

IMPLEMENTING HEALTH TAX POLICIES

LEGAL AND TRADE CONSIDERATIONS



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Translating what we have learnt
about taxation into legislative
proposals for implementation:
overcoming the
TRADE BARRIER
concerns



1. Consultation
2. Development of Draft/proposed policy
3. Concept note
4. Cabinet submission – Justification
5. Cabinet Decision
6. Drafting process
7. Legislative committee
8. Repeat ???

Presumption of innocence?

v

Presumption of guilt?

Justification Statement



Overview of the 'Health tax' and 'Earmarking' concept

- ✓ Health taxes are excise taxes usually imposed on products that have a negative public health impact (e.g. taxes on tobacco, alcohol, sugar-sweetened beverages (SSBs)).
- ✓ Earmarking is one policy area that has been proposed to direct resources towards the health sector
- ✓ While in some sectors it is supported as a policy option, the aim is usually to provide countries who are looking to earmark with a balanced overview of considerations that should be made before undertaking earmarking, and as a way to understand whether it is the right tool to help meet their objectives.



A free trade agreement is an arrangement under which goods and services originating in one country or a group of countries are allowed to enter the market of another country or group of countries free from the payment of import duties.

JUSTIFICATION

**International instruments
have supported the
introduction of fiscal policies,
such as taxation and subsidies**

JUSTIFICATION

All CARICOM States have ratified the Convention on the Rights of the Child (CRC).

This may be grounds for consideration as it relates to the policy/ proposals regarding the imposition of taxes in view of the need to protect public health

JUSTIFICATION

CRC General Comment on the right to health under Art. 24:

“States should also address obesity in children, as it is associated with hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of adult obesity, and premature death. Children’s exposure to “fast foods” that are high in fat, sugar or salt, energy-dense and micronutrient poor, and drinks containing high levels of caffeine or other potentially harmful substances should be limited. The marketing of these substances—especially when such marketing is focused on children—should be regulated and their availability in schools and other places controlled.”

JUSTIFICATION

2014 UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health:

Report on Unhealthy foods, Non-communicable diseases and the Right to health

States urged to implement their obligations regarding **children's right to health**, which requires States to **address obesity in children, limit children's exposure to fast foods and drinks high in sugar** and caffeine and **other harmful substances**, regulate the marketing of such foods and control their availability in schools and other places frequented by children....”

Consideration to be given to

Some existing treaties/trade Agreements



- ✓ World Trade Organization (WTO) Agreements
- ✓ CARIFORUM/EU Economic Partnership Agreement 2008
- ✓ Revised Treaty of Chaguaramas 2001
- ✓ Draft CARICOM Investment Treaty actively being worked on.
- ✓ Bilateral treaties with territories such as Costa Rica, Cuba and the Dominican Republic.

*All CARICOM Members, with the exception of the Bahamas, are Members of the WTO.

Consideration to be given to

BILATERAL AGREEMENTS

CARICOM Member States have concluded 5 bilateral trade agreements providing for duty free trade on selected goods; and one comprehensive Economic Partnership Agreement (EPA).

The five bilateral trade agreements, which provide for duty free trade on selected goods, concluded by CARICOM are with the following countries: Venezuela (1993); Colombia (1994); Cuba (2000); Dominican Republic (2001); Costa Rica (2004). The EPA was signed in October 2008.



No discrimination as it relates to imports and “like products”



Despite the need for tax imposition, Caribbean countries have to be mindful of that they do not create trade barriers.

CARICOM States cannot impose import duties (applicable to all the member states of CARICOM) **unilaterally**.

GATT lays down the Scope for Public Health

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*, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures:

....

**(b) necessary to protect human ... health
(GATT Article XX(b))**

TWO RULES UNDER ART III:2 GATT

1. If “like” products, imported products must not be taxed *in excess of* that applied to domestic products.



2. If not “like” products, but directly competitive or substitutable products, they must *not be taxed* in a manner so as to afford protection to the domestic product.

Trade Restrictiveness –Article 2.2 TBT

The TBT Agreement ‘aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade’/ does not restrict trade more than is necessary.

TBT ‘principles’:

- ‘**necessary** to fulfil a **legitimate** objective, taking account of the risks non-fulfilment would create’
- ‘protection of **human health**’ is a ‘**legitimate objective**’
(*national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment*)
- not less favourable treatment if ‘stems exclusively from a legitimate regulatory distinction’

Determining 'Like' Products :

Determination of the nature and extent of a **competitive relationship** of the products at stake:

- i. The product's properties, nature and quality
- ii. End-uses; and
- iii. Consumer tastes and habits, and
- iv. Tariff classification

Lessons learned

- The design of the tax must be clear, evidence-based, logical and based on clear public health objectives as part of a comprehensive strategy to address unhealthy diet consumption;
- Anti-competitiveness of a tax should be analyzed before implementation to avoid lawsuits.
- Procedural requirements and due process should be observed in design and administration of the tax.
- Countries can take comfort in judicial recognition of the sovereign right of states to regulate in the interests of public health.

- ❑ Governments seeking to implement an SSB, tobacco, alcohol taxes need to:
- ❑ Establish clear expectations with industry that NCD risk factors will be subject to ongoing regulation.
- ❑ Consider whether the tax discriminates against and/or between imported products or foreign investors in its design, structure.
- ❑ Consider the process adopted in the design and implementation of an SSB tax to ensure the measure is robust in the face of potential legal challenges under domestic, regional and international laws and agreements.
- ❑ Ensure due process is observed to the extent required in interactions with industry while being conscious that public health policies need to be protected from the vested interest of industry.

To conclude...

Implementing SSB, tobacco and alcohol taxes as part of a comprehensive strategy to combat overweight and obesity will ensure that governments are following best practice public health principles.

For more info:

Dennis Wright, Sheryl: 'Taxing Sugar Sweetened Beverages in Jamaica: Legal Considerations' *Published in Journal of Arts, Science and Technology, Vol. 11, Special Issue: Scientific Symposium- Fiscal Measures to prevent obesity/NCDs in Jamaica: focus on sugar Sweetened Beverages. June 2018*

