NEW DIRECTIONS IN TRADE AND INVESTMENT AGREEMENTS FOR PUBLIC HEALTH: THE CASE OF ALCOHOL LABELLING

ANDREW D MITCHELL* AND PAULA O'BRIEN†

Alcohol is a widely traded global commodity that has significant impacts on the public's health. This article investigates whether the text of new trade and investment agreements further protects or restricts states' capacity to impose public health measures relating to alcohol. In the new round of trade and investment agreements negotiated over the past five years, no single policy direction for public health is discernible. Textual developments of new trade and investment agreements are pulling in different directions. However, this article argues that the general trend is tending towards the expansion of regulatory space for public interest measures. States are afforded greater regulatory autonomy through various mechanisms, including deference clauses, the affirmation of a state's right to regulate, the circumscription of the rules on fair and equitable treatment and expropriation obligations, and the introduction of the General Agreement on Tariffs and Trade art XX-style general exceptions. At the same time, in the context of alcohol-specific changes to trade and investment agreements, WTO-plus changes have tended to reduce the policy space for alcohol labelling. A rule about alcohol supplementary labelling presents a new obstacle to the introduction of alcohol labelling. While not insurmountable, this obstacle is a further consideration and potential constraint to be taken into account by states when considering introducing alcohol warning labels.

CONTENTS

* Professor and Associate Dean (Research), Faculty of Law, Monash University. Email: andrew.mitchell@monash.edu. ORCID 0000-0001-8399-8563.

† Associate Professor, Melbourne Law School, University of Melbourne; Director, Health Law and Ethics Network; Director, COVID-19 Research Network. Email: obrienpl@unimelb.edu.au. ORCID 0000-0002-6879-0489. The authors would like to thank Dr James Munro for his helpful comments on an earlier draft of this article and Ken Zhunwye Kiat and Theodore Samlidis for their research assistance.

I INTRODUCTION

The past year has seen an increase in global expressions of concern for the harms associated with alcohol consumption. In February 2020, the Executive Board of the World Health Organization ('WHO') made a landmark decision, recognising the carcinogenicity of alcohol, its causal role in the development of several cancers and the 'unacceptably high' burden of diseases and injuries attributable to alcohol consumption.[1] In 2016, alcohol was responsible for 5.3% of all deaths and 5.1% of the global burden of disease.[2] In its decision, the Executive Board also committed the WHO to the development of a global action plan (2022–30) to 'effectively implement' the WHO *Global Strategy to Reduce the Harmful Use of Alcohol*[3] 'as a public health priority'.[4] The Executive Board's decision is significant because it puts the question of alcohol control back on the table at the WHO[5] and opens up the possibility of strengthening the global governance architecture relating to alcohol.[6] However, the Executive Board has also been subject to criticism,[7] including for its rejection of a proposal from a group of developing countries that a working group be convened 'to review and propose the feasibility of developing an international instrument for alcohol

---

1 Executive Board, *Accelerating Action to Reduce the Harmful Use of Alcohol*, 146th sess, 12th mtg, Agenda Item 7.2, WHO Doc EB146(14) (7 February 2020) Preamble para 2 ('*Accelerating Alcohol Action*').

2 World Health Organization, *Global Status Report on Alcohol and Health 2018* (Report, 2018) 84.

3 World Health Organization, *Global Strategy to Reduce the Harmful Use of Alcohol* (Report, 2010) ('*WHO Global Alcohol Strategy*').

4 *Accelerating Alcohol Action*, WHO Doc EB146(14) (n 1) para 1.

5 For an account of how alcohol has been treated in international institutions, including at the WHO, see Robin Room, 'Global Intergovernmental Initiatives to Minimise Alcohol Problems: Some Good Intentions, but Little Action' (2021) 12(2) *European Journal of Risk Regulation* 419, 423–30.

6 'WHO: Countries Request Accelerated Action on Alcohol', *Movendi International* (News Post, 10 February 2020) <https://movendi.ngo/news/2020/02/10/who-countries-request-accelerated-action-on-alcohol-harm/>, archived at <https://perma.cc/7JLL-ALUG>.

7 See, eg, Sally Casswell and Jürgen Rehm, 'Reduction in Global Alcohol-Attributable Harm Unlikely after Setback at WHO Executive Board' (2020) 395(10229) *Lancet* 1020.

control',[8] which proponents hoped would be for alcohol what the *WHO Framework Convention on Tobacco Control* ('*FCTC*')[9] has been for tobacco.[10]

The WHO represents one international forum for the global governance of alcohol. The rules and institutions of international economic law represent another. Alcohol, especially wine and spirits, is a widely traded commodity. Furthermore, the production and marketing of alcohol is dominated by a small number of global brands,[11] who make extensive use of social media platforms for cross-border marketing of their products.[12] There is foreign direct investment by alcohol companies, with Africa being a target in recent times.[13] A significant concern for public health is that international economic law may stifle the introduction of progressive domestic measures to reduce the harmful impacts of alcohol consumption,[14] such as alcohol pricing controls (eg taxation and minimum unit pricing), the licensing and limiting of alcohol supply, the restriction of alcohol marketing, and the mandating of health warnings and other information on the alcohol label space.[15] In previous work, we have also identified that the major alcohol-exporting World Trade Organization members seem to be turning to the WTO, in particular the Committee on Technical Barriers to Trade ('TBT Committee'), to advance trade-related concerns about alcohol control measures such as restrictions on product labelling, packaging and marketing.[16] We, and others, have expressed the view that, *technically*, it is unlikely that WTO

---

8 Executive Board, 'International Mechanisms for Alcohol Control: Draft Decision Proposed by the Delegations of Bangladesh, Bhutan, Indonesia, Iran, Sri Lanka, Thailand, and Vietnam' (24 January 2020) para 2.

9 *WHO Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).

10 On the question of a treaty for alcohol, see Gian Luca Burci, 'A Global Legal Instrument for Alcohol Control: Options, Prospects and Challenges' (2021) 12(2) *European Journal of Risk Regulation* 499; Suzanne Zhou, 'What Difference Would a Binding International Legal Instrument on Alcohol Control Make? Lessons from the World Health Organization Framework Convention on Tobacco Control's Impact on Domestic Litigation' (2021) *European Journal of Risk Regulation* 514.

11 See David Jernigan and Craig S Ross, 'The Alcohol Marketing Landscape: Alcohol Industry Size, Structure, Strategies, and Public Health Responses' (2020) 81(2) *Journal of Studies on Alcohol and Drugs* 13, 14–15.

12 See, eg, Seb Joseph, 'Heineken Prioritizes Mass Reach over Hypertargeting on Google and Facebook', *Digiday* (online, 8 August 2017) <https://digiday.com/media/heineken-prioritizes-mass-reach-hypertargeting-google-facebook/>, archived at <https://perma.cc/KLZ5-LMD6>. Note that the problem of cross-border alcohol marketing was specifically mentioned in the WHO Executive Board decision: *Accelerating Alcohol Action*, WHO Doc EB146(14) (n 1) Preamble para 4.

13 David H Jernigan and Thomas F Babor, 'The Concentration of the Global Alcohol Industry and Its Penetration in the African Region' (2015) 110(4) *Addiction* 551, 552–6. See generally Olivier Van Beemen, *Heineken in Africa: A Multinational Unleashed*, tr Bram Posthumus (Hurst & Company, 2019).

14 See, eg, Desmond McNeill et al, 'Trade and Investment Agreements: Implications for Health Protection' (2017) 51(1) *Journal of World Trade* 159, 166.

15 These are measures mentioned in the WHO report: *WHO Global Alcohol Strategy* (n 3) 14–17. The first three of these interventions have been labelled as 'best buys': *Tackling NCDs: 'Best Buys' and Other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases*, WHO Doc WH/NMH/NVI/17.9 (2017) 9.

