

Trade, alcohol policy and public health

Introduction

1. The purpose of trade is to increase economic efficiency. Trade allows countries to specialise in producing the goods and services that they are better at producing and to import goods and services that other countries are better placed to produce. Perhaps the most famous illustration of the benefits of trade, used in Economics classes to this day, relates to alcohol: David Ricardo's observation in 1817 that the English and Portuguese would both be better off if Portugal specialised in wine and sold it to England, while England specialised in cloth and traded to the Portuguese in exchange for the wine.¹
2. The reason efforts to promote trade come into conflict with public health is because for many unhealthy commodities, it is desirable to make markets *less efficient*, not more.² Consider the 'best buy' policies recommended by the World Health Organization (WHO) to reduce alcohol harm: regulating prices, restricting marketing and advertising, limiting where and when alcohol can be sold.³ Such policies can be seen as attempts to put 'grit in the wheels', and slow down a market in some ways working too well, encouraging too much consumption.
3. With alcohol markets increasingly globalised, trade has become an ever more prominent consideration for policymakers trying to balance efficiency and regulation. To illustrate: the UK based multinational drinks producer Diageo generated 83% of its revenue from Europe and North America in 2000; by 2019, this had fallen to 57%. In 2019, its sales in Europe rose by 2%, while African sales rose by 50%.⁴
4. Trade and investment agreements (TIAs) – ranging from bespoke bilateral deals between countries through to the membership requirements of the World Trade Organization (WTO) and European Union (EU) - seek to lower 'barriers to trade' between the countries that sign up to them. First and foremost, they work to reduce or eliminate explicit restrictions, such as tariffs and quotas. Increasingly, though, TIAs have moved beyond such explicitly protectionist measures, focusing more on 'non-tariff' barriers, including regulations that apply equally to domestic and imported goods, but which could be seen indirectly (or even hypothetically) to favour domestic producers.
5. Many regulations of the alcohol market to protect public health have been or could be interpreted as non-tariff barriers. The tension between public health and trade law may be heightened by the advent of 'new generation' agreements, of which the proposed Transatlantic Trade and Investment Partnership (TTIP) and Trans-Pacific Partnership (TPP) have been the most prominent examples. Though those specific agreements ultimately foundered, they may provide an indication of the shape of future deals.

¹ Gillespie, P. (2019), How wine from Portugal helped define free trade, *CNN Money* (19 April). Available: <<https://money.cnn.com/2017/04/19/news/economy/trade-theory-comparative-advantage-david-ricardo/>> [Accessed 28 July 2020].

² Or, more precisely, to correct for market failures in ways that would otherwise reduce efficiency.

³ World Health Organization (2017), *'Best Buys' and other recommended interventions for the prevention and control of noncommunicable diseases: updated (2017) appendix 3 of the Global Action Plan for the Prevention and control of noncommunicable diseases 2013-20*. Available: <https://www.who.int/ncds/management/WHO_Appendix_BestBuys_LS.pdf> [Accessed 28 July 2020].

⁴ Diageo (2019), *Annual report 2019*. Available: <https://www.diageo.com/PR1346/aws/media/7948/b3801-000797_diageo_ar2019.pdf> [Accessed 28 July 2020].

6. 'New generation' agreements raise particular concerns because they are broader in scope, with greater focus on services and regulations than their predecessors.⁵ They are also perceived to strengthen the influence of private businesses, particularly their ability to raise legal challenges through the controversial investor-state dispute settlement process.
7. All this means it is imperative that future TIAs are developed and written in a way that permits governments to address the harm caused by alcohol. TIAs may also influence the political and economic environment in a way that makes it easier for opponents to resist public health policies (for example, encouraging tax competition).
8. This paper is structured as follows. It considers how three major areas of alcohol policy - pricing, labelling and marketing - have been affected by TIAs in the past. It then provides a number of recommendations for public health organisations seeking to shape future TIAs to minimise any negative effect on public health. Finally, it suggests some areas for future research.

