

How much NCD policy space is eaten by trade? Navigating trade and investment barriers to regulating food and beverages

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Background International trade and investment agreements (TIAs) pose real and perceived barriers to policy development and implementation for NCD prevention, especially in relation to policies that regulate food environments.

Objectives The aim of this study was to determine whether, how, and to what extent TIAs may constrain governments' policy space for regulating food environments in different country contexts.

Methodology We conducted a realist review of legal and scientific literature to consolidate global evidence on the impacts of TIAs on domestic policy space for regulating unhealthy foods and beverages. Interventions of focus included: **fiscal policies, product bans, advertising restrictions, nutrition labelling, reformulation and composition standards, and procurement policy**. This was complemented by interviews with trade and investment lawyers and key stakeholders, who provided detailed expert opinion on the potential conflicts between trade and investment law and a sub-sample of the priority policy instruments. Policy space and certainty thereof was ranked based on the frequency and range of assertions made by the reviewed literature and experts interviewed.

Results

What are the mechanisms?

- Mechanisms of TIA influence on policy space include both substantive and process constraints (see Table). *Interpretations* of the rules written into agreements may vary, depend on context, and/or evolve over time.
- Actors, institutions and power structures play a role in whether and how these mechanisms are activated.
- Contextual factors such as strong (local or international) evidence, political will, industry power, media attention, and public opinion may moderate the mechanisms of TIAs' influence on policy space.

Principle / Mechanism	Type of Constraint	Description / Summary	Moderating factors
Non-discrimination	Substantive	All trading partners must be treated equally. Imported products & services should receive treatment no less favourable than 'like' products or services of domestic origin – both in <i>intent</i> & in <i>effect</i> .	<ul style="list-style-type: none"> • Products or services within remit • Determination of 'like' products
Necessity	Substantive	Policy must be the least trade restrictive measure available to achieve a <i>legitimate</i> desired objective (such as health protection / to ensure quality of a service). Evidence is required to justify.	<ul style="list-style-type: none"> • Availability & quality of evidence justifying need & projected effectiveness in achieving desired objective. • Framing of policy objectives.
Harmonisation to International standards	Substantive & Process	Where an international standard exists, it should be applied as basis for regulation, except if it would be ineffective or inappropriate to do so (e.g. WTO TBT).	<ul style="list-style-type: none"> • Definition of what constitutes an international standard • <i>Codex Alimentarius</i> guidelines • Recognition of WHO recommendations as complement/alternative to Codex.
Transparency / Notification	Process	If a measure does not follow international standards (or no relevant standard exists), members must notify others, provide information and allow time for comment (e.g. WTO TBT). CPTPP goes beyond WTO rules, requiring prior stakeholder consultation.	
Regulatory coherence	Process	Prescribes consultation & coordination mechanisms which may require governments to provide opportunities for stakeholder input into policymaking. Could provide greater role and access for industry input.	
Intellectual Property Rights	Substantive	Trademarks should not be <i>unjustifiably</i> encumbered by special requirements.	<ul style="list-style-type: none"> • Availability & quality of evidence justifying need & projected effectiveness in achieving desired objective. • Framing of policy objectives.
Expropriation (indirect)	Substantive	Expropriation of an investment, even for a public purpose, may still warrant compensation. However, experts agree that a regulatory taking would have to be extreme in order for a claim of indirect expropriation to be upheld.	<ul style="list-style-type: none"> • Degree of impact on an investment. • Definition of expropriation as loss of control or possession (the control standard) or simply interference with the use of property (the use standard).
Fair & Equitable Treatment	Substantive & Process	Protects the legitimate expectations of an investor of the regulatory environment. If a host induces investment and later introduces a policy that regulates the products of that investment, this challenge could be applied.	<ul style="list-style-type: none"> • Promises made pertaining to regulatory environment • Incentives or investment contracts given
Investor-State Dispute Settlement	Process	Allows investors to directly challenge government policy, rather than appealing to their host government to do so.	

Level of Certainty	High	Fiscal policies	--	Product bans
	Medium	Reformulation/ Composition standards	Advertising restrictions; Labelling	--
	Low	Procurement (insufficient data)		
		Low	Medium	High
Policy Space Constriction by TIAs				

How much food policy space do governments have?

There is a high level of certainty that well-designed fiscal policies are capable of withstanding legal challenge, while individual product bans are not viable under TIAs. Opinions on policy space for front-of-pack labelling, advertising restrictions, and composition standards vary more widely, thus, these policy areas require a more careful approach to policy design. There is insufficient evidence to ascertain the policy space for procurement policy.

Conclusions Multiple TIA rules and principles could potentially constrain policy space for public health nutrition. However, we argue that governments have more policy space than commonly perceived. Awareness of legal risks, moderating factors and careful policy design is key to mitigating challenges.