16 See Paula O'Brien and Andrew D Mitchell, 'On the Bottle: Health Information, Alcohol Labelling and the WTO Technical Barriers to Trade Agreement' (2018) 18(1) *QUT Law Review* 124, 130–43; Tim Stockwell et al, 'Cancer Warning Labels on Alcohol Containers: A Consumer's Right to Know, a Government's Responsibility to Inform, and an Industry's Power to Thwart' (2020) 81(2) *Journal of Studies on Alcohol and Drugs* 284, 288–9.

agreements or international investment agreements ('IIAs') unnecessarily proscribe the policy space for well-designed, evidence-based policy interventions for public health measures for alcohol control.[17] For example, given current WTO jurisprudence on art 2.2 of the *Agreement on Technical Barriers to Trade* ('*TBT Agreement*'),[18] we have argued that it is likely that large, front-of-container warning labels (advising, for example, about the links between alcohol consumption and suicide, domestic violence or sexual impotence, using text and photographs) would be consistent with art 2.2 of the *TBT Agreement*.[19] By contrast, we have argued that a measure that bans industry from using any 'cartoons' on alcohol product labels and that defines 'cartoon' so broadly as to encompass any artwork may breach the rules on fair and equitable treatment ('FET') and indirect expropriation under international investment law.[20] These views about the formal consistency of alcohol measures with the rules of international economic law do not, however, speak to the possible 'regulatory chill' that might arise from the application of trade and investment rules to alcohol.[21]

In this article, we investigate whether the text of recent trade and investment agreements further restricts or protects the capacity of states to impose public health measures in respect of alcohol. We extrapolate the direction in which alcohol policy is moving from a study of the major agreements signed since

---

17 Paula O'Brien et al, 'Marginalising Health Information: Implications of the *Trans-Pacific Partnership Agreement* for Alcohol Labelling' (2017) 41(1) *Melbourne University Law Review* 341, 367–75; O'Brien and Mitchell (n 16) 144–53; Andrew D Mitchell and Paula O'Brien, 'If One Thai Bottle Should Accidentally Fall: Health Information, Alcohol Labelling and International Investment Law' (2020) 21(5) *Journal of World Investment and Trade* 674; Tania Voon, 'WTO Law and Risk Factors for Non-Communicable Diseases: A Complex Relationship' in Geert Van Calster and Denise Prévost (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar, 2013) 390, 394, 397–402; Tania Voon and Andrew D Mitchell, 'International Trade Law' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014) 86, 93; Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press, 2011) 203–13.

18 *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*') art 2.2.

19 O'Brien and Mitchell (n 16) 144–53.

20 Mitchell and O'Brien (n 17) 687–8, 697. Briefly, FET is a non-contingent standard of investment protection. It is contained in most international investment agreements but can be expressed in different ways, and the application of the standard will depend upon the language of the treaty involved. Investment tribunals have found that it 'include[s] protection of investors' legitimate expectations, non-abusive treatment, non-arbitrary and non-discriminatory exercise of public powers, and … adherence to due process requirements': James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 601. It is a concept concerned with the rule of law in international investment protection: Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd ed, 2017) 273. Indirect expropriation is the deprivation of a right of property through government measures that have the equivalent effect as a seizure of property, depriving the owner of the substantial benefits of ownership: Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) ch VI. Indirect expropriations have become more important, but a 'constant difficulty is to establish the line between lawful regulatory measures and forms of indirect … expropriation': Crawford (n 20) 604.

21 Jonathan Liberman and Andrew Mitchell, 'In Search of Coherence between Trade and Health: Inter-Institutional Opportunities' (2010) 25(1) *Maryland Journal of International Law* 143, 165.

1 January 2015, including the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('*CPTPP*'),[22] the EU–Canada *Comprehensive Economic and Trade Agreement* ('*CETA*'),[23] the *Agreement between the United States of America, the United Mexican States and Canada* ('*USMCA*')[24] and the *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* ('*ChAFTA*').[25] The parties to these agreements include some of the world's largest economies and strongest political powers, with the terms to which they are committing applying to significant amounts of the world's trade and investment activity. This is particularly the case in respect of trade in alcohol. The countries that were responsible for 77% of the world's alcohol exports in 2014 are parties to or signatories of one or more of the agreements discussed in this article.[26] Furthermore, the top 15 alcoholic beverage companies (by annual sales) of 2019 are incorporated in a country that is a party to or signatory of at least one of the agreements covered in this article.[27] The commitments that they have made in relation to public health and alcohol have the potential to be replicated in later bilateral agreements to which they are a party, thereby incrementally changing the entire trade and investment policy landscape. We use alcohol labelling and packaging as our case study for two reasons. First, this is an alcohol policy intervention that, as indicated above, is regularly giving rise to trade-related concerns in the TBT Committee. The adoption of health warnings on alcohol beverage labels appears to be gaining policy traction,[28] with countries increasingly using labelling as a means to address alcohol-related harm in accordance with the developing evidence about the effectiveness of this intervention in changing drinking attitudes and behaviour.[29] For example, in 2020, Australia-mandated warnings on alcoholic beverage containers about the risks of

---

22 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) ('*CPTPP*').

23 *Comprehensive Economic and Trade Agreement*, signed 30 October 2016, [2017] OJ L 11/23 (provisionally entered in force 21 September 2017) ('*CETA*').

24 *Agreement between the United States of America, the United Mexican States and Canada*, signed 30 November 2018 (entered in force 1 July 2020) ('*USMCA*').

25 *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) ('*ChAFTA*').

26 Top Alcoholic Beverage Exporters', *World's Richest Countries* (Web Page) <http://www.worldsrichestcountries.com/most-valuable-liquor-exports.html>, archived at <https://perma.cc/6JCL-J66P>. These countries are France (18.5%), United Kingdom (11.7%), Italy (9.3%), United States (7%), Germany (5.3%), Spain (5.3%), Mexico (4.3%), the Netherlands (4.3%), Singapore (3%), Belgium (2.6%), Chile (2.2%), Australia (2.1%) and Portugal (1.5%).

27 Daniel Workman, 'Major Export Companies: Alcoholic Beverages', *World's Top Exports* (Web Page) <http://www.worldstopexports.com/major-export-companies-alcoholic-beverages/>, archived at <https://perma.cc/3V38-LL4B>.

28 *Global Status Report on Alcohol and Health 2018* (n 2) 120.

29 See, eg, Erin Hobin et al, 'Testing Alcohol Labels as a Tool to Communicate Cancer Risk to Drinkers: A Real-World Quasi-Experimental Study' (2020) 81(2) *Journal of Studies on Alcohol and Drugs* 249; Jinhui Zhao et al, 'The Effects of Alcohol Warning Labels on Population Alcohol Consumption: An Interrupted Time Series Analysis of Alcohol Sales in Yukon, Canada' (2020) 81(2) *Journal of Studies on Alcohol and Drugs* 225.

drinking during pregnancy.[30] In 2018, Ireland passed legislation requiring that alcohol containers bear a warning about 'the direct link between alcohol and fatal cancers'.[31] In 2017, South Korea introduced new health warnings on alcohol, including 'alcohol is [a] carcinogen, so excessive drinking causes liver cancer, gastric adenocarcinoma and so on'.[32] There is also some suggestion that South Korea is considering graphic, tobacco-style health warnings for alcohol.[33] Given the emerging trade and investment law-related tensions around this policy approach, we would predict that states may seek to negotiate terms into new trade and investment agreements that respond to their concerns about these measures. These could be WTO-plus rules for opponents of new alcohol labelling requirements and additional protections for those wanting to introduce these measures without fear that the terms of new agreements would be used to challenge their public health interventions.

Secondly, although an alcohol labelling and packaging policy measure has not been the subject of a formal dispute in the WTO or under an IIA, closely related tobacco measures have been challenged under both international economic law regimes. Australia's tobacco plain packaging law was the subject of dispute in the WTO, with the Appellate Body in *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* concluding that the measure was consistent with the WTO agreements at issue.[34] Government-mandated tobacco graphic warnings, comprising 80% of the front and back of a package, were also the subject of an international investment law claim brought by Philip Morris

---

30 *Australia New Zealand Food Standards Code — Standard 2.7.1 — Labelling of Alcoholic Beverages and Food Containing Alcohol 2016* (Cth) ss 2.7.1—2, 2.7.1—8–2.7.1—12. The warning includes a pictogram; set colours of red, white and black; and reads: 'Pregnancy Warning: Alcohol can cause lifelong harm to your baby'.

31 *Public Health (Alcohol) Act 2018* (Ireland) s 12(1)(iii). The details of the warnings, including their design, are the subject of delegated legislation: at s 12(10)(a).

