

MARGINALISING HEALTH INFORMATION: IMPLICATIONS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT FOR ALCOHOL LABELLING

PAULA O'BRIEN,^{*} DEBORAH GLEESON,^{**}
ROBIN ROOM[†] AND CLAIRE WILKINSON[‡]

This article explores the public health implications of a novel set of trade rules for the labelling of wine and spirits included in the final text of the Trans-Pacific Partnership Agreement ('TPP'), signed in February 2016. While the TPP seems unlikely to proceed in its current form, its alcohol labelling provisions are beginning to appear in subsequent regional trade agreements. These provisions include the requirement that parties allow wine and spirits suppliers to place country-specific information on a supplementary label rather than the main label. A government's interest in prioritisation of health warning, for instance, would thus be subordinated to the supplier's interest in its desired labelling. The new rules promote regulatory harmonisation, making it easier for producers to comply with different labelling requirements, but they also create potential challenges for countries wishing to introduce effective health warning schemes and other types of health information on alcohol containers. The article concludes that these challenges are probably not insurmountable, but the interpretation of the rules in the context of a complaint or dispute is uncertain, creating the potential for a deterrent effect against governments requiring health warning labels and other information. The burden of alcohol-related harm is considerable and there is a strong rationale for better health information on alcohol containers. In this context, it is important that the state's right to supply

^{*} BA (Hons), LLB (Hons) (Melb), LLM (Cantab); Senior Lecturer, Melbourne Law School, The University of Melbourne.

^{**} BAppSc (RMIT), Grad Dip Health Prom, MPH, PhD (La Trobe); Senior Lecturer, School of Psychology and Public Health, La Trobe University.

[†] PhD (UC Berkeley); Professor and Director of the Centre for Alcohol Policy Research, La Trobe University; Professor, Centre for Social Research on Alcohol and Drugs, Stockholm University.

[‡] BASc, DML (Jap), BSc (Hons) (Melb); Research Officer, Centre for Alcohol Policy Research, La Trobe University.

health information and use it to mark alcohol as ‘no ordinary commodity’ is preserved.

CONTENTS

I	Introduction.....	342
II	The Global Burden of Alcohol-Related Harm	350
III	Alcohol Health Information in <i>TPP</i> Countries: Current Labelling Measures	353
IV	Evidence Supporting Health Information on Alcohol Products.....	359
	A Rationales for Alcohol Label Information	359
	B Studies of Alcohol Health Warning Labels.....	361
	C Studies of Prototype Alcohol Warning Labels	363
	D Studies of Nutritional Panels and Ingredient Lists.....	364
	E Tobacco Labelling	366
V	WTO Law and Alcohol Labelling.....	367
	A Introduction	367
	B Article 2.1: National Treatment.....	370
	C Article 2.2: Trade-Restrictive Measures.....	373
VI	The <i>Trans-Pacific Partnership Agreement</i> and Alcohol Labelling.....	375
	A Introduction.....	375
	B Objectives of the Technical Barriers to Trade Chapter.....	378
	C <i>TPP</i> Annex 8-A.....	379
	1 Supplementary Labelling Rules	379
	2 Trade Rationales for Supplementary Labelling.....	381
	3 The Supplementary Labelling Requirement and Health Information	383
	D Public Health Exception.....	385
VII	Conclusion	389

I INTRODUCTION

This article examines the emergence of new trade rules for the labelling of alcoholic beverages, and their implications for public health. The label on the bottles, cans, casks and other containers used to package alcoholic beverages is the alcohol industry’s ‘valuable label real estate’.¹ It is a small but powerful

¹ Australian Alcoholic Beverage Industries, Submission to Secretariat on Alcoholic Beverages, *Review of Food Labelling Law and Policy* (5 September 2011) 14 <www.wfa.org.au/assets/submissions/pdfs/2011/Blewett_Review_submission.pdf>, archived at <<https://perma.cc/DT4A-GGS5>>.

marketing platform used by producers to disseminate information about their particular brand, as well as subtle and positive messages about alcohol and its consumption as part of a normal 21st-century life. The alcohol industry is therefore very resistant to demands for the label on alcoholic beverage containers to bear public health information, including warnings about the risks associated with alcohol consumption, such as ‘drinking causes cancer’; nutrition panels consisting of the average nutrient content in the food, such as energy, protein and fat; and ingredient lists. Public health advocates, including the World Health Organization (‘WHO’), call for the inclusion of such health information on alcohol labels, as part of a multifaceted campaign to inform people about the harms associated with alcohol consumption and to induce them to change their drinking behaviour accordingly.² Such information strategies are directed towards reducing the significant harms from alcohol.³

As one of its opposition strategies, the alcohol industry may rely upon international and regional trade and investment laws, arguing that the introduction of labelling requirements would be inconsistent with the relevant rules.⁴ The World Trade Organization’s (‘WTO’) rules on non-discrimination in the treatment of goods,⁵ and intellectual property,⁶ as well as the rules

² World Health Organization, *Global Strategy to Reduce the Harmful Use of Alcohol*, WHA Res 63.13, 63rd sess, 8th plen mtg, WHO Doc WHA63/2010/REC/1 (21 May 2010) 23–4; World Health Organization, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020* (2013) 34 <http://apps.who.int/iris/bitstream/10665/94384/1/9789241506236_eng.pdf?ua=1>, archived at <<https://perma.cc/LR4H-GMDR>>.

³ World Health Organization, *Global Status Report on Alcohol and Health 2011* (2011) 20 <www.who.int/substance_abuse/publications/global_alcohol_report/msbgsruprofiles.pdf>, archived at <<https://perma.cc/Z3MH-D3V8>> (‘*Global Status Report 2011*’).

⁴ The alcohol industry’s current concerns about domestic regulation conflicting with international trade and investment laws extend beyond health information labelling to tariff barriers, geographical indicators, wine testing and certification: see ‘APEC Initiative’, *World Wine Trade Group* (Web Page) <www.wwtg-gmcv.org/p/apec-initiative.html>, archived at <<https://perma.cc/CTG7-S9PC>>. Most recently, these concerns have related to the sale of wine: see *Canada — Measures Governing the Sale of Wine in Grocery Stores*, WTO Doc WT/DS520/5 (23 February 2017) (Request for Consultations by the United States).

⁵ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*General Agreement on Tariffs and Trade 1994*’) art III(4) (‘*GATT 1994*’); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*Agreement on Technical Barriers to Trade*’) (‘*TBT Agreement*’).

⁶ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (‘*Agreement on the Trade-Related Aspects of Intellectual Property Rights*’) (‘*TRIPS Agreement*’).

in bilateral investment treaties,⁷ have potential application to domestic regulations requiring health labelling of alcoholic beverages. But it is the WTO's *Agreement on Technical Barriers to Trade* ('*TBT Agreement*')⁸ that has been most frequently relied upon to contest alcohol labelling requirements. The *TBT Agreement* establishes disciplines for 'technical regulations,' a concept that encompasses labels on alcoholic beverages.⁹ Although no dispute relating to alcohol labelling has been brought under the *TBT Agreement*, WTO members regularly raise concerns in the WTO Committee on Technical Barriers to Trade ('*TBT Committee*') about alcohol labelling proposals, with, for example, concerns being repeatedly raised about Thailand's graphic warning label proposal for alcohol.¹⁰

But it seems that the protections offered by the current trade and investment rules are not meeting the interests of the major alcohol-exporting countries, such as the United States, the European Union, Australia, Chile and New Zealand. Being jointly responsible for over 85% of the world's wine exports,¹¹ these five parties (along with others) are seeking to create new trade rules that specifically address alcoholic beverage labelling and that harmonise labelling requirements between countries, or at least make it easier for producers to comply with divergent labelling requirements. For example, some of the leading wine-producing countries have negotiated the *World Wine Trade Group Agreement on Requirements for Wine Labelling* which prima facie restricts the right of parties to mandate where country-specific information is placed on the wine label.¹² But the most significant development to date has been the signing of the *Trans-Pacific Partnership Agreement* ('*TPP*') on 4 February 2016 between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru,

⁷ See, eg, *Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments*, Switzerland and Uruguay, signed 7 October 1988, 1976 UNTS 389 (entered into force 22 April 1991) arts 3(1), 3(2), 5, 11. These were the provisions that were the basis of Philip Morris's challenge to Uruguay's tobacco labelling laws: see *Philip Morris Brands SÀRL v Uruguay (Award)* (ICSID, Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [12].

⁸ *TBT Agreement* (n 5).

⁹ *Ibid.*

¹⁰ Paula O'Brien, 'Australia's Double Standard on Thailand's Alcohol Warning Labels' (2013) 32 *Drug and Alcohol Review* 5, 6.

¹¹ Renée Johnson, 'The US Wine Industry and Selected Trade Issues with the European Union' (Congressional Research Service No R43658, 1 April 2015) 4.

¹² *World Wine Trade Group Agreement on Requirements for Wine Labelling*, [2012] ATS 17 (signed and entered into force 1 July 2012) arts 9, 11.

Singapore, the United States and Vietnam.¹³ The final text of the *TPP* incorporates the rules from the *TBT Agreement*, but, most significantly, requires parties to allow wine and spirits importers to place country-specific labelling information on a 'supplementary label', rather than having to incorporate it into the principal label.¹⁴ This is the first appearance of a supplementary labelling requirement in an international trade agreement and represents a clear attempt to curtail the impacts on the alcohol industry if states require additional label information, such as health information. It seems that many states do not currently approve of supplementary labelling and that these new trade rules would require widespread change in law and practice among the *TPP* parties.¹⁵

Although the *TPP* is unlikely to come into force (at least in its current form) given President Donald Trump's withdrawal of the United States from the *TPP*,¹⁶ the terms negotiated in the *TPP* in relation to wine and spirits labelling (and in relation to a host of other matters) are set to become a model for future regional trade agreements. The *TPP* negotiations commenced in 2010¹⁷ and were finalised in late 2015 by the 12 parties who represent over 37% of global GDP and almost 26% of global trade.¹⁸ It is the largest regional trade agreement negotiated to conclusion to date and was intended to be the first of a 'new generation' of trade agreements which deal with traditional barriers to trade in goods and services, but go beyond and address other 'trade-related' topics, including transparency, anti-corruption, and regulatory

¹³ *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) ('*TPP*'). In this paper, for ease of reading, one or more of these twelve countries will be referred to as a 'party' or 'parties' although we acknowledge that the treaty has no binding effect on a signatory country until the treaty enters into force and the country completes its domestic legal processes to consent to be bound, see: at art 30.5.

¹⁴ *Ibid* ch 8 annex 8-A arts 5, 10.

¹⁵ See, eg, *Minutes of the Meeting of 5–6 November 2014*, WTO Doc G/TBT/M/64/Rev.1 (6 March 2015) (Note by the Secretariat) [2.118]–[2.221].

¹⁶ Donald J Trump, 'Presidential Memorandum regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement: Memorandum for the United States Trade Representative' (Presidential Memorandum, 23 January 2017) <www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>, archived at <<https://perma.cc/PET3-EU4C>>.

¹⁷ 'The Trans-Pacific Partnership (TPP)', *Coalition of Services Industries* (Web Page) <<https://servicescoalition.org/negotiations/the-trans-pacific-partnership-tpp>>, archived at <<https://perma.cc/7UGF-HMXU>>.

¹⁸ 'Trans-Pacific Partnership Agreement', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx>>, archived at <<https://perma.cc/HXQ9-HLF8>>. See also *ibid*.

coherence. It was once hailed as ‘set[ting] the gold standard in trade agreements to open free, transparent, fair trade, the kind of environment that has the rule of law and a level playing field.’¹⁹ Furthermore, at least prior to the US election in November 2016, it was the ambition of the 12 *TPP* parties that more countries would accede to the agreement²⁰ and that it would become ‘a pathway to a free trade area across the entire Asia Pacific region.’²¹ It was also intended that the *TPP* would become a template for other regional trade agreements.²²

Although the *TPP* was largely driven by the US,²³ the rules of supplementary labelling of wine and spirits are likely to make their way into other regional trade agreements. The rules have already been included, word for word in their entirety, in the *Agreement to Amend the Singapore–Australia Free Trade Agreement*, signed on 13 October 2016.²⁴ These rules will also likely be included in new regional trade agreements that replace the *TPP*. This could include a ‘*TPP*-minus-one’ deal between the remaining *TPP* parties.²⁵ It could also include the *Regional Comprehensive Economic Partnership Agreement* (‘*RCEP Agreement*’) being negotiated between the Association of Southeast

¹⁹ United States Department of State, ‘Remarks at Techport Australia’ (Remarks by Secretary Clinton, PRN: 2012/T74-07, 15 November 2012) <<http://perma.cc/ZB4J-WN7E>>. This claim became controversial during Clinton’s US presidential election campaign, when she opposed the deal: see Lauren Carroll, ‘What Hillary Clinton Really Said about TPP and the “Gold Standard”’, *PolitiFact* (Washington, District of Columbia and St Petersburg, Florida, 13 October 2015) <<http://politifact.com/truth-o-meter/statements/2015/oct/13/hillary-clinton/what-hillary-clinton-really-said-about-tpp-and-gol/>>, archived at <<https://perma.cc/NQ8H-WSDR>>.

²⁰ See ‘Trans-Pacific Partnership Agreement’, *Australian Government Department of Foreign Affairs and Trade* (n 18).

²¹ Minister for Trade and Investment, ‘Robb Signs Historic Trans Pacific Trade Pact (TPP) in New Zealand’ (Media Release, 4 February 2016) <http://trademinister.gov.au/releases/Pages/2016/ar_mr_160204.aspx>, archived at <<https://perma.cc/T92D-YFZZ>>.

²² Ian F Fergusson, Mark A McMinimy and Brock R Williams, ‘The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress’ (Congressional Research Service No R42694, 20 March 2015) 7.

²³ See Todd Allee and Andrew Lugg, ‘Who Wrote the Rules for the Trans-Pacific Partnership?’ (2016) 3(3) *Research and Politics* 1. It has been argued that the *TPP* text closely reflects certain preferential trade agreements to which the US is a party and that 80% of ch 9 (the ‘Investment Chapter’) reflects past US agreements: at 7.

