

Trans-Pacific Partnership Agreement (TPP): Alcoholic Beverages and Health Information/Warning Labels

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There is nothing in the TPP which expressly prevents parties from introducing warning or health information labels for alcoholic beverages, or from prescribing the content, design and placement of those labels. There are obligations in the TPP which might be used to attempt to deter countries from introducing effective, evidence-based health information on alcoholic beverages. Any such attempts should be resisted, as the provisions in the TPP provide a degree of flexibility to regulate to protect the public's health.

Introduction

1. There are several chapters of the TPP which are relevant to a proposal to introduce mandatory health information or warnings on alcoholic beverage labels. This note focuses primarily on the Technical Barriers to Trade chapter as the one most likely to be used to oppose warnings or health information being placed on alcoholic beverages. Other chapters, such as Investment (ch 9), might also be used, depending on the features (design, size, placement, content) of the labelling requirements and the extent of the alcohol industries' objections to these measures.
2. This note presents the legal arguments which may be made under the TPP in relation to alcoholic beverage labelling. These legal arguments may be raised in the context of a formal legal dispute. However, they may also be used in discussions between the parties during the policy development stage, with a view to dissuading a party from introducing health information or persuading them to use a version of the health information which is more acceptable to alcohol suppliers, but potentially less effective in terms of health promotion. It is important that parties are not unjustifiably deterred from regulating.
3. At the outset, it should be noted that nothing in the TPP expressly prevents parties from introducing warning or health information labels for alcoholic beverages, or from prescribing the content, design and placement of those labels.

Annex 8-A Technical Barriers to Trade chapter

4. There is a special annex to the TPP chapter on Technical Barriers to Trade ('TBT') which applies to **wine and distilled spirits** (Annex 8-A). If a party requires a supplier to include information on wine labels (except product name, country of origin, net contents or alcohol content) or spirits labels, the party must permit the supplier of the wine or distilled spirits to provide this information on a supplementary label: see Annex 8-A, para 6 (for distilled spirits) and 8-A, para 11 (for wine). This means that, if Australia or another TPP country were to require wine and spirits bottles to display a health warning, it must allow the wine and spirits suppliers to place this information on a supplementary label.
5. What is a 'supplementary label'? There is no definition in the TPP. But it is generally understood as a label which is added to the usual or standard labelling for the particular product. For example, many wine bottles are labelled with a front and back label. In these

instances, a supplementary label is a one which is additional to these two labels, such as a sticker along the side of the bottle or over the corner of one of front label. Supplementary labels are often added after the main manufacturing process. Annex 8-A requires parties to permit supplementary labels after wine or distilled spirits have been imported but before the products are offered for sale to the public.

6. The very purpose of a supplementary label is to save suppliers from having to redesign their standard product labels to accommodate different labelling requirements for different countries. The goal is that suppliers, if they wish to, can use the same standard label for every export country and just add the supplementary label in some unused space on the container and in a manner which will not interfere with the standard labelling. The supplementary labelling provision adds some complexity to regulating for health warnings in a manner consistent with the TPP.
7. Assume Australia introduced mandatory, large, front of container, graphic and text warnings like [those proposed by The Foundation for Alcohol Research and Education \(FARE\)](#) on all packaged alcoholic beverages. [FARE's review](#) of research evidence on health warnings suggests that these types of labels are the most likely to be effective in informing people about the risks associated with consumption of alcohol. If Australia said that suppliers could *not* use supplementary labels for the warnings and insisted that they change their usual labels to incorporate the health warnings, then Australia would be in breach of the obligation in the Annex to allow for supplementary labelling. If Australia wished to defend this decision, Australia would need to argue that its insistence on health warnings being included in the primary label is justified by the 'public health exception' (see discussion below at [9]-[10]).
8. However, even if Australia said that suppliers could add the warnings by way of a supplementary label, it might face an argument that the prescribed warning labels are so large that suppliers cannot, *in practice*, use a supplementary label to apply the warnings and they have to redesign their label to accommodate the warnings. In turn, it might be argued that although Australia might formally be agreeing to the use of supplementary labels, it is, in substance, not complying with the requirement to allow supplementary labelling. Similar arguments might be made if Australia proposed to legislate for warning labels to be on the front of containers. Some suppliers may argue that, given the size or design of the standard label they use on the front of the bottle, there is no room for a supplementary label on the front of a bottle and they would need to change their labelling to accommodate the health warning. Again, in reply to this argument, Australia would need to rely on the public health exception (see discussion below at [9]-[10]).

