

TPPA and Regulating for Health in Thailand

Professor Jane Kelsey, School of Law, The University of Auckland, New Zealand

5 issues to discuss

1. Different mindsets:

health policy v commerce

2. Process & price of accession to TPPA

3. Cross-border & financial services

4. Industry influence on decisions

5. Exceptions

1. Understanding the TPPA mindset

Health policy is **social** - TPPA works for **commerce**

‘Trade’ is longer just about goods or foreign investment

Aim is to expand **global supply and value chains**, eg global alcohol

Integrated **across borders** through Internet

Uninterrupted flows of information, data, capital, executives

Protection of **intellectual property**

National regulation, policies and processes are seen as **barriers**

Regulation must impose **least burdens** on commerce

Common rules across countries through TPPA rules & processes

Rights for business to **influence** national policy decisions

Read all TPPA chapters as **integrated and mutually reinforcing**

Battle over which **superpower** makes the rules – US or China

Some TPPA chapters that impact on health

Goods – imported food, alcohol & tobacco products, meds & devices

IP - medicine patents, biologics, brands & trade marks

Government procurement – PPPs, equipment, bloods

Services – advertising, retail, sponsorship, hospitals, lab- testing, professions, sanitation, water supply, telemedicine

Financial services – health, accident, disaster insurance

E-Commerce – e-services, offshore data holdings

Investment – alcohol production, mines, coal-fired power stations, retail chains, trademarks,

SOEs – government-owned commercial and non-commercial entities and monopolies

TBT – labelling, food safety & product standards

SPS – quarantine and disease control

Temporary movement of persons – brand ambassadors, health professionals, foreign healthcare executives

Environment – international agreements, climate change

2. Process & price of accession to TPPA

Article 30.4 process is similar to joining WTO

Existing parties set the price

Any APEC member can ask to join but they must ...

negotiate terms with each existing TPPA party,

then **all TPPA members must agree** as a group.

New TPPA parties will have to agree to TPPA+

One party, eg **US**, can **veto** entry

US will need **Congress to approve the terms** of entry for a new party

Then US will have to **certify Thailand's compliance** with those terms

(see www.tppnocertification.org)

Thailand may have to **implement changes first**, no phase in period

3. Cross-border services & financial services

Health-related policies are activities **within a market**

Target 'behind the border' activities of governments

Laws, policies, regulations, administrative decisions are **potential barriers**

At **national, regional and local levels** and bodies with delegated roles

Aim is to **reduce barriers** to global expansion of business, whether

- delivered from offshore by internet (advertising, xrays, insurance)
- people travelling to the country for a service (health tourism)
- foreign investors (private hospitals, mines, tobacco industry)
- visiting personnel (consultants, professionals, executives)

Earlier agreements were too fragmented,

want coherence in rules & obligations

Main rules on services

Cannot discriminate against foreign services & providers

Cannot restrict services markets, countrywide or by region, eg. **not**

- **Ban** an activity (eg alcohol advertising or direct marketing of medicines)
- Limit the **number of providers** (eg licensed private hospitals, rubbish dumps)
- Limit the **number of services** they can provide (eg. beds per hospital, hotel rooms due to waste disposal, alcohol sales hours)
- Require **proof of unmet supply** (economic needs test) (eg. rubbish dumps, fast food outlets)
- **Monopolies** (eg. household water supply, public health insurance)

Domestic regulation

US resistant to rules on 'technical standards' as in WTO
RCEP may be worse as Australia & NZ strong demanders

TPPA says all general measures must be *administered* in a **reasonable, objective, impartial** way

States must **endeavour** to ensure decisions on

- qualification requirements and procedures
- Technical standards (advertising, retail, water quality, zoning, etc)
- licensing requirements

are based on objective and transparent criteria, such as competence and

licensing procedures don't themselves restrict supply of the service,
administration fees reasonable, transparent, do not restrict supply

These 'disciplines' aim to ensure that measures don't constitute **unnecessary barriers** to trade in services ... while recognising the **right to regulate** and introduce new regulations.

But the '**right to regulate**' can be **misleading**:

Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, **but this sovereignty ends whenever rights of other Members under the GATS are impaired**"
(WTO Panel, *US-Gambling*)

4. Industry's right to influence policy

Industry, especially foreign firms, are **guaranteed opportunities to influence domestic policy decisions** in many ways, including:

Transparency rules in chapters (TBT, services, IP)
chapter 26 and Annex 26-A pharmaceuticals and medical devices:
Disclosure, evidence-based decisions, contested evidence, explain decisions, reviews

Regulatory coherence chapter, not as bad as it was
Regulatory impact analysis, presumption of minimal regulation
Right of affected commercial interests to participate

Chilling effect backed by threat of an ISDS dispute
States or investors use information gathered for disputes

5. Exceptions: Schedules

Cross border services & investment, financial services/investment

Reservations are listed in 2 annexes

Negative list - what is not listed is not protected

Annex 1: existing measures can be kept but not make more restrictive

Annex 2: service activities and sectors where policy space is preserved

High risk because it is almost impossible to add to the list in the future
Applies automatically to new technologies for providing the service

Does not apply to some rules,
eg not to investor protections or some domestic regulation rules

Separate annexes for financial services

General exception is imported from WTO

Does **not** apply to the **investment chapter**, including ISDS

Multiple layers must be satisfied: the measure **must be**

- to **protect human life or health**
- **necessary** to achieve that objective, ie no reasonably available alternative to achieve the goal
- not a means of **arbitrary or unjustified discrimination**
- not a **disguised barrier** to foreign suppliers

Recent cases view health measures in the policy context

But general exception has fully succeeded only **1 in 44** disputes when relied on as a defence in WTO



Thank you!

j.kelsey@auckland.ac.nz