

Overcoming tobacco industry opposition to standardized packaging in the Americas

Eric Crosbie,¹ Luciana C. Borges,¹ Robert Eckford,² Ernesto M. Sebríe,² Gianella Severini² and Stella A. Bialous³

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ABSTRACT

Countries in the Region of the Americas have been slow to adopt standardized packaging of tobacco products. The objectives of this analysis are to report on the progress made in adopting such packaging in countries in the Region, review known tobacco industry strategies for opposing these policies and discuss the resources available to academics, advocates and policy-makers who might be interested in advancing the use of standardized packaging in the Region. Of the 23 countries worldwide that have fully adopted standardized packaging laws, only 2 are in the Region (Canada and Uruguay). Six other countries (Brazil, Chile, Costa Rica, Ecuador, Mexico and Panama) have tried to introduce standardized packaging through draft bills, all of which have been delayed or withdrawn. There are indications that the tobacco industry has used its playbook of arguments to oppose the policy in those countries, including allegations that standardized packaging breaches national laws and international treaties protecting intellectual property, alongside threats of litigation. It is possible that these threats and allegations may have had a greater effect in the Region because of the lengthy (6 years) and costly (legal fees of US\$ 10 million) international investment arbitration brought by Philip Morris International against Uruguay's strong tobacco packaging laws. However, all of the industry's arguments have been debunked, and national courts and international legal forums have upheld standardized packaging as a lawful policy. Governments in the Region of the Americas should follow the examples of Canada and Uruguay and reject the industry's false arguments and litigation threats. This analysis discusses some of the financial and technical resources that can assist them.

Keywords

Americas; tobacco industry; tobacco products; tobacco-derived products packing; government regulation.

Following the implementation of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) there has been an acceleration of tobacco control policies globally (1). In particular, the WHO Region of the Americas has experienced important successes in adopting comprehensive bans on tobacco advertising, promotion and sponsorship in eight countries in the Region (2); adopting pictorial health warning labels (HWLs) on cigarette packages in 25 countries (3); passing tobacco excise taxes in 30 countries (4); and adopting comprehensive smoke-free policies in all indoor public

places, workplaces and on public transport in 23 countries, including in the entire subcontinent of South America, among other successes (5).

While progress continues to be made throughout the Region, one policy area that appears to be lagging is the adoption of plain packaging for tobacco products (also known as standardized packaging), which removes promotional elements by requiring a dull (usually green or brown) color for packaging, with the brand name in a standard typeface and with pictorial HWLs (Figure 1). The implementing Guidelines for Articles

¹ School of Public Health, University of Nevada, Reno, Reno, United States of America

² Campaign for Tobacco-Free Kids, Washington, D.C., United States of America
✉ Ernesto M. Sebríe, ESebrie@tobaccofreekids.org

³ School of Nursing, University of California, San Francisco, California, United States of America

FIGURE 1. WHO brochure cover page for World No Tobacco Day 2016: Get ready for plain packaging

Source: World Health Organization, World No Tobacco Day 2016, (https://www3.paho.org/hq/index.php?option=com_content&view=article&id=11972:world-no-tobacco-day-2016-get-ready-for-plain-packaging&Itemid=40273&lang=en).

11 and 13 of the WHO FCTC recommend using standardized packaging with pictorial HWLs covering “more than 50%” of the tobacco package with the aim “to cover as much of the principal display areas as possible” (6). This guidance is supported by evolving evidence that standardized packaging increases the noticeability of health warnings, prevents misleading information and decreases pack appeal and attractiveness, all of which help individuals quit smoking (7). As of July 2022, 20 countries had implemented standardized packaging at the retail level, while three more countries (Georgia, Mauritius and Myanmar) will implement standardized packaging in 2023 (8). However, in the Region of the Americas only two countries (Canada and Uruguay) have adopted standardized packaging (8). Since 2012, six other countries (Brazil, Chile, Costa Rica, Ecuador, Mexico and Panama) have attempted to introduce standardized packaging, but each of these attempts has been delayed, sometimes for many years, or withdrawn. A key reason for the lack of progress is likely tobacco industry opposition, including potential regulatory chill created by domestic and international litigation both within and outside the Region (7, 9). This analysis reports on (i) the development of and progress in adopting standardized packaging in the Region, (ii) tobacco industry opposition to standardized packaging and (iii) the best practices and resources that can be used to overcome opposition and implement standardized packaging throughout the Region.