²⁴ Signed 13 October 2016, [2017] ATNIF 9 (not yet in force) annex 5C. Cf *TPP* (n 13) ch 8 annex 8-A.

²⁵ International Centre for Trade and Sustainable Development, ‘TPP Signatories Consider Next Steps Following US Withdrawal’, *Bridges* (Geneva, 9 February 2017) <www.ictsd.org/bridges-news/bridges/news/tpp-signatories-consider-next-steps-following-us-withdrawal>, archived at <<https://perma.cc/B549-CUSU>>.

Asian Nations ('ASEAN') members and six countries that have existing free trade agreements with ASEAN (Australia, China, India, Japan, South Korea and New Zealand). These negotiations include 7 of the 11 *TPP* parties.²⁶ The *RCEP Agreement* has assumed greater global importance in light of the *TPP*'s demise,²⁷ and negotiations are said to have accelerated in 2017.²⁸ While the *RCEP Agreement* is likely to be less 'ambitious' than the *TPP* due to the participation of more low and middle income countries, integrating some *TPP* provisions into the *RCEP Agreement* has been mooted as one way to salvage parts of the *TPP* that are seen as useful in reducing barriers to trade.²⁹ Support for a new Asia-Pacific free trade area has also increased in light of the US election result.³⁰ Further, the draft *Transatlantic Trade and Investment Partnership* between the EU and the US (though now also under a cloud after Trump's electoral success), likely includes a version of the *TPP*'s labelling rules for wine and spirits, with its draft chapter entitled 'Trade in Wine and Spirits' and a 'Protocol on Wine Labelling'.³¹

During the *TPP* negotiations, many public health academics and non-government organisations raised concerns about the health implications of the agreement,³² which were reinforced by successive leaks of certain

²⁶ 'Regional Comprehensive Economic Partnership', *Australian Government: Department of Foreign Affairs and Trade* (Web Page) <<http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx>>, archived at <<https://perma.cc/Y9MM-VKN7>>.

²⁷ Walter Sim, 'With TPP Unlikely, Japan Turns to Asian Trade Pact: Seven TPP Countries among Members of RCEP, a China-Led Deal That Excludes US', *The Straits Times* (Singapore, 16 November 2016) <www.straitstimes.com/asia/east-asia/with-tpp-unlikely-japan-turns-to-asian-trade-pact>, archived at <<https://perma.cc/7A9N-ZW9Y>>.

²⁸ Phusadee Arunmas, 'RCEP Members Ramp Up Talks as TPP Flops', *Bangkok Post* (Bangkok, 6 February 2017) <www.bangkokpost.com/business/news/1193469/rcep-members-ramp-up-talks-as-tpp-flops>, archived at <<https://perma.cc/RS5W-BZYY>>.

²⁹ Shiro Armstrong, 'What Can We Do with the Trans-Pacific Partnership Now?', *Australian Financial Review* (Melbourne, 27 January 2017) <www.afr.com/news/economy/trade/what-can-we-do-with-the-transpacific-partnership-now-20170127-gtzs4b>, archived at <<https://perma.cc/PED9-54WE>>.

³⁰ Stuart Lau, 'Pacific Rim Nations Urged to Revise TPP without US before Trump Cuts Trade Ties', *South China Morning Post* (Hong Kong, 12 November 2016) <www.scmp.com/news/china/diplomacy-defence/article/2045246/pacific-rim-nations-urged-salvage-regional-trade-pact>, archived at <<https://perma.cc/KZG6-JM82>>.

³¹ See 'Draft Chapter on Trade in Wine and Spirit Drinks', *European Commission: Trade* (Textual Proposal, 21 March 2016) <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154374.pdf>, archived at <<https://perma.cc/G2VD-V27U>>.

³² See, eg, Paula L O'Brien and Deborah H Gleeson, 'Retaining Our Right to Regulate Alcohol Warnings' (2013) 199 *Medical Journal of Australia* 447; Andrew D Mitchell, Tania Voon and

controversial draft chapters,³³ as well as the final text of the *TPP*. Initial health impact assessments of the *TPP* suggest that the agreement may have negative implications for human health,³⁴ reduce health equity³⁵ and compromise the ability to meet the UN's Sustainable Development Goals.³⁶ Many provisions have implications for access to medicines and other health technologies;³⁷ nutrition and diet-related health;³⁸ and other determinants of health — including tobacco and alcohol.³⁹ The concern is that the *TPP* rules limit the regulatory autonomy of the parties, either preventing them from pursuing

Devon Whittle, 'Public Health and the Trans-Pacific Partnership Agreement' (2015) 5 *Asian Journal of International Law* 279.

³³ See Kate Hirono et al, 'Negotiating Healthy Trade in Australia: Health Impact Assessment of the Proposed Trans-Pacific Partnership Agreement' (Health Impact Assessment, Centre for Health Equity Training Research and Evaluation, February 2015) 5.

³⁴ Ronald Labonté, Ashley Schram and Arne Ruckert, 'The Trans-Pacific Partnership: Is It Everything We Feared for Health?' (2016) 5 *International Journal of Health Policy and Management* 487; Katherine Hirono et al, 'Is Health Impact Assessment Useful in the Context of Trade Negotiations? A Case Study of the Trans Pacific Partnership Agreement' (2016) 6(4) *BMJ Open* 1, 8–9.

³⁵ Gay Keating et al, 'The Potential Impact of the Trans-Pacific Partnership Agreement on Health Equity, with Illustration from New Zealand' (2016) 14 *Applied Health Economics and Health Policy* 397, 398–9.

³⁶ Goal 3 is to '[e]nsure healthy lives and promote well-being for all at all ages' and Goal 3.5 has a specific target to '[s]trengthen the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol': *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess, 4th plen mtg, Agenda Items 15 and 116 (21 October 2015, adopted 25 September 2015). See Jeff Collin and Sally Casswell, 'Alcohol and the Sustainable Development Goals' (2016) 387 *Lancet* 2582, 2583; Arne Ruckert et al, 'Policy Coherence, Health and the Sustainable Development Goals: A Health Impact Assessment of the Trans-Pacific Partnership' (2017) 27 *Critical Public Health* 86.

³⁷ Joel Lexchin and Deborah Gleeson, 'The Trans Pacific Partnership Agreement and Pharmaceutical Regulation in Canada and Australia' (2016) 46 *International Journal of Health Services* 597; Brook K Baker, 'Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere' (2016) 13(3) *PLOS Medicine* 1.

³⁸ See Sharon Friel et al, 'A New Generation of Trade Policy: Potential Risks to Diet-Related Health from the Trans Pacific Partnership Agreement' (2013) 9 *Globalization and Health* 46; Anne Marie Thow et al, 'Will the Next Generation of Preferential Trade and Investment Agreements Undermine Prevention of Noncommunicable Diseases? A Prospective Policy Analysis of the Trans Pacific Partnership Agreement' (2015) 119 *Health Policy* 88.

³⁹ Hirono et al, 'Negotiating Healthy Trade in Australia' (n 33) 10–17; Hirono et al, 'Is Health Impact Assessment Useful' (n 34) 6; Labonté, Schram and Ruckert (n 34) 491.

laws and policies that are optimal for health or making them reluctant to do so for fear of acting inconsistently with the *TPP*.⁴⁰

Given that the *TPP* rules on wine and spirits supplementary labelling are likely to become the baseline standard for the treatment of alcohol labelling in future trade agreements, and given the concerns about the health impact of the *TPP*, our purpose in this article is to analyse the alcohol labelling rules in the *TPP* and assess their implications for the autonomy of states to regulate health information on alcoholic beverage containers. What do the *TPP* rules mean for states who wish to address problems in their society with alcohol-related harm by implementing progressive, evidence-based alcohol health warnings or other health information on product labels? In Parts II–IV, our article considers the health landscape and evidence against which the *TPP* rules have been negotiated and will operate. Part II maps the burden of health-related harm caused by alcohol, including in *TPP* parties. The current requirements for health information in *TPP* parties are then considered in Part III, revealing that few *TPP* parties require public health information on alcohol containers, thereby signalling the future significance of alcohol labelling as a novel public health intervention to be trialled. Part IV provides an original analysis of the evidence regarding alcohol warnings, nutrition information and ingredient lists, including their effects on consumer thinking and behaviour, and the impacts of different labelling content and design features. This body of evidence is drawn on in the analysis of the interpretation and application of the relevant trade rules. Part V then provides the legal context for the *TPP* supplementary labelling rules, outlining the *TBT Agreement* rules as they relate to alcohol labelling and providing an example of the application of these rules to health information labelling.

In Part VI, we examine the *TPP*'s rules for wine and spirits supplementary labelling and their likely interpretation in light of international law, in particular their implications for the autonomy of states to mandate health information. While several chapters of the *TPP* may have implications for regulatory autonomy in relation to health information on alcohol containers (including ch 9 (the 'Investment Chapter') and ch 18 (the 'Intellectual Property Chapter')), our focus in this paper is on the novel rules on supplementary labelling contained in the annex on wine and distilled spirits to ch 8 (the 'Technical Barriers to Trade Chapter'). Our analysis leads us to conclude that although states have agreed to a set of rules in the *TPP* that

⁴⁰ Deborah Gleeson and Sharon Friel, 'Emerging Threats to Public Health from Regional Trade Agreements' (2013) 381 *Lancet* 1507, 1508.

gives further protection to the industry's command of the alcohol label space, these rules do not prevent states from mandating the inclusion of evidence-based health information, and its design and placement features, on alcohol labels. The issue will be whether states are prepared to exercise this autonomy or whether the deal struck on alcohol labelling in the *TPP* reflects a general reluctance by states to require the use of the label contrary to the desires of the alcohol industry. Concluding comments, with recommendations for future trade negotiations, are in Part VII.

II THE GLOBAL BURDEN OF ALCOHOL-RELATED HARM

Harmful use of alcohol is a major health issue around the world. It affects the health of drinkers directly by contributing to health problems such as alcohol dependence, liver cirrhosis, cancers, injuries and neuropsychiatric disorders.⁴¹ Harmful use of alcohol can also affect the health of others, physiologically through drink driving, violence, and foetal alcohol syndrome,⁴² and mentally through role failures and drunken comportment in the family, at work and in relation to friends and acquaintances.⁴³

The WHO reports that approximately 2.5 million deaths per year are attributable to the harmful use of alcohol.⁴⁴ Globally, it is the third leading risk factor for disease and disability, and the leading risk factor for death among males aged 15–59.⁴⁵ Even when adjusted to take into account the 'beneficial impact of low risk alcohol use on morbidity and mortality in some diseases and in some population groups', it is estimated that alcohol consumption was responsible for 2.25 million deaths in 2004.⁴⁶ Alcohol consumption varies in different parts of the world, with the highest consumption in developed countries, particularly in the Northern Hemisphere, as well as some countries in the Southern Hemisphere (notably, Australia, New Zealand and

⁴¹ *Global Status Report 2011* (n 3) 22.

⁴² *Ibid.*

⁴³ *Ibid* 35.

⁴⁴ *Ibid* x, 20.

⁴⁵ *Ibid* 20. The exact ranking among the leading risk factors varies according to risk factors included and the reference date and data of the calculations. In 2015, the Institute for Health Metrics and Evaluation placed alcohol as ninth leading risk factor for disease and disability: see Mohammad H Forouzanfar et al, 'Global, Regional, and National Comparative Risk Assessment of 79 Behavioural, Environmental and Occupational, and Metabolic Risks or Clusters of Risks, 1990–2015: A Systemic Analysis for the Global Burden of Disease Study 2015' (2016) 388 *Lancet* 1659, 1659.

⁴⁶ *Global Status Report 2011* (n 3) 20.

Argentina).⁴⁷ At the same time, most countries experience a significant burden of alcohol-related disease and disability, with middle-income countries particularly at risk.⁴⁸

Table 1 compares, for populations aged 15 and over in *TPP* parties, per capita alcohol consumption, and rates of heavy episodic drinking and of alcohol use disorders for males and females. Alcohol use disorders include alcohol dependence and harmful use of alcohol.⁴⁹ Of the *TPP* parties, those with prevalence rates of alcohol use disorders of 5% or more among males include Australia, Canada, Chile, Mexico, Peru, the United States and Vietnam. The list of countries with male rates of heavy episodic drinking above 9% is similar — adding Japan and subtracting Vietnam. For per-capita consumption above eight litres, Mexico and Vietnam fall off the listing for alcohol use disorders, while New Zealand is added. Looked at another way, alcohol consumption is a serious health and social issue, particularly among males, in 9 of the 12 *TPP* countries, but less important an issue in 3 of the countries — Brunei Darussalam, Malaysia and Singapore.

⁴⁷ Ibid 4.

⁴⁸ Ibid x.

⁴⁹ World Health Organization, *Global Status Report on Alcohol and Health 2014* (2014) 13, <http://apps.who.int/iris/bitstream/10665/112736/1/9789240692763_eng.pdf?ua=1>, archived at <<https://perma.cc/G7AV-F7GG>>.

Table 1: Alcohol Use Disorders, Heavy Episodic Drinking, and Annual per Capita Consumption, among Populations Aged 15 and over in TPP Parties (12-Month Prevalence in Percentage)⁵⁰

TPP parties	Alcohol use disorders		Heavy episodic drinking		Annual per capita consumption (litres) 2008–10
	Males	Females	Males	Females	
Australia	5.0	2.1	16.8	5.1	12.2
Brunei Darussalam	3.1	0.6	1.0	0.1	0.9
Canada	10.2	3.6	25.0	10.9	10.2
Chile	8.5	1.5	9.8	0.1	9.6
Japan	4.6	1.0	28.1	7.5	7.2
Malaysia	4.1	0.8	0.6	<0.1	1.3
Mexico	5.2	0.5	19.7	5.3	7.2
New Zealand	4.5	2.0	7.4	1.7	10.9
Peru	12.2	3.3	23.6	3.6	8.1
Singapore	1.4	0.4	8.6	0.4	2.0
United States	10.7	4.2	23.2	10.9	9.2
Vietnam	8.7	0.9	2.6	0.2	6.6

⁵⁰ Ibid 144–288.

