# Supplementary materials

Table X. Participant responses to marketing restriction scenarios, by type of agreement

|  | IIAS | GATS | GATT | TBT | TRIPS | Other FTAs, e.g. CPTPP | Customs Unions, e.g. EC | General |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 0.0 Baseline: Mandatory ban on persuasive advertising of unhealthy food/beverage products to children under 12 during designated children’s broadcasting | Expropriation (indirect), fair and equitable treatment, and non-discrimination commitments pose no risk or no realistic threat.(P4, P5)  Unless there were concrete/ specific promises made to a company/ industry that there would be no restrictions on food advertising (P4, P9), egregious error on behalf of government (P7), or this was life-or-death issue for a company (P8). *So* perhaps there could be a case, but would depend upon economic interests involved. (P8) | Trade in Services rules do not pose realistic threat (P1, P5, P7, P8). Original GATS wording “nullify & impair” difficult to prove & enforce.(P5)  Depends upon:  Specific commitments made (service sectors) by individual country.  Whether panel views this as quantitative (market access restriction) or qualitative regulation (far more likely – it does not disallow advertising).(P1, P5, P8, P9)  Government taking it up as a challenge; realistically, no advertising provider will have the political power to get govt to bring a claim. (P1, P8) | Non-discrimination (MFN & NT) rules do not pose realistic threat.(P1, P7, P9)  Unless restriction primarily applies to processed foods manufactured by multinationals abroad (in effect).  Even then, subject to general exceptions XX(b) which in most cases would protect.(P1, P7)  Evidence for focus on children <12 might come up for justification.(P9) | Art 2.1 MFN & NT rules seem to be fine  Art 2.2 Ensure technical regulations do not create unnecessary obstacles to trade (Necessity) – will become more and more relevant as you progress through the policy scenarios.(P7) | Subject to Art. 20 Trademarks should not be unjustifiably encumbered by special requirements.(P1, P7)  Question is whether a ban on broadcast advertising is a justifiable restriction on use of a trademark. There are strong arguments to support marketing restrictions in that context. Its partial application (not comprehensive) could raise some legal issues.(P1) | CPTPP: subject to Regulatory Coherence and Transparency chapters (incl. transparency provisions in cross-border services chapter). Reg. Coherence not subject to dispute settlement but means domestic RIAs favouring least restrictive approach. Transparency chapter requires prior notification so potential for lobbying & domestic pressure to occur. (P5)  Several more recent FTAs have tighter rules on Services (than GATS) on technical standards, incl: Necessity test (evidence). (P5)  FTAs with United States will likely have TRIPS+ requirements. (P7) | Uncertain. Depends on the individual country’s commitments.  There may be internal customs unions rules, e.g. EU’s on accepting content from other members  (in which case it could rely on Article 36 public health exception, requiring a proportionality test).(P1) | Other TIAs, e.g. CER & TTMRA: because of deep integration of food industry between Australia & NZ, regulatory dialogue processes under CER could be invoked to lobby and pressure decisions. Food & Grocery Council would take advantage of RIA processes, transparency, and reg coherence processes.(P5) |
| 1.0 Content restricted: persuasive vs. all advertising | No change to the legal issues with the more comprehensive policy. (P4, P6) | Should be OK but requires justification.  This would likely be viewed as a Market Access restriction (quantitative). (P5)  Again, depends which commitments made in positive listing. Then, it relies on General Exceptions. (P5)  Same legal issues, but analysis might change; more comprehensive 🡪 more likely to be effective 🡪 more likely to be upheld. (P1) | Greater emphasis on evidence to prove necessity if relying on General exception XX(b). (P7, P9)  Same legal issues, but analysis might change; more comprehensive 🡪 more likely to be effective 🡪 more likely to be upheld. (P1, P7) | Greater emphasis on evidence to prove Necessity, but may be more likely to be effective. (P7) | This essentially now prohibits the use of trademarks, by not allowing advertisement of the product during those times.(P7) Still, this is a very narrow time frame, so not much restriction is actually happening. (P3)  Same legal issues, but analysis might change; more comprehensive 🡪 more likely to be effective 🡪 more likely to be upheld. (P1) | Services chapters in FTAs: Market Access restriction rules would apply (being now a quantitative restriction).  Agreement may have negative listing; has country preserved its relevant sectors as standstill? Ratchet? Or kept space in Annex 2 on policy space to make changes? (P5)  May have to rely on General exceptions (necessity for protection of public health) and Chapeau. | No data | In general, (domestically):  arguments will be around free speech, individual responsibility, and the freedom of choice. (P3)  From a policy design perspective, no need to define what is ‘persuasive,’ which is often challenging. (P2) |
