

Using Domestic Law in the Fight Against Obesity:

An Introductory Guide for the Pacific



World Health Organization
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Contents

Acknowledgements	
What is the purpose of this introductory guide?	4
Why use domestic laws in the fight against obesity?	5
What must be considered when using domestic laws in the fight against obesity?	5
The Agreement on Agriculture	6
The SPS Agreement	6
The TBT Agreement	7
Which approach is best used in the fight against obesity?	8
Pricing controls	9
Restrictions on supply	9
Labelling requirement	10
How might a regulatory approach be justified?	15
Where to from here?	17
Conclusion	19
References	20

What is the purpose of this introductory guide?

Hughes¹ describes obesity as a “rising epidemic in the Pacific”. Quoting the work of Coyne² he confirms that the prevalence of obesity is increasing dramatically in many Pacific countries and is reaching alarming levels in several countries. The obesity epidemic is said to be characterized by increasing urbanization and the consumption of high-energy diets, with increasing intake of high-fat foods in populations with reduced levels of physical activity. While obesity is more prevalent in urban areas, Coyne found that urban/rural differences are diminishing.

The role of diet in the etiology of most noncommunicable diseases is well established. Overweight and obesity are closely associated with increased risk of hypertension, cardiovascular disease and diabetes.³ Chopra, Galbraith and Darnton-Hill⁴ state “The shifts towards highly refined foods and towards meat and dairy products containing high levels of saturated fats ... now increasingly evident in middle-income and lower-income countries, have, together with reduced energy expenditure, contributed to rises in the incidence of obesity and noncommunicable diseases.”

Because of the global extent of the epidemic, Chopra et al suggest that the potential role of international legal mechanisms in promoting healthy diets and preventing overnutrition should be explored. However, it should be remembered that countries also have national legal mechanisms available to them that may be used in different regulatory approaches to achieve such ends. While domestic law is required to be consistent with international obligations, those international obligations do not necessarily abrogate a country’s right to exercise sovereignty in making domestic laws, particularly laws designed to protect and improve public health.

Most Pacific island countries and areas have National Plans of Action on Nutrition (NPAN). This Guide is intended to raise awareness that NPAN may be supported by the passing of domestic law. Such domestic law should not contradict international obligations such as the responsibilities undertaken as a consequence of accession to the World

Trade Organization (WTO). Thus, it is important to understand the nature of international obligations, particularly those contained within the WTO agreements, since international trading obligations impact upon the conditions for the production, availability and security of the food supply.

Why use domestic laws in the fight against obesity?

Domestic laws can be used by a government to influence the availability and accessibility of food products. They can therefore be used to help to achieve public health nutrition objectives. Domestic laws can be used as a public health policy instrument to support NPAN by regulating the availability and conditions of sale of certain foods. There are three such regulatory approaches:

1. using pricing controls on foods such as imposing tariffs, providing for domestic subsidies or imposing or increasing domestic taxes on particular food commodities;
2. placing restrictions on the supply of particular foods such as banning their import, prohibiting the domestic sale of specific foods or requiring certain composition standards; and
3. mandating labelling requirements for foods sold in the domestic market, such as labels containing warning statements, nutrient claims and nutrition information panels.

What must be considered when using domestic laws in the fight against obesity?

In 1995 the WTO was established as the international organization to supervise the operation of the rules of trade between member nations. Central to the work of the WTO is its role in administering the various WTO Agreements. The WTO Agreements provide a framework for the preparation, adoption and application of technical regulations including

key procedural requirements. The main WTO Agreements that impact upon health and health policies are the Agreements on Agriculture, Technical Barriers to Trade (TBT), Sanitary and Phytosanitary Measures (SPS), Trade-Related Intellectual Property Rights (TRIPS) and Trade in Services (GATS). Members of the WTO are obliged to abide by the rules and provisions in the WTO Agreements that set the framework for international trade liberalization.

It would appear that the use of domestic measures to address obesity problems would come within the terms of the Agreement on Agriculture and the TBT Agreement, the focus of the SPS Agreement being on food safety and the protection of humans from plant- or animal-carried diseases.

The Agreement on Agriculture

The main purpose of the Agreement on Agriculture is to outline generally applicable rules regarding trade-related agricultural areas that address country-specific commitments to reduce tariffs and trade-distorting subsidies.