There are many negative effects from alcohol, some of which are connected to health impacts and some of which are separate. There are medical costs associated with disease and disability.⁵¹ But alcohol is also connected to property crime, loss of workplace productivity, impaired ability to care for children, and loss of public amenity and safety. Collins and Lapsley estimated the cost of alcohol to Australian society in 2004–05 as \$15.3 billion, including costs primarily to governments or to the drinker.⁵² Laslett and others estimated the cost of alcohol's harm to others in 2008 in Australia at \$19.1 billion, with little overlap between the two sets of costs.⁵³

III ALCOHOL HEALTH INFORMATION IN *TPP* COUNTRIES: CURRENT LABELLING MEASURES

In 2010, the World Health Assembly adopted the *Global Strategy to Reduce the Harmful Use of Alcohol* ('Global Alcohol Strategy') to guide alcohol policy in WHO member states.⁵⁴ The strategy recommends policy options in 10 'target areas', one of which is 'providing consumer information about, and labelling alcoholic beverages to indicate, the harm related to alcohol'.⁵⁵ This direction in the Global Alcohol Strategy has been reiterated in the WHO's *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020*.⁵⁶ In line with the global recommendations, many countries require health information on alcohol containers, with more than 30 countries mandating health warnings.⁵⁷

The labelling schemes in the 12 *TPP* countries are summarised in Table 2 ('Health Warnings')⁵⁸ and Table 3 ('Other Health Information').⁵⁹ Of the 12

⁵¹ Ibid 17.

⁵² David J Collins and Helen M Lapsley, *The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/05* (Commonwealth of Australia, 2008) xi.

⁵³ Anne-Marie Laslett et al, *The Range and Magnitude of Alcohol's Harm to Others* (Alcohol Education and Rehabilitation Foundation, 2010) 177.

⁵⁴ WHO, *Global Strategy to Reduce the Harmful Use of Alcohol* (n 2).

⁵⁵ Ibid 17 para 36(f).

⁵⁶ WHO, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases* (n 2) 34.

⁵⁷ 'Health Warning Labeling Requirements', *International Alliance for Responsible Drinking* (Web Page, April 2016) <www.iard.org/policy-tables/health-warning-labeling-requirements/>, archived at <<https://perma.cc/74CU-XURT>>.

⁵⁸ Table 2 relies primarily on information from the following sources: *ibid*; Jose M Martin-Moreno et al, 'Enhanced Labelling on Alcoholic Drinks: Reviewing the Evidence to Guide Alcohol Policy' (2013) 23 *European Journal of Public Health* 1082, 1083. For information on

TPP parties, only the US, Mexico and Peru have a mandatory requirement for health warning information on alcoholic beverages. Three other TPP parties have voluntary health warning schemes operated by industry-level associations: Australia, New Zealand and Japan.⁶⁰ In the case of Australia and

Australia's health warning text, see: 'Get the Facts: Labeling on Alcohol Products and Packaging', *DrinkWise* (Web Page, 2017) <<https://drinkwise.org.au/our-work/get-the-facts-labeling-on-alcohol-products-and-packaging/#>>, archived at <<https://perma.cc/Y4AJ-XSNR>>. For information on Canada's provincial-level health warnings, see: Gerald Thomas et al, 'The Effectiveness of Alcohol Warning Labels in the Prevention of Fetal Alcohol Spectrum Disorder: A Brief Review' (2014) 3 *International Journal of Alcohol and Drug Research* 91, 91; 'Alcohol Warning Labels', *Yukon Government: Yukon Liquor Corporation* (Web Page, 8 May 2017) <www.ylc.yk.ca/pdf/warning_label_initiative.pdf>, archived at <<https://perma.cc/7VQT-GK5A>>; 'Social Responsibility', *Government of Northwest Territories* (Web Page) <www.fin.gov.nt.ca/services/liquor/liquor-commission/social-responsibility-0>, archived at <<https://perma.cc/ZK4B-P62H>>. Brunei is not mentioned in any of the sources we have used for this table. We also note that data as to Brunei's labelling of alcoholic beverages is missing from the WHO's Global Health Observatory data repository: see 'Global Health Observatory Data Repository: Health Warning Labels on Alcohol Containers Data by Country', *World Health Organization* (Web Page, 10 January 2014) <<http://apps.who.int/gho/data/view.main.55920>>, archived at <<https://perma.cc/8NAZ-FWYP>>. We have therefore assumed that Brunei has no mandatory or voluntary warning requirements.

⁵⁹ Table 3 relies primarily on information from the following sources: Martin-Moreno et al (n 58); 'Beverage Alcohol Labeling Requirements', *International Alliance for Responsible Drinking* (Web Page, 2017) <www.iard.org/policy-tables/beverage-alcohol-labeling-requirements/>, archived at <<https://perma.cc/T6C8-LRLB>>. For information on Australia and New Zealand's 'Standard Drinks Information', see: *Australia New Zealand Food Standards Code — Standard 2.7.1 — Labelling of Alcoholic Beverages and Food Containing Alcohol 2016* (Cth) standard 2.7.1—4 ('FSANZ'). Australia and New Zealand have had a shared food standards system since 2000: see Paula O'Brien, 'The Contest over "Valuable Label Real Estate": Public Health Reforms to the Laws on Alcohol Beverage Labelling in Australia' (2014) 37 *University of New South Wales Law Journal* 565, 588–90; 'History of FSANZ', *Food Standards Australia New Zealand* (Web Page, 2015) <www.foodstandards.gov.au/about/foodlawandtreaties/history/pages/default.aspx>, archived at <<https://perma.cc/YS2K-323E>>. For information on New Zealand's voluntary warnings, see: Ministry for Primary Industries, 'Evaluation of Voluntary Pregnancy Labelling on Alcohol Products in New Zealand' (MPI Technical Paper No 2014/7, 15 May 2014); Health Promotion Agency, 'Attitudes to and Awareness of Alcohol Pregnancy Warning Labels' (Attitudes and Behaviour toward Alcohol Survey, June 2017) 5–6. Brunei is not mentioned in any of the sources we have used for Table 3. We have therefore assumed it has no mandatory labelling requirements.

⁶⁰ 'Health Warning Labeling Requirements' (n 57); 'Beverage Alcohol Labeling Requirements' (n 59). However, it goes without saying that individual producers may also choose to apply health warnings to some or all of their products: see '2015 Progress Report: Beer, Wine and Spirits Producers' Commitments to Reduce Harmful Drinking', *Producers' Commitments* (Web Page, 22 July 2016) 1, 19 <www.producerscommitments.org/wp-content/uploads/2016/07/2015-Progress-Report.pdf>, archived at <<https://perma.cc/WRT3-9K6S>>, where individual producers and the major global players made 'producers' commitments' in 2012 to develop labels to 'discourage: (1) drinking and driving; (2) consumption by those [under-

New Zealand at least, the government has required the industry to operate this scheme and reviews its operation to determine whether industry is voluntarily complying.⁶¹ Some *TPP* countries also have alcohol health warnings at the sub-national level. For example, health warnings for pregnant women are to be used on alcohol containers in Yukon Territory in Canada,⁶² and labels on containers in Canada's Northwest Territories include warnings about alcohol and motor vehicles as well as alcohol consumption during pregnancy.⁶³ These are in the form of adhesive labels stuck onto the bottle.

Four of the six *TPP* parties that have mandatory or voluntary warning schemes also have some other type of health-related labelling requirement, such as ingredient lists for all alcoholic beverages (Japan and Peru)⁶⁴ or a statement of the number of standard drinks contained in the package (Australia and New Zealand).⁶⁵ Of the *TPP* countries that do not have a national level mandatory or voluntary scheme for health warnings, Singapore has a requirement for a list of ingredients.⁶⁶ It is not uncommon for countries to exempt alcoholic beverages from food labelling rules relating to ingredient lists or nutrition panels, but to provide that packaged alcohol must bear such information in certain circumstances, such as where the beverage contains certain allergens. For example, for beer in the United States, the label must disclose if the product contains saccharin or aspartame.⁶⁷ Table 3 only records a *TPP* party as requiring an ingredient list or nutrition panel if the party requires that information on packaged alcohol in *all circumstances*.

age]; and (3) consumption by pregnant women.' The labels are to be placed on all of the committed producers' products by 2017.

⁶¹ See O'Brien, 'The Contest over "Valuable Label Real Estate"' (n 59) 577–8, 583–5, 587–90.

⁶² Thomas et al (n 58); 'Alcohol Warning Labels', *Yukon Government: Yukon Liquor Corporation* (n 58).

⁶³ 'Social Responsibility', *Government of Northwest Territories* (n 58).

⁶⁴ Martin-Moreno et al (n 58); 'Beverage Alcohol Labeling Requirements' (n 59).

⁶⁵ *FSANZ* (n 59) standard 2.7.1—4.

⁶⁶ Martin-Moreno et al (n 58) 1083; 'Beverage Alcohol Labeling Requirements' (n 59).

⁶⁷ Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury, *The Beverage Alcohol Manual (BAM): A Practical Guide* (2007) vol 3, 1-9–1-10.

Table 2: Alcohol Health Information in the TPP Parties — Health Warnings

TPP parties	Mandatory/voluntary	Text	Other requirements
Australia	Voluntary	'Get the facts DRINKWISE.ORG .AU' alone or with one of: 'Kids and alcohol don't mix' 'Is your drink harming yourself or others?'	Optional graphic of pregnant woman
Brunei Darussalam	No requirement	N/A	N/A
Canada	No requirement (only at level of some territories)	N/A	N/A
Chile	Voluntary	'CCU asks you to drink responsibly' 'Product for those 18 and older'	Placed on Compañía Cervecerías Unidas SA ('CCU') products
Japan	Voluntary	'Drinking alcohol during pregnancy or nursing may adversely affect the development of your fetus or child' 'Be careful not to drink in excess' 'Drink in moderation'	Displayed in an easy-to-read location on the container, using uniform Japanese font, at least 6 point in size

TPP parties	Mandatory/voluntary	Text	Other requirements
Malaysia	No requirement (mandatory health warning to come into effect December 2017)	'Alcohol can harm health'	Placed on products on 2% ABV or more, in not less than 12 point non-serif font
Mexico	Mandatory	"The abuse of the consumption of this product is harmful to health"	For products more than 6% ABV, three symbols (underage drinking, pregnancy, driving) are also required to be used together or in four-month rotations For products 2%-6% ABV, a symbol against underage drinking is required Presentation requirements apply
New Zealand	Voluntary	'It is safest not to drink while pregnant' Other wording of the producer's choice	Optional graphic of pregnant woman Other graphic of producer's choice

TPP parties	Mandatory/voluntary	Text	Other requirements
Peru	Mandatory	'Excessive drinking of alcoholic beverages is harmful'	Must take up 10% of the label and be in capital letters
Singapore	No requirement	N/A	N/A
United States	Mandatory	'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'	Health warning must appear on brand label or separate front label, or on a back or side label, separate and apart from all other information; be readily legible under ordinary conditions; appear on a contrasting background Labels bearing the warning must be firmly affixed to the container The words 'GOVERNMENT WARNING' must appear in capital letters and in bold type Minimum type size is specified for containers of various sizes
Vietnam	No requirement	N/A	N/A

Table 3: Alcohol Health Information in the TPP Parties — Other Health Information

TPP parties	Standard drinks information	Ingredient lists	Nutrition panels
Australia	Yes	No	No
Brunei Darussalam	No	No	No
Canada	No	No	No
Chile	No	No	No
Japan	No	Yes	No
Malaysia	No	Yes	No
Mexico	No	No	No
New Zealand	Yes	No	No
Peru	No	Yes	No
Singapore	No	Yes	No
United States	No	Yes	No
Vietnam	No	Yes	No

This review of the prescription of alcohol health information labels in *TPP* countries reveals a very low take-up of labelling as an alcohol control strategy. Alcohol labelling is therefore a policy of potential interest to most, if not all, of the *TPP* parties as an option for reducing alcohol-related harm. The next section reviews the evidence in relation to health information on alcohol products.

IV EVIDENCE SUPPORTING HEALTH INFORMATION ON
ALCOHOL PRODUCTS

A *Rationales for Alcohol Label Information*

There are several rationales for health information, including warning labels, on alcohol products:

- 1 It can be regarded as good governmental practice to give citizens information about the composition of, and risks from, a commodity designed to be taken into the body, whether the citizens pay attention or not. Thus, there is an argument for listing the fat content, sodium content, etc on food labels whether or not anyone reads the small print and acts on it: factual information is thereby readily available as a consumer right.
- 2 For substances carrying risks such as alcoholic beverages, warning labels serve the function of marking alcohol apart from other commodities as ‘no ordinary commodity’.⁶⁸ If this symbolic function has an effect, it is likely to be longer-term and not measurable with the usual studies of effectiveness, which focus on effects in the short term.
- 3 Warning labels and other health information may persuade drinkers to reduce or otherwise change their consumption of a risky comestible such as an alcoholic beverage.

The literature evaluating warning labels and other health information on alcohol products has been primarily focused on the third rationale, with effects of the labels measured in a classic ‘knowledge-attitudes-behaviour’ paradigm at the level of the individual person. Whether those questioned have seen labels and read their content is often collected along the way in such studies — which is relevant also to the first rationale. To our knowledge, there has been no study of the symbolic function of warning labels, although in the longer term this has the potential to be the most important, for instance if it contributes to changing the framing and position of alcoholic beverages in a culture.⁶⁹ A number of reviews of the effectiveness of alcohol warning labels in terms of the third rationale were undertaken in the late 2000s to inform government debate in Australia, Canada, and the European Commission.⁷⁰ Since this time there has been a number of primary studies of the effects of

⁶⁸ See Thomas Babor et al, *Alcohol: No Ordinary Commodity* (Oxford University Press, 2nd ed, 2010).

⁶⁹ See generally Michael Savic et al, ‘Defining “Drinking Culture”: A Critical Review of Its Meaning and Connotation in Social Research on Alcohol Problems’ (2016) 23 *Drugs: Education, Prevention and Policy* 270, 279–80.

