

International trade & investment treaties

The protection of public health

Wolfgang Alschner, 30 June 2023



Agenda

- 1) Basic principles
- 2) Public health measures and trade law
- 3) Public health measures and investment law
- 4) Conclusion

Basic Principles

1) Public health > international trade

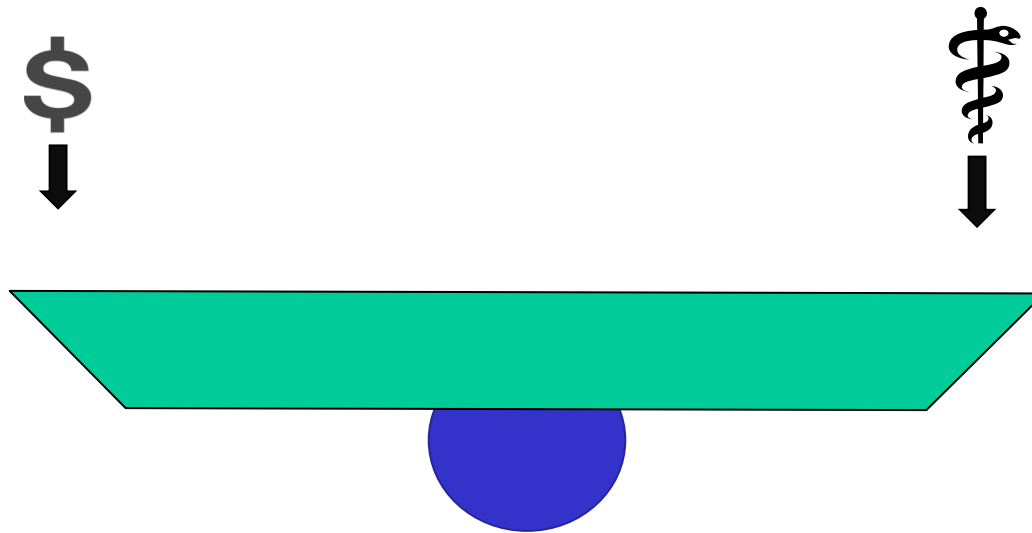
International trade rules do not prevent states from imposing public health-related measures.

2) No one size fits all

States can set their own level of public health protection, which may deviate from that set by their trading partners.

Basic Principles

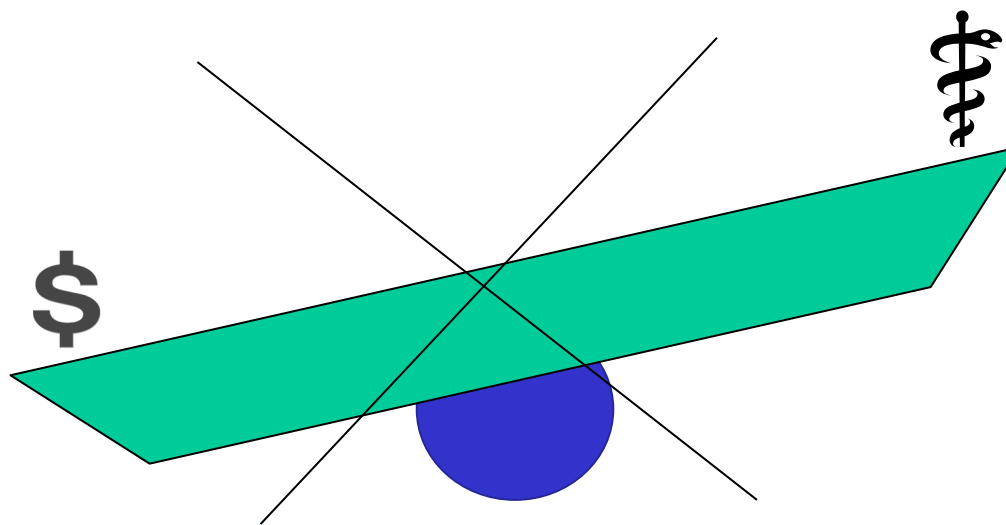
1) Public health vs international trade



Basic Principles

1) Public health > international trade

International trade rules do not prevent states from imposing public health-related measures.

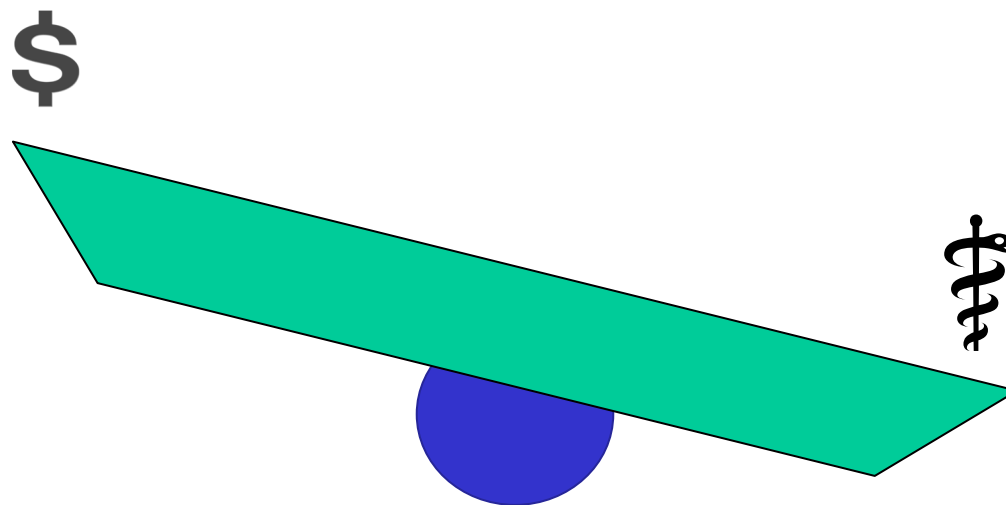


Measures do **not** have to sacrifice public protection to become less trade restrictive.

Basic Principles

1) Public health > international trade

International trade rules do not prevent states from imposing public health-related measures.



Measures can restrict trade if that is necessary to protect public health.

Basic Principles

2) One size fits all?



Basic Principles

2) No one size fits all

States can set their own level of public health protection, which may deviate from that set by their trading partners.



Each state can set its own level of public health protection.

Public health measures and trade law

Trade agreements primarily protect against **origin-based discrimination** between products.

(GATT Art. III, TBT Art. 2.1)

Public health exceptions allow states to treat products differently that raise different health concerns.

(GATT Art. XX, TBT Art. 2.1 & 2.2)

Public health measures and trade law



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- Scientific evidence helps justify differential treatment
- Due process (non-arbitrariness) ensures equity

Public health measures and investment law

Investment agreements primarily protect against **unfair treatment and expropriation** of investments.

Treaties impose a **high threshold for violations** given that states have right to regulate in the public interest.

Public health measures and investment law

Pre-supposes eligible foreign **investment** (e.g a company, an intellectual property right).



Public health measures and investment law

Losses or reduced profits alone do **not** lead to investment treaty violation.



Conclusion

Robust protection for public health regulation under international economic treaties.

Outlook

Importance of public health is being further strengthened in more recent treaties.



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Public health clauses in international investment agreements: Sword or shield?

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