The SPS Agreement

The Uruguay Round negotiations addressed the Agreement on Agriculture. That Round ended in 1994. During the Uruguay Round, concern was expressed that countries might start to use non-tariff barriers to protect their domestic agricultural sectors, effectively using health as an excuse to restrict trade. The SPS Agreement was then negotiated. It contains specific rules for countries wanting to restrict trade to ensure food safety and the protection of human life from plant- or animal-carried diseases (zoonoses). While recognizing the sovereign right of Members to decide upon the level of health protection they deem appropriate, the main purpose of the SPS Agreement is to restrict the use of technical regulations and conformance procedures as disguised trade barriers. Indeed, sanitary or phytosanitary requirements should not be unnecessary, arbitrary, scientifically unjustifiable or a disguised restriction on international trade.

As the focus of this Guide is not food safety, the SPS Agreement will not be discussed further.

The TBT Agreement

The new TBT Agreement came into force at the same time as the WTO in 1995. It is binding on all WTO members. Under the Agreement, all members have the right to restrict trade for legitimate objectives. These legitimate objectives include:

1. the protection of human health or safety;
2. the protection of animal or plant life or health;
3. the protection of the environment;
4. the protection of national security interests; and
5. the prevention of deceptive practices.

The Agreement allows countries to obstruct trade for legitimate reasons, including health, but such measures must not unnecessarily restrict trade. It aims to ensure that product requirements, and any procedures used to assess compliance with those product requirements, do not create unnecessary obstacles to trade. This means that countries must ensure that any technical requirements are not more trade restrictive than necessary to fulfil the legitimate objective. In the fight against obesity, the legitimate objective is the protection of human health.

There are also fundamental WTO principles that guide the implementation of the Agreements. **The basic WTO principle is non-discrimination.** This means that WTO members cannot discriminate between their trading partners, nor between imported and locally produced goods that are otherwise similar. Non-discrimination is achieved through the application of the principles of most-favoured-nation (MFN) that requires other WTO members to be treated equally (e.g. if a member country imposes a tariff onto a food imported from a fellow WTO member it has to do so for the same food imported from all WTO members) and the National Treatment principle that requires foreigners and locals to be treated equally⁵. However, members of WTO

still retain the right to take measures to restrict imports and export of products when those measures are necessary to protect the health of humans, animals and plants⁶. Generally, the WTO Agreements require the health measures to be no more trade restrictive than necessary, with the factors to be weighed in assessing the necessity of the measure given in the relevant Agreement.

The obligation to abide by the Agreements presents challenges for the planning and implementation of domestic laws and provisions that are intended to support NPAN activities. This is not only the case for those nations that are already members of WTO. Equally, the challenges exist for those nations who aspire to membership and those who are party to regional trade agreements who have agreed to implement WTO standards in their trading relationships.

Currently most nations of the Pacific are not members of the WTO and hence, in the absence of other international trade agreements, are not bound by the rules and provisions in its agreements. In the absence of such international obligations, non-members of the WTO retain greater flexibility in exercising sovereignty in the passing of domestic laws that affect trade. However, trade restrictive behaviours may expose nations to retaliatory measures by other nations with whom they trade. It should also be remembered that observer governments to the WTO that do not abide by the rules and provisions of its agreements may influence detrimentally their prospects for future WTO membership.

Which approach is best used in the fight against obesity?

Different approaches have different potential benefits and difficulties in the context of supporting a NPAN and taking account of the rules and provisions of the Agreement on Agriculture and the TBT. The ways in which regulatory approaches supported by domestic laws can be used as policy instruments that are consistent with a NPAN, together with the potential benefits and difficulties associated with such approaches, are discussed below and summarized as a table.

PRICING CONTROLS

Tariffs and domestic subsidies

Tariffs, import duties and domestic subsidies are trade-related agricultural areas that address market access and domestic support and as such fall under the Agreement on Agriculture. These domestic support schemes can strengthen food security by protecting capacity for local food production, processing, distribution and consumption. The use of tariffs and domestic subsidies by WTO members will depend on commitments made when becoming a signatory to the WTO Agreements, including any commitments to reduce tariffs/subsidies over a period of time. Those nations that are not members of the WTO need to determine what commitments they want to make in relation to tariffs and domestic subsidies when acceding to the WTO Agreement.