⁷⁰ Tim Stockwell, *A Review of Research into the Impacts of Alcohol Warning Labels on Attitudes and Behaviour* (Report, February 2006); Peter Anderson, Institute of Alcohol Studies, *Consumer Labelling and Alcoholic Drinks* (Report, 2008); AER Foundation, ‘Alcohol Product Labelling: Health Warning Labels and Consumer Information’ (Policy Position Paper, 16 August 2011) <<http://fare.org.au/wp-content/uploads/research/AER-Foundation-Policy-Position-Paper-Alcohol-Health-Warning-Labels.pdf>>, archived at <<https://perma.cc/B4X4-6CAW>>.

alcohol warning labels. This section summarises the state of the research evidence on alcohol warning labels, paying particular attention to research published since the previous reviews. It also considers the evidence in relation to other health information. The experience with, and evaluations of, the effects of tobacco warning labels are also briefly considered.

B Studies of Alcohol Health Warning Labels

While many countries around the world have introduced some type of health warnings on alcoholic beverage containers, the best-studied experience regarding the impact of introducing alcohol warning labels is for the US label.⁷¹ Mandated on all alcoholic beverages since 1989, the label is a relatively lengthy text message, may be displayed vertically or horizontally, has a very small minimum font size, and may be placed on the back of the container amongst other product information. The content of the warning message has not changed since 1989.⁷² The body of research on this US experience finds that, while there is little evidence that indicates this alcohol warning label changed behaviour, there is evidence that it influenced certain ‘intervening variables’ considered necessary for behaviour change, such as having more conversations about risks related to drinking and intentions to change drinking habits.⁷³ Since the previous reviews were conducted, one further primary study evaluating the US experience with labels has been undertaken. Tam and Greenfield found that individuals who could recall seeing the US warning label were more likely to report they had taken action to deter another person from driving when intoxicated (such as offering to drive someone home).⁷⁴ Thus, the experience with the US label suggests that even with alcohol warning labels that are small in size and not highly visible, and whose message has not been rotated in more than 15 years, there is some evidence that the labels influence behaviour, but stronger evidence that the warning labels have influenced cognitions.

⁷¹ Claire Wilkinson and Robin Room, ‘Warnings on Alcohol Containers and Advertisements: International Experience and Evidence on Effects’ (2009) 28 *Drug and Alcohol Review* 426, 426, 432.

⁷² Ibid 432.

⁷³ Ibid 431–2.

⁷⁴ Tammy W Tam and Thomas K Greenfield, ‘Do Alcohol Warning Labels Influence Men’s and Women’s Attempts to Deter Others from Driving When Intoxicated?’ (2010) 20 *Human Factors and Ergonomics in Manufacturing and Service Industries* 538, 543–5.

Among the other countries with some form of health warning labels on alcohol containers, South Africa's text warnings stand out both because of the strong warning message (for example, 'Alcohol abuse is dangerous to your health'), and because of the prominence and size of the message on the beverage bottle.⁷⁵ However, we have been unable to find any studies on what happened when these text labels were introduced. In the Australian and New Zealand context, evidence is mounting that voluntary industry self-regulation is not an effective approach to alcohol labelling. The alcohol industry organisation 'DrinkWise' has supported producers in Australia and New Zealand to add one or more of the warnings listed in Table 2, such as 'It is safest not to drink while pregnant'.⁷⁶ Coomber et al evaluated the voluntary DrinkWise labels in Australia, both in terms of awareness and recall of the label, as well as visits to the DrinkWise website.⁷⁷ The authors found very low levels of warning label recall (16%); awareness was greatest among young adults and regarding the message about drinking when pregnant, and 7.3% of respondents had visited the website.⁷⁸ The DrinkWise labels are usually relatively small and do not appear on all alcohol products. About half of all beer, wine and ready-to-drink beverages (commonly referred to as RTDs) in New Zealand bore the DrinkWise pregnancy labelling in 2014.⁷⁹ In Australia, only 38.2% of products in 2014 had a pregnancy health warning.⁸⁰

Overall, the evidence of impacts is limited to experience where warning labels are small and not prominent, and it is perhaps not surprising then that there is little evidence to indicate that these health warnings have had an impact on drinking behaviour. The research evaluating experience with labelling as currently implemented internationally emphasises that the effectiveness of alcohol warning labels is dependent upon the content, format, and presentation of the messages.⁸¹ As Agostinelli and Grube note, the

⁷⁵ Martin-Moreno et al (n 58) 1085; Celia Wilkinson et al, Food Standards Australia New Zealand, *Alcohol Warning Labels: Evidence of Impact on Alcohol Consumption amongst Women of Childbearing Age* (Report No 2, 12 May 2009) 61.

⁷⁶ 'Get the Facts: Labeling on Alcohol Products and Packaging', *DrinkWise* (n 58).

⁷⁷ Kerri Coomber et al, 'Do Consumers "Get the Facts"? A Survey of Alcohol Warning Label Recognition in Australia' (2015) 15 *BMC Public Health* 816.

⁷⁸ *Ibid* 816, 819–21.

⁷⁹ Ministry for Primary Industries, 'Evaluation of Voluntary Pregnancy Labelling on Alcohol Products in New Zealand' (n 59) 3–4.

⁸⁰ Siggins Miller, *Evaluation of the Voluntary Labelling Initiative to Place Pregnancy Health Warnings on Alcohol Products* (Final Report, 23 May 2014) iv, 7, 12.

⁸¹ See generally Gina Agostinelli and Joel W Grube, 'Alcohol Counter-Advertising and the Media: A Review of Recent Research' (2002) 26 *Alcohol Research and Health* 15, 15, 19–20.

effectiveness of alcohol warning labels is heavily influenced by label design (which influences whether warning labels are actually noticed), the content of warning labels (which impacts on whether or not warnings evoke visceral avoidance responses) and how well the messages are targeted at their intended audience.⁸² For a greater chance of effectiveness in changing behaviour, it has been argued that warning labels should comprise both text and symbol; the label should be placed on the front of product containers, horizontally oriented and separated by a prominent black border; there should be at least five different health warning messages including one relating to risks of drinking during pregnancy; and the health warning message should occupy a specific percentage of the container's surface.⁸³

C Studies of Prototype Alcohol Warning Labels

Several recent studies have explored consumer reactions to alternative message format and content. A number of these use prototype labels based on the current practice in tobacco product labelling. Thomson, Vandenberg and Fitzgerald used graphic (and confronting) alcohol warning labels and reported that these labels found varying acceptance by study participants.⁸⁴ Support for labels was strongly associated with characteristics of the drinker, including their preferred beverage.⁸⁵ There was a strong tendency to self-exempt from messages drinkers felt were not relevant to them,⁸⁶ suggesting multiple messages should be used in rotation in order to expose different drinkers to different messages.⁸⁷ Al-hamdani and Smith examined multiple label variables, including the effect of label format and whether plain packaging enhances warning recognition.⁸⁸ The authors found plain packaging enhanced the effect of warning labels, and labels including text and image were more effective than text-only labels.⁸⁹ The findings provide some

⁸² Ibid 19–20.

⁸³ AER Foundation (n 70) 3.

⁸⁴ Lisa M Thomson, Brian Vandenberg and John L Fitzgerald, 'An Exploratory Study of Drinkers Views of Health Information and Warning Labels on Alcohol Containers' (2012) 31 *Drug and Alcohol Review* 240, 242–6.

⁸⁵ Ibid 246.

⁸⁶ Ibid.

⁸⁷ See *ibid* 247.

⁸⁸ Mohammed Al-hamdani and Steven Smith, 'Alcohol Warning Label Perceptions: Emerging Evidence for Alcohol Policy' (2015) 106 *Canadian Journal of Public Health* 395.

⁸⁹ Ibid 398.

support for the proposition that plain packaging increased warning label recognition, although the effect was not found across all beverage types.⁹⁰ While the study used a small convenience sample,⁹¹ it is an example of recent research exploring implementation of alcohol health warnings according to knowledge from current practice in tobacco product labelling.

Several recent Australian studies have assessed the likely efficacy as well as acceptability of informing drinkers about the risk of cancer related to drinking by using labels on beverages. Miller et al found specific warning statements, including statistics, had more impact than general statements about cancer.⁹² Pettigrew et al found support for using messages about specific forms of cancer rather than a general cancer-alcohol risk message,⁹³ and for using multiple rotating messages rather than a single warning message.⁹⁴ The authors also found that younger people believed or were more easily convinced by warning statements relating to cancer.⁹⁵

Thus, summarising evidence from the primary studies conducted since the previous reviews indicates that messages that are specific and detailed, containing statistics, are more effective than general health messages. This updated review of evidence suggests that in addition to the label features recommended for effectiveness by the Foundation for Alcohol Research and Education ('FARE'),⁹⁶ effective labels would need to be large enough to display such specific and detailed messages. Further evidence for using multiple rotating warning messages can be found in the tobacco experience.⁹⁷

D Studies of Nutritional Panels and Ingredient Lists

In relation to health-conscious consumers, some have argued that providing ingredient and nutrition labels may be a stronger motive for reducing

⁹⁰ Ibid.

⁹¹ Ibid 396.

⁹² Emma R Miller et al, 'Message on a Bottle: Are Alcohol Warning Labels about Cancer Appropriate?' (2016) 16 *BMC Public Health* 139, 141–2.

⁹³ Simone Pettigrew et al, 'Developing Cancer Warning Statements for Alcoholic Beverages' (2014) 14 *BMC Public Health* 786; Simone Pettigrew et al, 'The Effect of Cancer Warning Statements on Alcohol Consumption Intentions' (2016) 31 *Health Education Research* 60, 64.

⁹⁴ Pettigrew et al, 'Developing Cancer Warning Statements for Alcoholic Beverages' (n 93) 788.

⁹⁵ Ibid 710; Pettigrew et al, 'The Effect of Cancer Warning Statements' (n 93) 64.

⁹⁶ AER Foundation (n 70) 3.

⁹⁷ See Part IV(E).

consumption than providing information about alcohol-related harms.⁹⁸ From a public health point of view, alcohol is relatively high in calories. Providing information on this content could influence drinking behaviour. Ingredient lists are relatively limited internationally, although more common than displaying information on nutrient content. Such information is rarely required to be displayed on alcoholic beverage containers, as indicated for TPP parties in Table 3. Russia requires the amount of sugar to be displayed.⁹⁹ The lack of ingredient lists and nutrient content on alcoholic beverages is a widespread anomaly, since other packaged comestibles are routinely required in many countries to include such notices.

There is relatively little research on the effect of providing ingredient or nutritional information labelling on alcoholic beverage containers. A study by Bui et al found US university students generally made incorrect estimates in relation to nutrient content in alcoholic drinks.¹⁰⁰ When provided with accurate nutrition labels for each beverage type, students reported increased consumption intentions for wine and spirits beverage types where their estimates had diverged most from actual nutritional content.¹⁰¹ Martinez et al found that providing a nutrition label on a bottle of beer among a university and community sample of drinkers had no influence on self-reported intentions to drink.¹⁰² They did find a clear majority of their online community sample preferred seeing nutritional information displayed compared to not having nutrient labels.¹⁰³

A recent research project, partially funded by the International Organisation of Vine and Wine ('OIV'), an intergovernmental organisation of wine-producing countries, finds low understanding of the nutrient content of wine¹⁰⁴ and strong support for nutritional labelling,¹⁰⁵ although support

⁹⁸ See, eg, Kypros Kypri et al, 'Ingredient and Nutrition Information Labelling of Alcoholic Beverages: Do Consumers Want It?' (2007) 187 *Medical Journal of Australia* 669, 669.

⁹⁹ Martin-Moreno et al (n 58) 1083.

¹⁰⁰ My Bui et al, 'What Am I Drinking? The Effects of Serving Facts Information on Alcohol Beverage Containers' (2008) 42 *Journal of Consumer Affairs* 81, 88–96.

¹⁰¹ Ibid 95.

¹⁰² Julia A Martinez et al, 'The Impact of Standard Nutrition Labels on Alcoholic Beverages' (2015) 59(2) *Journal of Alcohol and Drug Education* 43, 45–50.

¹⁰³ Ibid 50–3.

¹⁰⁴ A Annunziata et al, 'Nutritional Information and Health Warnings on Wine Labels: Exploring Consumer Interest and Preferences' (2016) 106 *Appetite* 58, 64; Azzurra Annunziata et al, 'Do Consumers Want More Nutritional and Health Information on Wine Labels? Insights from the EU and USA' (2016) 8(7) *Nutrients* 416:1–19, 8.

¹⁰⁵ Annunziata et al, 'Nutritional Information and Health Warnings on Wine Labels' (n 104) 67.

varied by whether the wine consumer was from Italy, France or Spain.¹⁰⁶ Consumers' valuation of nutritional labelling was second only to support for health warning labels.

We have found no studies examining the effect of ingredient or nutritional information on drinking behaviour per se. In contrast, studies of food products, where nutritional and ingredient labels are mandated, have found strong evidence that healthier diets are associated with use of such information.¹⁰⁷ Despite the relative lack of research on providing ingredient or nutritional information labelling on alcoholic beverages, there is strong public support for providing such information¹⁰⁸ and there is not a convincing reason why alcoholic beverages are exempt from the ingredient and nutrition labelling requirements.

E Tobacco Labelling

The literature on tobacco package warning labels offers a contrast with the alcohol warning label experience, both in terms of the different form labelling has taken, and because of the contrast in the conclusions from the evaluated work.¹⁰⁹ As of 2015, more than 70 jurisdictions had introduced pictorial warning labels,¹¹⁰ and as of 2010, over 30 countries had adopted labels that cover at least half of the product.¹¹¹ Evidence for the effectiveness of tobacco health warnings suggests that a similar approach to that used on tobacco products (large, rotating, pictorial warnings, prominently displayed, with specific text, size and formatting requirements)¹¹² may be far more effective than the existing text-based alcohol warnings. Hammond reviewed the

¹⁰⁶ Azzurra Annunziata et al, 'European Consumers' Interest Toward Nutritional Information on Wine Labeling: A Cross-Country Analysis' (2015) 5 *BIO Web of Conferences* 04003:1–5, 4.

¹⁰⁷ See, eg, Sarah Campos, Juliana Doxey and David Hammond, 'Nutrition Labels on Pre-Packaged Foods: A Systematic Review' (2011) 14 *Public Health Nutrition* 1496, 1496, 1499.

¹⁰⁸ Thomson, Vandenberg and Fitzgerald (n 84) 242, 245. See also Kypri et al (n 98) 669.

¹⁰⁹ Wilkinson and Room (n 71) 432.

