

Lessons learned from tobacco control: court decisions that ratify public health policies

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Introduction

Non-communicable diseases (NCDs) are the leading cause of death worldwide. According to the World Health Organization (WHO), these diseases are mainly caused by four risk factors: unhealthy eating, tobacco use and exposure, alcohol abuse and physical inactivity^I. NCDs mainly affect vulnerable social sectors that are exposed to less healthy environments and do not have the same access to education and health as richer sectors^{1 2}.

NCDs can be prevented if an environment with effective public policies that promote healthy environments is guaranteed^{II}. With regard to the prevention of malnutrition, a front-of-package labeling policy that gives consumers direct, simple and quick information is one of the most cost-effective measures recommended by the Pan American Health Organization (PAHO).

Labels must warn about the high content of nutrients associated with health problems, like

sugars, fats and salt, according with a nutrient profile, and must be complemented by campaigns that promote more conscious purchases using these labels. This will guarantee the consumer's right to information needed to make more thoughtful decisions, while protecting them from misleading advertising and discouraging the purchase of unhealthy products^{3 III}.

The promotion of front-of-package labeling policies has been fought by arguments used by companies that seek to interfere with their adoption. Most of those arguments are based on questioning these policies' legality, rationality and effectiveness. However, many of these questions have already been resolved by the justice in analogous cases.

I. More recently, environmental pollution in indoor and outdoor environments and mental health were added as important aspects that significantly affect non-communicable diseases. See Time to deliver: report of the WHO Independent High-level Commission on Noncommunicable Diseases. Geneva: World Health Organization; 2018.

II. Policies that create a healthy environment are those that promote regular physical activity, a reduction in tobacco use and exposure, a reduction in alcohol intake and a healthy diet, understood as an increase in the consumption of natural and minimally processed foods, in detriment of ultra-processed foods high in sodium, fats and sugars.

III. A country that has adopted better regulations to protect consumers' rights is Chile, where Law 20.060 forces food manufacturers to include warning signs in products that are high in salt, fats and sugars. The warning consists of a black “stop” symbol that says “high in...” for foods with excess salt, fat and sugar. Recently, Peru has passed law 30.021, which poses similar labeling obligations to the Andean country's food industry.

Objectives

This document intends to show that many of the arguments against front-of-package food labels can be responded based on similar judicial precedents in the tobacco control realm. The expected outcome will be a set of answers to contribute with States' policy making processes so that they are not affected by litigation threats by the food industry. It is expected that these recommendations are useful and applicable in all countries seeking to advance this kind of measures, thus protecting the human right to health and healthy eating.

Food industry and its similarities with the tobacco industry

Tobacco use, like unhealthy eating, is one of NCDs' main causes. Despite the proven damage caused by smoking, tobacco companies were famous for investing millions of dollars in hiding information about their product's consequences on health. Although misleading advertising was their main tool to hide tobacco's real nature, it is a known fact that lobbying and intimidation were as well strategies developed to prevent governments from implementing tobacco control public policies.

In the 1990s, 46 US states filed complaints against the world's five most important tobacco companies for the health cost generated by diseases caused by tobacco use. The companies settled an agreement -the "*Master Settlement Agreement*"⁴(MSA) - that obliged them to publish a series of internal documents, among other actions. These documents proved the intentionality behind misinformation actions regarding tobacco consequences on health and addiction to nicotine, as well as the existence of strategies to block public health policies⁵.

Tobacco companies have developed aggressive strategies⁶ to raise their sales and block the enactment and enforcement of effective policies that limit tobacco marketing, advertising and use, and have invested permanent efforts to improve their deteriorated imagen before the public opinion. One of these strategies was legally questioning the legality and rationality of tobacco control measures like 100% smoke-free environments, restrictions to advertising and the incorporation of health warnings in cigarette packs. Many of these cases were based in confronting health measures with commercial freedom.

Thanks to the MSA and the policies recommended by the WHO's Framework Convention on Tobacco Control⁷, many countries' courts were allowed to know the real goal of the legal arguments used by tobacco companies against tobacco control measures: to hinder the advance of effective policies. Today, arguments against the legality and legitimacy of measures to reduce tobacco use have been responded by the courts, which have ruled in favor of governments and their public health policies.

Strategies deployed by the food industry have astounding similarities with those used by the tobacco industry, as evidenced in almost every country of the region. Like tobacco companies, these corporations use diverse tools to increase their profits and interfere with the enactment of public policies: they create their own health institutes, buy scientific consultants to disseminate biased researches that benefit their interests, and sponsor individual scientists, signing research agreements with public and private institutions and sponsoring pediatric, nutrition and diabetes associations, among other tactics⁸.

Food companies also sign collaboration agreements with governmental institutions in most countries in the region. Collaboration is made

basically through corporate social responsibility programs (physical activity, campaigns to promote healthy lifestyles, campaigns to fight hunger, etc.), a sort of social marketing used to clean their image and strengthen their brand and products, but which -like in the case of tobacco- do not help improve people's health.

