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Commentary

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Commentary on 'Communicating Messages About Drinking': *Using the 'Big Legal Guns' to Block Alcohol Health Warning Labels*

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Abstract

Like the tobacco industry, the alcohol industry, with the support of governments in alcohol exporting nations, is looking to international trade and investment law as a means to oppose health warning labels on alcohol. The threat of such litigation, let alone its commencement, has the potential to deter all but the most resolute governments from implementing health warning labeling.

The recent Special Issue of *Alcohol and Alcoholism* (Hassan and Siu, 2018; Hobin *et al.*, 2018; Pham *et al.*, 2018; Vallance *et al.*, 2018) reviewed evidence on the role of health warnings, in particular, on labels. There is a particular legal aspect which deserves mention. The law has an intimate relationship with alcohol, and has been essential to many advances in alcohol control. But law is not only facilitative. It can be an obstacle to good alcohol policy and can be used to raise objections to new public health measures. This is particularly evident at present in relation to the labeling of alcoholic beverages with health information, including warning labels. The alcohol industry may claim that alcohol warning labels would be unlawful, threatening to commence a formal legal challenge in national, supra-national or international courts and tribunals. These claims may not have legal merit, and may not succeed if the challenge proceeded to final dispute settlement, but will be expensive, time-consuming and distracting if they do. Furthermore, the mere raising of these issues may deter governments from proceeding with labeling reforms.

The tobacco industry has shown governments around the world that it is serious about using law to challenge new tobacco control packaging and labeling measures. Although Australia has successfully defended legal challenges by the tobacco industry to its plain packaging measure in its highest court on constitutional law grounds (Liberman, 2013) and before an international arbitration tribunal on the basis of international investment law (Voon and Mitchell, 2016), and it seems likely that the World Trade Organization will decide in its favor (Reuters, 2017), it has been highly costly and time-consuming to defend these challenges (Sydney Morning Herald, 2017). When Uruguay was subject to an international investment law claim by Phillip Morris International (Voon, 2017) for its graphic tobacco warnings and single presentation requirement, it considered scaling back the regulations to appease the tobacco company, at least partly because it could not afford the onerous costs involved in defending the threatened claims. In the end, Uruguay stayed the course and was successful against the tobacco industry, but was highly dependent on support from the Bloomberg Foundation to do so (Crosbie *et al.*, 2017).

Sometimes, industry challenges are successful and public health measures have to be redrawn or abandoned. This was the case in the USA, with the Court of Appeals for the DC circuit accepting that graphic tobacco warnings breached the first amendment right to freedom of speech (Orentlicher, 2013). The US Food and Drug Administration has yet to produce a revised set of graphic warnings, but even if it does, delay in the introduction of new measures is a

win for the industry. 'Regulatory chill' can affect governments, who wait to see the outcome of industry challenges before pursuing similar public health measures (Liberman and Mitchell, 2010). In the words of Margaret Chan, former Director-General of the World Health Organization, '[w]hat industry is aiming for is a domino effect, where countries fall in their resolve, one after another, under the threat of legal action' (Bloomberg Philanthropies, 2016).

The alcohol industry also seems to have realized the power in raising legal arguments and claims against alcohol control policies. Litigation has previously been used to attack alcohol marketing restrictions (Alemanno, 2013), and taxation and retailing arrangements (McGrady, 2011). In Yukon Territory, in Canada, the alcohol industry succeeded in removing new labels warning that 'Alcohol can cause cancer, including breast and colon cancers' from bottles and cans by raising a 'large range of [legal] concerns' (Picard, 2018). The alcohol industry—with the support of governments in the major alcohol exporting nations—now seems to be increasingly turning to the body of international trade and investment law to push back against countries seeking to pursue labeling reforms.

The first clear evidence of this was in 2010, when Thailand proposed graphic health warnings, with confronting images and text warnings that, amongst other things, 'drinking alcohol causes liver cirrhosis', 'drinking alcohol leads to inferior sexual performance' and 'drinking alcohol is a bad influence on children and young people' (European Policy Alliance, 2010). Thailand's proposal was subject to intense and extensive discussion in the World Trade Organization's Technical Barriers to Trade Committee (TBT Committee). The TBT Committee is a diplomatic and not a legal forum where WTO members can raise trade concerns about regulatory proposals, but the raising of issues in the TBT Committee is a harbinger of future disputes. Australia, the European Union, New Zealand and USA all expressed strong opposition to the Thai labels on the grounds that they would not be consistent with *WTO Agreement on Technical Barriers to Trade* (TBT Agreement, 1994) because they were more restrictive of international trade than was necessary to achieve Thailand's public health goal of addressing harms from alcohol consumption (O'Brien, 2013). The objecting WTO members all suggested that less trade restrictive measures were available, which they claimed were equally effective, including public and school education campaigns, and inclusion of alcohol content information on the label. Given the threat of litigation the objections implied, the Thai warning proposal has not proceeded.