32 'Health Warning Labelling Requirements', *International Alliance for Responsible Drinking* (Web Page, 2019) <https://iard.org/science-resources/detail/Health-Warning-Labeling-Requirements>, archived at <https://perma.cc/U4TP-7A8Y>.

33 Yonhap, 'Health Law Revision Proposes Graphic Warnings on Alcoholic Beverages', *The Korea Herald* (online, 12 December 2018) <http://www.koreaherald.com/view.php?ud=20181212000122>, archived at <https://perma.cc/HC49-F658>.

34 Appellate Body Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/AB/R and WT/DS441/AB/R (9 June 2020) [7.14]–[7.15]. See also Panel Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R and WT/DS441/R and WT/DS458/R and WT/DS467/R (28 June 2018); Panel Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R/Add.1 and WT/DS441/R/Add.1 and WT/DS458/R/Add.1 and WT/DS467/R/Add.1 (28 June 2018); Panel Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R/Suppl.1 and WT/DS441/R/Suppl.1 and WT/DS458/R/Suppl.1 and WT/DS467/R/Suppl.1 (28 June 2018). The Panel Report was appealed by the Dominican Republic on 23 August 2018 and by Honduras on 19 July 2018.

against Uruguay.[35] Given the experience of the parties to these disputes, we would again expect that other states may attempt to firm up their position in new trade and investment agreements with the addition of more protections or restrictions depending on the state's position on alcohol policy.

In this article, we argue that developments in the terms of new trade and investment agreements are pulling in different directions. Some alcohol-exporting states have begun developing new rules that specifically target alcohol labelling in preferential trade agreements to address the commercial interests of the wine and spirits industries. This approach, which was first seen in the *Trans-Pacific Partnership Agreement* ('*TPP*'),[36] was carried over to the *CPTPP* and has since been included in several other bilateral and regional trade agreements. Australia seems to be a key proponent of these new rules. These rules are usually accompanied by a 'general exception' imported from international trade law (especially the WTO *General Agreement on Tariffs and Trade* ('*GATT*') art XX[37] and the WTO *General Agreement on Trade in Services* ('*GATS*') art XIV).[38] Such an exception may provide technical protection in the context of a formal dispute under the relevant new agreement. However, there is the issue of how these rules affect the alcohol policy development process in more informal ways. These new alcohol-specific trade rules are discussed in Part II below.

At the same time as these new alcohol-specific rules are being agreed, many states (including some of those promoting the new restrictive trade rules for alcohol labelling) have been attempting to refine and clarify international investment law rules to enhance states' ability to regulate in the public interest (for example, to promote public health or the environment). These changes are not specific to alcohol, but, to the extent that these non-traditional approaches to core investment law norms succeed in enhancing policy space, they are also likely to increase states' regulatory autonomy in relation to alcohol labelling for public health purposes. For example, changes in treaty drafting to narrow the scope of the FET standard and the meaning of indirect expropriation may favour states wishing to introduce public health labelling measures. Similarly, 'general exceptions' to positive obligations are being increasingly imported from international trade law (especially art XX of the *GATT* and art XIV of the *GATS*) into IIAs, typically including reference to measures necessary to protect human life or health, which could preserve measures requiring graphic health warnings on alcohol labels. In respect of tobacco, we have seen several agreements include a 'carve out' from investment law challenges for tobacco control measures. This carve out provides a possible model for other commodities such as alcohol,

---

35 *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) ('*Philip Morris v Uruguay*'). Note that Australia's tobacco plain packaging law was also subject to a claim under international investment law, but it did not proceed to an award on the merits: *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015).

36 *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) ('*TPP*').

37 *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 XX ('*GATT 1994*').

38 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') art XIV ('*GATS*').

but its utility is highly contested, and there is currently a low likelihood of it being extended to alcohol. Some of these developments in IIAs are addressed in the existing literature,[39] but we address them here in Part III in the context of the most recent examples of innovative IIAs and in relation to our case study on alcohol labelling.

II AGREEMENTS WITH RESTRICTIONS ON POLICY SPACE

A *Trans-Pacific Partnership Agreement/Comprehensive and Progressive Agreement for Trans-Pacific Partnership*

The *TPP* was signed on 4 February 2016 by 12 countries including Australia and the United States,[40] but the US withdrew from the agreement in January 2017.[41] The remaining 11 countries (commonly known as the TPP-11) entered into a new trade agreement — the *CPTPP* — in March 2018.[42] Most of the *TPP* provisions were incorporated into the *CPTPP*, including the provisions under discussion in this article.[43] The *CPTPP* has entered into force for some of the parties, including Australia, Canada and Japan, who have completed their domestic ratification processes.[44]

Annex 8-A of the *CPTPP* includes innovative provisions that require the parties to allow suppliers to use a supplementary label to display government-mandated labelling information for wine and spirits. In relation to spirits, annex 8-A provides:

---

39 Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart Publishing, 2014) 169–77; Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011) 351; Céline Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press, 2013) 363, 363–4; Barton Legum and Ioana Petculescu, 'GATT Article XX and International Investment Law' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press, 2013) 340, 344–8; Julien Chaisse, 'Exploring the Confines of International Investment and Domestic Health Protections: Is a General Exceptions Clause a Forced Perspective?' (2013) 39(2–3) *American Journal of Law and Medicine* 332.

40 'Trans-Pacific Partnership Agreement', *New Zealand Treaties Online* (Web Page) <https://www.treaties.mfat.govt.nz/search/details/t/3853>, archived at <https://perma.cc/XS66-JYUR>.

41 Peter Baker, 'Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal', *The New York Times* (online, 23 January 2017) <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>, archived at <https://perma.cc/438L-TUPM>.

42 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership', *New Zealand Treaties Online* (Web Page) <https://www.treaties.mfat.govt.nz/search/details/t/3911>, archived at <https://perma.cc/NZR4-WXND>; Mai Nguyen and A Ananthalakshmi, 'TPP Trade Deal Members Seek to Move Ahead without US', *Reuters* (online, 19 May 2017) <http://www.reuters.com/article/us-apec-vietnam-idUSKCN18F0MR>, archived at <https://perma.cc/7MQU-92VY>.

43 *CPTPP* (n 22) art 1. All references to the *CPTPP* provisions in this article should be understood as references to the *TPP* operating through art 1.1 of the *CPTPP*.

44 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)', *Department of Foreign Affairs and Trade* (Web Page) <https://dfat.gov.au/trade/agreements/in-force/cptpp/Pages/comprehensive-and-progressive-agreement-for-trans-pacific-partnership.aspx>, archived at <https://perma.cc/UK35-VPFM>.

> If 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. Each Party shall permit a supplier to affix the supplementary label on the container of the imported distilled spirits after importation but prior to offering the product for sale in the Party's territory, and may require that the supplier affix the supplementary label prior to release from customs.[45]

Annex 8-A includes a similarly worded provision about supplementary labelling of wine.[46] The ostensible purpose of the supplementary label rule is a functional one: to enable suppliers to adapt alcoholic beverage packaging to meet country-specific labelling requirements without having to modify the entire design of the packaging. The rule covers any form of information mandated by national governments,[47] which could include health warnings or advice (such as 'alcohol may harm your unborn child') as well as calorie disclosures, ingredient lists, lot numbers or producer/importer contact details. Although the *CPTPP* does not define 'supplementary label', a supplementary label would appear to be a label additional to that of the standard or principal labels. The supplementary label can be a sticker that suppliers affix on the bottle, but it cannot be 'a tag on a piece of string hung around the neck of a bottle' or a sticker that can be peeled easily, as the label must have permanency.[48]

One of the concerns about the supplementary label rule is that suppliers may seek to argue that a 'supplementary label' in annex 8-A should be defined as a label that fits in a space on the container that is not otherwise taken up by the supplier's principal labelling — in other words, in an unused space on the container. If this definition were accepted, this may have a negative effect on state parties' capacity and willingness to set size and placement requirements for alcoholic beverage labels. For example, it might be claimed that a state that legislated for an alcohol health warning to cover *50% of the front* of a wine bottle is acting inconsistently with para 10 of annex 8-A. Usually, a supplier's labelling will take up most of the front of a standard wine bottle. In this scenario, the large size (50%) and the specific positioning of the warning (front of the container) would mean that most standard-size wine bottles could not fit the warning on a supplementary label in *an unused space* on the bottle whilst also complying with the state's mandatory labelling requirements. Such a warning could only be accommodated on the front of a bottle of wine if the supplementary label covered the principal label or the principal label was redesigned to be a much smaller size. Setting design requirements that make it impossible for a supplier to place a supplementary label *in an otherwise unused space* on the container may be regarded as inconsistent with annex 8-A.[49]

In the face of these limitations arising from the *CPTPP*, a state may be disinclined to impose labelling design requirements that may amount to a breach

---

45 *CPTPP* (n 22) annex 8-A para 5.