| 2.0 Definition children’s advertising (hours) | No change to legal issues with more comprehensive policy. Does not meet the description of Indirect Expropriation. (P4, P6)  Now potentially moving from the supply of a service to the interests of an investor. Doubtful impact. An investor (in the food industry or fast food industry) might threaten, but it’s not going to be serious. Claim would be indirect expropriation (of investment being in actual production of the product, or ability operate a valuable part of the service), or breach of FET. (P5) | This becomes a very significant ban / market access restriction. If the gov’t had to rely on the Gen. exception (i.e. if specific commitments have been made not to regulate the relevant sectors), it may be judged as disproportionate / more restrictive than necessary. (P5) | This seems to be a better regulatory approach (in terms of effectiveness), so perhaps from that point of view, easier to defend its Necessity under Gen. exception XX(b). (P7) | This seems to be a better regulatory approach (in terms of effectiveness), so perhaps from that point of view, easier to defend (its Necessity). (P7)  This will require evidence/data to show the number of children watching, and at what times. (P2) | Same as above, this essentially now prohibits the use of trademarks, by not allowing advertisement of the product during those times.(P7) This broader time period seems to be a better regulatory approach (in terms of effectiveness), so perhaps from that point of view, easier to defend / justification. (P7) | Under certain regional agreements, you will have the proportionality principle.  Perhaps not quite here, but at some point, the measure could be questioned for its proportionality (i.e. necessity). This will depend on how the objectives have been framed. (P1) | No data | Same arguments as in first scenario but can expect stronger opposition, as significant reduction in presence of these products on TV during these hours. (P3)  May be harder to justify – would need evidence. There would likely be countries that would complain – just general statements, but that might chill policy, especially for countries that don’t know any better. (P9) |
| 3.0 Target audience (age increase) | No change to legal issues with more comprehensive policy. (P4, P6)  Evidence for need within teenage population is strong; alcohol is not marketed to that age group, nor is tobacco. (P4)  May reduce the likelihood of a FET /discrimination claim from a company that only produces food/beverage products for younger children (that products for 12-18 have been excluded). (P7) | Necessity/ proportionality justification becomes more onerous as you move the age up to 18. (P5) | This would depend on evidence – arguably the power of marketing would be reduced the older children get, and you’d be more capable of making rational informed decisions. But they are still minors under the age of 18, so this likely would not affect answers (unless age of majority in country is already lower). (P1) | Again, may be more justifiable to regulate advertising of all unhealthy products, not just those targeting very young children. (P7) | Again, may be more justifiable to regulate advertising of all unhealthy products, not just those targeting very young children. (P7) | Necessity/ proportionality justification becomes more onerous as you move the age up to 18. (P5) | No data | Age is more relevant if the regulation still bans ‘persuasive’ advertising, or that *targets* children, rather than ALL advertising during time frame. Because the definition of targeting a broader age group will be more general, and may start to look like advertising that targets adults. (P2, P3) |
| 4.1 Medium: non-broadcast media | Still marginal risk / no change at this point. (P1, P6)  The only difference, in extending the restriction to all media, is in enforceability. (P4) | This increases the range of services that are affected by the measure – you would have to look again at commitments made. (P1, P5) | New trade in goods issue: restricting trade in goods that *contain* advertising, e.g. magazines or posters. Could look like a quantitative restriction, contrary to Art 11.1 which needs to be justified under Gen. exceptions XX(b). (P1)  Non-discrimination still depends where regulatory distinctions are drawn – is there greater burden on certain products, and does that have anything to do with where they come from. (P9) | Again, more comprehensive so may be more defensible against an argument of discrimination against TV-advertised products while other media are unregulated, under Art. 2.1. (P7) | Again, more comprehensive so may be more defensible against an argument of Discrimination against TV advertising while other media are unregulated. (P7) | Now potentially affects telecommunications (often very specific rules), and e-commerce(P1), and CPTPP cross-border services. (P5)  TTIP and other new EU agreements can have strict requirements on process for taking regulatory action, a higher bar for evidence, and greater TBT emphasis on international standardisation. (P8) | No data | To justify necessity, you may have to limit physical advertising restriction to places where it’s mostly children. (P2)  In a practical sense, these variations become much more difficult to enforce P4, P5) |