At the same time, these companies interfere with the enactment of laws by hindering effective initiatives for the implementation of healthier diets, and promoting measures that only serve their business goals. This industry invests millions of dollars in lobbying, funding political campaigns and interfering with public health policies^{9 10}.

In the following paragraphs we show how food and beverage companies use the same legal arguments as tobacco companies to block effective tobacco control measures. This allows to replicate the courts' answers in analogous ways, setting a precedent in legitimizing policies that limit food industry's actions that infringe the right to health and healthy eating.

Judicial responses to food industry's arguments

The progress made in the region^{11 12 13} with regard to the adoption of front-of-package labeling policies caused food companies to argue that these measures violate a series of commercial rights and guarantees. Specifically, front-of-package labeling policies force food factories to incorporate warnings in products with a high content of salt, fats and sugars. The warning consists on a black "stop" symbol that says "high in..." and the critical nutrient that the product contains in excess. This labeling system was supported by the PAHO for being the best for warning about the presence of critical nutrients in foods and beverage

ages, and thus the most effective in guaranteeing the rights to health, information and healthy eating³.



High in sugar / High in sodium / High in fats / High in saturated fats

However, pressure and lobbying by the food industry, and the trade chambers of which they are members, have hindered and delayed the advance of these policies in every country. The food industry states that a front-of-package labeling policy violates economic and business rights and guarantees. Here we expose the main arguments used by food and beverage companies against front-of-package labeling before courts and the media.

Each argument will be responded based on national or international judicial decisions that ruled in favor of labeling policies as public health measures in tobacco control cases. The use of analogies is a frequent practice in law, consisting on a logical procedure through which the principles of the solutions of a particular case are analyzed and applied through deduction in other hypotheses¹⁴. Analogy is thus a principle that allows to solve a case by using arguments used in cases of similar characteristics.

Judicial arguments

- It violates intellectual property protections since it does not allow the use of registered trademarks

Facing the prohibition to use animated characters in packs with warning labels when these are associated with or directly aimed at children, the companies argued that the use of these characters¹⁵ responds to an intellectual property "legitimate right" that not only protects their trademark, but also the figures associated with it. Therefore, the norm is said to violate intellectual property rights and contradicts the industrial property law that recognizes the trademark's property¹⁶. Arguments against the warning's size were also used, acknowledging the "warnings' intrusiveness in respect of intellectual property over trademark aspects, which are relevant for a food manufacturer".¹⁷

However, measures that regulate labeling or packaging do not infringe intellectual property protections, since the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does not recognize the right to use a trademark but "negative rights" -i.e. rights to prevent others from using the registered trademark, which are not affected in this case¹⁸. For this reason, a measure that restricts this use of a trademark does not affect in any way the spirit of trademark registration, which is the right of exclusion, nor does it affect property rights, which are held by the trademark's owner¹⁹.

- It expropriates the trademark

Another argument used to reject the legitimacy of front-of-package labeling policies was to consider

that they "affect property rights (...) since they prohibit the exercise of a trademark's nature, which is to differentiate market products, thus consisting in an expropriation"²⁰.

As was already mentioned, property rights associated with trademarks imply a "legal guarantee of exclusive use, not a positive right or the authority to use. On this basis, imposing restrictions on its use would not remove any rights granted". Furthermore, for an expropriation to take place it must create a benefit -in the form of property- for the State. "It cannot be said that a governmental entity, by any authority or instrument, has acquired any proprietary benefit due to the enforcement of a health law over property rights...". Therefore, by definition a labeling policy cannot imply trademark's expropriation.

Arguments used in the media

- It imposes trade barriers

It has been said that a food warning labeling policy would go against international norms that regulate food packaging included in bodies such as the Codex Alimentarius^{IV} or MERCOSUR resolutions²¹, thus creating non-tariff barriers^V to international trade.

Specifically in MERCOSUR countries^{VI}, companies have argued that a front-of-package food labeling proposal must be regional, recognizing "the importance of trade exchange" that will ensure "effective results for the promotion of healthy habits and the reduction of obesity and overweight among the population". In this way, they consider it "essential that any regulatory proposal that promotes new definitions, technical requirements or changes in the normative framework of food and

IV. More information: <http://www.fao.org/fao-who-codexalimentarius/en/>

V. Countries' non-monetary laws, regulations or policies that restrict trade with others.

VI. Argentina, Brazil, Paraguay and Uruguay.

beverage production, goes through the path of harmonization in the MERCOSUR^{VII} and through an honest and responsible dialogue between all stakeholders. This avoids conflicts, and preserves regional exchange and the connection of the region with the world²².

These statements denounce an alleged incompatibility between countries' advances in terms of national health policy and the MERCOSUR, presuming that such norms would create barriers to trade. This creates a notion that any national regulation would violate trade agreements set in the MERCOSUR^{VIII IX}.

However, it has been pointed out that public health measures must not be considered barriers to trade²³. Health policies operate only as necessary restrictions to trade to the extent that they fulfill the legitimate goal of protecting people's health. Therefore, they must not be regarded as a violation to international trade agreements. Also, considering that labeling policies are enforced to protect the right to health, they should not be considered an "unjustified" encumbrance. Furthermore, it has been argued that the adoption of trade related legal frameworks should not "be interpreted in order to impede the adoption of measures necessary to protect public health and people's lives"²⁴.

