Public Health and International Economic Law: Alcohol Labelling, Obesity Prevention Laws and Beyond

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1. Regulation, Risks & Recommendations

2. Case Study: Thai Alcohol Labelling

   • Two radical policies to control the labelling of alcohol from Thailand
   • Compatibility of Thai policy with international investment law
   • IIL-based recommendations for Thailand’s labelling policy
Regulation, Risks & Recommendations
## NCDs, Risk Factors & Regulatory Measures

<table>
<thead>
<tr>
<th>Non-communicable diseases (NCDs)</th>
<th>Behavioural Risk Factors</th>
<th>Regulatory Measures</th>
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<tbody>
<tr>
<td>• Cardiovascular diseases</td>
<td>• Tobacco Use</td>
<td>• Taxation</td>
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<td>• Cancers</td>
<td>• Unhealthy Diet</td>
<td>• Advertising</td>
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<td>• Chronic Respiratory Diseases</td>
<td>• Physical Inactivity</td>
<td>• Restrictions</td>
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<td>• Diabetes</td>
<td>• Harmful Use of Alcohol</td>
<td>• Distribution</td>
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<td>• Packaging and</td>
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<td>• Labelling</td>
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<td>Requirements</td>
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MiniSnack alla crema pasticcera incartati singolarmente

Puff pastry rolls filled with pastry cream - Rouleaux feuillets fourrés à la crème de pâtisserie - Blätterteiggebäck mit zarter heller Cremefüllung
<table>
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<tr>
<th>Type of Risk</th>
<th>Consequences</th>
<th>Factors Increasing the Risk</th>
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<tr>
<td>Use of Dispute Settlement</td>
<td>- High legal fees</td>
<td>- ISDS mechanisms</td>
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<td></td>
<td>- Long timeframes</td>
<td>- Lack of procedural controls</td>
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<td>- Strain on human resources and expertise</td>
<td>- Poor signalling of commitment to measure, confidence in its legality, and capacity and capacity and intention to defend any challenge</td>
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<td>Adverse Finding or Outcome</td>
<td>- Payment of compensation</td>
<td>- Explicitly/implicitly discriminate</td>
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<td>- Repeal of the measure</td>
<td>- Restrict imports or foreign investments</td>
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<td>- Restrict trademarks</td>
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<td>- Lack of evidence</td>
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<td>- Improper process</td>
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Revealed: $39m cost of defending Australia's tobacco plain packaging laws

Exclusive: Two years after an FOI claim was lodged, the price of the six-year fight with Philip Morris has been revealed

Gareth Hutchens and Christopher Knaus

Sun 1 Jul 2018 19.00 BST
1. Review trade & investment **treaties**
   – sufficient regulatory autonomy, modification, termination

2. Participate in & promote the development of evidence-based regional & international **standards**

3. **Anticipate complaints** and litigation
   – counter-arguments, resources to defend

4. Follow best practice when **developing domestic measures**
   – process, evidence, non-discrimination

5. Manage future foreign **investment**
   – screening: review IIAs, domestic regulations, investment applications
Case Study: Thai Alcohol Labelling
• Thai warning labels proposal introduced in 2010 but not given legal effect.

• Highly controversial in WTO TBT Committee: see O’Brien and Mitchell ‘On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement’ (2018) Queensland University of Technology Law Review.
Alcohol Labelling and International Investment Law: Thai Warning Labels
Content of the labels
- drinking alcohol causes the hypertension and liver cirrhosis;
- alcohol intoxication leads to the accident;
- drinking alcohol leads to unconsciousness and even death;
- drinking alcohol leads to inferior sexual performance;
- drinking alcohol leads to adverse health effects and family problems;
- alcohol is a bad influence on children and young people

Alternative translation: ‘alcohol could cause….’
Design of the labels

- four colours and six fonts
- 50% of the largest side of a square container or 30% of the surface area of the entire package for other shapes
- six labels were to be rotated every 1000 units of production.
• Part 1: ban on messages which are ‘unfair to consumers’ or lead to ‘bad effects to the society as a whole’.

• Part 2: ban on messages which ‘directly or indirectly persuade [people] to consume’ alcohol or which ‘pretentiously exaggerate … the benefit or quality of alcoholic beverages’.
Part 2 ban includes messages which:

- suggest that drinking can lead to social and sexual success;
- are about or include pictures of athletes, artists, singers, movie stars, actors;
- use cartoons;
- use the promise of a donation to charity from the purchase or consumption of alcohol; and
- encourage participation in activities such as music, sports, contests or recreation.
Alcohol Labelling and International Investment Law: Thai Marketing Ban

Carabao 2011

คำราบราว (means buffalo) thai rock music
• Are the warnings reasonably related to a rational policy and is their impact proportionate to their objective?
• ‘Margin of appreciation’ & ‘deference’
• International basis
• Scientific evidentiary basis
• Thailand’s warnings are generally consistent with the traditional international investment obligations
• Risk that the content of certain labels may be found excessive?
Recommendations

• Tighten the wording of the warnings from ‘cause’ to ‘can cause’.

• See, eg, Yukon Territories in Canada: ‘alcohol can cause cancer’
Alcohol can cause cancer
including breast and colon cancers

L'alcool peut causer le cancer
y compris le cancer du sein et du colon

To reduce health risks, drink no more than
standard drinks a day.
Plan two or more non-drinking days each week.
Pour réduire les risques pour la santé, ne pas boire plus de
verres standards par jour.
Prevoir deux ou plus de
journées sans alcool par semaine.
• Review the evidence base for the warnings
Recommendations

• Studies on US labels introduced in 1989: no behaviour change; some effect on intervening variables (intention to change, conversations about alcohol, willingness to offer to drive someone home if they are affected by alcohol)

• No studies of other labelling schemes
GOVERNMENT WARNING: (1) ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS. (2) CONSUMPTION OF ALCOHOLIC BEVERAGES IMPAIRS YOUR ABILITY TO DRIVE A CAR OR OPERATE MACHINERY, AND MAY CAUSE HEALTH PROBLEMS.
Recommendations

• Evidence for design, presentation and rotation requirements:
  – Supported by emerging evidence from prototype alcohol labels (Valance et al, Hobin et al, Miller et al, Pettigrew et al)
  – Also evidence borrowed from tobacco graphic health warnings (Noar et al)

• But advisable to follow Yukon lead and support research:
  – pre-studies of label content and design that is likely to be salient to Thai population
  – Implementation studies
Recommendations

• Marketing rule:
  – Review wording
  – But even more important for Thailand to support research on impact of alcohol labelling on consumption
  – Little existing evidence on impact of label on consumption: see Gates et al (2007); Purves, Stead and Eadie (2014)
  – Thailand would need to rely on evidence about impacts of other forms of alcohol marketing on under-age consumption: see systematic reviews from Smith and Foxcroft (2009); Anderson et al (2009); Jernigan (2017)
Further References


• ‘Legal Responses to Corporate Maneuvering in International Investment Arbitration’ (2014) 5(1) Journal of International Dispute Settlement 41–68 (with Tania Voon and James Munro).


• ‘Protecting the Autonomy of States to Enact Tobacco Control Measures Under Trade and Investment Agreements’ (2014) Tobacco Control (with Elizabeth Sheargold).

• ‘Plain Packaging of Tobacco Products in Australia: A Novel Regulation Faces Legal Challenge’ (2012) 307(3