

INTERNATIONAL TRADE AGREEMENTS AND IMPLEMENTATION OF THE INTERNATIONAL CODE OF MARKETING OF BREAST-MILK SUBSTITUTES

Frequently Asked Questions

WHO/UNICEF Information Brief



WHO policy brief on international trade agreements and implementation of the International Code of Marketing of Breast-milk Substitutes

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Frequently Asked Questions



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INTERNATIONAL TRADE AGREEMENTS AND IMPLEMENTATION OF THE INTERNATIONAL CODE OF MARKETING OF BREAST-MILK SUBSTITUTES

Frequently Asked Questions

This Information Brief describes the implications of trade agreements for domestic implementation of the International Code of Marketing of Breast-milk Substitutes for policy makers, regulators and other relevant officials.

The document provides a brief description of the right to regulate under WTO law, including core principles and relevant WTO covered agreements.

To explain the issues in simple terms the document uses a question and answer format.

WHO/UNICEF Information Brief on International trade agreements and implementation of the International Code of Marketing of Breast-milk Substitutes

Background

The aggressive marketing of breastmilk substitutes creates a major barrier to breastfeeding. In 1981, the International Code of Marketing of Breast-milk Substitutes (the Code)¹ was adopted to protect families from the industry's aggressive marketing tactics. Repeatedly, the World Health Assembly has called on governments to give effect to the provisions in the Code through national, legally-binding regulations.

States have obligations to protect, respect and fulfil the right to health under international human rights law. This includes an obligation to protect and support breastfeeding under Article 24 of the Convention on the Rights of the Child (CRC).² The Committee on the Rights of the Child has recognized the Code as an appropriate measure that States Parties to the CRC are obliged to take in the fulfillment of their obligations under the Convention.³ UNICEF/WHO/IBFAN have identified 136 countries as having Code regulations in place.⁴

Those lobbying against implementation of the Code have sought to argue that certain measures are inconsistent with international trade agreements.

¹ World Health Assembly, Resolution WHA34.22 (1981)

² United Nations Convention on the Rights of the Child (1989) (UNCRC)

³ Implementation Handbook for the Convention on the Rights of the Child, Third Edition, United Nations Children's Fund, 2017, page 360.

⁴ Marketing of breast-milk substitutes: national implementation of the international code, status report 2018. Geneva: WHO, UNICEF and IBFAN; 2018, Licence: CC BY-NC-SA 3.0 IGO

Although most of countries worldwide have implemented the Code in legislation, there has never been a formal legal dispute concerning domestic implementation of the Code under an international trade agreement. International trade agreements recognize the right of States to regulate (including to protect health). Nonetheless, the implications of trade agreements for implementation of the Code has been a topic of discussion in recent years. This can be observed, for example, in the World Trade Organization (WTO) Committee on Technical Barriers to Trade (TBT Committee), where WTO Members have questioned one another concerning specific trade concerns in the context of measures to implement the Code.⁵

World Health Assembly Resolution 59.26 requested the Director-General of WHO to provide support to Member States to frame coherent policies that address the relationship between trade and health.⁶

In this context, this document describes the implications of trade agreements for domestic implementation of the Code for policy makers, regulators and other relevant officials. The document provides a brief description of the right to regulate under WTO law, including core principles and relevant WTO covered agreements. To explain the issues in simple terms the document uses a question and answer format.

⁵ See for example, World Trade Organization, Committee on Technical Barriers to Trade, Minutes of the Meeting of 8-9 November 2017, G/TBT/M/73, paras 2.124 – 2.127

⁶ World Health Assembly (2006). WHA Resolution 59.26: International Trade and Health. Geneva, Switzerland: World Health Assembly available at http://apps.who.int/gb/ebwha/pdf_files/WHA59-REC1/e/Resolutions-en.pdf .

Q. What is the World Trade Organization Agreement?

The World Trade Organization (WTO) Agreement⁷ is the central multilateral treaty governing international trade. The Agreement is an umbrella agreement that encompasses a number of WTO 'covered agreements'.⁸

In short, WTO law disciplines the ways in which WTO Members may restrict or regulate trade in goods and services, including using tariffs (customs duties) and non-tariff measures, such as regulations. WTO law also obliges Members to ensure minimum standards of protection for intellectual property rights, including trademarks.