DEVELOPMENT OF TOBACCO STANDARDIZED PACKAGING IN THE REGION

Standardized packaging laws enacted and implemented

Several case studies describe the development of standardized packaging globally (10-16). In the Region of the Americas, a bill was introduced in Canada in 1994 that resembled the idea of standardized packaging (17). Originally referred to as generic packaging, the Canadian proposal would have required cigarettes to be sold in plain white packs and would have removed any branding or logos, but would not have required pictorial HWLs, commonly seen in standardized packaging today. The proposal faced intense pressure from tobacco companies and ultimately was dropped (17). Almost 25 years later, in December 2016, the Canadian government introduced a bill to implement standardized packaging. The proposal was approved in April 2019 and implemented on February 7, 2020 (8). The legislation also requires pictorial HWLs to cover 75% of the front and back of cigarette packs.

In Uruguay, a bill proposing the implementation of standardized packaging was introduced in November 2016. While the bill was pending in August 2018, the president issued an executive decree mandating standardized packaging, which was challenged in domestic courts but upheld by the judiciary (18). On December 19, 2019, the bill was approved by Congress, and

standardized packaging was implemented in January 2020 (8). The implementing regulations were also challenged in court, but that challenge was rejected, based mostly on Uruguayan constitutional and procedural law (18). Uruguay had previously required pictorial HWLs to cover 80% of the front and back of cigarette packs, and that requirement remained in effect but with the addition of standardized packaging.

Legislative proposals for standardized packaging

As of July 2022, six countries in the Region (Brazil, Chile, Costa Rica, Ecuador, Mexico and Panama) had formally introduced legislation to implement standardized packaging.

Brazil. Between 2014 and 2016, five separate tobacco control bills, including provisions requiring standardized packaging, were introduced in Brazil (19). One of these, introduced in December 2015, was approved by the Senate in 2019, but the Committee on Constitution, Justice and Citizenship in the Chamber of Deputies removed the standardized packaging provisions from the bill (19). These provisions could be reinstated by the Chamber of Deputies, but as of May 2022, this bill remains pending (19).

Chile. Chile introduced a proposal to require standardized packaging in April 2013 (20). The bill was passed by the Senate in July 2015, but was stalled for 2 years (20). In October 2017, the Health Committee in the Chamber of Deputies approved the bill, and it was scheduled for further debate by the Agriculture Committee, where it remained for 4 years without any action being taken. In October 2021, the Agriculture Committee held public hearings (20), but then rejected the bill in November 2021. In December 2021, the bill was approved “in general” by the plenary of the Chamber of Deputies and will be discussed “in particular” by the Health Committee sometime in 2022 because changes have been proposed by some senators. Once this discussion happens, the Committee must forward the bill again to the Agriculture Committee. As of July 2022, the bill remains pending.

Costa Rica. In March 2021, a bill that included provisions requiring standardized packaging was introduced in Costa Rica, but it has remained in the Health Committee (21). If adopted, the law would mandate standardized packaging not only for conventional tobacco products (e.g. cigarettes) but also for electronic nicotine delivery systems (e.g. e-cigarettes) and heated tobacco products (e.g. products that heat but do not burn tobacco, such as IQOS), following the examples of Israel and the Netherlands (21). The bill seeks to anticipate industry arguments by referring to the scientific evidence, stating that standardized packaging does not lead to an increase in the use of illicit tobacco or violate international trade agreements (21).

Ecuador. In August 2016, a bill that included provisions requiring standardized packaging was introduced in Ecuador. As of July 2022, the bill remains in the Health Committee in the National Assembly (22).

Mexico. Between 2012 and 2018, six separate bills that included provisions requiring standardized packaging were introduced in Mexico, but none of them made it out of committee in the

Chamber of Deputies or in the Senate. In May 2021, a new bill that also included provisions requiring standardized packaging was introduced in the Senate, but as of July 2022 this bill has not been discussed and remains pending (23).

Panama. In January 2015, a bill that included requirements for standardized packaging was introduced in Panama. In October 2018, it was approved by the Health Committee of the General Assembly (22). In March 2019, the bill was approved by the General Assembly, but the standardized packaging provisions had been removed during discussion (22). This led the Health Ministry to request that the president veto the bill, which he did in May 2019. As of July 2022, a bill that includes standardized packaging has not been reintroduced in Panama.