46 Ibid annex 8-A para 10.

47 Note that the allowance for a supplementary label does not extend to certain information required to be provided on wine labels, namely, the product name, country-of-origin information, net content and alcohol content: ibid.

48 O'Brien et al (n 17) 380–1.

49 See generally ibid 381–5.

of annex 8-A. However, the omission of such features would also likely mean that the labels are inconsistent with the evidence about alcohol labelling effectiveness. Recent studies suggest that alcohol warning labels are most effective if they take a graphic/pictogram form (as opposed to just words), are large and use multiple colours.[50] This is in line with the evidence about the effectiveness of tobacco graphic warnings, which also suggests that warnings should additionally be regularly rotated and prominently displayed, and have certain text, size and formatting.[51]

The general exception from *GATT* art XX is incorporated into the *CPTPP* and applies to the supplementary labelling rule in annex 8-A.[52] In formal dispute settlement, it is likely that the WTO jurisprudence relating to art XX would be followed,[53] thereby affording some protection to alcohol labelling measures that conflict with the supplementary labelling rule. Article 8.3.6 of the *CPTPP* also affirms:

> For greater certainty, nothing in this Chapter shall prevent a Party from adopting or maintaining technical regulations, standards or conformity assessment procedures in accordance with its rights and obligations under this Agreement, the *TBT Agreement* and *any other relevant international agreement*.[54]

This provision is not in the nature of a true general exception, as it requires that the technical regulation be consistent with the *CPTPP*.[55] However, it is worth noting that, with the references to 'rights' and 'any other relevant international agreement', this provision seems to open up a possibility of a future international treaty on alcohol control trumping the supplementary labelling rule in the *CPTPP*.[56]

---

50 See, eg, Kate Vallance et al, '"We Have a Right to Know": Exploring Consumer Opinions on Content, Design and Acceptability of Enhanced Alcohol Labels' (2018) 53(1) *Alcohol and Alcoholism* 20; Erin Hobin et al, 'Testing the Efficacy of Alcohol Labels with Standard Drink Information and National Drinking Guidelines on Consumers' Ability to Estimate Alcohol Consumption' (2018) 53(1) *Alcohol and Alcoholism* 3; Cuong Pham et al, 'Alcohol Warning Label Awareness and Attention: A Multi-Method Study' (2018) 53(1) *Alcohol and Alcoholism* 39.

51 M Scollo, D Hippolyte and C Miller, 'What Makes an Effective Health Warning?' in Elizabeth Greenhalgh, Michelle Scollo and Margaret Winstanley (eds), *Tobacco in Australia: Facts and Issues* (Cancer Council Victoria, online at July 2019) <https://www.tobaccoinaustralia.org.au/chapter-12-tobacco-products/attachment-12-1-health-warnings/12a-4-what-makes-an-effective-health-warning>, archived at <https://perma.cc/3KU5-PNZX>.

52 *CPTPP* (n 22) art 29.1.

53 Ibid art 28.12.3. For WTO jurisprudence, see Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014) [5.169], citing Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996) 22; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [119]–[120]; Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2015) [292].

54 *CPTPP* (n 22) art 8.3.6 (emphasis added).

55 See below n 98 and accompanying text.

56 See, eg, Burci (n 10) 5–6 for a discussion of the way in which international economic law impacts on public health controls on alcohol and tobacco. Gian Burci argues that the *FCTC* sought to 'distinguish tobacco as a product warranting special treatment in the framework of international economic law': at 3.

B *Singapore–Australia Free Trade Agreement*

The signed amendments to the *Singapore–Australia Free Trade Agreement* ('*SAFTA*')[57] also include the supplementary label rule found in the *CPTPP*. Australia and Singapore first signed a free trade agreement on 28 July 2003, since which time there have been multiple rounds of amendments.[58] In the latest amendments, Australia and Singapore, both signatories to the *TPP* and the *CPTPP*, agreed to the inclusion of the supplementary labelling rules for alcohol found in the *CPTPP*.[59] Also, as in the *CPTPP*, a general exception in the form of *GATT* art XX applies to certain goods-related chapters.[60] Further, *SAFTA* provides:

> Nothing in this Chapter shall prevent a Party from adopting or maintaining, in accordance with its international rights and obligations:
>
> …
>
> (b) mandatory requirements necessary to ensure the quality of its imports, or for the protection of human, animal or plant life or health, or the environment, or for the prevention of deceptive practices or to fulfil other legitimate objectives, at the levels it considers appropriate.[61]

This provision is similar to the *GATT* art XX general exception. It, however, makes express that a party may determine the level of protection of life or health that it seeks, whereas this has been implied into *GATT* art XX by the WTO Appellate Body.[62] It also makes the exception subject to consistency with other international rights and obligations, which would include the WTO agreements.

C *Peru–Australia Free Trade Agreement*

Peru and Australia signed the *Free Trade Agreement between Australia and the Republic of Peru* ('*PAFTA*') on 12 February 2018, which came into force on 11 February 2020.[63] Both are parties to the *TPP* and the *CPTPP*, but, as with the amendments to *SAFTA*, at the time of signing *PAFTA*, the fate of the *TPP* was unclear. *PAFTA* includes the same supplementary labelling rules for alcohol that

---

57 *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, 2257 UNTS 103 (entered into force 28 July 2003) ('*SAFTA*'); *Agreement to Amend the Singapore–Australia Free Trade Agreement*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) ('*SAFTA Amendment*').

58 'Singapore–Australia FTA', *Department of Foreign Affairs and Trade* (Web Page) <https://www.dfat.gov.au/trade/agreements/in-force/safta/Pages/singapore-australia-fta>, archived at <https://perma.cc/DP7A-9MCE>.

59 *SAFTA* (n 57) annex 5-C paras 5, 10.

60 Ibid ch 17 art 5.

61 Ibid ch 5 art 2(2).

62 Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [140]; Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) [168].

63 *Free Trade Agreement between Australia and the Republic of Peru*, signed 12 February 2018, [2020] ATS 6 (entered into force 11 February 2020) ('*PAFTA*').

are found in the *CPTPP* and *SAFTA*.[64] It also follows the approach in the *CPTPP*, incorporating *GATT* art XX and making it applicable to the whole agreement.[65]

D *Australia–Hong Kong Free Trade Agreement*

The new trade agreement between Australia and Hong Kong also includes the supplementary labelling rules for wine, as in the *TPP*. Signed on 26 March 2019 and in force from 17 January 2020, paras 7 and 9 of annex 5-A of the *Free Trade Agreement between Australia and Hong Kong, China* ('*A–HKFTA*') require that parties allow wine suppliers to use supplementary labels for information required by the party.[66] *GATT* art XX is incorporated into the *A–HKFTA* with application to annex 5-A.[67] Annex 5-A is also covered by art 5.2, which provides that ch 5 ('Technical Barriers to Trade') does not limit the party's right to prepare, adopt or apply technical regulations that are in accordance with the *TBT Agreement* 'to the extent necessary to fulfil a legitimate objective'.[68] However, annex 5-A also includes an additional provision, not found in the other trade agreements that incorporate the alcohol supplementary labelling rules. Paragraph 10 provides:

> For greater certainty, notwithstanding paragraph 7 and paragraph 9, a Party may impose any labelling requirement to fulfil a legitimate objective, such as for the protection of human health and safety, in accordance with the *TBT Agreement*.[69]

The words '[f]or greater certainty' seem to seek to convey that this is an unnecessary provision and that its content would apply in any case, given the application of art 5.2 to annex 5-A and the incorporation of art XX of the *GATT*. It may be that the main work of para 10 of annex 5-A is to signal to domestic stakeholders that concerns about health are given protection in the *A–HKFTA*.

