

NZ reserves the right to adopt or maintain any measure for public health or social policy purposes with respect to tobacco products and alcoholic beverages but only for distribution services and only for market access for cross-border trade in services (not investment or advertising and sponsorship)

Myth 3: Special annexes protect health

Special annex on interpreting expropriation rule protects right to take health measures

- Full of loopholes
- Uncertain interpretation by investment tribunals
- Doesn't apply to main protection investors use ('fair and equitable treatment')



What can you do?

Date

“Doctors for Healthy Trade”

Network of health professionals in Aotearoa is

- Raising awareness
- Publicly expressing concerns
- Writing analysis
- Making submissions
- Talking to professional bodies
- Talking to politicians

Human rights impact assessment

Asked human rights commissions to conduct impact assessment of proposed TPPA (or other FTAs), no resources

Recent calls from international health community, including World Medical Association ...

Statement from 10 UN Rapporteurs expressing concern and calling for HRIA ...

Need new pressure for HRIA from broad range of prestigious organisations **before** a deal is done

International collaboration on public health

Not enough to seek to protect alcohol

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.

International alliances need to act now ***before it is too late.***