TOBACCO INDUSTRY OPPOSITION

There is an extensive, and growing, body of research on the tobacco industry’s opposition to standardized packaging policies (10-16, 24). Since the 1990s, when the idea of standardized packaging was first introduced in Canada, the tobacco industry has continually argued – against a strong and evolving body of evidence to the contrary – that standardized packaging would (i) not reduce tobacco use, (ii) increase the illicit tobacco trade, (iii) create unnecessary problems for retailers and small businesses (e.g. job losses) and (iv) violate domestic laws and international treaties governing intellectual property (e.g. trademarks, patents, copyright) and investment (17). All of these arguments have been successfully countered in the countries that have passed standardized packaging legislation. For example, (i) courts in different jurisdiction have ruled that the large and growing body of evidence supports the conclusion that standardized packaging meets public health objectives; (ii) government seizures of illicit tobacco in Australia fell to their lowest level for 8 years during 2014–2015, following implementation of standardized packaging; (iii) transaction times for individual purchases of tobacco remained the same after the implementation of standardized packaging in Australia; and (iv) domestic courts in Australia, France and the United Kingdom, and the World Trade Organization’s (WTO’s) dispute panel and appellate body, have all ruled that standardized packaging does not violate relevant intellectual property laws and treaties (17).

Other arguments made by the tobacco industry are that introducing standardized packaging creates a slippery slope (e.g. standardized packaging for food or alcohol would be next), creates a nanny state, reduces excise tax revenues and leads to job losses in local tobacco businesses. For example, in Chile in 2016, billboards set up on the main road leading to the legislature claimed that the bill introducing standardized packaging would lead to the loss of 800 jobs (Figure 2). Tobacco companies have also lobbied and met with policy-makers (e.g. finance ministers in Brazil and Chile) (25), used trade associations and front groups to counter the introduction of standardized packaging (e.g. the American Chamber/Mexico) (26), and British American Tobacco threatened to close its operations in Chile in response to bills proposing standardized packaging (27).

Tobacco industry litigation threats

There is evidence that these tobacco industry arguments have been employed in the Region of the Americas (28) and, in

FIGURE 2. Billboard outside Santiago, Chile, calling on the president to oppose plain packaging



Source: Photo by Robert Eckford.

particular, that the industry has continued to threaten governments by arguing that standardized packaging would violate domestic laws and international treaties governing intellectual property. Claims that standardized packaging proposals violate domestic constitutional laws were made in Brazil, Chile and Mexico (25, 29). For example, in Brazil tobacco companies have claimed that standardized packaging would breach Article 5, Section XXIX of the Constitution, which protects trademark rights. In Canada, Chile, Panama and Uruguay, tobacco companies also argued that standardized packaging proposals would violate international treaties, including most notably the WTO's Technical Barriers to Trade Agreement and the Agreement on Trade-Related Aspects of Intellectual Property Rights (known as the TRIPS agreement) (25, 29). In addition, tobacco companies have argued that standardized packaging would violate regional trade agreements, such as the North American Free Trade Agreement, as happened in Canada.

Tobacco industry litigation

Tobacco companies have both threatened legal action against governments over standardized packaging proposals (17) and sued governments in domestic courts (in Australia, France, Ireland, Norway, the United Kingdom and Uruguay) and in international legal forums (7, 9). In addition, five countries (with assistance from tobacco companies) filed complaints with the WTO dispute settlement system against Australia (17). All of these claims were eventually dismissed or struck down, but the often lengthy and costly litigation created regulatory chill among governments in other countries (28), and this may have been a factor in delaying the introduction of standardized packaging proposals in the Region. Governments in countries in the Region may also have been influenced by the years of litigation resulting from the international claim against Uruguay's strong packaging laws (9). This claim used many of the same legal arguments the industry has used repeatedly when opposing standardized packaging proposals, including that the regulations expropriate the trademarks and intellectual property of Philip Morris International without compensation (9). Just the threat or possibility of this type of litigation can deter governments from introducing or proceeding with standardized packaging laws.

In addition to threats of legal action and threats related to intellectual property rights, tobacco companies have used

arguments, and in some cases sued governments, claiming that standardized packaging violates individual and commercial rights, which happened in response to the presidential decree issued in Uruguay to implement standardized packaging (18). The companies argued that the executive branch exceeded its authority, that standardized packaging would result in a loss of identity and would cost too much money to implement in terms of modifications to production, estimated at US\$ 1 million per year (18). Nonetheless, in July 2019, the Uruguayan Court of Appeals dismissed these arguments (18).