In terms of the legal position, however, this exception or the one in art 5.2 may be slightly more generous than the *GATT* art XX exception and therefore offer more protection to domestic alcohol labelling measures that depart from the supplementary labelling rule. The *GATT* exception turns on a measure being necessary for the achievement of the *specific* objective of 'the protection of human life or health'. In contrast, art 5.2 and para 10 of annex 5-A rest on the fulfilment of a 'legitimate objective', which arguably embraces objectives beyond those specifically articulated in *GATT* art XX. Furthermore, in the context of art 2.2 of the *TBT Agreement*, the WTO Appellate Body has recognised an objective not expressly mentioned in art 2.2 as legitimate in and of itself and has not required a nexus to any stated objective in art 2.2. For example, in *United States — Certain Country of Origin Labelling (COOL) Requirements* ('*US — COOL*'), the Appellate Body did not require the objective of providing consumer information to be additionally qualified or linked to some other public policy goal — such as protecting health or the environment — in order to qualify as 'legitimate' under

---

64 Ibid annex 7-A paras 5, 10.

65 Ibid arts 28.1(1)–(2).

66 *Free Trade Agreement between Australia and Hong Kong, China*, signed 26 March 2019, [2020] ATS 4 (entered into force 17 January 2020) annex 5-A paras 7, 9 ('*A–HKFTA*').

67 Ibid art 19.3(1).

68 Ibid art 5.2.

69 Ibid annex 5-A para 10.

art 2.2 of the *TBT Agreement*.[70] In terms of demonstrating the consistency of a labelling measure with the *TBT Agreement*, as required by both art 5.2 and para 10 of annex 5-A of the *A–HKFTA*, it may be easier to meet the requirements of art 2.2 of the *TBT Agreement* with an objective framed as 'providing consumers information about alcohol' than with the objective of 'protecting public health'. For example, the degree of contribution of a labelling measure that simply seeks to 'inform' consumers about the risks of drinking alcohol during pregnancy may be assessed as greater than the contribution of the same measure that seeks to 'protect' the health of pregnant women and their unborn children. It may be more difficult to show that labelling information 'protects' health in the sense of changing consumers' knowledge, understanding and intentions about drinking or actual consumption behaviour. Although there is some evidence that alcohol warnings can achieve these behavioural changes,[71] the mere provision of public health information is a more straightforward goal.

E *United States–Mexico–Canada Agreement*

On 30 November 2018, the US, Mexico and Canada signed the *USMCA* to replace the *North American Free Trade Agreement*.[72] The *USMCA* entered into force on 1 July 2020. It includes several important provisions regarding alcohol labelling. Like the agreements discussed in Parts II(A)–(D) above, it includes the *CPTPP*'s supplementary labelling rule for wine and spirits.[73] The *GATT*'s art XX exception is incorporated into the *USMCA* and made applicable to annex 3-C, where the supplementary labelling rules are found.[74] The *USMCA* slightly modifies the supplementary labelling rule by stating in art 3.C.3(6):

> A Party may require that information indicated on a supplementary label affixed to a distilled spirits or wine container not conflict with information on an existing label.[75]

On the one hand, this provision seems intended to operate as an assurance that if a supplier chooses to use a supplementary label rather than relabelling their products, there must not be a conflict between the messages on the two labels. A straightforward example of such a conflict could be if there were different blood alcohol concentration ('BAC') levels that were prohibited in the product's country-of-origin and the importing country and these BACs were displayed on the main and supplementary label. However, the provision, as drafted, only partly gives effect to this purported intention. The word 'existing' is defined in the *USMCA* to mean 'in effect on the date of entry into force of this Agreement'.[76] If the defined meaning is used in interpreting this provision (and terms should be used consistently across a treaty unless the treaty expressly or impliedly suggests

---

70 Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Docs WT/DS384/AB/R and WT/DS386/AB/R (29 June 2012) [435]–[437].

71 Hobin et al (n 29); Zhou et al (n 29).

72 *North American Free Trade Agreement*, Canada–Mexico–United States, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994).

73 *USMCA* (n 24) arts 3.4(5), (11).

74 Ibid art 32.1.

75 Ibid art 3.C.3(6).

76 Ibid art 1.5 (definition of 'existing').

otherwise),[77] then the rule would operate as a form of standstill. It would only apply to labels on wine and spirits containers as at the date of the treaty coming into force (ie 'existing labels') and not to all future labels. This is possibly a case of poor treaty drafting, and the wider context of annex 3-C may suggest that a different meaning should be given to the term 'existing'. For example, art 3.C.4(1) requires that a party 'normally allow a reasonable period of time' before insisting that wine and spirits products that are already in the territory comply with any new applicable measure.[78] This type of allowance for stock in trade — a form of grandfathering — is common in the product regulation field so as to reduce the burden on industry and to avoid product wastage. However, the application of art 3.C.3(6) *solely* to current stock, including stock in trade, is not consistent with such a grandfathering clause and may point to the term 'existing' having a different meaning to that in the definitions section of the *USMCA*.

III AGREEMENTS WITH PROTECTIONS OF POLICY SPACE

A *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*

1 *Investor–State Dispute Settlement 'Carve Out' for Tobacco*

The signatories to the *CPTPP* agreed on an unprecedented 'carve out' from investor–state dispute settlement ('ISDS') for tobacco control measures. Article 29.5 of the *CPTPP* provides:

> A Party *may elect to deny the benefits* of [ISDS] *with respect to claims challenging a tobacco control measure* of the Party. Such a claim shall not be submitted to [ISDS] if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration … a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.[79]

This provision allows a host state to prevent or preclude a claim by an investor against a 'tobacco control measure'.[80] The state may elect to deny the benefits of the ISDS provisions in the *CPTPP* investment chapter, either in advance with respect to all such claims or after notification of a particular claim. This broad discretion may thus avoid the considerable financial and human resource costs typically associated with defending a claim (even if the defence is successful),

---

77 *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) ('*VCLT*').

78 *USMCA* (n 24) art 3.C.4(1).

79 *CPTPP* (n 22) art 29.5 (emphasis added).

80 A 'tobacco control measure' is defined as

> a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure.

Ibid art 29.5 n 12.

as well as the associated risk that a state is discouraged from implementing health controls (described as 'regulatory chill'), said to arise from the risk of an ISDS claim under IIAs.[81]

This carve out has been the subject of both support and criticism.[82] It directly addresses the problem of wasted time and resources on ISDS claims (which might otherwise have to be defended on the merits, for example, with respect to the scope of the FET obligation or the applicability of a general exceptions clause).[83] However, concerns have been raised about the operation of footnote 11 to art 29.5, which states that the carve out does not prejudice a *CPTPP* party's rights under ch 28 ('Dispute Settlement') in relation to a tobacco control measure,[84] meaning that tobacco control measures can still be the subject of state-to-state dispute settlement. The carve out also provides no protection for other regulatory concerns, such as alcohol harm, and could even conceivably undermine such concerns or the more common 'general exceptions'-type provisions now sometimes found in IIAs. A careful approach to treaty interpretation pursuant to the relevant international law rules may prevent such unintended consequences.[85] The carve out may nevertheless unintentionally detract from the impetus for systemic reforms to the ISDS regime.

The possibility of including such a carve out for alcohol labelling measures or other alcohol regulation may seem remote given the significance of the alcohol industry in many countries, but the inclusion of the tobacco carve out in the *CPTPP*, notwithstanding the political importance of the tobacco industry in the US, suggests that it might be possible for states that wish to preserve their regulatory discretion with respect to alcohol labelling for public health purposes.

---

81 Andrew Mitchell and Elizabeth Sheargold, 'Protecting the Autonomy of States to Enact Tobacco Control Measures under Trade and Investment Agreements' (2015) 24(e2) *Tobacco Control* e147, e147–8; Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2017) 50(2) *Vanderbilt Journal of Transnational Law* 355, 356–63, 380–4, 398–406. See also Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606.

