On this page:

Key points:

- The WTO Appellate Body has described the preservation of life and health as “vital and important in the highest degree”. All three of the GATT, TBT and TRIPS Agreements recognise that members may adopt measures to protect public health.
- Under the GATT, Article XX(b) provides an explicit exception for public health. WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation under this exception.
• Under the TBT, human health is explicitly recognised as a legitimate objective which WTO members may pursue in implementing technical regulations, and legitimate regulatory distinctions based on health will not constitute discrimination
• The TRIPS Agreement and its Doha Declaration require TRIPS provisions to be interpreted consistently with public health objectives.

40 default wide line Introduction
The WTO Appellate Body and WTO panels have on several occasions described the preservation of life and health as ‘vital and important in the highest degree’. [tooltip hint="See, e.g., EC Asbestos, Appellate Body, para 172; Brazil Tyres, Appellate Body, para 179, Australia Plain Packaging, Panel, para 7.1311"][*][/tooltip] Each of the agreements discussed in these pages provide space for public health for the purposes of WHO FCTC implementation, either through general exceptions for health, or through the way their obligations are defined. These are summarised below.

20 default 2. The GATT general exception for human health line Item 1
Under Article XX(b) of GATT, WTO Members may adopt measures that violate GATT if it is necessary to protect human health, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

The general exceptions give WTO Members significant space to design and implement measures to protect public health (and other public interests), provided that measures are adopted and implemented in good faith.

**Whether the measure is directed at human health**

In order to determine whether a WTO Member can successfully invoke the exception, a panel will first ascertain whether the measure is directed at the protection of human health. In the case of WHO FCTC measures, this stage should be relatively easy to satisfy through evidence of tobacco-related harm. The existence of the FCTC itself is evidence of strong global consensus on the risk to health occasioned by tobacco use and the objective of FCTC measures.

**Whether a measure is necessary**

A panel will then determine whether the measure in question is addressed toward that health risk and is necessary to protect against that risk, accepting the right of WTO Members to set their own level of protection against that risk. In determining whether a particular measure is necessary to achieve its objective, a panel will weigh and balance several factors, including the contribution that the measure
makes to its objective and the degree of restriction that the measure places on international trade.

This process of weighing and balancing takes place in light of the importance of the objective pursued by the government. Where a panel determines that the measure appears to be necessary to achieve its objective, it will go on to examine whether there are alternative measures that are reasonably available.

The importance of protecting health

On several occasions, WTO panels and the Appellate Body have affirmed the importance of protecting health. For example, in EC — Asbestos the Appellate Body stated that ‘the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.’

In Brazil — Tyres, the panel stated that ‘the objective of protecting human health and life against life threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree.’

The Appellate Body agreed with the panel that ‘few interests are more "vital" and "important" than protecting human beings from health risks.

WHO FCTC parties can be confident that a WTO panel would recognize the importance of protecting health through the adoption of tobacco control measures. In the pre-WTO (and pre-WHO FCTC) case Thailand — Cigarettes, a GATT panel held that tobacco consumption posed a serious risk to human health and that measures designed to reduce the consumption of cigarettes fell within the scope of the exception. In the US — Clove Cigarettes dispute the panel stated that it was 'self-evident' that measures adopted to reduce youth smoking were aimed at the protection of human health.

Contribution made by the measure to the objective

Where a WTO Member seeks to rely on Article XX, it must demonstrate that its measure has contributed to or is likely to contribute to the achievement of the objective.

In Brazil — Tyres, the Appellate Body clarified that a measure does not have to be indispensable to be characterized as necessary, but that its contribution to the objective must be material, rather than marginal or insignificant.
the protection of public health through evidence or data pertaining to the past or the present. [tooltip hint="Appellate Body Report, Brazil — Tyres para 151"][*]/[tooltip]

Where the measure is part of a package of interrelated measures, the contribution it makes to the achievement of its objective may be demonstrated by showing with quantitative projections or qualitative reasoning that the measure is 'apt to produce a material contribution to the achievement of its objective' in the future. [tooltip hint="Appellate Body Report, Brazil — Tyres para 150-151"][*]/[tooltip] The Appellate Body stated:[tooltip hint="Appellate Body Report, Brazil — Tyres para 151"][*]/[tooltip]

[blockquote author="" link="" target="_blank"]certain complex public health ... problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short term, it may prove difficult to isolate the contribution to public health ... objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions — for instance ... certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time — can only be evaluated with the benefit of time.[/blockquote]

A state is therefore not required to isolate the impact of each measure that it adopts as part of a complementary package.

