

UCSF

UC San Francisco Previously Published Works

Title

Containing diffusion: the tobacco industry's multipronged trade strategy to block tobacco standardised packaging

Permalink

<https://escholarship.org/uc/item/066357r4>

Journal

Tobacco Control, 28(2)

ISSN

0964-4563

Authors

Crosbie, Eric

Eckford, Robert

Bialous, Stella

Publication Date

2019-03-01

DOI

10.1136/tobaccocontrol-2017-054227

Peer reviewed



HHS Public Access

Author manuscript

Tob Control. Author manuscript; available in PMC 2019 March 01.

Published in final edited form as:

Tob Control. 2019 March ; 28(2): 195–205. doi:10.1136/tobaccocontrol-2017-054227.

Containing diffusion: the tobacco industry's multipronged trade strategy to block tobacco standardised packaging

Eric Crosbie¹, Robert Eckford², and Stella Bialous^{1,3}

¹Center for Tobacco Control Research and Education, University of California, San Francisco, California, USA

²International Legal Consortium Campaign for Tobacco Free Kids, Campaign for Tobacco Free Kids, Washington, DC, USA

³School of Nursing, University of California, San Francisco, California, USA

Abstract

Objective—To analyse the tobacco industry's strategy of using trade and investment agreements to prevent the global diffusion of standardised packaging (SP) of tobacco products.

Methods—Review of tobacco industry documents, relevant government documents and media items. The data were triangulated and thematically analysed.

Results—Internal tobacco industry documents reveal that during the early 1990s, tobacco companies developed a multipronged trade strategy to prevent the global diffusion of progressive tobacco packaging and labelling proposals, including SP. This strategy consisted of (1) framing the health issue in terms of trade and investment, (2) detailing alleged legal violations concerning trade barriers, intellectual property and investment rights, (3) threatening legal suits and reputational damage, and (4) garnering third-party support. These efforts helped delay SP until 2010 when Australia became the first country to reintroduce SP proposals, followed by governments in the UK and New Zealand in 2012, Ireland in 2013 and France in 2014. Review of government documents and media sources in each of the five countries indicate the industry continues to employ this multipronged strategy throughout the SP policy's progression. Although this strategy is tailored towards each domestic context, the overall tobacco industry's trade strategy remains consistently focused on shifting the attention away from public health and towards the realm of trade and investment with more corporate-friendly allies.

No commercial use is permitted unless otherwise expressly granted.

Correspondence to: Eric Crosbie, Center for Tobacco Control Research and Education, University of California, San Francisco, CA 94131, USA; eric.crosbie@ucsf.edu.

Contributors EC, with guidance from RE, and SB conceptualised the study. EC collected the raw data and prepared the first and subsequent drafts of the manuscript. RE and SB contributed to revisions of the paper.

Disclaimer The funding agencies played no role in the conduct of the research or the preparation of this article.

Competing interests None declared.

Patient consent Not required.

Provenance and peer review Not commissioned; externally peer reviewed.

Conclusion—Governments seeking to implement SP need to be prepared to resist and counter the industry’s multipronged trade strategy by avoiding trade diversions, exposing industry legal and reputational claims, and monitoring third-party support.

INTRODUCTION

The WHO Framework Convention on Tobacco Control (FCTC), the first and only international health treaty, provides a legal framework to assist governments in reducing tobacco consumption.¹ Articles 11 and 13 implementation guidelines recommend ‘aim(ing) to cover as much of the principle display areas as possible’ and that governments adopt plain packaging (or standardised packaging (SP)) along with pictorial health warning labels (HWLs) covering 50% or more of the tobacco package.² SP measures remove promotional elements of tobacco packs by requiring a dull (usually green/brown) colour on all surfaces apart from the HWL with the only trademarks permitted being the brand name in a standard typeface (figure 1). A growing body of research demonstrates that SP is effective at reducing the appeal of tobacco packs, and increases the salience and noticeability of larger, pictorial HWLs.^{3–7} The implementation of pictorial HWLs and SP have significantly reduced tobacco consumption and youth smoking initiation rates as well as lowered government health expenditures and tobacco industry sales.^{8–10} Since the entry of the FCTC in 2005, pictorial HWLs have been implemented at an exponential rate, but the global diffusion of pictorial HWLs covering more than 50% of the package, and more importantly SP, have spread at a slower pace.¹¹

The literature on SP has identified this slow diffusion has been primarily due to the opposition of the tobacco companies, which have centred around four main arguments claiming that SP (1) lacks sufficient evidence to demonstrate that it will work,¹² (2) would increase illicit tobacco trade,¹³¹⁴ (3) would create unnecessary problems for retailers¹⁴¹⁵ and (4) would violate domestic laws and international treaties governing intellectual property (eg, trademarks, patents, copyright) and investment.¹⁶¹⁷

The fourth argument incorporates various international elements as tobacco companies have aggressively threatened governments with lawsuits claiming that SP would violate various trade and investment agreements.^{18–20} For decades, these legal threats appeared to have created a chilling effect²¹ as governments either withdrew, weakened or delayed implementation of SP due in part to fears over potential costly legal battles with the industry.¹⁷ Despite several legal opinions,²²²³ court rulings²⁴²⁵ and the tobacco industry’s own internal legal advice¹⁷²⁶ that pictorial HWLs and SP do not violate these agreements, tobacco companies continue to publicly threaten governments with domestic and international lawsuits.