82 Sergio Puig and Gregory Shaffer, 'A Breakthrough with the TPP: The Tobacco Carve-Out' (2016) 16(2) *Yale Journal of Health Policy, Law, and Ethics* 327, 331–3; Ellen R Shaffer and Joseph E Brenner, 'Carving Out Tobacco from Trade Agreements' (2014) 104(12) *American Journal of Public Health* e4; Andrew D Mitchell, Tania Voon and Devon Whittle, 'Public Health and the Trans-Pacific Partnership Agreement' (2015) 5(2) *Asian Journal of International Law* 279, 290–3; Mitchell and Sheargold (n 81) e150; Katherine Hirono, Deborah Gleeson and Becky Freeman, 'To What Extent Does a Tobacco Carve-Out Protect Public Health in the Trans-Pacific Partnership Agreement?' (2016) 26(2) *Public Health Research and Practice* e2621622:1–3; Simon Lester and Bryan Mercurio, 'Safeguarding Policy Space in Investment Agreements' (IIEL Issue Brief 12/2017, Institute of International Economic Law, Georgetown University, December 2017) 5–8.

83 Puig and Shaffer (n 82) 331–2; Mitchell and Sheargold (n 81) e148–9.

84 *CPTPP* (n 22) art 29.5 n 11.

85 For an example of international investment agreement interpretation not following the rules of international law, see Andrew D Mitchell and James Munro, 'Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements' (2017) 28(3) *European Journal of International Law* 669.

2 *Scope of Investment Obligations*

The *CPTPP* also delineates the scope of the FET standard by equating that standard of treatment with that of customary international law:[86]

> 1. Each Party shall accord to covered investments treatment in accordance with *applicable customary international law principles*, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the *customary international law minimum standard of treatment of aliens as the standard of treatment* to be afforded to covered investments. … The obligations in paragraph 1 to provide:
>
> (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world …[87]

Whether this formulation is different from the scope and substance of the FET provision on which the *Philip Morris v Uruguay* award was based is not settled under investment law.[88] The debate centres on whether and how the customary international law standard has evolved beyond its articulation in the 1920s.[89] The *CPTPP* reformulation is unlikely to have any material impact on the 'arbitrariness' aspect of the FET standard as addressed in the *Philip Morris v Uruguay* award,[90] except to bolster support for a similar interpretation by a future tribunal.

---

86 This approach is consistent with various US investment agreements: *2012 US Model Bilateral Investment Treaty* art 5; *Free Trade Agreement between the United States and the Republic of Korea*, signed 30 June 2007 (entered into force 15 March 2012) art 11.5; *United States–Panama Trade Promotion Agreement*, signed 28 June 2007 (entered into force 31 October 2012) art 10.5; *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment*, signed 19 February 2008, TIAS 12-101 (entered into force 1 January 2012) art 5.

87 *CPTPP* (n 22) art 9.6 (emphasis added).

88 The relevant FET provision in *Philip Morris v Uruguay* states:

> Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.

Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, signed 7 October 1988, 1976 UNTS 389 (entered into force 22 April 1991) art 3(2) ('*Switzerland–Uruguay BIT*').

89 It is understood that the case of *LFH Neer v United Mexican States* articulated the minimum standard of treatment of aliens as amounting to 'an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency': *LFH Neer v United Mexican States* (1926) 4 RIAA 60, 61–2.

90 *Philip Morris v Uruguay* (n 35) [323]–[324], [390].

The *CPTPP* similarly clarifies the meaning of indirect expropriation under the traditional expropriation standard (the standard that was addressed in the *Philip Morris v Uruguay* award):[91]

> Non-discriminatory regulatory actions by a Party that are designed and applied to protect *legitimate public welfare objectives*, such as public health, safety and the environment, do not constitute indirect expropriations, *except in rare circumstances*.[92]

This provision, common to modern IIAs, is important in protecting regulatory autonomy with respect to public health measures such as alcohol labelling measures. However, the phrase 'except in rare circumstances' leaves scope for a non-discriminatory alcohol labelling measure protecting public health to constitute an indirect expropriation.

3 *Regulatory Objectives*

The *CPTPP* investment chapter does not contain a general exception applicable to all investment obligations[93] but instead provides a weaker provision regarding deference to regulatory objectives:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing *any measure otherwise consistent* with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken *in a manner sensitive to* environmental, *health or other regulatory objectives*.[94]

This text goes beyond product specific concerns to encompass 'health or other regulatory objectives'.[95] However, the words 'otherwise consistent with this Chapter' mean that the provision is not a true exception.[96] Nevertheless, in accordance with the requirement in the *Vienna Convention on the Law of*

---

91 The expropriation provision relevant to *Philip Morris v Uruguay* states:

> Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto.

Switzerland–Uruguay BIT (n 88) art 5(1).

92 *CPTPP* (n 22) annex 9-B art 3(b) (emphasis added).

93 The *CPTPP* investment chapter does, however, contain an exception provision that is similar to the *GATT* art XX general exception clause, where the state's measures are 'necessary to protect human, animal or plant life or health': ibid art 9.10.3(d)(ii). However, the exception provision applies only to the specific investment obligation that precludes the maintenance of performance requirements.

94 Ibid art 9.16 (emphasis added).

95 This language is similar to that found in art 11.11 of the *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005). Yet, in that agreement, it is limited to environmental objectives.

96 Andrew D Mitchell, 'Australia and New Zealand' in Markus Krajewski and Rhea Tamara Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar Publishing, 2019) 390, 416.

Treaties art 31(1),[97] the provision does provide important interpretative context for other *CPTPP* investment obligations and may increase a state's regulatory capacity with respect to alcohol labelling. When confronted by the same language, the Appellate Body in *US — COOL* rejected the proposition that 'otherwise consistent' language subordinates the applicable principle to the provisions in the agreement:

> [W]e do not agree with the arguments of Canada and Mexico that the qualification 'subject to the requirement that they … are otherwise in accordance with the provisions of this Agreement' in the sixth preambular recital of the *TBT Agreement* subordinates the principle expressed in that recital — that a Member shall not be prevented from pursuing a legitimate objective 'at the levels it considers appropriate' — to the provisions of the *TBT Agreement*.[98]

Under this reading, *CPTPP* investment obligations must be balanced with the principle contained in art 9.16 that parties can take measures to ensure that investment is sensitive to health objectives.

B *Singapore–Australia Free Trade Agreement*

1 *Investor–State Dispute Settlement 'Carve Out' for Tobacco*

The amendments to *SAFTA* also include a carve out from ISDS for tobacco control measures:

> No claim may be brought under this Section in respect of a tobacco control measure of a Party.[99]

Unlike the *CPTPP* carve out, this provision does not require the host state to elect to preclude ISDS claims against tobacco control measures. It is a blanket prohibition on any such ISDS claim. The definition of a 'tobacco control measure' in the *SAFTA* amendments also appears slightly broader than that in the *CPTPP*,[100] highlighting the importance of the precise definition of the intended protected measure were a carve out to be applied to other specific products or policy measures such as alcohol labelling.

---

97 *VCLT* (n 77) art 31(1).

98 Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements — Recourse to Article 21.5 of the DSU by Canada and Mexico*, WTO Docs WT/DS384/AB/RW and WT/DS386/AB/RW (18 May 2015) [5.266].

99 *SAFTA Amendment* (n 57) ch 8 art 22.

100 The *SAFTA Amendment* states:

> 'Tobacco control measure' means a measure of a Party related to tobacco products (including products made or derived from tobacco), such as for their production, consumption, distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as fiscal measures such as internal taxes and excise taxes, and enforcement measures, such as inspection, recordkeeping, and reporting requirements. 'Tobacco products' means products under Chapter 24 of the Harmonised System, including processed tobacco, or any product that contains tobacco, that is manufactured to be used for smoking, sucking, chewing or snuffing.

Ibid ch 8 art 22 n 29. Cf *CPTPP* (n 22) art 29.5 n 12.

2 *General Exception in the Investment Chapter*

The amended *SAFTA* investment chapter also provides a provision regarding deference to regulatory objectives,[101] in similar terms to the *CPTPP*. However, *SAFTA* goes further than the *CPTPP* in including a general exception that applies to the entire investment chapter, including FET and expropriation:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, *nothing in this Chapter shall be construed to prevent* the adoption or enforcement by a Party of measures:
>
> (a) *necessary* to protect public morals or to maintain public order;
>
> (b) *necessary* to protect human, animal or plant life or health; …[102]

The inclusion of such exceptions stems from Canadian treaty practice (eg the *Canada 2014 Model Foreign Investment Promotion and Protection Agreement*)[103] and is reflected in a number of more modern IIAs such as the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*.[104] The categories of policy objectives typically covered, including in *SAFTA*, are those most likely to be invoked in the context of alcohol labelling requirements, such as the protection of public morals[105] and human life or health.[106]

Concerns have been raised regarding the 'importation' of WTO language into IIAs.[107] Critics allude to the unforeseen effects of such language in a field that has already evolved to 'read in' discretion for policy objectives. For example, indirect expropriation has incorporated the doctrine of police powers for public welfare objectives in the absence of general exceptions.[108] Thus, incorporating a 'necessity' analysis corresponding to *GATT* art XX could inadvertently restrict policy space by adding a requirement to compare less restrictive alternatives of alcohol controls, in accordance with the WTO Appellate Body's established approach to art XX. Whether such a test is incorporated may depend on a tribunal's understanding of customary rules of interpretation in public international law.[109]

---

101 *SAFTA Amendment* (n 57) ch 8 art 20.