Public Health Exception

9. A party can seek to justify public health measures which are inconsistent with Annex 8-A by way of an exception which has been incorporated into the TPP (art 29.1). The exception states, 'subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...necessary to protect human...life or health...'.
10. If Australia were to introduce a labelling scheme like that proposed by FARE, it might argue that the scheme is covered by this exception as 'necessary to protect human...life or health'.

The public health exception provides considerable leeway for countries to introduce measures to protect their people's health. Australia's success in using the exception would depend on, amongst other things, the exact details of the labelling measure it proposed and the evidence it could muster to support the measure. Australia would particularly need to justify the use of large, front of container labels, as opposed to the smaller, less prominent labels which some parts of the alcohol industry voluntarily use on their products. It would also need to confront the likely argument that, even though it is legitimate for Australia to provide information to the public with a view to improving the public's health, there are less trade-restrictive measures that Australia could use, such as schools or public education campaigns.

Technical Barriers to Trade chapter

11. There are also obligations in the TBT chapter (and not just the Annex) which are applicable to the labelling of alcoholic beverages. The TBT chapter covers 'technical regulations' (art 8.1) and mandatory alcohol beverage labels are 'technical regulations'.
12. The TBT chapter includes a number of provisions, but the one which is most relevant to alcoholic beverage labelling requires that 'technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective' (art 8.4(1)(a)).
13. Continuing with the example of Australia introducing the graphic health warnings proposed by FARE, one of the other TPP parties might argue that the warnings would not be consistent with the obligation that technical regulations 'not be more trade-restrictive than necessary to fulfil a legitimate objective'. This provision could be used to challenge warning labels on all kinds of alcoholic beverages, including beer, which is not covered by the Annex.
14. Australia would need to answer such a claim in much the same way as it made its case for the public health exception (see above [9]-10]).

Investment

15. There is also a mechanism for a corporation (incorporated in a country which is a party to the TPP) to bring claims against the government of other TPP parties, using the investor-state dispute settlement mechanism in the TPP's Investment chapter (ch 9). This mechanism might be used by alcohol industry corporations to contest the introduction of mandatory health warnings on alcohol containers. The public health exception outlined above (art 29(1)) does not apply to the Investment chapter.
16. The Investment chapter includes an obligation on states to provide a minimum standard of treatment to foreign investments (art 9.6). It also includes an obligation not to expropriate directly or indirectly foreign investments except in limited circumstances (art 9.7). Similar (but not exactly the same) provisions have been used by Phillip Morris against Uruguay to challenge its law introducing graphic health warnings on tobacco products which are required to cover 80% of the front of the tobacco packet. Similar (but, again, not exactly the same) provisions are being used by Phillip Morris to contest Australia's tobacco plain packaging legislation.
17. The TPP Investment chapter includes some safeguards which make it more difficult for corporations to succeed in a case over alcohol health warnings. For example, Annex 9-B (Expropriation) to the Investment chapter states that 'non-discriminatory regulatory actions

by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.’

18. An alcohol labelling measure which is designed in accordance with the best available evidence, applies to all alcohol products and which is subject to Australia’s standard processes for the development and passage of legislation is unlikely to be inconsistent with the provisions in the TPP Investment chapter.
19. That said, even if the chance of success in a claim under the Investment chapter is slim, an alcohol industry corporation may still bring a claim, or threaten to bring a claim, in the hope of deterring governments from proceeding with a health-related labelling measure.