Domestic taxes

Domestic taxes are not generally affected by the Agreement on Agriculture and are unlikely to fall under the rules and provisions of the WTO Agreements.

RESTRICTIONS ON SUPPLY

Import bans, prohibitions on domestic sales and composition standards

Import bans, prohibitions on domestic sales and composition standards are technical regulations and as such fall under the TBT Agreement. Imposing an import ban on a product is a powerful regulatory approach to target the restriction of the supply of a specific food and is relatively easily enforced. However, it is one of the more trade restrictive measures available and vulnerable to accusations of being discriminatory.

Prohibiting the domestic sale of specific foods is less discriminatory as it applies to both imported and local foods. However, this approach may be perceived as being against the spirit of the WTO Agreements.

The setting of composition standards for the fat content of specific foods also is less discriminatory if applied consistently to local and imported food products. However, there would need to be a scientific and consistent basis for setting and applying the fat composition level to different food products and this will introduce complexities for assessing compliance.

LABELLING REQUIREMENTS

Warning statements, nutrient claims and nutrition information panels

Warning statements, nutrient claims, and nutrition information panels are technical regulations and as such fall under the TBT Agreement.

The use of labelling requirements is relatively straightforward in relation to nutrition claims and a nutrition information panel as there are widely accepted guidelines and standards available that countries can incorporate into their food regulatory systems⁷. The use of warning statements may offer relatively more powerful labelling information regarding the potential health implications of a product but they need to be applied consistently.

The potential benefits and difficulties of the different regulatory approaches

Regulatory approach	Specific strategy	Potential benefits	Potential difficulties
PRICING CONTROLS	Tariff, import duties	<p>May help protect food security by restricting access to certain food imports by reducing imports or making them more expensive in the domestic market.</p> <p>Can be targeted to specific food products.</p>	<p>Potentially discriminatory.</p> <p>Ascertaining an appropriate basis for setting tariffs/duties, e.g. is the fat content level of food the appropriate measure?</p> <p>If fat content is the measure, fat content analysis is required in order to ensure the application of the appropriate tariff/import duty. (A certification scheme might be an alternative to analysis).</p>
	Domestic subsidies	<p>May help protect food security by promoting the production of local food.</p> <p>May help promote traditional farming and production methods and the consumption of local foods.</p> <p>Can be targeted to specific food products.</p>	<p>Potentially discriminatory.</p> <p>Accession to WTO might include commitment to reduce/remove domestic subsidies.</p>

Regulatory approach	Specific strategy	Potential benefits	Potential difficulties
RESTRICTIONS ON SUPPLY	Domestic taxes	Unlikely to fall under WTO agreements.	
	Import ban	<p>Strong intervention.</p> <p>Relatively easy and inexpensive to enforce.</p> <p>Can target particular high fat foods.</p>	<p>Most discriminatory measure available.</p> <p>No precedent of a ban on a particular food.</p>
	Prohibition on domestic sale ⁸	<p>No discrimination between imported and locally produced products.</p> <p>Can target particular high fat foods.</p> <p>Can raise consumer awareness of contributing factors to obesity.</p> <p>A precedent exists.</p>	<p>May be perceived as being against the spirit of the WTO Agreements and invite retaliatory measures.</p> <p>If measure is expressed as a prohibition of sale of a particular food item, there may be attempts to sell the item under a different description that would not be contrary to the prohibition as expressed.</p> <p>Dependent on availability of affordable and acceptable alternative foods.</p>

Regulatory approach	Specific strategy	Potential benefits	Potential difficulties
	Fat composition standards ⁹	<p>Less discriminatory.</p> <p>A precedent exists.</p>	<p>Not limited in application to a particular food item.</p> <p>Ascertaining an appropriate basis for setting the composition criteria and justifying need for the measure to be taken so as to protect human health.</p> <p>Without provision to analyse the fat content of the food, difficult to enforce. (Certification may be an alternative to analysis).</p>
LABELLING REQUIREMENTS	Warning statements	<p>Strong information.</p> <p>Relatively easy to enforce.</p>	<p>Labelling may take time to change behaviour and may be less effective over time.</p> <p>Potentially discriminatory.</p> <p>Ascertaining an appropriate basis for warning to be included.</p> <p>The chosen basis may be dependent upon availability of analysis.</p>

Regulatory approach	Specific strategy	Potential benefits	Potential difficulties
			<p>Small nations may find that this approach serves to limit the availability of the targeted imported product.</p> <p>There may be a less trade-restrictive alternative to achieve the legitimate objective.</p>
	Nutrient content claims	Permitted within WTO Agreements. Codex guidelines available.	Labelling may take time to change behaviour.
	Nutrition information panel	Permitted within WTO Agreements. Codex guidelines available.	Labelling may take time to change behaviour.

