

FRONT-OF-PACKAGE NUTRITION LABELING IN MERCOSUR COUNTRIES LEGAL ANALYSIS OF PUBLIC HEALTH ARGUMENTS IN TOBACCO CASES

FIC Argentina;

;

© 2019, FIC ARGENTINA



This work is licensed under the Creative Commons Attribution License (<https://creativecommons.org/licenses/by/4.0/legalcode>), which permits unrestricted use, distribution, and reproduction, provided the original work is properly credited.

Cette œuvre est mise à disposition selon les termes de la licence Creative Commons Attribution (<https://creativecommons.org/licenses/by/4.0/legalcode>), qui permet l'utilisation, la distribution et la reproduction sans restriction, pourvu que le mérite de la création originale soit adéquatement reconnu.

IDRC Grant/ Subvention du CRDI: 108644-001-Enabling consumer-friendly front-of-package nutrition labelling in MERCOSUR countries



Front-of-package nutrition labeling in MERCOSUR countries Legal analysis of public health arguments in tobacco cases

This document is a legal analysis of Supreme Courts cases related to tobacco products. It aims to explore the arguments used and to extrapolate their application as a public health antecedent for the promotion of front-of-package labeling in food products.



Background: Through the study of the jurisprudence of the Supreme Courts of different Latin American countries and international courts, the states' power to legislate in favor of public health –thus restricting certain economic and business freedoms- has been analyzed.

Methodology:

- A policy analysis was made through traditional online search engines (Google and Google Scholar, among others) and includes results at the national, regional and global levels.
- The search was conducted on government websites, particularly those of the countries' courts and the World Trade Organization (WTO), among others.
- Keywords included the terms “jurisprudence”, “business and human rights”, “tobacco regulation”, “public health”, “economic freedom”, “public health rulings” and “right to health”.

Tobacco cases identified:

- 1) Philip Morris Asia Limited v. Australia
- 2) Cuba, Dominican Republic, Honduras and Indonesia v. Australia
- 3) British American Tobacco Panama v. the Ministry of Health of Panama
- 4) Philip Morris v. Uruguay
- 5) Nobleza Piccardo S.A.I.C. y F. v. the Province of Santa Fe (Argentina)



- 6) British American Tobacco Colombia v. the Ministry of Health of Colombia
- 7) British American Tobacco of Peru S.A.C. v. Congress of the Republic
- 8) Pablo J. Cáceres Corrales v. Colombia

Arguments identified:

- 1) The norm is “unnecessarily restrictive to trade” to protect health.

It is not more restrictive to trade to achieve the legitimate objective of **protecting public health**. In addition, generic packaging of tobacco products is not an “unjustifiable” burden since its requirements are adopted to protect a social interest such as is public health (Cuba, Dominican Republic, Honduras and Indonesia v. Australia).

- 2) A. It violates intellectual property protections

Generic or plain packaging does not infringe upon intellectual property rights, since the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization grants “negative rights”, i.e. rights to prevent others from using the registered trademark, which are not affected by plain packaging (Cuba, Dominican Republic, Honduras and Indonesia v. Australia).

- B. It violates intellectual property protections

“The cigarette pack is a fundamental element for product promotion, which becomes the only means of advertising, hence the importance of its rigorous examination.” Therefore, “**the measures questioned protect a right superior to that of economic freedom and private initiative, as is the protection of the public interest, life, physical integrity and health-related principles [...]** in addition property and business activities have a social function that entails obligations.” Therefore, no expropriation of intellectual property was found. The Court also stated that **intellectual property rights must be exercised in accordance with human rights obligations** (British American Tobacco Colombia v. Ministry of Health, 2015).

- 3) Public health regulations are arbitrary, since they lack evidence that proves their effectiveness, and thus generate an unjust and inequitable treatment



A state must not prove a direct, causal relation between a measure and any observable public health result. It suffices that the measures taken address a public health issue and are taken in good faith (Philip Morris v. Uruguay).

- 4) The legitimate expectations (of Philip Morris International) of a stable regulatory framework and to use its brand assets for profit were not met

“The manufacturers and distributors of harmful products, such as cigarettes, must not expect new and stricter regulations not to be imposed [...] the expectation could only have been to have increasingly restrictive limits to the sale and use of tobacco products. The fact that a norm is innovative is not a valid objection to its implementation either” (Philip Morris v. Uruguay).

- 5) Commercial freedoms, such as the right to a legitimate industry and to freedom of enterprise, are violated

A. The Court rejects this argument explaining that the norm pursues a constitutionally valid purpose, understanding that **the Constitution not only allows but obliges public authorities to adopt measures and policies to protect people’s health.** Moreover, restrictions are fully grounded on and justified by scientific evidence about the harmful health effects of tobacco use and exposure (Nobleza Piccardo S.A.I.C. y F. v. the Province of Santa Fe (Argentina)).

B. The “freedom of enterprise and free economic initiative are constitutional guarantees... [But] [t]he definition of the content and scope of these economic freedoms must be analyzed **considering the State’s power** to direct the economy... [which] implies... the *prima facie* admissibility of **legal and administrative measures that regulate and limit economic freedoms”** (British American Tobacco of Peru S.A.C. v. Congress of the Republic).

Conclusions:

This analysis aimed to identify the arguments used by different Courts in their ruling in favor of the States’ power to design public tobacco control policies. In this way, it intended to show that policies restrictive of certain economic and business activities are plausible, provided that the State’s ultimate goal is to protect people’s health.



The arguments presented here are thus intended to serve as a basis for the discussion about the implementation of effective public policies regarding front-of-package labeling and marketing of food products.