Conflicts between Alcohol Policies and Trade Regulations

Pricing

9. The most prominent conflict between policy to reduce alcohol harm and trade regulations in recent years is the introduction of minimum unit pricing (MUP) in Scotland. Implementation of the policy, which bans the sale of alcohol below the price of 50p per unit⁶, was delayed for six years as a result of a series of legal challenges from alcohol industry bodies. They claimed MUP contravenes EU law because it impedes trade between EU member states. Ultimately, courts ruled that MUP does indeed restrict trade, but that it is permissible because EU law allows trade to be restricted in order to protect "the life and health of humans".⁷ Though the Scottish Government still had to demonstrate that MUP was a 'proportionate' measure to achieve this aim, the fact that the EU explicitly made allowance for restriction of trade on health grounds was crucial to the policy ultimately being deemed legal.
10. EU membership also constrains alcohol tax policy. In an effort to 'harmonise' tax systems, the EU specifies how member states may or may not structure alcohol duty rates.⁸ Some of these requirements have proved inimical to public health and difficult to adjust. Notably, governments must tax wine and cider according to their volume, rather than their alcohol content, resulting in a lower rate of duty per unit for stronger products. This creates a perverse incentive for producers to formulate stronger products, such as high strength cider. Though other countries – notably the Republic of Ireland⁹ - have been able to work within EU requirements to impose higher taxes on cider, one potential benefit of Britain leaving

⁵ Schram, A. et al (2019), Public health over private wealth: rebalancing public and private interests in international trade and investment agreements, *Public Health Research & Practice* 29:3: e2931919; Koivulsalo, M. & Perehudoff, K.(2018), What future for global health governance and the right to health in the era of new generation trade and investment agreements?, *Global Health Governance* 12:1, pp116-30.

⁶ A UK unit is 10ml of pure alcohol

⁷ Judiciary of Scotland (2013), Petition for Judicial Review by Scotch Whisky Association and Others: Summary of Lord Docherty's decision in the Petition for Judicial Review.

⁸ EUR-Lex, Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages. Available from: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0083>> [Accessed 28 July 2020].

⁹ Institute of Alcohol Studies (2017), *Cider Duty in the Republic of Ireland*. London: Institute of Alcohol Studies.

the EU is that it may make it easier to fix such anomalies, which may be addressed in a forthcoming review of alcohol duty structures.¹⁰

11. In some countries, tariffs on imported alcohol may have significant public health consequences. In India, for example, multinational drinks producers have sought free trade agreements to ease access to the Indian market.¹¹ Evidence from Switzerland shows that liberalisation of spirit imports as part of a WTO agreement, including a reduction in taxes on foreign products, led to a 30-50% decrease in their price and increased spirit consumption by 29%.¹² At the same time, tariffs are a rather blunt and indirect way of addressing alcohol harm – if the intention is to make alcohol less affordable, it is better to have policies applying to all drinks, such as taxes and minimum prices.
12. As well as the direct effect of TIAs on pricing policy, it is worth considering how they may shape the wider policy environment. Following Brexit, industry groups have been able to exploit the government’s desire to strike new trade deals by framing cuts to alcohol duty as boosting the UK’s international ‘competitiveness’.¹³ With little evidence, they suggest such measures will encourage governments in other countries to lower their taxes too, encouraging export sales abroad. Thus, TIAs can potentially make it easier to argue for policies that harm public health.

Labelling

13. Many public health groups favour warning and information labels on alcohol, describing the health risks associated with drinking, as well as ingredients, calorie and nutritional content. TIAs have in the past been used to obstruct such measures. Since 2010, a number of complaints have been brought to the WTO regarding policies from governments such as Thailand, Kenya, India, South Africa and Turkey to require mandatory health warnings on alcohol containers. Governments of Australia, the EU, New Zealand and USA have argued that these contravene the WTO’s regulations on ‘technical barriers to trade’.¹⁴ While the WTO does permit obstruction of trade in the interests of “protection of human health”, the objecting governments suggested less restrictive measures (such as public education campaigns) could be equally effective. It is often unclear to governments what sort of evidence is necessary to defend novel labelling requirements. Disputes are typically resolved through diplomatic procedures, meaning that less powerful governments can be pressurised into dropping proposals even if they would be legally defensible.¹⁵ Indeed, the covert threat of such pressure could have a ‘chilling effect’¹⁶, discouraging governments from raising the prospect of regulation at all – especially if they lack the expertise and resources to take on trade disputes.