| 4.2 Medium: All adv.  Includes:  - In-store promotion  - On- or in-product hooks  - In-school promotion | No issues. (P6)  No issues, as long as it’s not discriminatory, criteria are clear and evidence-based (Transparency). (P4)  For FET, a regulation this comprehensive increases the issue around justifiability. (P7)  On- or in-product hooks: Claim could be made that prohibiting the use of a trademark has equivalent effect to expropriation, or results in trade that is not fair and equitable. More justification may be required that it’s not arbitrary, because products of large multinationals are heavily affected; if forced to remove logos/TMs from some of their products, they could observe a differential impact on the conditions of competition. (P1) | In-store promotion: This again expands the categories of services supply that could be affected (adding retail). (P1)  Physical spaces – displays: these are technical standards. Could be considered a measure affecting the supply of a service, or for the delivery of a distribution or marketing service. It *might* even become a condition on licensing (a domestic regulation discipline). (P5) | On- or in-product hooks: In a Kinder Surprise-type scenario, this becomes product prohibition. An argument could be made that it’s discriminatory, that it’s a quantitative restriction contrary to Art 11.1 (basically a ban on importation), or if considered a behind-the-border regulation, a violation of Art 3. (P1) | On- or in-product hooks: relates to product formulation, so is TBT. Might be argued that it is more trade restrictive than necessary to achieve the objective (it prohibits the import of certain products with those hooks). (P1, P9)  Depends on framing of objectives. (P1)  Arguably, you are getting to the point where you have a ‘dark market’ for advertising (as Australia has with tobacco); this is a significant step, and you need evidence to justify. (P7) | A regulation this comprehensive increases the issues around justifiability. (P7)  On- or in-product hooks: companies may bring claims their trademarks are being interfered with unjustifiably (Art 20). (P1) | On- or in-product hooks: TIAs may require compliance with TRIPS, or they may set out TRIPS+ obligations. Similar arguments could also be made to those under GATT (i.e. product prohibition, discriminatory, quantitative restriction). (P1)  TBT chapters in FTAs: could be argued more trade restrictive than necessary. (P9)  In-school regulation: Procurement chapters in FTAs: if a public/ government schooling system, could relate to procurement if govt is purchasing things to put in vending machines, etc. (P9)  CPTPP regulatory coherence: need to make sure you have evidence, and procedure is upheld. (P9) | On- or in-product hooks: Customs unions may require compliance with TRIPS, or they may set out TRIPS+ obligations. (P1) | On- or in-product hooks: practically, it’s very difficult to define design elements that are hooks for children. (P3)  Across agreements, more evidence for justification will be required. This will depend on framing of objectives. (P1)  In-schools, School sponsorship: Most participants saw no issues (P1, P4, P6) |
| 5.0 Products vs. Brands | Greater potential for a discrimination / arbitrary argument. Will depend what criteria are applied, type of company (single/limited product vs diverse product line). Could go either way (50/50). (P4)  Still very unlikely to raise investment issue, but potential discrimination argument, or FET argument if has not followed proper process. Clear evidence-based categories and some consultation would be supportive. (P6)  May begin to open arguments around whether this goes beyond legitimate expectations of regulatory environment (FET). (P7) | No data (no change from above) | No data (no change from above) | Same issues under TBT (e.g. justification of Necessity), but as long as companies are still able to sell products, should be ok. (P7) | Greater evidence burden. Brand is protected as a trademark; likely argument around unjustifiable restriction on use. Would need evidence on how brand advertising/presence affects intention to purchase (or other point in causal chain). Framing of objectives will be important. (P1)  Same issues under TRIPS (e.g. justification), but as long as companies are still able to sell products, should be ok. (P7) | FTAs with United States will likely have TRIPS+ requirements. (P7) | No data (no change from above) | Chilean regulation was not able to regulate licensed characters of a brand – only their activities portrayed in relation to unhealthy products. (P2) |