**The restrictive impact on trade**

The Appellate Body has stated that it may be easier to justify as necessary a measure with a less restrictive impact on international trade. [tooltip hint="Appellate Body Report, China — Audiovisuals para 307"][*]/[tooltip]Nevertheless, a WTO member will be able to justify measures with significant effects on trade (such as an import ban) if it can demonstrate that the measures sufficiently contribute to the achievement of the objective. [tooltip hint="Appellate Body Report, Brazil — Tyres para 150"][*]/[tooltip]

**The existence of alternative measures**

If a complaining WTO Member points to another less trade restrictive measure available to achieve the objective, the responding Member must demonstrate that the proposed alternative is not 'reasonably available.'[tooltip hint="Appellate Body Report, Brazil — Tyres para 156"][*]/[tooltip]

A reasonably available measure is one which would equally achieve or make an equivalent contribution to the achievement of the regulatory objective, which the government is capable of adopting and which does not impose an 'undue burden' in the form of prohibitive costs or technical difficulties.[tooltip hint="Appellate Body Report US — Gambling para 307-308; Appellate Body Report, Brazil — Tyres para 156; Appellate Body Report, China — Audiovisuals para 318."][*]/[tooltip] The Appellate Body has not fully explained what is meant by an 'undue burden,'
although the case law suggests that such a burden would entail more than just some additional costs to government.[*]

In the context of tobacco control, individual measures will invariably be part of a multipronged strategy, as was acknowledged in the Australia — Plain Packaging panel decision. FCTC measures are intended to form a mutually supportive package of measures, meaning that employing one measure is not an alternative to other complementary strategies including measures that are in place at the same time as the challenged measure.

**Arbitrary or unjustifiable discrimination or a disguised restriction on international trade**

A measure invoked under the health exception of GATT must also satisfy the introductory paragraph or 'chapeau' to Article XX, which provides: ‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.’ This enquiry aims to identify situations where the measure itself might be necessary to protect public health, but has been applied in practice in a way that: has no rational relationship with the objective of protecting public health, is overly broad, or does not include situations which it logically should include.[*]

It is unlikely that a WTO panel would regard a measure to be applied in a way that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade if any distinctions drawn in the application of the measure were the result of the measure’s public health objective. Similarly, if a measure such as a ban or other restriction on imported goods is applied in an even-handed way, it should survive scrutiny under the chapeau.

To look at GATT obligations more generally, see our page on discrimination.
incorporates a ‘weighing and balancing’ exercise similar to that in GATT article XX(b). The TBT must also be interpreted in light of its preamble, which recognise that ‘no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health’.

For more on the scope of TBT obligations, see our pages on discrimination and trade-restrictiveness.

20 default 4. Public health under TRIPS line Item 2

TRIPS also does not contain an explicit health exception. However, TRIPS obligations cover only registration rights and the enforcement of negative rights against third parties. They do not extend to how states may regulate the use of intellectual property rights. States therefore have significant leeway to implement public health measures that may affect the use or value of intellectual property rights if those measures do not affect rights to registration or rights to prevent third parties from using intellectual property without the owner’s consent.

Additionally, all TRIPS obligations must be interpreted consistently with the objectives and principles clauses of TRIPS (articles 7 and 8) and the Doha Declaration on TRIPS and Public Health adopted by the WTO Ministerial Council (i.e. all of its members), which recognise that:

- ‘The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology... in a manner conducive to social and economic welfare, and to a balance of rights and obligations’ (TRIPS article 7)
- ‘Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition ... provided that such measures are consistent with the provisions of this Agreement’. (TRIPS article 8)
- ‘the TRIPS Agreement does not and should not prevent members from taking measures to protect public health’ and ‘should be interpreted and implemented in a manner supportive of WTO members' right to protect public health’ (Doha Declaration)

At COP4, the Parties adopted the Punta Del Este Declaration, which affirms that TRIPS is to be interpreted in light of its objects and principles and in line with the statements in the Doha Declaration.

For more on TRIPS obligations, see our page on intellectual property.
• Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Panel Report, WT/DS435/R; WT/DS441/R; WT/DS458/R; WT/DS467/R, 28 June 2018.