¹⁰ Institute of Alcohol Studies (2020), *Budget 2020 analysis*. London: Institute of Alcohol Studies.

¹¹ Seth, D. (2015), Free-trade agreement with European Union: India may relax tariffs on spirits, auto parts, *The Economic Times* (19 March). Available: <<https://economictimes.indiatimes.com/news/economy/foreign-trade/free-trade-agreement-with-european-union-india-may-relax-tariffs-on-spirits-auto-parts/articleshow/46614867.cms?from=mdr>> [Accessed 28 July 2020]. ; Pendrous, R. (2017), Scotch whisky sector calls for a trade deal with India, *Food Manufacture* (30 July). Available: <<https://www.foodmanufacture.co.uk/Article/2017/07/28/Indian-tariffs-on-Scotch-imports-must-be-reduced>> [Accessed 28 July 2020].

¹² Heeb J-L et al (2003), Changes in Alcohol Consumption Following a Reduction in the Price of Spirits: A Natural Experiment in Switzerland, *Addiction* 98:10, pp1433-46.

¹³ Bhattacharya, A (2018), *Brexit Battlegrounds: Where are public health and the alcohol industry likely to clash in the years ahead?* London: Institute of Alcohol Studies

¹⁴ O’Brien, P. et al (2018), Commentary on ‘Communicating Messages About Drinking’: *Using the ‘Big Legal Guns’ to Block Alcohol Health Warning Labels*, *Alcohol & Alcoholism* 53:3, pp333-6.

¹⁵ Ibid.

¹⁶ Kelsey, J. (2012), New-generation free trade agreements threaten progressive tobacco and alcohol policies, *Addiction* 107, pp1719-21

14. Within the EU, alcohol is exempt from the Food Information Regulation, and so there are no mandatory informational requirements on alcoholic beverages. The UK government has responded by relying on voluntary labelling schemes.¹⁷ Though the government has always had the power to go further, several groups have used Brexit as an opportunity to urge reform.¹⁸ This demonstrates that sometimes the minimum standard permitted or specified by TIAs can stick and become normative, even when it would be desirable to exceed it.

Marketing

15. Restrictions on alcohol marketing are widely recognised as an effective way to reduce harmful drinking and protect health.¹⁹ Yet it is sometimes unclear whether such restrictions are permissible under trade law. France's *Loi Évin* (which bans sponsorship agreements and advertising on television, and regulates the content of advertisements to ensure they are limited to factual details about the product) has been deemed consistent with EU law, following a challenge by the European Commission and UK government. However, a proposed Swedish total ban on alcohol advertising in print and broadcast media had to be reversed because the European Court of Justice judged it would excessively disadvantage foreign producers seeking to enter the Swedish market. The major difference appears to be that the French government was able to persuade the Court that its measures were necessary and proportionate to protecting public health.²⁰

What should public health groups do?

16. Drawing on the examples and issues discussed above, this section proposes a number of principles for public health groups seeking to influence future TIAs in a way that minimises alcohol harm.

Fight for a seat at the table

17. Trade negotiations are complex and secretive affairs.²¹ As the UK Public Health Network observes, "Texts of the proposals are rarely made available for public discussion and often shared only with industry-dominated trade advisory committees".²² That makes them tricky to shape from the inside, and near impossible to influence from the outside.