¹¹⁰ Minsoo Jung, 'Implications of Graphic Cigarette Warning Labels on Smoking Behavior: An International Perspective' (2016) 21 *Journal of Cancer Prevention* 21.

¹¹¹ David Hammond, 'Health Warning Messages on Tobacco Products: A Review' (2011) 20 *Tobacco Control* 327, 327.

¹¹² Michelle Scollo, 'Attachment 12.1 Health Warnings: A12.1.4 What Makes an Effective Health Warning?' in Michelle M Scollo and Margaret H Winstanley (eds), *Tobacco in Australia: Facts and Issues* (Cancer Council Victoria, 4th ed, 2012) <www.tobaccoinaustralia.org.au/chapter-12-tobacco-products/attachment-12-1-health-warnings/a12-1-4-what-makes-an-effective-health-warning>, archived at <<https://perma.cc/2XRT-H758>>.

evidence from 94 articles on cigarette labels and concluded that the impact depends upon their size and design and that cigarette pack warnings can be effective in promoting quitting smoking, especially when warnings are large, full-colour, and use graphic images.¹¹³ A recent meta-analysis by Noar et al of experimental cigarette warning label studies demonstrated that pictorial warnings were more effective than text-only warnings in the vast majority of outcomes studied, including the intention to not take up smoking and the intention to cease smoking.¹¹⁴

V WTO LAW AND ALCOHOL LABELLING

A Introduction

Before the conclusion of the *TPP*, there were rules in several international and regional trade agreements governing the labelling of alcoholic beverages. The *General Agreement on Tariffs and Trade* ('*GATT 1994*'),¹¹⁵ annex 1C ('*Agreement on the Trade-Related Aspects of Intellectual Property Rights*') to the *Marrakesh Agreement Establishing the World Trade Organization* ('the *TRIPS Agreement*'),¹¹⁶ and the *TBT Agreement* contain rules that potentially apply to government measures requiring public health content on beverage alcohol labels. With 164 members,¹¹⁷ the disciplines of the WTO shape the laws and policies of most of the world, but it is the *TBT Agreement* that is most relevant to alcohol labelling. The *TBT Agreement* contains the provisions that have been most used to date to contest alcohol labelling measures in the WTO's TBT Committee¹¹⁸ and are likely to be the central plank of any

¹¹³ Hammond (n 111) 334.

¹¹⁴ Seth M Noar et al, 'Pictorial Cigarette Pack Warnings: A Meta-Analysis of Experimental Studies' (2016) 25 *Tobacco Control* 341, 346.

¹¹⁵ *GATT 1994* (n 5). It is a national treatment obligation in relation to goods and provides that imported products must be accorded 'treatment no less favourable' than like domestic products 'in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use': at art III(4).

¹¹⁶ *TRIPS Agreement* (n 6) arts 3.1, 15.4, 16.1, 22.2(b), 24.3. These provisions were the bases for the challenge to Australia's plain packaging of tobacco laws in the WTO by Honduras: see *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/16 (17 October 2012) (Request for the Establishment of a Panel by Honduras).

¹¹⁷ 'Members and Observers', *World Trade Organization* (Web Page, 29 July 2016) <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, archived at <<https://perma.cc/W7KV-GTAC>>.

¹¹⁸ See O'Brien, 'Australia's Double Standard on Thailand's Alcohol Warning Labels' (n 10).

complaint brought to WTO dispute settlement.¹¹⁹ The *TBT Agreement* provisions have been discussed extensively in relation to alcohol labelling in other literature.¹²⁰ We include a discussion of arts 2.1 and 2.2 of the *TBT Agreement* here because they represent the legal context in which the more stringent *TPP* rules on alcohol labelling are to be understood and also because these provisions have been incorporated into the *TPP* and are therefore relevant to the content of the *TPP* itself.

The aims of the *TBT Agreement* rules are to encourage the development of international standards for technical regulations and to ensure that technical regulations do not create unnecessary obstacles to international trade.¹²¹ They do so by setting rules in relation to ‘technical regulations’,¹²² ‘standards’¹²³ and ‘procedures for assessment of conformity.’¹²⁴ It is the concept of ‘technical regulations’ that is most pertinent to the issue of alcohol labelling, although the concept of ‘standards’ which refers to voluntary, as opposed to mandatory, measures may also have some application.¹²⁵ A ‘technical regulation’ is relevantly defined as a ‘[d]ocument which *lays down product characteristics ... with which compliance is mandatory*. It may also include or deal exclusively

¹¹⁹ WTO panels usually consider claims under the *TBT Agreement* (n 5) before considering *GATT 1994* (n 5): Tania Voon, Andrew Mitchell and Catherine Gascoigne, ‘Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement’ in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2013) 454, 461. However, it is also possible that a provision could violate *GATT 1994* art III(4) but not the *TBT Agreement*. The ‘legitimate regulatory distinction’ test that applies to *TBT Agreement* art 2.1 does not apply to *GATT 1994* art III(4), such that a member state must rely on *GATT 1994* art XX to save a measure that is inconsistent with art III(4): see Panel Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R, WT/DS401/R (25 November 2013) [5.125] (‘EC — Seal’).

¹²⁰ See Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press, 2011) 170–214; Voon, Mitchell and Gascoigne (n 119); Benn McGrady and Alexandra Jones, ‘Tobacco Control and Beyond: The Broader Implications of *United States — Clove Cigarettes* for Non-Communicable Diseases’ (2013) 39 *American Journal of Law and Medicine* 265.

¹²¹ *TBT Agreement* (n 5) Preamble recital paras 4–5.

¹²² *Ibid* Preamble para 5.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ *Ibid* annex 1 para 2. ‘Standard’ refers to a ‘[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products ... with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product’. Some *TPP* signatories have voluntary alcohol labelling schemes in place: see Part III.

with terminology, *symbols, packaging, marking or labelling requirements* as they apply to a product.¹²⁶ In accordance with this definition, a rule by government mandating that packaged alcoholic beverages be labelled with health information or a health warning constitutes a ‘technical regulation’, as it is a *mandatory* rule laying down the labelling *characteristics* for alcoholic beverage products.¹²⁷

In terms of the substantive rules of the *TBT Agreement*, arts 2.1 and 2.2 are most pertinent to alcohol labelling. Article 2.1 is a national treatment and most-favoured nation obligation applying to central government bodies:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

Article 2.2 is directed to preventing unnecessarily trade-restrictive technical regulations by central government bodies:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create ... In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

We examine each of these articles and consider their application to a current alcohol labelling proposal. We conclude that the WTO’s interpretation of these provisions provides considerable scope for well-designed, non-discriminatory and evidence-based measures.

¹²⁶ *TBT Agreement* (n 5) annex 1 para 1 (emphasis added). See Panel Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [183]–[189] (‘US — Tuna II (Mexico)’). See generally Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) [67] (‘EC — Asbestos’); Appellate Body Report, *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/AB/R (26 September 2002) [189], [191], where the Appellate Body has made clear that rules which set down ‘characteristics’ such as ‘the means of identification, the presentation and the appearance of a product’ come with the definition of a technical regulation.

¹²⁷ See Panel Report, *US — Tuna II (Mexico)* (n 126) [7.186].

B *Article 2.1: National Treatment*

The national treatment obligation in art 2.1 of the *TBT Agreement* prohibits the 'less favourable treatment' of an imported product compared to 'like' domestic products.¹²⁸ The question of likeness in art 2.1 turns on 'the "nature and extent of [the] competitive relationship between and among products"'.¹²⁹ Article 2.1 prohibits both de jure and de facto discrimination between like domestic and imported products,¹³⁰ but it does not prohibit trade restrictiveness per se.¹³¹ The WTO Appellate Body has stated that less favourable treatment 'should be assessed "by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products"'.¹³² However, the Appellate Body has stated that a detrimental impact on the conditions of competition for imported goods is not 'sufficient' to constitute 'less favourable treatment' for the purpose of art 2.1, and a WTO panel must also consider 'whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products'.¹³³ To be legitimate, the regulatory distinction must be

¹²⁸ See Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/R (2 September 2011) [7.240]–[7.255] ('US — Clove Cigarettes').

¹²⁹ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (4 April 2012) [111] ('US — Clove Cigarettes'). See Appellate Body Report, *EC — Asbestos* (n 126) [101]–[103], where it is conveyed that this is usually determined by considering several factors (physical characteristics of the products, end-uses, consumer tastes and habits, and tariff classification), but all of the evidence must be considered. See also Jason Houston-McMillan, 'The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement' (2016) 15 *World Trade Review* 543, 550–2, where it is argued that the analysis should be of 'policy-like' as opposed to 'market-like' goods.

¹³⁰ Panel Report, *US — Clove Cigarettes* (n 128) [7.256].

¹³¹ See *ibid* [7.290], [7.325]; Panel Report, *US — Tuna II (Mexico)* (n 126) [4.55], [4.58]–[4.59]; Panel Reports, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/R, WT/D386/R (18 November 2011) [7.572] ('US — COOL'). To prohibit any trade restrictiveness would deprive art 2.2 of any utility: Appellate Body Report, *US — Clove Cigarettes* (n 129) [171].

¹³² Appellate Body Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012) [214] ('US — Tuna II (Mexico)') (emphasis omitted).

¹³³ Appellate Body Report, *US — Clove Cigarettes* (n 129) [182], quoted in Appellate Body Report, *US — Tuna II (Mexico)* (n 132) [215]. See Appellate Body Reports, *US — COOL — Recourse to Article 21.5 of the DSU by Canada and Mexico*, WTO Doc WT/DS384/AB/RW, WT/DS386/AB/RW (18 May 2015) [5.16] ('US — COOL (Article 21.5 — Canada and

‘designed and applied in an even-handed manner’, which requires at least that it is not designed or applied in a manner that constitutes ‘arbitrary or unjustifiable discrimination’.¹³⁴

Under art 2.1, if a WTO member were to introduce an alcohol warning labelling measure that prescribed the label’s content, as well as its design and placement features, and that applied to *all types* of alcoholic beverage containers, whether domestic or imported, there would be no risk of the measure constituting de jure discrimination for the purposes of art 2.1. Such a labelling measure is on its face neutral. An argument of de facto discrimination in relation to such a measure is also unlikely to succeed, even though there may be circumstances, such as where an imported alcoholic beverage is attempting to gain a foothold in a new market, in which a labelling rule change could be detrimental to the imported products.

However, the greater risk for a WTO member lies in a situation where it introduces a labelling measure that differentiates between alcoholic beverages. For example, say a WTO member proposed a two-level labelling law that required alcoholic beverages under 15.5% alc/vol to bear the information ‘This product contains alcohol and excessive drinking should be avoided’ (‘lower level warning’) and products with alcohol content above 15.5% to include the information ‘Excessive alcohol consumption risks lives and is harmful to health’ (‘higher level warning’).¹³⁵ Spirits, often with 40%-plus alcohol content by volume, are the category of alcoholic beverage most likely

Mexico’), regarding the analysis of detriment in terms of actual trade effects compared to hypothetical effects.

¹³⁴ Appellate Body Reports, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R (29 June 2012) [271] (‘US — COOL’), quoted in Appellate Body Reports, *US — COOL (Article 21.5 — Canada and Mexico)* (n 133) [5.91].

¹³⁵ This law was, in fact, proposed by Israel, a non-TPP party, and discussed in the WTO’s TBT Committee: see *Notification*, WTO Doc G/TBT/N/ISR/609 (17 July 2012); *Minutes of the Meeting of 6–7 March 2013*, WTO Doc G/TBT/M/59 (8 May 2013) (Note by the Secretariat) [2.178]–[2.181]; *Minutes of the Meeting of 17, 19 and 20 June 2013*, WTO Doc G/TBT/M/60 (23 September 2013) (Note by the Secretariat) [3.134]–[3.136]; *Minutes of the Meeting of 30–31 October 2013*, WTO Doc G/TBT/M/61 (5 February 2014) (Note by the Secretariat) [2.106]–[2.108]. Concerns about Mexico’s multi-level alcohol warning label have also been expressed in TBT Committee meetings: see *Minutes of the Meeting of 5–6 November 2014*, WTO Doc G/TBT/M/64/Rev.1 (6 March 2015) (Note by the Secretariat) [2.2.2.8], [2.44]; *Minutes of the Meeting of 18–19 March 2015*, WTO Doc G/TBT/M/65 (28 May 2015) [2.2.2.7]. In Appellate Body Reports, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) (‘*Japan — Alcoholic Beverages II*’), the law at issue was a multi-level tax for products with different alcohol contents.

to be subject to the higher level warning. A spirits-exporting WTO member may complain about less favourable treatment of its spirits product compared to a lower alcohol product that is predominantly domestically produced and subject to the lower level warning, such as wine.

Assuming that the imported spirits are considered to be 'like' domestic wine products,¹³⁶ the key issue would be whether the differing warning label requirements for the two classes of products modifies the conditions of competition between products to the detriment of the imported products. It seems likely that they do. But a panel would also consider whether the detriment to the imported spirits results from a 'legitimate regulatory distinction' drawn by the labelling measure. With presumed regulatory objectives of providing information and advice to consumers about the consumption of alcohol, and reducing excessive alcohol consumption, the key issue would be whether it is justifiable to place more serious warnings on alcoholic beverages above 15.5% and less serious warnings on those below this level of alcohol content. The responding member needs to be able to identify the rationale and supporting evidence for the more serious and specific warnings applying to products above 15.5% alc/vol, as opposed to, say, products above 6% alc/vol (in circumstances where the likely alcohol content of the locally produced wines is 7% or 8% alc/vol). Although there is international evidence to show that fatal alcohol poisonings increase with the consumption of spirits but not with the consumption of alcohol generally,¹³⁷ a member proposing this measure would need to lead evidence of the specific consumption patterns and associated harms amongst its population. Without such evidence, the two levels of warning appear to be 'arbitrary' and not 'even-

¹³⁶ The question of 'likeness' will always be one to be determined on the facts of the case, but this would likely be a live issue here. In the WTO context, the taxation cases concerning alcohol have compared a set of domestic spirits products and an imported spirits product and found them to be 'like': see, eg. Appellate Body Reports, *Japan — Alcoholic Beverages II* (n 135) 19–23. In the EU context, several cases have examined whether wine and beer are 'competing products': *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) art 110. The European Court of Justice has found on a number of occasions that 'the lightest and least expensive [wines] ... share a sufficient number of characteristics with strong beer — with an alcoholic strength equal to or higher than 3.5% vol ... to be regarded as being in competition with strong beer': see *Commission of the European Communities v Sweden* (C-167/05) [2008] ECR 2127, 2159 [43]–[44].