Q. How can WTO law be invoked?

A system of dispute settlement permits one WTO Member (a government) to bring a complaint against another alleging violation of WTO commitments. If the WTO panel adjudicating the dispute finds a violation of WTO law, the panel will recommend to the Dispute Settlement Body (DSB) that the violating Member bring its law into conformity with WTO law.⁹ This system does not permit companies to bring legal claims directly before the WTO and does not require payment of compensation or monetary damages in the event WTO law is violated.

⁷ Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154. The WTO Agreement and other legal texts are available at: <https://www.wto.org/english/docs_e/legal_e/legal_e.htm>

⁸ A full list of the covered agreements is included in the List of Annexes at the end of the WTO Agreement.

⁹ See Article 19(1) of the Dispute Settlement Understanding.

If the offending Member has not brought its law into conformity with WTO law within a reasonable period of time, the complainant may obtain authorization to suspend concessions (WTO obligations owed by the complainant to the respondent) from that point forward, at a level equivalent to the consequences of the violation.¹⁰ For example, a complainant might be authorized to impose otherwise prohibited tariffs on imports from the Member in violation.

Q Which WTO covered agreements are most relevant to domestic implementation of the Code?

Depending on how WTO Members implement the Code, several WTO covered agreements may be relevant. These include the:

- General Agreement on Tariffs and Trade 1994 (GATT 1994)
- Agreement on Technical Barriers to Trade (TBT Agreement)
- Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)
- Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).

As a general rule, these agreements are cumulative in their application, meaning that a given regulation must comply with each. The exception to this is for SPS measures, which do not fall within the scope of the TBT Agreement (i.e. a measure cannot fall both within the scope of the SPS and the TBT Agreements, it will be within one or the other).

¹⁰ See Articles 22(1) and 22(2) of the Dispute Settlement Understanding.

Q. Is the right to regulate protected in these agreements?

Yes. WTO law recognizes a balance between rights (to regulate) and obligations. Each agreement permits WTO Members to implement measures to protect human health.

Q. How is the GATT 1994 relevant to domestic implementation of the Code?

The GATT 1994 governs trade in goods and has the widest application of the WTO covered agreements mentioned above. Among other things, the GATT 1994 prohibits discriminatory measures, such as measures that treat imported products less favourably than like domestic products (Article III:4), and quantitative restrictions on imported products (Article XI:1). These prohibitions are subject to general exceptions, including for measures that are *inter alia* necessary to protect human life or health (Article XX(b)).

The basic principles set out in the GATT 1994 are also reflected in other, more specific, WTO covered agreements.

Q. How is the TBT Agreement relevant to domestic implementation of the Code?

The TBT Agreement applies, amongst other measures, to technical regulations and standards.

A standard under the TBT Agreement is a document approved by a recognized body that sets out product characteristics or methods of

production but is not mandatory. Standards are to be developed in accordance with a Code of Good Practice.¹¹

Technical regulations are mandatory requirements that set out product characteristics.¹² For example, measures restricting marketing on product labelling constitute technical regulations because they govern the characteristics that a product can or cannot take. By contrast, a ban on television advertising or other methods of promotion that do not affect the form of the product itself would not ordinarily be technical regulations or, subject to the TBT Agreement.

Under the TBT Agreement, technical regulations must be non-discriminatory, not more trade restrictive than necessary to achieve a legitimate objective and must be implemented in line with obligations concerning transparency. These obligations are explained in more detail below.

Q. What does it mean for a regulation implementing the Code to be not more trade restrictive than necessary?

Under Article 2.2 of the TBT Agreement WTO Members must ensure that technical regulations are not more trade restrictive than necessary to achieve a legitimate objective, such as protection of human health. Therefore, when implementing the Code, WTO Members must ensure

¹¹ Article 4.1 TBT Agreement. See also, Decision of the Committee on Technical Barriers to Trade, G/TBT/9 (13 November 2000) which sets out principles of good practice.

¹² The phrase ‘technical regulation’ is defined in paragraph 1 of Annex 1 of the TBT Agreement.

that regulations governing labelling of breast milk substitutes are no more trade restrictive than necessary to achieve their objectives.