18. Interviews with Australian policy actors involved in advocacy and negotiation around the TPP found that implications for alcohol harm were given far less attention than other public health issues.²³ While this can be partly explained by the economic significance of the industry and a lack of political consensus, it was suggested that the relative weakness of pre-existing networks of public health organisations with the skills to monitor and critique trade regulations in relation to alcohol also played a role. By contrast, having learned from

¹⁷ Eurocare, Creating alcohol labelling chaos. Available: <<https://www.eurocare.org/cares.php?sp=labeling&ssp=creating-alcohol-labelling-chaos>> [Accessed 28 July 2020].

¹⁸ Bhattacharya, op. cit.

¹⁹ World Health Organization, op. cit.

²⁰ Gould, E. (2005), Trade Treaties and Alcohol Advertising Policy, *Journal of Health Policy* 26:3, pp359-76.

²¹ Lodge, H. (2017), *A public health guide to trade and investment agreements: Aesclepius meets Mercury*. UK Public Health Network, p5.

²² Ibid.

²³ Townsend, B. et al (2020), What Generates Attention to Health in Trade Policy-Making? Lessons From Success in Tobacco Control and Access to Medicines: A Qualitative Study of Australia and the (comprehensive and Progressive) Trans-Pacific Partnership, *International Journal of Health Policy and Management* 9:7, pp312-4.

previous Australian trade negotiations, public health groups were better prepared to challenge intellectual property laws that would restrict access to medicines.

19. If public health groups are to be effective in ensuring TIAs do not adversely affect public health, it is vital for them to ensure that alcohol harm is on the agenda for trade negotiators, and ideally to secure a formal role in the negotiating process. Not only is this necessary for proposals that may harm or benefit public health to be identified and resisted or defended as negotiations progress, but it also sends a clear signal that governments recognise public health as a significant consideration in formulating the agreement.

Seek explicit protections for public health

20. As we have seen in the case of minimum unit pricing, labelling and the *Loi Évin*, explicit recognition that governments may restrict trade in the interests of protecting their citizens' health has played a crucial role in defending public health policies in the past. Similar – ideally stronger – exemptions are likely to be important for limiting the threat from future TIAs.
21. The United Nations Conference on Trade and Development has suggested that the wording of trade agreement provisions could be altered such that measures merely '*designed*' or '*related*' to the objective of protecting human life and health are permitted, lowering the standard of proof on governments from having to show their measures are '*necessary*'.²⁴
22. A potentially more robust approach would be to seek a 'carve out' for alcohol, exempting alcoholic drinks from the provisions of the TIA altogether.²⁵ In principle, this could avoid the uncertainty and delays caused by the need for courts to determine whether particular regulations are excessively restrictive of trade.
23. However, carve outs remain controversial. The TPP contained a carve out for tobacco, but it was criticized for prioritising tobacco to the exclusion of other unhealthy commodities. Moreover, unless they are very extensive (which may make them harder to pass), carve outs may contain gaps. For example, the TPP tobacco carve out only prevented tobacco producers from challenging regulations, so could not stop governments doing so on their behalf and failed to cover leaf tobacco.²⁶

Strengthen global health agreements

24. International health institutions, such as the WHO, can play an important role in mitigating potentially harmful elements of TIAs. The WHO's Framework Convention on Tobacco Control (FCTC), with its specified obligations on member states and endorsement of effective policies, was referred to by the WTO's dispute panel on plain packaging for cigarettes. The FCTC is also reported to have encouraged Australian trade negotiators to take tobacco control more seriously in negotiating the TPP. It is possible, therefore, that a similar framework for alcohol, or stronger endorsement by the WHO of alcohol regulations could make it easier to defend future public health measures.

²⁴ Schram et al, op. cit.

²⁵ Lodge, op. cit., p7.

²⁶ Hirono, K. et al (2016), To what extent does a tobacco carve-out protect public health in the Trans-Pacific Partnership Agreement?, *Public Health Research & Practice* 26:2: e2621622.