¹³⁷ See Kari Poikolainen, Kalervo Leppänen and Erkki Vuori, 'Alcohol Sales and Fatal Alcohol Poisonings: A Time-Series Analysis' (2002) 97 *Addiction* 1037, 1039.

handed’ or ‘legitimate’, and the warning would be found to be inconsistent with art 2.1.

C Article 2.2: Trade-Restrictive Measures

Article 2.2 of the *TBT Agreement* is concerned with whether a technical regulation is an *unnecessary* obstacle to international trade. This is another potential basis for a complaint about an alcohol labelling measure. Article 2.2 is not a prohibition on measures that have any trade-restrictive effect.¹³⁸ It prohibits those measures that exercise a ‘limiting effect’¹³⁹ or a ‘limiting condition’¹⁴⁰ on international trade that ‘exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.’¹⁴¹ A ‘legitimate objective’ includes ‘protection of human health or safety.’¹⁴² In relation to art 2.2 as it appears in the *TBT Agreement*, the Appellate Body has suggested that the assessment of whether a technical regulation is more trade restrictive than necessary under art 2.2 involves a ‘relational analysis’¹⁴³ — or a ‘weighing and balancing’¹⁴⁴ — of the following factors:

- (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the

¹³⁸ Appellate Body Report, *US — Tuna II (Mexico)* (n 132) [319]; Appellate Body Reports, *US — COOL* (n 134) [375]; Appellate Body Reports, *US — COOL (Article 21.5 — Canada and Mexico)* (n 133) [5.212].

¹³⁹ Appellate Body Report, *US — Tuna II (Mexico)* (n 132) [319]; Appellate Body Reports, *US — COOL* (n 134) [375].

¹⁴⁰ Appellate Body Reports, *China — Measures related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (30 January 2012) [319].

¹⁴¹ Appellate Body Report, *US — Tuna II (Mexico)* (n 132) [319], quoted in Appellate Body Reports, *US — COOL* (n 134) [375].

¹⁴² *TBT Agreement* (n 5) art 2.2.

¹⁴³ Appellate Body Report, *US — Tuna II (Mexico)* (n 132) [318].

¹⁴⁴ *Ibid* [321]; Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) [306]–[308] (*‘US — Gambling’*); Appellate Body Reports, *US — COOL (Article 21.5 — Canada and Mexico)* (n 133) [5.211]. See Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [178] (*‘Brazil — Retreaded Tyres’*).

risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.¹⁴⁵

Considering ‘possible alternative measures’ is a ‘conceptual tool’ used by panels for determining whether a particular measure is an unnecessary obstacle.¹⁴⁶ An alternative measure proposed by a complainant would be assessed by a panel to determine whether it is less trade restrictive than the technical regulation and whether it would make an equivalent contribution to the relevant objective as the technical regulation, taking into account the risks non-fulfilment would create, and whether it is reasonably available.¹⁴⁷

Voon, Mitchell and Gascoigne hold the view that the WTO Appellate Body is likely to be more ‘stringent’ about discrimination under art 2.1 and to grant ‘more leeway to Members under Article 2.2 in determining what is necessary to achieve a legitimate policy goal’.¹⁴⁸ If correct, a WTO panel might find that the two-level warning system, discussed in relation to art 2.1 above, is consistent with art 2.2. To reach its decision, the panel would need to weigh and balance the various factors referred to above. In terms of the contribution that a labelling measure makes to the achievement of such an objective, the evidence set out in Part IV would suggest that a labelling measure, whose content and design reflects current knowledge, was ‘capable of making ... some contribution’¹⁴⁹ to reducing alcohol-related harm, even if this could not be expressed in quantitative terms.¹⁵⁰ Furthermore, warning labels are arguably only a small burden on international trade.

A panel would then also consider whether there is an alternative to the warning labels that is less trade-restrictive and that makes an equivalent, but not necessarily identical,¹⁵¹ contribution to achieving the level of protection chosen by the responding country.¹⁵² The alternative must be one that is not

¹⁴⁵ Appellate Body Report, *US — Tuna II (Mexico)* (n 132) [322].

¹⁴⁶ *Ibid* [320]; Appellate Body Reports, *US — COOL* (n 134) [376].

¹⁴⁷ Appellate Body Report, *US — Tuna II (Mexico)* (n 132) [322]; Appellate Body Reports, *US — COOL* (n 134) [376]; Appellate Body Reports, *US — COOL (Article 21.5 — Canada and Mexico)* (n 133) [5.197].

¹⁴⁸ Voon, Mitchell and Gascoigne (n 119) 473.

¹⁴⁹ Panel Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R, WT/DS401/R (25 November 2013) [7.460].

¹⁵⁰ Appellate Body Reports, *US — COOL* (n 134) [80].

¹⁵¹ Appellate Body Reports, *US — COOL (Article 21.5 — Canada and Mexico)* (n 133) [5.125], [5.267], [5.269].

¹⁵² Appellate Body Reports, *US — COOL* (n 134) [373]; Appellate Body Reports, *US — COOL (Article 21.5 — Canada and Mexico)* (n 133) [5.201].

already in use by the member.¹⁵³ One alternative here would be a single level of warning, the discussion of which would again draw in the evidence considered in relation to art 2.1 about the rationale for the two levels of warnings. This may well be found to be a less trade-restrictive alternative such that the panel would conclude that the double-level measure is inconsistent with art 2.2. Other alternatives that are repeatedly suggested in TBT Committee meetings are public education campaigns, which are probably able to be implemented in most countries without imposing an ‘undue burden’.¹⁵⁴ Whilst less trade-restrictive than warning labels, the evidence for such education programs in isolation suggests low levels of effectiveness in changing behaviour (even though some campaigns have had success in building support for restrictive alcohol policies).¹⁵⁵

VI THE *TRANS-PACIFIC PARTNERSHIP AGREEMENT* AND ALCOHOL LABELLING

A Introduction

In this part, we focus on annex 8-A on ‘Wine and Distilled Spirits’ of the Technical Barriers to Trade Chapter of the *TPP*. Annex 8-A contains a novel, WTO-plus set of provisions for wine and spirits that require *TPP* parties to allow suppliers to place government-mandated labelling information on a supplementary label. Over the last five years in the WTO’s TBT Committee, WTO members have regularly called on other members to allow supplementary labelling of alcoholic beverages, rather than requiring that the principal label be adapted country-specific information.¹⁵⁶ The new

¹⁵³ Appellate Body Report, *Brazil — Retreaded Tyres* (n 144) [172].

¹⁵⁴ Appellate Body Report, *US — Gambling* (n 144) [308]; Appellate Body Reports, *US — COOL (Article 21.5 — Canada and Mexico)* (n 133) [5.330], quoting Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) [327] (*‘China — Publications and Audiovisual Products’*) (emphasis omitted).

¹⁵⁵ Babor et al (n 68) 215. In part, this lack of success with behaviour change reflects the fact that the campaigns that have been evaluated were not nearly as hard-hitting as campaigns against drink-driving or cigarette smoking: at 201.

¹⁵⁶ See, eg, *Minutes of the Meeting of 17, 19 and 20 June 2013*, WTO Doc G/TBT/M/60 (23 September 2013) (Note by the Secretariat) [3.134]–[3.136]; *Minutes of the Meeting of 30–31 October 2013*, WTO Doc G/TBT/M/61 (5 February 2014) (Note by the Secretariat) [2.106]–[2.108], in relation to an Israeli alcohol labelling measure. See also *Minutes of the Meeting of 5–6 November 2014*, WTO Doc G/TBT/M/64/Rev.1 (6 March 2015) (Note by the Secretariat) [2.118]–[2.125], which relates to an Indian food labelling proposal applying to alcohol.

annex 8-A rules on supplementary labelling now mandates that this flexibility be accorded.

The new annex 8-A rules are an advance on the current rules relevant to alcohol labelling in the *TBT Agreement*, particularly arts 2.1 and 2.2, although arts 2.1 and 2.2 have also been incorporated, by reference, into the Technical Barriers to Trade Chapter.¹⁵⁷ We will not consider in detail the implications of their incorporation. We do note that there are interesting issues about how a *TPP* panel will interpret these provisions,¹⁵⁸ given the differences in the text, context and objectives of the *TPP* compared to the *TBT Agreement*.¹⁵⁹ As discussed above, these provisions, as they appear in the *TBT Agreement*, provide considerable space to WTO members to regulate alcohol labelling using reasonable, evidence-based measures. Whether a *TPP* panel would seek to achieve the same balance between trade liberalisation and national autonomy to protect legitimate public interests is to be seen.

In this section, we consider in detail the legal arguments that may be raised about the new supplementary labelling rules in annex 8-A in the context of a formal dispute brought by one state against another under the dispute settlement processes in ch 28 of the *TPP*. We focus on annex 8-A because this rule has not been previously included in any trade agreement and has therefore not been subject to examination elsewhere. The arguments

¹⁵⁷ *TPP* (n 13) art 8.4.1(a). We note that there are at least three other potential bases in the *TPP* for challenging an alcohol labelling measure, but these are beyond the scope of this article and not considered here. Article 2.3 imposes a national treatment obligation on *TPP* parties in relation to goods, and incorporates the national treatment obligation in *GATT 1994* (n 5) art III into the *TPP*. The Investment Chapter also includes a number of provisions (see arts 9.4, 9.6, 9.8), including on national treatment, minimum standard of treatment, and indirect expropriation, that may be used by a private actor to challenge an alcohol labelling measure using investor-state dispute settlement ('ISDS'). Alcohol control measures are not given a specific exemption from the rules in the Investment Chapter. This differs from the situation with tobacco, for which a party may 'elect to deny the benefits of' ISDS in respect of claims challenging a tobacco control measure: see art 29.5. The Intellectual Property Chapter may also have implications in the context of a dispute over alcohol labelling.

¹⁵⁸ See, eg, *TPP* (n 13) art 8.4.2, where a complaint that a labelling measure is inconsistent with one or both of arts 2.1 and 2.2, as incorporated into the *TPP*, cannot be subject to *TPP* dispute settlement if it *exclusively* alleges a violation of one or both of these provisions.

¹⁵⁹ A panel constituted under the *TPP* (n 13) dispute settlement process '[w]ith respect to any provision of the WTO Agreement that has been incorporated into this Agreement ... shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body': at art 28.12.3. See also Andrew D Mitchell and Tania Voon, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 114, 119, which suggests that a *TPP* panel may see the WTO jurisprudence as persuasive and 'helpful', but it may also decide not to follow it.

outlined here may also be used in informal negotiations between the parties, or between a party and the alcohol and alcohol-related industries (such as media, advertising, sports, and agriculture) during the policy development stage for a proposal for an alcohol labelling measure. Domestic alcohol producers may also call on trade rules in an attempt to prevent a policy development that will harm their commercial, but not necessarily their trade, interests.¹⁶⁰ Governments may be concerned that being involved in an international dispute, even with a strong legal case, is a cost they are not prepared to incur as part of introducing a new public health measure. Resisting challenges in international economic law is notoriously difficult and expensive, as Australia and Uruguay both learnt when defending their tobacco control measures against international investment law claims by Philip Morris.¹⁶¹ In this sense, the mere existence of trade rules has the potential to stymie the development of public health policies.

As we will argue, it is essential that parties are not unjustifiably deterred from regulating because of arguments based on the *TPP* that have no legal merit or would not necessarily succeed if the matter proceeded to formal dispute settlement. There is a risk that, if not properly understood, rules like those on supplementary labelling in annex 8-A of the *TPP* could have a 'chilling effect' on parties interested in introducing alcohol health information labels but anxious not to invite a trade dispute and all of its inconvenience.¹⁶² Our analysis below suggests that there is scope under the Technical Barriers to Trade Chapter for parties to require evidence-based health information on alcohol warning labels, with the proviso that they must generally allow such information to be provided on a supplementary label. There are not unreasonable arguments that industry could raise in light of the Technical Barriers to Trade Chapter against health information on alcohol labels, but a government wishing to use alcohol labelling for public health purposes has the stronger case and needs to be prepared to defend it.

¹⁶⁰ See Tania Voon, 'WTO Law and Risk Factors for Non-Communicable Disease: A Complex Relationship' in Geert Van Calster and Denise Prévost (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar, 2013) 390, 402.

¹⁶¹ See *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015); *Philip Morris Brands SÀRL v Uruguay (Award)* (ICSID Tribunal, Case No ARB/10/7, 8 July 2016); *Philip Morris Asia Ltd v Australia (Final Award regarding Costs)* (Permanent Court of Arbitration, Case No 2012-12, 8 March 2017).

¹⁶² See Jonathan Liberman and Andrew Mitchell, 'In Search of Coherence between Trade and Health: Inter-Institutional Opportunities' (2010) 25 *Maryland Journal of International Law* 143, 165.

We commence our discussion with a consideration of the objectives of the Technical Barriers to Trade Chapter, before considering the substantive provisions relating to (1) supplementary labelling in annex 8-A; and (2) the public health exception from WTO *GATT 1994* art XX that has been incorporated by reference into the *TPP* and has application to the Technical Barriers to Trade Chapter.

B *Objectives of the Technical Barriers to Trade Chapter*

The objective of the Technical Barriers to Trade Chapter is to ‘facilitate trade, including by eliminating unnecessary technical barriers to trade, enhancing transparency, and promoting greater regulatory cooperation and good regulatory practice.’¹⁶³ This reflects the parties’ objectives for the whole *TPP* that include

[strengthening] the competitiveness of their businesses in global markets and enhanc[ing] the competitiveness of their economies by promoting opportunities for businesses, including promoting the development and strengthening of regional supply chains.¹⁶⁴

The concern with eliminating obstacles to international trade is also seen in the preamble to the *TBT Agreement*. However, the *TPP*’s vision for improving regional supply chains, increased transparency, regulatory cooperation and improved regulatory practice¹⁶⁵ possibly takes the *TPP* in a different direction to the *TBT Agreement*. Whereas the latter has been interpreted by the Appellate Body as addressing ‘regulatory protectionism’¹⁶⁶ as opposed to seeking ‘positive integration’ or ‘harmonization’ of regulation between the parties, it is arguable that the *TPP* is heading in the latter direction. With regulatory protectionism, ‘under the *TBT Agreement*, domestic regulations must jump through a different set of hoops [to *GATT 1994*], but in the end if they are genuinely non-protectionist they should be able to land on their feet’.¹⁶⁷ By comparison, positive integration seeks to streamline and synthesise, to the extent possible, regulatory schemes between parties.