In determining whether a regulation is more trade restrictive than necessary, WTO panels weigh the extent to which a regulation contributes to its objective against the trade restrictiveness of the measure, taking account of the risks non-fulfilment of the objective would entail. In practice, the test has been applied in a way that preserves a substantial right to regulate for WTO Members. However, legal analysis of an individual regulation will often turn on what evidence there is, either of a risk to health, or of the contribution a regulation makes to its objectives.

Q. How relevant is the Code to application of the necessity test?

Article 2.4 of the TBT Agreement obliges Members to use relevant international standards as the basis for technical regulations, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Article 2.5 then creates a presumption that health measures in accordance with relevant international standards do not create unnecessary obstacles to international trade under Article 2.2.

It is an open question whether the Code, or parts thereof, would constitute an international standard for purposes of the TBT Agreement. It is also possible that Codex Alimentarius Commission standards, guidelines or recommendations could constitute relevant international standards. In a recent WTO dispute, a Panel emphasized that whether an

instrument constitutes an international standard will be assessed on a case-by-case basis depending on the context. Nonetheless, the Panel emphasized that in addition to being adopted by a body with activities in standardization, the instrument must be sufficiently clear and precise to allow it to be implemented in a consistent and predictable manner.¹³

Irrespective of whether these instruments are considered relevant international standards in a dispute, a WTO panel may consider them. For example, in a WTO dispute concerning tobacco control measures a panel relied on Guidelines for Implementation of the WHO Framework Convention on Tobacco Control even though it was not argued that they constitute relevant international standards.¹⁴

It is also possible to justify regulations under Article 2.2 in the absence of relevant international standards, or where a Member goes above and beyond an international standard. Under WTO law each WTO Member has the right to determine its own appropriate level of protection with respect to a health risk. The legal question that may then arise is whether the means of achieving that level of protection (the regulation) is more trade restrictive than necessary.

¹³ WTO Panel Reports, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 28 June 2018, para. 7.370.

¹⁴ Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865.

Q. What does it mean for a regulation to be non-discriminatory?

Article 2.1 of the TBT Agreement prohibits discriminatory technical regulations. For example, a technical regulation must not treat imported products less favorably than like domestic products.

Discrimination may arise either through the form or effect of a measure. A labelling regulation that applies only to imported products could be discriminatory through the form of the regulation. By contrast, a labelling regulation that applies equally to imported and domestic products might discriminate through its effect if that effect reduces the competitiveness of imported products and is not even-handed.

If a regulation treats products or product categories differently, and the difference in treatment reduces the competitiveness of imported products, a panel will examine whether that difference in treatment is based solely on a legitimate regulatory distinction. For example, a panel might consider whether the difference in treatment is justified by reference to a WTO Member's objectives, or based a difference in the risks posed by different products

Q. What is the TBT Committee and how does it work?

WTO Members also have obligations with respect to transparency under Article 2.9 of the TBT Agreement. Article 2.9 creates notification obligations if a WTO Member implements a technical regulation not in accordance with a relevant international standard, or where no relevant international standard exists. These obligations apply if a technical regulation may have a significant effect on trade of other Members.

Paragraphs 1 – 4 of Article 2.9 require a Member to, among other things, publish a notice, notify other WTO Members, provide particulars of the proposed regulation upon request, allow a reasonable time for comments, and take those comments into account.

The TBT Agreement also establishes the TBT Committee, which provides a forum for WTO Members to discuss regulations, with a view to avoiding formal dispute settlement. Regulations implementing the Code have been discussed in the TBT Committee.

Q. How is the SPS Agreement relevant to implementation of the Code?

The SPS Agreement applies to food safety measures, including to ‘any measure implemented ‘to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs’.¹⁵

Although this definition is broad enough to encompass packaging and labelling measures, WTO Members have tended to address regulations governing marketing on labelling through the TBT Committee. This suggests that the SPS Agreement is more likely to be relevant to food safety measures, such as measures to address adulterants, or labelling measures concerning food safety risks. In the case of these measures (SPS measures), the SPS Agreement will apply, but the TBT agreement will not.

¹⁵ See Annex A, para. 1

In short, the TBT Agreement and GATT 1994 are more likely to be relevant to implementation of the Code (although in the case of a dispute, it would be for the panel to decide on whether the measure falls under the SPS or TBT Agreement).

Q. How is TRIPS relevant to implementation of the Code?

TRIPS obliges WTO Members to ensure minimum standards of protection for intellectual property rights, including trademarks. This may be relevant to labelling measures that restrict use of images or words on product packaging if those images or words are trademarks.