➔ **It violates consumers right to information**

The food industry has systematically asserted that the front-of-package labeling system does not

provide elements to help consumers make free choices. Consequently, the States are supposed to implement systems that allow people to choose based on the information provided. The warning system is thus said not to inform consumers for them to decide or be informed but only to "scare" them²⁵.

Regarding this point, it has been shown that government health measures like the one being questioned do not misinform consumers but, on the contrary, they guarantee that when people "purchase the product they have information about its characteristics before consuming it, i.e. they know beforehand its nature, composition, content, weight, origin, expiration date, toxicity and warnings".

➔ **There is not enough scientific evidence to support these measures**

Another argument consists in pointing out the alleged lack of evidence linking the intake of processed and ultra-processed foods high in critical nutrients with NCDs²⁶.

Regardless of the fact that there is indeed a corpus of scientific evidence that proves the negative effect of these products on health and the effectiveness of warning labels to discourage their consumption, lack of evidence is not an obstacle for the approval of public health policies "(A) State need not prove a direct causal link between the measure and any observed public health outcomes -rather that it was sufficient that the measures are an

VII. Among its powers, the MERCOSUR can approve general norms to facilitate trade among its members. To this end, all member countries implement at their national levels the norm passed by the bloc. The Resolutions of the Common Market Group, MERCOSUR's executive body, are binding on the States, and the way in which each country incorporates them to its normative system depends on such system. This process is known as harmonisation of standards.

VIII. In the frame of the MERCOSUR Trade Commission, Argentina and Paraguay conducted a consultation questioning Uruguay's Decree N° 272/2018 on "Nutritional Front-of-Package Labeling in Packaged Foods". More information: <https://documentos.MERCOSUR.int/reuniones/doc/6754> (in Spanish).

IX. From the business sector, Uruguay's Decree was also criticized for not being framed in the MERCOSUR system. More information: <https://copal.org.ar/wp-content/uploads/2018/07/DECLARACION%CC%81N-CIPAM-BRASILIA-2018.pdf> (in Spanish).

attempt to address a public health concern and taken in good faith"²⁷. Likewise, it is not mandatory that a State recreates a measure at the local level or that it makes additional studies to support it in order to implement it; the existing evidence suffices for supporting its adoption.

new and more onerous regulations will not be imposed. On the contrary (...) the expectation could only have been of progressively more stringent regulation of the sale and use of these products. Nor is it a valid objection to a regulation that it breaks new ground"²⁷.

→ Need to reform product package and costs associated with it

The companies have pointed that changing their packages will inevitably cause an increase in production costs, stressing negative economic consequences frequently presented as catastrophic. Other unfavorable effects are decreased consumption, massive job losses and decreased tax revenues²⁶. The companies assure these policies would hinder their commercial freedoms.

Regulation regarding the consumption of products that put public health at risk seeks to discourage said consumption, which affects the economy of the companies dedicated to the sale of those products. However, a measure meant to reduce the consumption of harmful products "*does not constitute, per se, an arbitrary measure or an attack to the right to free enterprise, since the State has privileged the protection of a greater good: public health*"²⁸.

→ Stable regulatory environment

Businessmen have expressed their need of legal certainty to invest or increase their market participation. According to them, the uncertainty marked by the possibility of new legislation harms foreign investments²⁹.

However, "*manufacturers and distributors of harmful products (...) can have no expectation that*

Conclusions

In this document we presented some of the arguments used by the food industry against the enactment of public policies to protect the human right to health, specifically those that implement front-of-package labeling on food products.

The first objective of this document was to generate evidence that brings peace of mind to the States so that, when they enact front-of-package laws, they have judicial precedents that respond to the companies' questions about the legitimacy of this kind of public health measures. This evidence was created using analogy based on legal cases in which the arguments used were identical to those used against front-of-package labeling.

As it was shown, in the last decades and facing the evidence of the harm caused by tobacco, cigarette companies filed complaints against the enactment of labeling and health warning policies. In most cases, the courts ruled in favor of the governments and their public health policies. Such is the second objective of this document: to show that the strategies planned by food companies are the same as those used by the tobacco industry years ago.

The analogy between the cases initiated by the tobacco companies and the obstacles posed by the food industry makes it evident that there must be no doubts about the legality, legitimacy and rationality of labeling policies. This way, if companies do initiate legal actions against a front-of-package warning labeling policy, it is possible to say that there are legal precedents that respond to those claims.

In this context, and despite the food companies' insistence, public policies do not represent expropriation of the trademark nor an unjustified encumbrance; they are not barriers to trade, nor do they violate intellectual property or business

rights, nor are they an obstacle to consumers' access to information. Companies that sell harmful products should expect progressively stricter regulations and adjust their businesses so that they comply with human rights obligations, thus protecting people's lives and health.

This document provides the necessary answers to face companies' legal threats. Although the food industry will continue to defend their economic interests, it ratifies the States' power and right to promote and guarantee the human right to health and to a healthy diet, through measures of proven effectiveness and recommended by international standards.-

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