¹⁶³ *TPP* (n 13) art 8.2.

¹⁶⁴ *Ibid* Preamble para 5.

¹⁶⁵ *Ibid* Preamble. Cf *TBT Agreement* (n 5) Preamble.

¹⁶⁶ Robert Howse, ‘Introduction’ in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2013) 1, 2.

¹⁶⁷ *Ibid* 2.

The risk in this drive for harmonisation is that ‘regulatory diversity’ is jeopardised and the parties’ ‘regulatory autonomy’¹⁶⁸ is reduced. Although the *TPP* Preamble states that the parties ‘[recognise] their inherent right to regulate[,] and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health,’¹⁶⁹ there is a strong thrust in the text of the *TPP* towards regulatory consistency between parties that suggests that the balance struck in the WTO agreements has shifted with the *TPP*. The inclusion of annex 8-A in the *TPP* directly reflects this move beyond the concerns about disguised protectionism that underpinned the negotiation of the WTO agreements and the new push for increased flexibility in the international trading environment.

This new direction as reflected in the objectives of the *TPP*, in turn, raises questions about the interpretation of the Technical Barriers to Trade Chapter and, in particular, the applicability of the interpretation of arts 2.1 and 2.2 of the *TBT Agreement* to the equivalent provisions in Technical Barriers to Trade Chapter. It may be that, given the different purposes underpinning the *TPP* compared to the *TBT Agreement*, we may see a stricter interpretation and application of arts 2.1 and 2.2 by a *TPP* panel, compared to the WTO approach.

C *TPP Annex 8-A*

1 *Supplementary Labelling Rules*

Annex 8-A prescribes rules for technical regulations in relation to wine and distilled spirits, including labelling and packaging,¹⁷⁰ quality and identity requirements for wine,¹⁷¹ and product certification.¹⁷² At least some of these provisions appear to be novel, in particular the provision on supplementary labelling that is the focus here.

¹⁶⁸ See *ibid* 1–2.

¹⁶⁹ *TPP* (n 13) Preamble para 9.

¹⁷⁰ *Ibid* ch 8 annex 8-A paras 1–18.

¹⁷¹ *Ibid* ch 8 annex 8-A paras 19–20.

¹⁷² *Ibid* ch 8 annex 8-A paras 21–3. The annex only applies to wine and spirits, and not to beer. But arguably annex 8-A creates a *de facto* standard for the labelling of beer, because it is highly unlikely that a party would allow supplementary labelling for imported wine and spirits, but not for imported beer. Otherwise, the principal labels on imported beer products alone would have to be modified to accommodate labelling rules of the importing country.

In relation to distilled spirits, para 5 of annex 8-A provides that '[i]f a Party requires a supplier to indicate information on a distilled spirits label, the party shall permit the supplier to indicate that information on a supplementary label that is affixed to the distilled spirits container'. Similar provision is made for supplementary labelling of wine,¹⁷³ except for the following labelling information: the product name, country of origin, net contents, and alcohol content, which must be presented in a single field of vision or, if not, in accordance with each party's laws¹⁷⁴ The effect of paras 5 and 10 is that if a *TPP* party were to require wine and spirits bottles to display alcohol health warnings or health information, there is a *prima facie* obligation on the party to allow wine and spirits suppliers to place this information on a 'supplementary label' to be affixed to the container. Similarly, if a party required an ingredients list, caloric information, a lot number or producer/importer contact details for a packaged alcoholic beverage, the party must allow these to be placed on a 'supplementary label'.¹⁷⁵

What is a 'supplementary label' for the purposes of annex 8-A? There is no definition in the *TPP*. But it seems to be a label that is affixed to the product, is additional to the standard or principal product labels, and is generally used as an alternative to removing the standard or principal labels and relabelling the container with the conforming label ('narrow definition'). For example, many wine bottles are labelled with a front and back label as their principal labels. In these instances, a supplementary label is one that is additional to these two labels, such as a sticker placed over the back label. This reading of the term is supported by the Codex Alimentarius standard on labelling of pre-packaged food, which does not define 'supplementary labelling' but refers to it in contradistinction to 'relabelling', with the latter involving the removal of the existing label on the container and its replacement with a new label.¹⁷⁶

The text of the *TPP* also suggests that the supplementary label cannot simply be a tag on a piece of string hung around the neck of a bottle or a sticker easily able to be peeled off (much like a price tag). Rather, the *TPP*

¹⁷³ *TPP* (n 13) ch 8 annex 8-A para 10.

¹⁷⁴ *Ibid* ch 8 annex 8-A para 8. There is also allowance made for parties to require net contents to be displayed on the principal display for less commonly used container sizes, if required by the party's domestic laws or regulation: at ch 8 annex 8-A para 9.

¹⁷⁵ *Ibid* ch 8 annex 8-A para 10.

¹⁷⁶ 'General Standard for the Labelling of Prepackaged Foods' (Codex Stan 1-1985, World Health Organization and Food and Agriculture Organization of the United Nations, 1985) cl 8.2 <www.fao.org/docrep/005/Y2770E/y2770e02.htm>, archived at <<https://perma.cc/F23A-MUBD>>.

seems to intend that a supplementary label be unable to be removed, in the course of ordinary usage. This reading is supported by the definition of ‘label’ in annex 8-A as ‘any brand, mark, pictorial or other descriptive matter that is written, printed, stencilled, marked, embossed or impressed on, or firmly affixed to the primary container of wine or distilled spirits.’¹⁷⁷ Each of these ways of adding a label to a wine or spirit container suggests the label is to have some permanence. It also suggests that the label is what appears on the container in which the alcoholic beverage is stored — ‘the primary container’¹⁷⁸ — and not the packaging around the bottle (eg the cardboard box in which a bottle of wine is presented). A party may also require that a supplementary label not obscure any required information on the container.¹⁷⁹

It is possible that the term ‘supplementary label’ may be used in a slightly different sense to refer to an additional label that can fit into some *unused* space on the container and that does not interfere with the standard labels (‘broad definition’). For example, this would mean that the supplementary label has to be able to fit down the side or around the neck of a regular-shaped wine bottle or in some blank space on the principal label. It might also mean that the label has to be able to fit on the bottom or top of a bottle if the bottle had an unusual design and the label could not be attached to the main surface of the bottle without interfering with the design.¹⁸⁰ We argue in Part IV(C)(3) that it is the narrow definition of supplementary labelling that applies in annex 8-A. The broad definition of the term, if applicable, would have serious implications for the operation of the rules in the *TPP* and the capacity of parties to achieve public health goals using labelling strategies.

2 Trade Rationales for Supplementary Labelling

One of the functional purposes 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 market and apply an extra country-specific label either during manufacturing or after manufacture, usually once the product has entered the importing country and before it leaves customs and passes into the hands of

¹⁷⁷ *TPP* (n 13) ch 8 annex 8-A para 2.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* ch 8 annex 8-A para 11.

¹⁸⁰ See Oendrilla De, ‘10 Unique Liquor Bottles’, *Wonderslist* (Web Page) <www.wonderslist.com/10-unique-liquor-bottles/>, archived at <<https://perma.cc/UJ5S-VRRN>>.

wholesalers/retailers. If the same base label is used on every unit of the product, there is no need for stoppages of labelling machines at the main manufacturing site to change over to a different form of labelling for a specific export market. In this sense, the common labelling of alcoholic beverages does reduce regulatory disharmony between *TPP* parties.

At the same time, the design and use of different labels for different markets may not be greatly disruptive of international trade. Specific information on the extra costs of changing wine bottle labels for different destinations is not in the public domain. The cost of introducing new wine labels with health warnings has been estimated as between A\$4,000 and A\$13,000 per stock-keeping unit (each product line), which is a very low cost for large manufacturers producing huge quantities of each product line.¹⁸¹ But this cost does not relate to a system of using different labels for different markets, so the costs of having multiple labels may be higher. At the same time, the alcohol industry may choose to produce different labels for different markets to accommodate language differences or to present the product in a manner which appeals to consumers in a specific market.¹⁸² Arguably what the option of a supplementary label does, in practice, is to give the alcohol industry flexibility as to whether it uses a supplementary label or it redesigns its principal label for a particular export market.

The industry may also argue that trade is further facilitated by a supplementary label that fits into *unused space* on a container (in support of the broad definition of supplementary labelling), because it enables a supplier to comply with labelling requirements for additional country-specific messages without interfering with the commercial appearance of the product's standard labelling. Otherwise, suppliers risk sullyng the appearance of the product, and, in turn, undermining the capacity of the product (particularly if it is a high-end product) to compete in the particular market. It is questionable whether alcohol labelling, in fact, burdens trade in this manner. But whatever the trade effects, when the industry can relegate government-mandated information to a supplementary label squeezed into some unused place on the container, the industry is able to undercut the expressive and symbolic potential of the government's message.¹⁸³

¹⁸¹ PricewaterhouseCoopers, *Cost Schedule for Food Labelling Changes* (Final Report, 7 March 2008) 2–5.

¹⁸² See, eg, 'Labels — Getting Started', *VinPro Central Otago: Resource Centre* (Web Page) <www.vinpro.co.nz/files/Labels%20-%20Basic%20Checklist.pdf>, archived at <<https://perma.cc/5WTN-UC2M>>.

¹⁸³ See Part IV for a discussion on alcohol messaging.

3 The Supplementary Labelling Requirement and Health Information

This section explores the supplementary labelling rules in paras 5 and 10 of annex 8-A and their implications for health information on alcoholic beverage containers. If a *TPP* party introduced a mandatory warning scheme and expressly stated that suppliers could *not* use supplementary labels for the health information and insisted that suppliers change their standard labels to incorporate the health information into the principal label, then such a party would be in breach of the obligations in paras 5 and 10 of annex 8-A to allow for supplementary labelling of spirits and wine respectively. If a *TPP* party wished to defend such a measure, it would need to argue that its refusal to accept supplementary labels for health information was justified under the ‘public health exception’ in *TPP* art 29.1. This exception is discussed in detail in Part VI(D).

An alternative scenario may involve a party introducing a new mandatory alcohol labelling scheme that includes design (eg size, font and layout) and placement (eg front of container) requirements for its labels, yet maintaining the position that suppliers are permitted to use supplementary labels. In this situation, an argument may be made that the design and placement prescriptions are such that wine and spirits suppliers cannot, *in practice*, use a supplementary label to apply the warnings and they are *de facto* being required to redesign their primary front labels to accommodate the warnings in the legislated form. For example, the argument might be made that if a party mandated that a label cover 50% of the front of the container, then a supplementary label would not be able to be applied without covering the front principal label. The complainant’s argument uses the broad definition of a supplementary label as one that can fit into the *unused space* on the container.

In our view, *TPP* parties have a reasonable rebuttal to this argument based on the narrow definition of ‘supplementary labelling’ as an additional label placed on the product after manufacture but before sale. If this definition were accepted, then there could be no complaint that a government is *de facto* prohibiting a supplementary label if it prescribes design and placement requirements. In the absence of any evidence that the parties intended for a special meaning to apply to the term ‘supplementary labelling’,¹⁸⁴ then the term is to be given its ordinary meaning in its context and in light of the treaty’s object and purpose, in accordance with arts 31 and 32 of the *Vienna*

¹⁸⁴ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(4).

Convention on the Law of Treaties, which is made to apply expressly to the interpretation of the *TPP* by *TPP* art 28.12(3).

The ordinary meaning of the term ‘supplementary’ could be said to be a label containing information that is added to the container to remedy some ‘deficiency’ or ‘inadequacy’ in the information contained on the principal label.¹⁸⁵ This ordinary meaning does not connote *where* that additional label is to be placed on the container. Other provisions in annex 8-A provide contextual support for this ordinary meaning. Paragraphs 5 and 10 of annex 8-A both make several mentions of the supplementary label being ‘affixed’ to the spirits or wine containers, and focus on the entitlement of the supplier to affix the label after import but before sale or release from customs. These provisions confirm the idea that the allowance for supplementary labelling is about avoiding the trade-related burden of having to relabel goods by allowing the ‘affixing’ of an additional label. Furthermore, para 13 of annex 8-A expressly provides that suppliers may decide where to place lot codes on containers (provided that these codes do not cover up essential information provided on the label), as well as the font size, phrasing and formatting for the codes. This express granting of a right to suppliers to decide design and placement features of one type of information (lot codes) would suggest that suppliers do not generally have this entitlement in relation to other types of labelling information.

The narrow reading of the term ‘supplementary labelling’ also fits with the purpose of the *TPP*, being to strengthen the competitiveness of businesses, develop regional supply chains and, specifically in relation to Technical Barriers to Trade Chapter, decrease technical barriers to trade. These obstacles are lessened when a supplier is permitted to use an additional label affixed after manufacture. The supplier averts the need to alter manufacturing practices to apply these country-specific labels. Although additional trade barriers might be removed if a supplier can place the supplementary label in an unused place on the container, the other factors outlined above suggest that the narrow reading of the term ‘supplementary label’ is to be preferred.

In a third scenario, if a party were to prescribe extensive design and format requirements for health information on wine and spirits labels, it might face

¹⁸⁵ Note the *Oxford English Dictionary* contains no definition of the term ‘supplementary label’ but its definitions of ‘supplementary’ (‘serving as a supplement’) and ‘supplement’ (‘A thing (occasionally a person) added to make good a deficiency or as an enhancement; an addition or continuation to remedy or compensate for inadequacies’) are a useful starting point: *Oxford English Dictionary* (3rd ed, June 2012), ‘supplement’ (n¹, def 1a), ‘supplementary’ (adj, def 1).

an argument that the party has no power to impose these requirements on suppliers. This argument would be based on the terms of para 4 of annex 8-A which states that

[a] Party may require a supplier to ensure that any statement required by that Party to be placed on a wine or distilled spirits label is: (a) clear, specific, truthful, accurate and not misleading to the consumer; and (b) legible to the consumer; and that such labels be firmly affixed.