| 6.0 Evidence: domestic vs international | Responses to this scenario were general across all relevant agreements, and most participants asserted that there is reasonable freedom to use international evidence. (P4, P5, P6, P7, P9) However, responses indicate that reliance on international evidence may increase the potential for TIAs to be used to constrain policy space, especially for the more restrictive policy scenarios. I have summarized some key points:  It depends what the evidence is meant to prove; which local data is weak, and how strong is the international evidence. The Chilean example had domestic data about the problem (obesity rates, advertising exposure), but relied on international studies linking child-directed advertising with food consumption or sales/health outcomes. “*You need a local diagnostic of the problem*” in order to justify the regulation. (P3) But, “*developing countries who enact similar type measures to those they see developed countries doing in these types of public health contexts have a reasonable degree of certainty that they will be okay, even if certain types of data are low… I think there would generally be a fair degree of tolerance of lesser data being available.”* (*investment-specific*) (P4) If the international evidence you are referring to is the [WHO] Best Buys, or best practice, that is much weaker than Framework Convention on Tobacco Control guidelines, for example. “*Best Buys and so on is kind of pretty weak*.” (P5)  The need for justifying evidence increases as the scenarios become more restrictive. With the exception of bodies with specific rules on audiovisual content (e.g. EU), marketing restrictions tend not to be very controversial under international law. If it is a general restriction on marketing, it is likely not much evidence will be needed to support it; when we get to the point where we restrict, say, a cartoon character on an individual product, or of a parent brand, or a Kinder Surprise-type hook, this gets into very specific scenarios, and is where local evidence would be useful (which could include fairly inexpensive ways of gathering local data in LMICs like focus groups, surveys, or experimental tracking studies).That being said, most of the first-movers in this space have been well-resourced countries (Australia tobacco plain packaging, Chile food marketing restrictions), so it would likely be more difficult for a low-income country, particularly a large one, to move this forward and take leadership on this. (P1) After a number of countries have done something, you can start to identify generalizability of the data, and the need for domestic evidence declines. (P1)  Government dispute respondents cannot control what evidence is brought against the policy. Policymakers have to draw on some global evidence, because otherwise policy makers end up with a paralysis of never being able to take innovative policy steps. Of course, the other side *will* argue lack of evidence. The problem is, the industries will generate their own biased research reports, and submit those as part of the regulatory process, and demand explanations as to why government policy makers have not acted on that research. (P5) They may turn this into an argument that the policy is not based on evidence, as well as being disproportionate. “*Public health does not have a monopoly on the articulation of evidence*.” (P7) Therefore, the requirements of evidence production are likely higher in practice than they should be in theory, and the more comprehensive the restrictions, the greater the incentive to counter the evidence.  Investment arbitration: there may be outlying interpretations, but risks can be mitigated. The basic view of most Tribunals seems to be that it is okay to move forward even if the evidence is not that strong, and even if you don’t know exactly what is going to happen (e.g. in Philip Morris Uruguay case), otherwise no country could introduce legislation for the first time. An outlying view (as demonstrated in that case) might be that, in a context where policy is innovative and there is less evidence available, in order for the investor to be treated in a way that is not arbitrary, the onus on the government to engage in a serious process of policy development is then higher, because there is less existing external evidence to rely on. (P6) This is still unlikely to breach an investment treaty; there is a small risk that it could, based on outlying views expressed occasionally in the jurisprudence and by dissenting arbitrators, but this can be mitigated by ensuring a structured policy development process that considers the evidence—but this should not be considered an obstacle to going ahead. (*investment-specific)* (P6) | | | | | | | |