Q. What relevant obligation does TRIPS create with respect to trademarks?

Under TRIPS, WTO Members are obliged to permit the registration of trademarks. This obligation is subject to exceptions, including for misleading trademarks.¹⁶ For example, under TRIPS, the general obligation to register trademarks would not apply in the case of marks that are misleading with respect to the health benefits of consuming a product, or misleading with respect to the relative health benefits of that product compared to breast feeding.

¹⁶ TRIPS, Article 15(2) provides a right to deny registration on the grounds permitted under the Paris Convention for the Protection of Industrial Property. Article 6 quinquies B(iii) provides that Parties may refuse registration on the basis that a mark is misleading.

Q. Does TRIPS provide a right for trademark owners to use their mark in the course of trade, such as on product packaging?

The ordinary wording of TRIPS does not require Members to grant trademark owners the right to use a trademark in the course of trade.¹⁷ Case law also suggests that TRIPS guarantees trademark owners only a right to exclude others from using a trademark.¹⁸ As one WTO Panel has stated TRIPS:

*does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue public policy objectives.*¹⁹

WTO Members may go further than TRIPS and provide a right of use under domestic trademark law, but this is not compelled by TRIPS.

Q. What limits are there on how WTO Members restrict use of trademarks?

Article 20 of TRIPS prohibits Members from unjustifiably encumbering the use of a trademark in the course of trade with special requirements. The concept of justifiability may also be interpreted in light of Article 8 of TRIPS, which specifies that Members may adopt measures necessary to

¹⁷ See Article 16.1, which suggests a negative right to exclude.

¹⁸ Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Complaint by Australia, WT/DS290/R, adopted 20 April 2005, paras 7.610 – 7.611.

¹⁹ *European Communities, Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*. WT/DS290/R 15 (March 2005) paragraph 7.210

protect public health so long as those measures comply with the terms of TRIPS. The Doha Declaration on TRIPS and Public Health may also be used in interpretation.²⁰ The Declaration (adopted by WTO Members) states:

We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

Article 20 has been applied to a health measure in one WTO dispute, *Australia – Tobacco Plain Packaging*. The Panel stressed that whether a measure is justifiable under Article 20 must be judged on a base-by-case basis by reference to:

i) the nature and extent of the encumbrance resulting from the special requirements, (ii) the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard;

²⁰ See WTO Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.2407 – 7.2411.

*and (iii) whether these reasons provide sufficient support for the resulting encumbrance.*²¹

On the facts, the Panel upheld Australia's tobacco plain packaging measure, which permitted only the use of a brand and variant name in a standardized form on retail tobacco packaging.²² In this respect, the Panel found on the facts that the regulation was contributing to the goal of reducing tobacco use. The Panel Report in that dispute is under appeal.

In summary, although TRIPS does not include general exceptions, the agreement recognizes 'flexibilities', and language that is relevant to the question of when a restriction on use of a trademark is justifiable.

It is also worth noting that domestic law may provide higher standards of protection for trademarks than are required by TRIPS. In this context, governments may wish to consider whether those domestic laws affect implementation of the Code.

In conclusion

- States have obligations to protect, respect and fulfil the right to health under international human rights law, including an obligation to protect and support breastfeeding under Article 24 of the Convention on the Rights of the Child (CRC).

²¹ WTO Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.2597

²² WTO Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.2604

- International trade agreements, including WTO agreements, recognize the right of States to regulate (including to protect health).
- When implementing the Code, WTO Members should ensure that regulations governing labelling of breast milk substitutes are no more trade restrictive than necessary to achieve their objectives;
- WTO Members should also ensure that regulations do not discriminate, for example by treating imported products less favorably than domestic products.
- In interpreting or applying WTO law a WTO panel may rely on the Code.
- WTO law does not guarantee a trademark owner the right to use that trademark, but only the right to exclude others from doing so. In any case, WTO Members may restrict the use of the trademark to where justified to protect public health.
- Although most of countries worldwide (136) have implemented the Code through some form of legislation, some of which is more stringent than the Code itself, there has never been a formal legal dispute concerning domestic implementation of the Code under an international trade agreement.

Assistance on these or other issues concerning implementation of the Code is available on request from WHO and UNICEF.



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