The argument may be made that this provision is an exhaustive statement of the matters that a *TPP* party is permitted to prescribe in respect of a supplementary label. This argument would be highly unlikely to succeed in litigation. A party has a very strong counterargument that this provision was not intended to limit the party's power to regulate design and placement features of wine and spirits label information. In both paras 5 and 10, the provision is prefaced with the words 'For greater certainty', which suggests that the provision seeks to affirm the right of parties to regulate the listed matters and does not alter the party's power in relation to unlisted matters, including label design and position.

This analysis of the supplementary labelling rule confirms that governments that mandate health information labelling for alcoholic beverages, including design and placement features for such labels, but allow the information to be applied as a supplementary label, will be acting consistently with the supplementary labelling obligations in annex 8-A. The text of the *TPP* suggests that a supplementary label should be understood as a label that is additional to the product's standard label, but not necessarily one that must be able to fit into an unused space on the container. States should therefore resist arguments from other parties or private actors to the contrary. The above analysis nonetheless shows that there is an arguable case to be made by the alcohol industry against alcohol labelling measures. Although we conclude that the industry's arguments would not prevail, governments will require some resolve to withstand the industry's claims under the *TPP*.

D Public Health Exception

Article 29.1 of the *TPP* imports, by reference, the general exceptions from art XX from the WTO *GATT 1994* into the *TPP* ('*TPP* exception'). The general exceptions in the WTO context represent a balance between trade

liberalisation and important social values, including human health.¹⁸⁶ Presumably, the exceptions have been incorporated into the *TPP* to maintain some similar balance. Relevantly to alcohol labelling, art XX(b) provides:

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 parties of measures: ...
(b) necessary to protect human, animal or plant life or health ...¹⁸⁷

Under the WTO system, the exception has been given no application to the *TBT Agreement* and has only been applied to *GATT 1994*.¹⁸⁸ However, the *TPP* applies the exception to the *TBT Agreement* Technical Barriers to Trade Chapter, including annex 8-A. It makes sense for the exception to be applied to annex 8-A, as there is otherwise no exception from the supplementary label rules even on grounds of public health. However, the application of the *TPP* exception to arts 2.1 and 2.2 is more complex. The presence of the exception may lead to a TPP panel giving a different interpretation to arts 2.1 and 2.2 as incorporated into the *TPP* compared to the interpretation given to them in the *TBT Agreement*.¹⁸⁹ But even if a stricter standard were therefore imposed

¹⁸⁶ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 3rd ed, 2013) 543–82.

¹⁸⁷ *GATT 1994* (n 5) art XX(b). There is also some possibility that a party may argue that the exception for measures ‘necessary to protect public morals’ applies to an alcohol labelling requirement: at art XX(a). In Appellate Body Report, *US — Gambling* (n 144) [296]–[299], citing Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.465] (‘*US — Gambling*’), the Appellate Body appeared to approve the Panel’s definition of public morals as ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’.

¹⁸⁸ However, note that there is some academic discussion that art XX could apply to the *TBT Agreement*. See Senai W Andemariam, ‘Can (Should) Article XX(b) GATT Be a Defense against Inconsistencies with the SPS and TBT Agreements?’ (2006) 7 *Journal of World Investment and Trade* 519. The issue was raised again in 2014: see Simon Lester, ‘GATT Article XX an Exception to the TBT Agreement’, *International Economic Law and Policy Blog* (Blog Post, 8 August 2014) <<http://worldtradelaw.typepad.com/ielpblog/2014/08/gatt-article-xx-and-the-tbt-agreement.html>>, archived at <<https://perma.cc/55F2-WR96>>.

¹⁸⁹ See, eg Appellate Body Report, *US — Clove Cigarettes* (n 129) [96]–[102]; Appellate Body Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) [5.122]–[5.124] (‘*EC — Seal*’), where the absence of a general exceptions clause, such as in art XX, in the *TBT Agreement* has been taken into account by WTO panels and WTO Appellate Body in reading art 2.1 in the *TBT Agreement*.

by way of arts 2.1 and 2.2, it may be that the *TPP* exception saves a measure otherwise inconsistent with these provisions.

Assuming the *TPP* exception operates in a similar manner to art XX in the *GATT 1994*, it would have the effect of allowing a measure even if it is inconsistent with other commitments in the *TPP*. To determine the applicability of the exception, there is a two-stage test to be applied.¹⁹⁰ A panel would firstly consider whether the disputed aspects of the measure meet the requirements in para (a) of art XX in the sense that the measure ‘address[es] the particular interest specified in that paragraph’ — the protection of the public’s health — and whether ‘there be a sufficient nexus between the measure and the interest protected’,¹⁹¹ being, in relation to para (a), that the measure is ‘necessary’ for the protection of public health. If the measure passes the first stage, the panel would then consider whether the measure meets the requirements of the chapeau in that it does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.¹⁹²

The necessity of a measure, such as an alcohol labelling requirement, is a weighing and balancing exercise, very similar to that discussed above in the context of the WTO Appellate Body’s interpretation of art 2.2.¹⁹³ The panel must weigh: (a) the relative importance of the objective of the measure (with the protection of human health being recognised as ‘vital’ and ‘important in the highest degree’),¹⁹⁴ (b) the extent to which the measure contributes to the public health objective (where the panel will be looking to see whether there is a genuine relationship of means and ends between the objective pursued and

¹⁹⁰ Appellate Body Reports, *EC — Seal* (n 189) [5.169], citing: Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996) 22 (‘*US — Gasoline*’); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [118]–[120] (‘*US — Shrimp*’). See also Appellate Body Report, *US — Gambling* (n 144) [292].

¹⁹¹ Appellate Body Report, *US — Gambling* (n 144) [292]. See also Appellate Body Reports, *EC — Seal* (n 189) [5.169].

¹⁹² Appellate Body Report, *US — Shrimp* (n 190) [159]. See also Appellate Body Reports, *EC — Seal* (n 189) [5.297].

¹⁹³ Appellate Body Reports, *EC — Seal* (n 189) [5.169], citing: Appellate Body Reports, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000) [164] (‘*Korea — Beef*’); Appellate Body Report, *US — Gambling* (n 144) [306]; Appellate Body Report, *Brazil — Retreaded Tyres* (n 144) [178], [182].

¹⁹⁴ Appellate Body Report, *EC — Asbestos* (n 126) [172] (emphasis omitted).

the measure at issue,¹⁹⁵ and whether the measure was apt to make a contribution to the achievement of the objective);¹⁹⁶ (c) the extent to which the measure produces restrictive effects on international trade;¹⁹⁷ and (d) in most instances, any more WTO-consistent measure which the member concerned is not currently taking¹⁹⁸ and which it could reasonably be expected to implement to make an equivalent contribution to the same policy end (taking into account the availability of the measure, and the technical or financial burden of the measure).¹⁹⁹ A measure will be necessary where there are no less trade-restrictive measures reasonably available that could make a contribution to the member's health objective equal to that of the contested measure.²⁰⁰ The purpose of the second stage of the test under the chapeau is to 'balance ... a Member's right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994'.²⁰¹

Were a *TPP* party to insist that all alcohol producers — domestic and foreign — place health warnings on the principal label, rather than on a supplementary label as required under annex 8-A, its ability to rely on the *TPP* exception to justify the measure would turn on whether it was considered necessary for the warning to be on the principal label and whether it met the requirements of the chapeau. Given that supplementary warning labels are less trade-restrictive than warnings appearing on the principal label, it is the issue of the relative contribution made by these two competing measures that would be determinative here. The responding party would need to push the argument that the appearance of the warning on the principal label makes a *greater* contribution to the achievement of an important public health objective than if the warning were on a supplementary label. In other words, the relegation of a warning to a supplementary label, even if design and placement features were mandated by the responding party, would send a

¹⁹⁵ Appellate Body Report, *Brazil — Retreaded Tyres* (n 144) [145].

¹⁹⁶ Ibid [152]; Appellate Body Reports, *EC — Seal* (n 189) [5.213].

¹⁹⁷ Appellate Body Reports, *EC — Seal* (n 189) [5.204]–[5.217].

¹⁹⁸ Appellate Body Reports, *Korea — Beef* (n 193) [166].

¹⁹⁹ Appellate Body Report, *US — Gambling* (n 144) [308]. See also Appellate Body Reports, *EC — Seal* (n 189) [5.261], citing Appellate Body Report, *Brazil — Retreaded Tyres* (n 144) [156].

²⁰⁰ Appellate Body Report, *Brazil — Retreaded Tyres* (n 144) [156]; Appellate Body Report, *China — Publications and Audiovisual Products* (n 154) [241]–[242].

²⁰¹ Appellate Body Reports, *EC — Seal* (n 189) [5.297], citing Appellate Body Report, *US — Shrimp* (n 190) [156].

different message about consumption and harms from alcohol than if the warning was on the principal label. There is no evidence, to our knowledge, about the effectiveness of warnings on principal as opposed to supplementary labels, but the responding party would need to draw heavily on the evidence outlined in Part IV about the design and placement features that have been shown to make health information effective on alcohol and tobacco products. The success of the responding party might be determined in part by the willingness of a panel to accept the argument about the symbolic or expressive function performed by labels in changing the way society thinks about potentially dangerous products, such as alcohol. However, this kind of claim is not easily supported by the positivist science that has recently been used by the WTO panels and the WTO Appellate Body.²⁰² However, if the measure were to (slimly) pass the necessity test, then there seems unlikely to be any difficulty satisfying the requirements of the chapeau, given that the measure applies without discrimination to all alcoholic beverages.

VII CONCLUSION

The *TPP*'s inclusion of new rules on supplementary labelling of wine and spirits speaks to the goal of increasing regulatory harmonisation that underpins the *TPP*. The alcohol industry and alcohol producing nations undoubtedly benefit from these new rules that are an advance on the protections for international trade found in the *TBT Agreement* and other existing international and regional trade and investment rules.

Our analysis suggests that the new rules negotiated in the *TPP* potentially create some challenges, though probably not insurmountable ones, for countries wishing to introduce new labelling regimes to display health information on alcohol containers. Complaints about such measures can already be brought under the *TBT Agreement*, particularly arts 2.1 and 2.2, but the way in which these provisions have been interpreted in WTO jurisprudence suggests that a government planning a well-designed, non-discriminatory and evidence-based labelling regime would be likely to be able to defend it in the WTO. The *TPP* imports these provisions. In the event that they are invoked in the context of a *TPP* dispute, their interpretation and application is somewhat uncertain.

²⁰² See Tania Voon, 'Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law' (2015) 18 *Journal of International Economic Law* 795.

Further, the *TPP* includes a set of novel rules that requires parties to allow wine and spirits suppliers to place information required by an importing country on a supplementary label. We expect that this rule may generate considerable argument between *TPP* parties, and with interested industries. In strict legal terms, we have concluded that the rule requires a party to generally allow a supplementary label to be used to display health information. The public health exception in the *TPP* is also potentially available to allow a party to insist that health information be on the principal label and not just a supplementary label. Very importantly, we have also concluded that the supplementary labelling rule does not prevent a party dictating placement and design features of supplementary labels. Compliance with the supplementary labelling rule rests on producers being permitted to affix an additional label to their products as an alternative to removing the standard labelling and applying a new label with the required information. Compliance with the *TPP* rule does not require a party to enable a supplementary label to be fitted into some unused space on the container. But whatever the technical terms of the supplementary labelling rule, it is possible that the industry sees it as an implied agreement by government not to burden industry with more labelling requirements. From a public health perspective, it is essential that the supplementary labelling rules not be interpreted in this manner.

Although the *TPP* is unlikely to come into operation in its current form, we are certain that these new rules on alcohol labelling will start to be proposed in other trade agreements, which are likely to emerge in the coming years in the wake of the *TPP*'s failure. We have already seen the inclusion of annex 8-A in the *Agreement to Amend the Singapore–Australia Free Trade Agreement*.²⁰³ The global burden of alcohol-related harm is considerable and there is a strong rationale for better health information on alcohol containers as an important element of a comprehensive strategy to reduce it. In this context, it is important that a state's right to introduce evidence-based alcohol health information to educate, change drinking behaviour and send the message that alcohol is '[n]o ordinary commodity' is preserved.²⁰⁴ In future trade agreements, the best course for the protection of public health would be to explicitly exclude health information from the supplementary labelling rules. For example, the existing text of annex 8-A para 5 could be amended to state: '*If a Party requires a distilled spirits label to indicate information other than information about human health, it shall permit the supplier to indicate*

²⁰³ *Agreement to Amend the Singapore–Australia Free Trade Agreement* (n 24) annex 5C.

²⁰⁴ See Babor et al (n 68).

that information on a supplementary label.²⁰⁵ Or an additional paragraph could be added to the annex:

The obligation in paragraphs 5 and 10 for a Party to permit information to be indicated on a supplementary label does not apply to information about human health required by the Party. For certainty, nothing in this Agreement prevents a Party from requiring that information about human health be indicated on the main label.

Alternatively, at the very least, the text should be amended to affirm that a state may prescribe the presentation and placement features for information it requires to be included on wine and spirits containers. The amendment to paras 5 and 10 could be in the following terms:

For greater certainty, a Party may require that the information indicated on a supplementary label meet the requirements in paragraph 4 *and any other requirements determined by the Party with respect to the presentation and placement of the information. Further, the Party may impose the same presentation and placement requirements for information indicated on a supplementary label or on the main label.*

If such changes are not made and states are bound by rules such as those in the Technical Barriers to Trade Chapter, it will be important for states seeking to use the alcohol label space for providing health information to their populations to understand the proper meaning of the supplementary labelling rules and to resist arguments from the industry and other governments that seek to deter states from regulating. Knowing the limits of these new rules is an important part of states being equipped to use health information labelling to reduce the harms from alcohol consumption in the face of an industry desperately trying to protect its priority use of the alcohol label space to disseminate its powerful marketing messages.

²⁰⁵ A similar amendment could be made in relation to wine in *TPP* (n 13) ch 8 annex 8-A para 10.