Since 2010, a further nine alcohol warning label proposals (by Kenya, India, Ireland, Israel, Korea, Mexico, South Africa and Turkey) have been subject to discussion in the TBT Committee about their consistency with international trade law. The major alcohol exporting nations repeatedly question specific features of the new alcohol labeling policies (e.g. see TBT Committee, Minutes of the Meeting 10–11 November 2016). The content of the warnings is always a contentious issue. If the warning is concerned with drink driving, underage drinking or drinking during pregnancy, there is usually no objection. However, if the warnings mention links between alcohol and cancer, there are persistent queries about the validity of the claim. Further, if there is a suggestion that drinking alcohol *per se* is a cause of health problems, there are further complaints. Warnings including graphics or pictograms also invite more comments from WTO members than those without, as do warning regimes that mandate prominent presentation and placement requirements, and regular rotation. Refusal by governments to allow warnings to be applied as stickers or supplementary labels rather than on the main label has also been a recurring theme.

International trade law imposes various disciplines on countries that are relevant to labeling, including that they not discriminate between local and imported goods, and that their domestic labeling laws and policies are not unnecessarily trade restrictive (TBT Agreement, 1994). International investment agreements require, among other things, fair and equitable treatment, and prohibit indirect expropriation of investments (Phillip Morris v Uruguay, 2016). Where warning labels are worded or designed to reflect good scientific evidence, a country can have some confidence that its warning policy would be found to be consistent with international trade and investment law if the matter proceeded to dispute settlement. But no absolute assurance can be given, and it is this uncertainty that the industry can exploit with threats of long, technical and expensive litigation if governments refuse to wind back their 'offending' public health measures.

A particular source of difficulty for governments defending new measures is the lack of clarity about the strength of the supporting evidence that will be demanded by international dispute bodies. Apart from the evidence on the connection between drinking and the specified harm, there is the issue of whether the label will have significant effects in changing behavior. For alcohol warnings, the evidence of behavior change from existing warning labels is weak in comparison with the evidence on tobacco warnings (O'Brien *et al.*, 2017). The evidence from consumer surveys on studies of prototype alcohol warning labels or from studies on tobacco, which points to increases in the specificity of the message and in the size and graphic nature of a label being associated with more caution about the product, may not be considered adequate (O'Brien *et al.*, 2017). In the face of these unknowns, there is a chance that a country may be convinced that it is too risky to experiment with labeling given the potential costs and imposts of litigation. This may be a particularly acute risk for low- or middle-income countries with few resources and those with little expertize in international trade and investment disputes. In these circumstances, it is important for intellectual and financial resources to be made available to equip and support countries (such as happened with Uruguay for tobacco) to pursue innovative alcohol control measures and to respond to claims that their measures are inconsistent with international trade law.

It now seems that the alcohol industry is not satisfied that existing international trade and investment law is providing sufficient protection of its labeling interests, and that it wants these rules to be strengthened in its favor. Additional rules governing wine and spirits labeling have been included in the *Trans-Pacific Partnership Agreement* ('TPP'), concluded in February 2016 between 12 parties, including USA, Australia, New Zealand and Canada (TPP, 2016). The USA has since withdrawn, but it seems that the TPP may proceed without the US (ABC, 2017). The wine and spirits labeling rules have also been included in the *Agreement to Amend the Singapore-Australia Free Trade Agreement* (SAFTA, 2016), and it seems likely that they are being considered for inclusion in the Regional Comprehensive Economic Partnership ('RCEP'), which is being negotiated between 16 countries, including the major economies of Asia, such as China, India and Japan.

These new rules require countries to allow manufacturers to apply country specific information on a 'supplementary label' on imported wine and spirits (TPP, 2016). This is intended to save manufacturers from having to design and apply different main labels for different markets. The rule seems a rather innocuous and commonsense provision at first glance. However, we argue that the industry may use the rule to raise a legal argument that countries are not entitled to set label presentation and placement requirements, because inherent in the concept of a 'supplementary label' is the idea

that the label must be able to fit around, and not interfere with, the main labels (O'Brien *et al.*, 2017). If so, the rule would not just mean that a warning is relegated to a supplementary label, rather than being on the main label (which might be problem enough), but that the supplementary label could be placed in some inconspicuous place on the container. This is how the industry, when left to regulate itself, is largely positioning warning labels about drinking during pregnancy in Australia (Siggins Miller, 2014). Although we hold the view that the industry argument would be unlikely to succeed if it were used in litigation, it is a plausible argument, an argument that government officials could not shrug off.

We also think that the industry may regard this supplementary labeling rule, whatever its intended *legal* meaning, as representing a *political* bargain between governments and industry: that governments will not seek to control the label space and will leave the industry's 'property' alone. We therefore wish to urge caution with the development of new trade and investment laws. At a minimum, the supplementary labeling rules, appearing in the TPP and being considered for inclusion in RCEP and possibly other regional trade agreements, should be revised to exclude limitations on information about human health (O'Brien *et al.*, 2017). It is essential that further bases for industry arguments against public health measures for alcohol are not opened up.

It is entirely predictable that the industry will continue to use law to deter governments from further regulation of alcohol. The raising of legal doubts, threats of litigation and the actual commencement of litigation all have the potential to sway all but the most the resolute and well-resourced governments from prioritizing public health over industry interests. At present, alcoholic beverages in most countries have little health-relevant information on the label. Often they are exempted even from requirements that foodstuffs be labeled with nutritive information. Warnings that alcohol is a risky commodity, and concerning specific health risks, are still rare. Given that alcohol drinking is among the leading risks to health globally (Lim *et al.*, 2012), governments are likely to move increasingly to require health warnings and information on alcohol labels. Impeding or stopping such moves through trade and investment treaties and disputes would be substantially against the public interest and public health.

CONFLICT OF INTEREST STATEMENT

No author has a conflict to declare.

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