How might a regulatory approach be justified?

There is no ‘recipe’ for successfully developing a regulatory approach. Whether or not a regulatory approach to support a NPAN is justified will depend upon building a case that fulfils the procedural requirements set down in the relevant WTO Agreement.

Building a case

1. Under the Agreement on Agriculture

Those countries that are members of the WTO need to identify what commitments to tariff reduction and reduction of domestic subsidies were made when acceding to the WTO Agreement to know to what extent these regulatory approaches can be used to achieve the objectives of their NPAN.

Those countries that are not WTO members, when negotiating to become so, need to ensure that their health and food security concerns are considered. Specifically, they need to draw on the ‘special and differential treatment’ provisions for developing countries that are recognized as an integral element of the negotiations available under the Agreement. These considerations are especially relevant to those Pacific island countries and areas that are currently WTO observer governments (Samoa, Tonga and Vanuatu). Observer governments must start accession negotiations within five years of becoming observers¹⁰. Least developed countries are not required to make commitments to reduce domestic subsidies when acceding to the WTO Agreement. Conversely, justifying the introduction of, or an increase in, tariffs and domestic subsidies will require establishing the contexts for special and differential treatment. Developing countries are allowed to use investment and input subsidies under certain conditions (for example, measures of assistance designed to encourage agricultural development).

2. Under the Agreement on Technical Barriers to Trade (TBT)

The favourable assessment of regulatory approaches that fall under the TBT Agreement is predicated on demonstrating their integral role in contributing to a legitimate objective such as the implementation of a NPAN. Moreover, it needs to be demonstrated that the approach(es) are not more trade restrictive than necessary to fulfil the legitimate objective, taking account the risks that non-fulfilment would create¹¹. The TBT specifically includes the protection of human health or safety as legitimate objectives. In taking account of the risks that non-fulfilment would create, the TBT states that relevant elements to consider include available scientific and technical information, related processing technology or intended end-uses of products. It should be remembered that the Agreement does not provide an exhaustive list of considerations.

Important arguments for developing regulatory approaches have been identified. These arguments provide a useful starting point for planning the case to justify such policy interventions and are outlined below.

Health problems, including those resulting from obesity, confronting Pacific island countries and areas are multifactorial in their aetiology and require a multi-pronged policy response. Also, given the extreme nature of the health problems there is a need for a combination of regulatory approaches.

Arguments to support the case for the use of pricing controls include:

- Food security may be protected.
- Shifts in consumption patterns to domestically produced foods through economic forces can be achieved.
- Traditional methods of production can be supported.

Arguments to support the case for restrictions on the supply of fatty foods include:

- The need to achieve changes in dietary intake patterns in a short time period.
- Restrictions on sale do not require the ability to read labels and then motivate behaviour change.
- Small decreases in the fat composition of certain foods can result in substantial cumulative reduction in dietary fat consumption.
- Many non-local foods are more available than ‘healthier’ local foods.

Arguments to support the case for introducing food labelling include:

- Food labelling does not prevent choice, but allows for informed choice.
- The food label is a component of a broader integrated approach.
- Whereas restrictions on the supply of certain foods may apply in the short term, food labelling may provide a longer term, more sustainable approach.

Where to from here?

The overriding theme regarding the use of regulatory approaches and domestic law in the fight against obesity that emerged from the FAO/SPC/WHO Pacific Islands Food Safety and Quality Consultation was the need to strengthen national capacity for developing such regulatory approaches. Four priority actions for capacity building were identified:

1. To increase understanding of the WTO Agreements and how to take advantage of their special and differential provisions so as to be better informed for policy planning when considering regulatory approaches.
2. To collect, analyze and interpret evidence to build the case for the regulatory approaches. Some evidence requirements that have been identified include:
 - correlating obesity and diet-related diseases to increased consumption of fatty and energy dense foods in Pacific island countries and areas;
 - quantifying the cost burden of obesity and diet-related disease in Pacific island countries and areas on the health budget expenditure when compared to profit from fatty food sales;
 - demonstrating that consumers have insufficient knowledge of the fat content of foods; and
 - demonstrating that pricing and availability concerns are a barrier to healthy eating.
3. To raise the profile of the case for regulatory approaches among stakeholders by:
 - promoting health interests in all trade agreement negotiations. This promotion could occur, for example, by seeking to have the Regional Director of WHO invited to attend meetings such as the round table discussions on the WTO agreements held in Auckland, New Zealand in 2002 and attended by representatives from FAO, WTO, Pacific Island Forum, and Trade and Finance Ministries;
 - promoting the case that may be built for a particular regulatory approach in relevant international fora, including the WTO Secretariat, the WHO and FAO Regional Coordinating Committee for North America and the South West Pacific, and the WHO Global Strategy on Diet, Physical Activity and Health.

4. To strengthen technical capacity for the enforcement, monitoring and evaluation of regulatory approaches employed in the fight against obesity.

Conclusion

The rules and provisions of the WTO Agreements place many challenges and demands upon those countries that are WTO members, or intend to become so and plan to develop regulatory approaches to support their NPAN. However, there are opportunities to work within the framework of the WTO Agreements to develop these regulatory approaches. In particular, it is because of the special needs confronting Pacific island countries and areas, and not despite these circumstances, that there is a strong potential for developing regulatory approaches within the context of the WTO Agreements in these countries.

This introductory guide has been designed to assist with starting the planning process for policy activities for regulatory approaches to support a NPAN. It is intended to complement the Consultation's more detailed background paper¹².

In the future, education and training activities might be considered to help translate the information contained in these documents into the building of a strong case to justify the development and implementation of regulatory approaches to support a NPAN.

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- ¹ Hughes RG, *A Review of Diet, the Food Supply and Obesity in the Pacific*, Background Paper prepared for the FAO/SPC/WHO Pacific Islands Food Safety and Quality Consultation Meeting, Nadi, Fiji, 11-15 November 2002.
- ² Coyne T, *Lifestyle diseases in Pacific Communities*, Eds. Hughes RG & Langi S, SPC Technical Paper No. 219, 2000, Noumea, New Caledonia, Secretariat of the Pacific Community.
- ³ WHO. World Health Report 2002. WHO. Geneva, 2002.
- ⁴ Chopra M, Galbraith S & Darnton-Hill I, *A global response to a global problem: the epidemic of overnutrition*, Bulletin of the World Health Organization 2002, 80 (12): 952.
- ⁵ For comprehensive information regarding the WTO Agreements and the fundamental principles, see WHO/WTO, *WTO Agreements and Public Health: A Joint Study by the WHO and the WTO Secretariat*, 2002, WHO ISBN 92 4 156214 5, WTO ISBN 92-870-1223-7.
- ⁶ Article XX, General Agreement on Tariffs and Trade (1948) and Article XIV of the General Agreement on Trade in Services. The same principle has been reiterated in the Agreement on the Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).
- ⁷ Conditions for the use of a 'high fat' nutrient content claim have not been developed.
- ⁸ For example: On 8 December 1999, the Fijian Cabinet decided that the meat derived from the belly of sheep (lamb flaps) be prohibited from sale by issue of an order under the provisions of the Fair Trading Decree 1992. The order prohibits the domestic sale of lamb flaps - whether imported or locally produced - it is not an import ban per se.
- ⁹ For example: The removal of U.S. turkey tails from the marketplace in Ghana has been achieved by a regulatory approach that involves setting a composition standard that prescribes a fat content level for meat and poultry products. Poultry imports must have a fat content of less than 15 percent; beef less than 25 percent; and pork less than 35 percent. These regulations have effectively halted US exports to Ghana of turkey tails, which typically contain at least 30 percent fat. Thus, the outcome has not been achieved by imposing an import ban per se.
- ¹⁰ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm
- ¹¹ Article 2.2, Agreement on Technical Barriers to Trade.
- ¹² Lawrence M, *An analysis of the appropriateness, acceptability and implications of regulatory approaches to control the flow of fatty foods in Pacific Island countries*, WPR/ICP/HSE/4.4/001/NUT-FOS(1)/2002.3, produced as a background paper for the FAO/SPC/WHO Pacific Islands Food Safety and Quality Consultation held in Nadi, Fiji from 11 to 15 November 2002.