102 *SAFTA* (n 57) ch 8 art 19 (emphasis added). '[B]etween the Parties' is a drafting error in the Treaty — it should be between 'investments' or 'investors of the Parties'.

103 *Canada 2014 Model Foreign Investment Promotion and Protection Agreement* art 18.1.

104 *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) art 22.1(3).

105 See, eg, *SAFTA* (n 57) ch 8 art 19(a).

106 See, eg, ibid ch 8 art 19(b).

107 See generally Andrew D Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks' in Lisa E Sachs, Lise J Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2017* (Oxford University Press, 2019) 305.

108 Chaisse (n 39) 353. See also Andrew Newcombe, 'The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?' in Armand de Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge, 2013) 267, 277.

109 See, eg, *VCLT* (n 77) art 31(3)(c). See also *Continental Casualty Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [192]; Titi (n 39) 177–9.

C *EU–Canada Comprehensive Economic and Trade Agreement*

1 *Scope of Investment Obligations*

The recently negotiated *CETA* includes additional protection for policy space under the FET obligation.[110] The text of *CETA* provides an exhaustive list that is very similar to the *Waste Management II* tribunal's enunciation of the FET obligation in 2004:[111]

> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
>
> (a) denial of justice in criminal, civil or administrative proceedings;
>
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
>
> (c) manifest arbitrariness;
>
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
>
> (e) abusive treatment of investors, such as coercion, duress and harassment; …[112]

In specifying the types of state conduct that breach the FET standard, this provision may expand regulatory flexibility with respect to alcohol labelling, or at least increase certainty as to the likelihood of a breach.

In addition, *CETA* establishes the Committee on Services and Investment to review the content of the FET standard.[113] This avenue may allow states party (as well as other stakeholders affected by labelling controls, assuming they have appropriate standing before the Committee)[114] to express interpretative concerns with respect to alcohol labelling.

Like the *CPTPP*, *CETA* establishes express parameters on indirect expropriation:

> For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied

---

110 See Bryan Mercurio, 'Safeguarding Public Welfare? — Intellectual Property Rights, Health and the Evolution of Treaty Drafting in International Investment Agreements' (2015) 6(2) *Journal of International Dispute Settlement* 252, 266–7.

111 *Waste Management, Inc v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3, 30 April 2004) [98] ('*Waste Management II*').

112 *CETA* (n 23) art 8.10.2.

113 Ibid art 26.2.1(b). See also at art 8.10.3:

> The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

114 Such standing, or a right of audience, is not clear from the *CETA* text as it relates to the operation of specialised committees: ibid arts 26.2.1(b), 26.2.3, 26.2.6.

> to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.[115]

However, unlike the *CPTPP* text (and recent US treaty practice),[116] *CETA* specifies 'rare circumstance' to be 'when the impact of a measure … is so severe in light of its purpose that it appears manifestly excessive'.[117] The words 'manifestly excessive' may expand a state's regulatory discretion to implement alcohol labelling requirements on grounds of public health, compared to the proportionality test applied by the tribunal in *Técnicas Medioambientales Tecmed SA v Mexico*.[118]

2 *Right to Regulate in the Investment Chapter*

The *CETA* investment chapter also contains a 'right to regulate' provision by which 'the Parties reaffirm their right to regulate … to achieve legitimate policy objectives', which include 'the protection of public health, safety, … public morals [or] social or consumer protection'.[119] While this provision corresponds broadly with the provisions regarding deference to regulatory objectives in the *CPTPP* and amendments to *SAFTA*, the *CETA* reference to a 'right to regulate' is arguably stronger. In addition, unlike the *CPTPP* and amendments to *SAFTA*, the *CETA* provision is not subject to the qualification of being 'otherwise consistent' with the obligations of the investment chapter.[120] In that sense, too, *CETA* may expand policy space for alcohol labelling controls. However, even though it omits the strict requirement of necessity often found in general exceptions, it is not worded as a clear exception to the *CETA* investment obligations and therefore may not

---

115 Ibid annex 8-A para 3 (emphasis added).

116 The *2012 US Model Bilateral Investment Treaty* provides a somewhat narrower policy space, in favour of the investor, by the omission of qualifying terms such as 'manifestly excessive' and 'non-discriminatory':

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

2012 US Model Bilateral Investment Treaty (n 86) annex B para 4(b).

117 *CETA* (n 23) annex 8-A para 3.

118 *Técnicas Medioambientales Tecmed SA v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [122]. The tribunal stated: 'There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.'

119 *CETA* (n 23) art 8.9.1, which states:

> For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

120 In addition, the preambles of certain trade agreements expressly provide for a 'right to regulate': see, eg, *PAFTA* (n 63) Preamble para 8; *Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China*, signed 7 April 2008, 2590 UNTS 101 (entered into force 1 October 2008) Preamble para 8:

> Upholding the rights of their governments to regulate in order to meet national policy objectives, and preserving their flexibility to safeguard the public welfare.

As this affirmation is contained in the preamble, it is likely to be characterised as an interpretive aid to the applicable substantive investment obligation rather than a binding preservation of policy space. Such language could form part of the 'object and purpose' used to interpret the treaty: *VCLT* (n 77) arts 31(1)–(2).

provide an independent defence to a breach of such an obligation, as opposed to 'mere' contextual support for interpreting those obligations in a manner deferential to the host state.

3 *General Exception in the Investment Chapter*

The *CETA* text does include general exceptions similar to art XX of the *GATT* and art XIV of the *GATS*.[121] Yet, unlike in the *SAFTA* amendments, with respect to the investment chapter, these exceptions apply only to the obligations on establishment (such as certain performance requirements) and non-discrimination (such as national treatment and most-favoured-nation treatment).[122] As such, *CETA*'s general exceptions do not apply to those investment protections that would be the most likely to apply to alcohol labelling measures, such as FET and expropriation. As noted above, we question whether the inclusion of the 'right to regulate' provision is sufficient to replace the general exceptions in protecting policy space with respect to these matters.

D *China–Australia Free Trade Agreement*

ChAFTA adopts a novel approach to public welfare regulation. Although *ChAFTA* does not currently include obligations concerning FET and expropriation, such obligations may be incorporated in the ongoing review of *ChAFTA*.[123] Their inclusion could increase the significance of *ChAFTA*'s mechanism allowing states party (China and Australia) to make a joint determination that a measure challenged in an ISDS claim is non-discriminatory and for a 'legitimate public welfare objective'.[124] Such a determination is binding

---

121 *CETA* (n 23) art 28.3. Namely, art 28.3.1 incorporates art XX of the *GATT* by reference, which applies to specific investment obligations covered under ss B–C of *CETA*'s investment chapter (which includes national treatment, most-favoured nation treatment and performance requirement restrictions). Article 28.3.2, in contrast, incorporates text that is similar to that of art XIV of the *GATS*, although it also applies to the same set of investment obligations covered by ss B–C.

122 The text limits the application '[f]or the purposes of … Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment)': ibid art 28.3.1.

123 As to the relationship between *ChAFTA* and the earlier *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, [1988] ATS 14 (signed and entered into force 11 July 1988), see Tania Voon and Elizabeth Sheargold, 'Australia, China, and the Coexistence of Successive International Investment Agreements' in Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The China–Australia Free Trade Agreement: A 21st-Century Model* (Hart Publishing, 2018) 215. On 24 March 2017, the Australian and Chinese governments signed a declaration of intent regarding a review of *ChAFTA*, which, inter alia, announced the commencement of reviews of services and investment commitments under it: *Declaration of Intent by the Government of Australia and the Government of the People's Republic of China regarding Review of Elements of the China–Australia Free Trade Agreement*, signed 24 March 2017 <https://www.dfat.gov.au/sites/default/files/declaration-of-intent-review-elements-chafta.pdf>, archived at <https://perma.cc/2CNF-8TE3>.