BEST PRACTICES AND RESOURCES FOR OVERCOMING OPPOSITION AND IMPLEMENTING STANDARDIZED PACKAGING

Despite the tobacco industry's opposition, policies requiring standardized packaging continue to grow globally, and momentum is needed within the Region of the Americas to advance these policies. There is a need to fill the knowledge gap around understanding the factors that have caused these policies to stall in the six countries mentioned and perhaps around understanding which factors might be barriers to supporting Regional momentum for standardized packaging. There exists scholarly work and frameworks (10-16, 24) that can guide research into these areas.

The rulings on the investment treaty challenge to Uruguay, and from the WTO dispute panel and appellate body on the complaints against Australia's standardized packaging law, strongly rejected the tobacco industry's arguments that standardized packaging or large HWLs violate states' international intellectual property obligations (7, 9). Advocates and policy-makers in countries that are interested in advancing these policies can rely on those rulings to counter and reject the legal arguments made by the tobacco companies to oppose standardized packaging. They can also draw from the successful examples debunking the tobacco industry's other allegations and arguments by relying on the body of evidence supporting standardized packaging as an effective tobacco control measure and the evidence that undermines the industry's arguments about illicit trade and problems for small retailers. WHO, the Pan American Health Organization, the FCTC Secretariat and several nongovernmental organizations have compiled resources that include both the evidence base that supports these policies and arguments to counter the interference from the tobacco industry (Table 1) (30, 31). Additionally, these organizations can provide technical assistance in developing policies, as well as information about strategies for successful implementation.

Anti-Tobacco Trade Litigation Fund

In 2015, Bloomberg Philanthropies and the Bill & Melinda Gates Foundation created the Anti-Tobacco Trade Litigation Fund to assist low- and middle-income countries fighting the tobacco industry's use of international trade and investment agreements and their threats of litigation to prevent countries from passing strong tobacco control laws. The Campaign for Tobacco-Free Kids helps coordinate funding and provides technical assistance in drafting tobacco control proposals to avoid potential international disputes and litigation, and also provides technical support to low- and middle-income countries to help them defend enacted policies.

TABLE 1. Some resources for countering the tobacco industry's opposition to and arguments against standardized packaging policies

Organization	Document or website
World Health Organization	<i>Plain packaging of tobacco products: evidence, design and implementation</i> (30). https://apps.who.int/iris/handle/10665/207478 <i>Tobacco plain packaging: global status 2021 update</i> (31). https://apps.who.int/iris/handle/10665/356900
Campaign for Tobacco-Free Kids	Plain Packaging Toolkit: https://www.tobaccofreekids.org/plainpackaging
Cancer Council Victoria (Australia)	Plain packaging. The facts: https://www.cancervic.org.au/plainfacts
Tobacco in Australia	Facts and issues: a comprehensive online resource. Analysis of major industry arguments against plain packaging: https://www.tobaccoinaustralia.org.au/chapter-11-advertising/indepth-11a-packaging-as-promotion/11a-3-analysis-of-major-industry
Tobacco Tactics (University of Bath)	Plain packaging: https://tobaccotactics.org/wiki/plain-packaging/
ASH: Action on Smoking and Health (United Kingdom)	Standardised plain packaging: https://ash.org.uk/category/information-and-resources/packaging-labelling-information-and-resources/standardised-plain-packaging/
WHO Framework Convention on Tobacco Control	WHO FCTC Knowledge Hub on Legal Challenges: https://untobaccocontrol.org/kh/legal-challenges/
McCabe Centre for Law and Cancer	Advancing law to fight cancer: https://www.mccabecentre.org/
Truth Tobacco Industry Documents (University of California, San Francisco)	Plain packaging collection: https://www.industrydocuments.ucsf.edu/tobacco/collections/plain-packaging-collection/
Southeast Asia Tobacco Control Alliance	Packaging and labelling of tobacco products: https://seatca.org/packaging-and-labelling-of-tobacco-products/

Source: Prepared by the authors based on data from websites.

CONCLUSIONS

Following the FCTC's entry into force in 2005 and the first implementation of standardized packaging in Australia in 2012, the use of standardized packaging has spread globally. However, in the Region of the Americas as of July 2022, only Canada and Uruguay have implemented standardized packaging. Since 2012, six countries in the Region have attempted to introduce standardized packaging, but strong opposition from tobacco companies, including threats of or actual domestic and international litigation, has impeded this progress. Governments should follow the examples of Canada, Uruguay and other countries and reject the tobacco industry's false arguments and litigation threats while pursuing standardized packaging policies with help from the FCTC and global support resources.