Remain alert to the indirect effect on the wider policy environment

25. It is important for public health groups to be conscious of the indirect, as well as the direct, impact of TIAs. Industry rhetoric attempting to exploit Brexit to encourage tax competition illustrates how TIAs can be used to shape policy discourse. They may also affect the wider policy process. Policy influence is often informal, based on access and relationships. Especially if public health groups are excluded from trade negotiations, trade could be used as a ‘trojan horse’ for the industry: an opportunity to build connections with policymakers and reinforce their authority and legitimacy in the policy process, which they can then leverage to shape non-trade policies.²⁷ Conversely, if public health groups can be involved in trade negotiations, that could be an opportunity for them to develop policy influence in other areas.

Encourage governments to go beyond the minimum

26. Inevitably, in negotiations with a large number of parties, each with their own constraints and interests, TIAs are likely to drift towards a ‘lowest common denominator’ level, specifying only what all can agree to. As we have seen in relation to labelling requirements and duty structures, the UK government has tended to follow these minimum standards, even when it could go further to protect public health. An important task for public health groups in such areas is to draw attention to the fact that the government is able to do more, and to campaign for it to use its full powers.

Be a good global citizen

27. Public health groups generally operate in a particular country, though they may also be members of international coalitions. This national focus means they are likely to be interested first and foremost on the impact of TIAs on their own government and nation. However, TIAs are by definition international, and the greater impact may be on those in other countries. As we have seen, the UK government attempted to challenge French restrictions on alcohol marketing. The UK government has also worked with industry groups to try and facilitate access to the markets of low and middle income countries – particularly India.²⁸ Under these circumstances, public health groups should be conscious of the possible impact of TIAs abroad. They will be more effective and responsible by working together with international counterparts, not least because similar public health safeguards are likely to be in the interests of all.

Suggestions for future research

28. Research can play an important role in helping to protect public health in TIAs. Given the technicality and complexity of trade law, and the fact that it is fairly far removed from the expertise of most public health specialists, legal scholarship is particularly crucial. For example, it would be useful to have a clearer understanding of the forms of public health protection that most appropriate and effective. Can carve outs work, or is it better to have more generic wording on governments’ right to protect health? How can these best be formulated? It is also important to pre-empt the sorts of proposals that public health groups must defend against, as these may not be obvious to lay observers.

²⁷ Bhattacharya, op. cit.

²⁸ Ibid.

29. More generally, we have seen that the defensibility of public health regulations often depends on whether they are held to be necessary and proportionate. There is some ambiguity over the sorts of evidence that can support this, and legal scholarship could be helpful in clarifying the standards courts are likely to apply. However, this also highlights the role of medical and social scientific researchers in building the evidence base supporting measures to regulate alcohol – such as minimum pricing in Scotland, or graphic warning labels in Thailand. Such evidence will be particularly effective if researchers can respond quickly and flexibly to the legal process. For example, initial hearings on minimum unit pricing in Scotland suggested the policy might be considered insufficiently targeted. In response, the Sheffield Alcohol Research Group provided detailed modelling of the impact of the policy on different social groups, work that was cited in the Supreme Court's ultimate judgement.²⁹

Conclusion

30. Public health policies and trade regulations increasingly come into conflict, particularly as trade and investment agreements have expanded to cover non-tariff barriers to trade. These agreements can and have been used to obstruct effective policies to reduce alcohol harm. Public health groups should respond by ensuring they are consulted on trade deals, seeking explicit protections for public health in trade agreements, strengthening global health agreements, anticipating the impact of TIAs on the broader policy environment, encouraging governments to go beyond minimum standards and considering the impact of trade regulations on other countries. Researchers should seek to identify the most effective ways to protect public health in TIAs, and to bolster the underlying evidence base behind effective alcohol policies. Trade is not the natural terrain of public health advocates and researchers. But it is one that they cannot afford to neglect.

²⁹ Supreme Court (2017), Judgement: Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents) (Scotland). Available: <<https://www.supremecourt.uk/cases/docs/uksc-2017-0025-judgment.pdf>> [Accessed 28 July 2020].