124 *ChAFTA* (n 25) arts 9.11.5–9.11.8. See also at art 9.11.4: 'Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim' by an investor. For more information, see Anthea Roberts and Richard Braddock, 'Protecting Public Welfare Regulation through Joint Treaty Party Control: A ChAFTA Innovation' (2016) *Columbia FDI Perspectives* 176:1–3.

on a tribunal.[125] This approach could preserve a host state's alcohol labelling controls for the purpose of public health, as long as the investor's home state agrees that the relevant measure was non-discriminatory and for the purpose of public health.

E *Regional Comprehensive Economic Partnership*

The *Regional Comprehensive Economic Partnership Agreement* ('*RCEP*')[126] was signed by 15 parties on 15 November 2020.[127] It has yet to come into force. One of the most significant features of the *RCEP* is its complete exclusion of an ISDS mechanism. This is a significant gain for public health, as it prevents claims being brought by investors against new legal measures to reduce alcohol consumption and harm. In this sense, the *RCEP* goes further than the *CPTPP* and *SAFTA*, which only carve out tobacco from the operation of ISDS. There are several other aspects of the *RCEP* that arguably enhance the policy space in respect of alcohol.

1 *Scope of Investment Obligations*

In addition to the exclusion of ISDS, the scope of investment obligations under the *RCEP* also protects states' regulatory capacity to implement public health measures for alcohol. Like the *CPTPP*, the *RCEP* equates the FET standard with the standard under customary international law:

> 1. Each party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens.
>
> 2. For greater certainty:
>
> (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings; …[128]

The *RCEP* does not provide any additional articulation of the FET standard, such as that included in art 8.10.2 of *CETA*. Therefore, it does not offer any additional flexibility concerning alcohol labelling regulations or additional certainty about FET obligations beyond what is provided for by the *CPTPP*.

Like the *CPTPP* and *CETA*, the *RCEP* also expressly circumscribes the meaning and scope of expropriation:

> Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals [and] the environment … do not constitute expropriation …[129]

---

125 *ChAFTA* (n 25) art 9.18.3.

126 *Regional Comprehensive Economic Partnership Agreement*, signed 15 November 2020 (not yet in force) ('*RCEP*').

127 'Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP)', *RCEP* (Web Document, November 2020) <https://rcepsec.org/wp-content/uploads/2020/11/RCEP-Summit-4-Joint-Leaders-Statement-Min-Dec-on-India-2.pdf>, archived at <https://perma.cc/3RL4-QJ86>.

128 *RCEP* (n 126) arts 10.5.1–10.5.2(a).

129 Ibid annex 10B para 4.

Unlike the *CPTPP* or *CETA*, this narrowed definition is not subject to a 'rare circumstances' exception. This increases protection for the policy space for alcohol labelling as well as certainty about whether legitimate health measures will constitute expropriation because it does not require the determination of what constitutes 'rare circumstances' or whether a measure is 'manifestly excessive'.[130]

The *RCEP* includes factors that are required to be considered as part of a 'case-by-case, fact-based inquiry' into whether a government action constitutes expropriation.[131] Similar provisions are featured in the *CPTPP* and *CETA*.[132] However, the factor concerning investors' prior expectations is limited to breaches of 'the government's prior binding written commitment to the investor, whether by contract, licence, or other legal document'.[133] This arguably provides greater protection than the *CPTPP* and *CETA*, which utilise broader language and require consideration of the extent to which the measure 'interferes with distinct, reasonable investment-backed expectations'.[134] Like *CETA*, the *RCEP* also provides additional clarification that the 'character' of the government action, as another factor to be taken into account, includes its 'objective and context'.[135] This may provide greater protection for policy space by ensuring that sufficient attention is paid to the objective of a legitimate and non-discriminatory measure and the particular exigencies of the country implementing it.

2 *Regulatory Principles in the Investment Chapter*

The *RCEP* includes a 'principle' in art 11.4(1) that provides that a party may, 'in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition … provided that such measures are consistent with this Chapter'.[136] This principle has similarities to the approach taken in the *CPTPP*, which includes a regulatory objective in its text: the 'principle' does not constitute a true exception, as any measures taken must be consistent with the obligations in the investment chapter. Furthermore, the principle imports a necessity test, with the language being more similar to that seen in the general exceptions from *GATT* and *GATS*.

3 *General Exception in the Investment Chapter*

The general exceptions in art XX of the *GATT* and art XIV of the *GATS* have been incorporated into, and been made part of, the *RCEP*,[137] and the exception from *GATS* has been made expressly applicable to the *RCEP* investment chapter. A footnote to the text makes clear that the parties 'understand' that the exception in art XIV(b) covers 'environmental measures necessary to protect human, animal or plant life or health'.[138] Unlike *CETA*, the exception is not limited to certain obligations in the investment chapter and instead covers the whole chapter.

---

130 See *CETA* (n 23) annex 8-A para 3.
131 *RCEP* (n 126) annex 10B para 3.
132 *CPTPP* (n 22) annex 9-A para 3(a); *CETA* (n 23) annex 8-A para 2.
133 *RCEP* (n 126) annex 10B para 3(b).
134 *CPTPP* (n 22) annex 9-B para 3(a)(ii); *CETA* (n 23) annex 8-A para 2(c).
135 *RCEP* (n 126) annex 10B para 3(c); *CETA* (n 23) annex 8-A para 2(d).
136 *RCEP* (n 126) art 11.4.1.
137 Ibid art 17.12.
138 Ibid art 17.12.1 n 6.

The exception resembles the approach taken in *SAFTA*. It arguably provides a good defence to a state party implementing alcohol control measures that may be in breach of its investment obligations.

IV CONCLUSION

There is no single policy direction for public health evident in the new round of trade and investment agreements negotiated over the last five years. The investment rules in these agreements are tending to move in the direction of affording *greater* regulatory autonomy to states. These changes are not specific to alcohol but potentially cover health, environment and other public interest concerns. This expansion of the regulatory space is being achieved through various mechanisms discussed in this article: the inclusion of a deference clause, the affirmation of a state's right to regulate, the circumscription of FET and expropriation obligations and the introduction of *GATT* art XX-style general exceptions. The 'big gun' approach has seen some carving out of tobacco control measures from ISDS. Alcohol labelling measures will arguably benefit from these public interest-oriented changes (except the tobacco-specific carve out) to the content of new investment agreements.

But the picture is somewhat different when we look at the alcohol-specific changes to trade and investment agreements. These clearly reflect the interests of exporter nations, including the US and Australia who were key proponents of the new supplementary labelling rules for wine and spirits. These WTO-plus changes are tending to *reduce* the policy space for alcohol labelling. Although a rule about alcohol supplementary labelling seems innocuous, the operation of the rule potentially makes it difficult for governments to prescribe the types of labelling features that are essential to their effectiveness in changing consumer attitudes and behaviour. These are features such as the size and prominent placement of the labels. The rule, however, does not operate in an absolute manner in all instances. The inclusion of a specific exception in *A–HKFTA* and the *GATT* art XX-style exceptions in all the other new agreements claws back some regulatory autonomy for states in respect of alcohol labelling.

But the presence of these exceptions does not distract from the conclusion that the new supplementary labelling rule is an additional obstacle to the introduction of alcohol labelling. It is not an insurmountable obstacle by any means, but it is a further consideration and potential constraint that states must take into account when determining whether to introduce alcohol warning labels. In that sense, it changes the policy space within which domestic alcohol labelling measures are developed and possibly renders states more reticent about introducing the type of alcohol labelling regime that would be most impactful. It is unlikely that these concerns about labelling would push states towards more interventionist measures, such as taxation, marketing controls or availability restrictions. The opposite is likely true — a state may choose the path of least resistance and pursue less interventionist measures, such as education campaigns. The further concern is that the creation of any new trade and investment rules provides a potential basis for a state-to-state dispute. Whether such rules and the possibility of an ensuing dispute influences policymakers to move away from a particular intervention may be context-specific, but again, the adding of more rules creates the potential for such 'chilling' to occur.