Authors' contributions. EC and RE conceptualized the analysis. EC, LB, GS and RE collected the raw data, and EC prepared the first and subsequent drafts of the manuscript. EC, LB, EMS, GS, RE and SAB contributed to revisions of the paper.

Conflicts of interests. None declared.

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Superando la oposición de la industria tabacalera al empaquetado estandarizado en la Región de las Américas

RESUMEN

Los países de la Región de las Américas han tardado en adoptar el empaquetado estandarizado de los productos de tabaco. Los objetivos de este análisis son informar sobre el progreso realizado en la adopción de dicho empaquetado en los países de la Región, revisar las estrategias conocidas de la industria tabacalera para oponerse a estas políticas y abordar los recursos disponibles para la comunidad académica, los defensores de la causa y los responsables de formular las políticas que podrían estar interesados en fomentar el uso del empaquetado estandarizado en la Región. De los 23 países de todo el mundo que han adoptado plenamente leyes sobre el empaquetado estandarizado, solo dos se encuentran en la Región (Canadá y Uruguay). Otros seis países (Brasil, Chile, Costa Rica, Ecuador, México y Panamá) han tratado de introducir empaquetados estandarizados mediante proyectos de ley, los cuales han enfrentado demoras o han sido retirados. En esos países hay indicios de que la industria tabacalera ha recurrido a una cartilla de argumentos para oponerse a esta política, como acusaciones de que los empaquetados estandarizados violan las leyes nacionales y los tratados internacionales que protegen la propiedad intelectual, además de amenazas de litigios. Es posible que estas amenazas y alegatos hayan tenido un mayor efecto en la Región debido al largo (6 años) y costoso (costos legales de US\$ 10 millones) arbitraje internacional en el ámbito de las inversiones presentado por Philip Morris International contra las fuertes leyes de empaquetado de tabaco de Uruguay. Sin embargo, todos los argumentos de la industria han sido desacreditados, y los tribunales nacionales y los foros jurídicos internacionales han defendido el empaquetado estandarizado como una política legal. Los gobiernos de la Región de las Américas deben seguir los ejemplos de Canadá y Uruguay y rechazar los argumentos falsos y las amenazas de litigio de la industria. En este análisis se examinan algunos de los recursos financieros y técnicos que pueden ayudarlos.

Palabras clave

Américas; industria del tabaco; productos de tabaco; envasado de productos derivados del tabaco; regulación gubernamental.

Superando a oposição da indústria do tabaco às embalagens padronizadas nas Américas

RESUMO

Os países da Região das Américas têm sido lentos em adotar embalagens padronizadas para produtos de tabaco. Os objetivos desta análise são: informar acerca do progresso feito na adoção de tais embalagens nos países da região; revisar as estratégias conhecidas da indústria do tabaco para se opor a essas políticas; e discutir os recursos disponíveis para acadêmicos, defensores e formuladores de políticas que possam estar interessados em avançar no uso de embalagens padronizadas na região. Dos 23 países do mundo que adotaram leis obrigando o uso de embalagens totalmente padronizadas, apenas 2 estão na região (Canadá e Uruguai). Seis outros países (Brasil, Chile, Costa Rica, Equador, México e Panamá) tentaram introduzir embalagens padronizadas por meio de projetos de lei, os quais foram todos adiados ou retirados. Há indícios de que a indústria do tabaco usou seus argumentos habituais – incluindo alegações de que embalagens padronizadas violam leis nacionais e tratados internacionais de proteção à propriedade intelectual, além de ameaças de litígio – para se opor às políticas nesses países. É possível que essas ameaças e alegações tenham tido um efeito maior na região devido ao longo (6 anos) e dispendioso (US\$ 10 milhões em honorários advocatícios) processo de arbitragem internacional iniciado pela Philip Morris International contra as fortes leis de embalagem de produtos de tabaco do Uruguai. Porém, todos os argumentos da indústria foram desmascarados e tanto os tribunais nacionais como fóruns jurídicos internacionais decidiram em favor da embalagem padronizada como política legal. Os governos da Região das Américas deveriam seguir os exemplos do Canadá e do Uruguai e rejeitar os argumentos falsos e as ameaças de litígio da indústria. Esta análise discute alguns recursos financeiros e técnicos que podem ajudá-los.

Palavras-chave

América; indústria do tabaco; produtos do tabaco; embalagem de produtos derivados do tabaco; regulamentação governamental.
