

# **TPPA: Regulating for Tobacco & Alcohol in Thailand**

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# International reference points

**Public health** policies on tobacco & alcohol aim to protect people & communities from harm -

**Trade & investment** agreements aim to maximise commercial opportunities for firms across borders

Both **powerful global forces**

The **FCTC** and the **WHO Global Strategy** on harmful use of alcohol need to be measured against the TPPA.

# TPPA focuses on :

- ✧ **economic integration** & facilitating cross-border supply chains (ie alcohol commodity supply chain of producers, importers, advertisers, marketers, distributors, retailers, etc)
- ✧ Removing **barriers to cross border trade, harmonisation & mutual recognition** (ie different product standards, labelling, advertising, disclosure, distribution rules, licensing rules & procedures, requirements for local presence, consumer laws)
- ✧ **behind-the-border practices**, (ie evidence based policy, least burdensome regulations, non-discriminatory licensing & administration criteria & processes, presumption of light-handed regulation)
- ✧ **Empowering industry players** directly & through states, increases their influence over government policy making (ie committee oversight, disclosure, review, enforcement)

# Rules do different things:

Some rules will say **what laws and policies governments cannot have** (eg. IP, non-discrimination)

Some rules will say **what criteria governments must privilege** in making policy choices (eg evidence based, least burdensome)

Some rules will say **who has the right to participate** and how decisions must be made (eg 'affected interests')

# Relevant chapters for tobacco/alcohol policy

2. Non-discrimination, market access, customs procedures for goods
7. Sanitary and phytosanitary
8. Technical barriers to trade & Annex 8-A
9. Investment – Annex I and 2
10. Cross-border services
14. E-Commerce
17. State-owned enterprises
18. Intellectual property
25. Transparency
26. Regulatory coherence
28. Dispute settlement
29. Exceptions

[See, Kelsey, J. *International Trade Law and Tobacco Control. Trade and investment law issues relating to proposed tobacco control policies to achieve an effectively smokefree policy for New Zealand by 2025*,

<http://www.turanga.org.nz/sites/turanga.org.nz/files/Kelsey%20Trade%20Law%20Tobacco%20Control%20Report.pdf>

# Examples of alcohol policy targets

- ✧ Large GHWs & **pictogrammes** that negate trademarks (as per plain packaging tobacco in Australia & GWH in Uruguay, even though lost)
- ✧ **Retail restrictions** (location, quantity, purchase hours, minimum price to stop loss-leading) that severely reduces profits & share value
- ✧ **restricting flavoured and alcopops** which target youth, by new regulations that make foreign investment unprofitable
- ✧ Stricter regulation of **alcohol sales & marketing** in areas where there are few rules

Some complaints are not strong legally, but the industry will make **threats** because their aim is to deter government policy

# TBT Annex 8-A on Wine & Distilled Spirits

No explicit rules prevent GHWs or labelling

But information required can be provided on a separate label, additional to producer's standard labelling

even if health policy makers think that is least effective

Problem if requirements for size or placement of supplementary label crowd out the standard labels

Likely argument that less trade restrictive options can achieve goal

Potential crossover to an investment dispute

## Reminder from yesterday on services ...

Covers laws, policies, regulations, etc *affecting* relevant services

**National, regional, local levels** and private bodies with delegated power

Applies to different ways of delivering those services,  
especially offshore and foreign investment.

- Not **restricting size or growth of markets** for alcohol-related services
- **Not restricting foreign players** or favouring locals
- Regulations are **not unnecessarily burdensome** for service providers, esp for licensing procedures and technical standards
- **Administration** of alcohol regulations **reasonable, objective, impartial**
- **Professional qualifications & licensing procedures** must be **objective** to achieve quality, licensing procedure not a restriction in itself

# Potential impacts on alcohol policies

- Ban an activity (eg alcohol advertising or sponsorship)
- Limit the number of providers (eg alcohol outlets )
- Limit the number of services provided (eg. alcohol-free days, times, location)
- Impose an economic needs test (too many alcohol outlets in area)
- Monopoly (state controlled or owned liquor outlets)
- No cross-border services without local presence (eg alcohol advertisers)
- No cross border e-commerce (eg internet purchases from offshore)
- Licensing body gives more weight to local communities' concern or government alcohol control policy than to commercial interest so not administered in a reasonable, objective, impartial way

# Investment chapter

Broad definition of investment: shares, enterprise, IPR, license

2 rules most relied on by investors to attack regulation:

**Fair & equitable treatment**, stable regulatory environment

**Direct & indirect expropriation**, not remove the value of investment by policy and regulatory actions.

# Exceptions: Schedules

Cross border services & investment, financial services/investment

Reservations are listed in 2 annexes

**Negative list** - what is not listed is not protected

**Annex 1:** existing measures can be kept but not make more restrictive

**Annex 2:** service activities and sectors where policy space is preserved

High risk because it is almost impossible to add to the list in the future

Applies automatically to new technologies for providing the service

Does not apply to some rules,

eg not to investor protections

or some domestic regulation rules for services

# Annex 2 Policy space example

Read carefully - **only applies to rules and activities that are stated ...**

**Sector:** Distribution Services

**Obligations Concerned:** Market Access (Article 10.5)

**Description:** Cross-Border Trade in Services

Malaysia/ New Zealand reserves the right to adopt or maintain any measure for public health or social policy purposes with respect to wholesale and retail trade services of tobacco products and alcoholic beverages.

Only applies to cross-border services, **not to investment**

Only protects distribution services, **not advertising or sponsorship**

**Only protects market access** (eg. a ban, a monopoly, numerical limit)

Does **not allow foreign and local shops to be treated differently**

Does **not apply to domestic regulation** rules

# Article 29.5 Tobacco control measures<sup>1</sup>

A Party **may elect to deny the benefits of Section B** of Chapter 9 (Investment) with respect to claims challenging a **tobacco control measure**<sup>12</sup> of the Party. Such a claim shall **not be submitted to arbitration** under Section B of Chapter 9 (Investment) if a Party has made such an election. **If a Party has not elected** to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party **may elect to deny benefits during the proceedings**. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.

<sup>1</sup> this Article does not prejudice ... a Party's rights under Chapter 28 (Dispute Settlement) in relation to a tobacco control measure.

# Definition of ‘tobacco control measure’

A tobacco control measure means a **measure** of a Party **related to the production or consumption of manufactured** tobacco products (including products made or derived from tobacco), their **distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use**, as well as **enforcement measures**, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to **tobacco leaf** that is not in the possession of a manufacturer of tobacco products or that is **not part of a manufactured tobacco product is not a tobacco control measure**.

# Problems with the ISDS exception

1. Exception is **not a total carveout** from the agreement:  
Malaysia proposed: nothing in this agreement shall apply to tobacco control measures (except tariffs)  
Only 1 other country formally supported Malaysia's carevout
2. **States can still enforce** investment & other chapters
3. Relies on government's **invoking the veto**
4. **Tobacco industry still has influence** on decisions in committees, transparency & regulatory coherence chapter
5. **Admits that protections** in investment chapter **are inadequate** for health measures
6. Does not protect **other health measures**

# General exception is imported from WTO

Does **not** apply to the **investment chapter**, including ISDS

**Multiple layers** must be satisfied: the measure **must be**

- to **protect human life or health**
- **necessary** to achieve that objective, ie no reasonably available alternative to achieve the goal
- not a means of **arbitrary or unjustified discrimination**
- not a **disguised barrier** to foreign suppliers

Recent cases view health measures in the policy context

But general exception has fully succeeded only **1 in 44** disputes when relied on as a defence in WTO

# Problems with the general exception

Discussed yesterday

Applies to **public health measures** but **many-layered test**

Recent cases say specific health measures need to be viewed in their **broader policy context** (*Brazil – Tyres*)

Being tested in Australia **plain packaging dispute in WTO**

But it does **not apply to the TPPA Investment** chapter

# Meaningless health protection for investment

## Article 9.15: Investment and Environmental, Health and other Regulatory Objectives

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Governments can do what the chapter allows governments to do!!!

Some specific health provisions apply for particular rules, eg Annex on indirect expropriation, tobacco exception from ISDS

## Chilling effect on alcohol & tobacco policy

The alcohol and tobacco industry wants to influence policies.

A 'chilling' effect on government is preferable to an actual dispute:

- ✧ **States threaten** to lodge complaints or do so;
- ✧ **Commercial interests threaten** to lodge complaints or do so;
- ✧ **Pressure from industry** during regulatory impact assessments and obligatory consultations;
- ✧ **Pressure on health officials** from trade ministries & Treasury
- ✧ **Health ministries** caution to avoid pressure.

Legal costs of disputes average \$8 million; Australia's tobacco case cost A\$50 million, average time 6 years



Thank you!

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