Discussions for SP began in the mid-late 1980s in Canada, New Zealand and Australia, which led to legislative proposals in Canada and Australia in 1994. These efforts that were defeated in 1995 due in part to legal concerns created by tobacco companies and the push for SP appeared to fade away over the next 15 years. Instead, governments incrementally adopted stronger textual HWLs throughout the 1990s and then pictorial HWLs throughout the 2000s.¹¹ Momentum for SP resurfaced again in 2010 when the Australian government

announced plans to adopt SP¹⁵ This analysis, built on two previous studies analysing internal tobacco industry documents to reveal opposition to SP,¹⁷²⁶ examines the development of the industry's sophisticated strategy of using trade and investment agreements (hereinafter 'trade strategy') to block and delay SP during the 1990s and how this strategy was deployed in various contexts since the reintroduction of SP in Australia in 2010.

METHODS

Between September and December 2015, we searched tobacco industry documents in the University of California San Francisco's Truth Tobacco Industry Documents Library (<https://www.industrydocumentslibrary.ucsf.edu/tobacco/>) using standard snowball search methods.²⁷ Initial search terms included 'plain packaging', 'standardised packaging', 'international trade' and 'trademark'. This led to a specific focus on industry documents dated between 1993 and 1995, closely connected individual (eg, John Luik) and third-party (eg, International Chamber of Commerce) participation and a concentration on specific international treaties, including the Paris Agreement and World Trade Organization. A total of 200 relevant documents were found. At the time of completing the collection of research data for this study (September 2016), five countries (Australia, New Zealand, UK, Ireland and France) had either enacted SP laws or were sufficiently progressed in legislative proposals to allow meaningful research into the issues. Thus, between May and September 2016, we reviewed government documents including reports, committee hearings and stakeholder submissions in each country, Australia (<http://www.aph.gov.au/>), New Zealand (<https://www.parliament.nz/en/>), the UK (<https://www.parliament.uk/>), Ireland (<http://www.oireachtas.ie/parliament/>) and France (<https://www.senat.fr/lng/en/>). We also reviewed media sources including press releases, media statements and news reports in Google using a snowball search of similar key terms. Finland, Hungary and Slovenia, other governments that have enacted SP as of March 2018, were excluded due to lack of significant SP legislative progression by September 2016. There are no known government proposals for SP between 1995 and 2007. Therefore, the results section examines tobacco industry internal planning during the 1990s to highlight the development of the industry's multipronged trade strategy to oppose SP and then applies these findings to analyse industry public actions against SP proposals since 2008.

RESULTS

Development of the industry's multipronged trade strategy

For decades, tobacco companies have been concerned about the diffusion of progressive tobacco packaging and labelling laws.²⁸ In 1985, Philip Morris International (PMI) internally discussed the potential spread of tobacco packaging and labelling laws stating that "a sneeze in one country today causes international pneumonia tomorrow",²⁹ and by 1989 considered this progress a "crisis".³⁰ In 1992, British American Tobacco (BAT) was concerned that SP "could spread rapidly to the rest of the world with serious commercial consequences",³¹ and by 1993 considered it "the biggest battle to be fought by the industry".³²

In response, the major tobacco companies at the time (PMI, BAT, Imperial Tobacco, Rothmans International, RJ Reynolds and Reemtsma & Gallaher) officially formed a 'Plain Pack Group' in November 1993 to develop a coordinated plan to prevent the global diffusion of SP.¹⁷²⁶ This global plan included a multipronged trade strategy that consisted of (1) framing the issue in terms of trade and investment (instead of health), (2) detailing alleged legal violations concerning trade barriers, intellectual property and investment rights, (3) threatening legal suits and reputational damage, and (4) garnering third-party support.

Framing the issue in terms of trade and investment

Tobacco industry internal planning (1990s)—Initial discussions between the major tobacco companies centred on how to shift the narrative of SP away from public health, a common tobacco industry strategy.³³³⁴ In 1993, BAT proposed to the other tobacco companies that SP “should not be contested as a health issue” but “should be treated as expropriation of Intellectual Property and contested politically on that basis”,³⁵ (table 1). By focusing on intellectual property, the industry stood “a better chance of setting their own agenda”, which would “confine the argumentation to political, economic, international trade, and intellectual property issues”.³⁵ Following internal discussions, tobacco companies implemented this strategy through written submissions to SP proposals in Canada and Australia.³⁶

Broadening the issue as an attack on all businesses

Tobacco companies recognised that by framing the issue as primarily concerning intellectual property and trade, the proposals would be viewed as an attack on all business, so the companies sought to “use those international laws which do exist not only for tobacco products but wherever multi-national products are marketed”.³² During a Plain Pack Group meeting in November 1993, they planned arguments on how SP “would establish dangerous precedents that could affect hundreds of other products and services”.³⁷ In December 1993, Rothmans proposed to push this idea on the agenda of the World Intellectual Property Organization, a United Nations agency that promotes intellectual property protection. Rothmans proposed hosting a meeting which would “help to context the issue as a problem that other industries also face so as to eliminate the perception of tobacco industry isolation”.³⁸ Following the meeting, tobacco companies began incorporating the issue of trademark infringement under ‘slippery slope’ arguments,³⁹⁴⁰ that is, if the policy is allowed for tobacco then governments will apply it to other ‘unhealthy’ traded products.

Tobacco industry public actions (2010–2016)—Since 2010, the main global tobacco companies, PMI, BAT, Imperial Tobacco Brands (formerly Imperial Tobacco until February 2016) and Japan Tobacco International (JTI), have continued to frame SP proposals as an attack on trademarks and foreign investment in each of the five countries included in this analysis (Australia, New Zealand, UK, Ireland and France). Tobacco companies have deployed this strategy by issuing press releases,^{41–43} running media campaigns,⁴⁴⁴⁵ participating in news events and interviews,^{46–50} testifying during parliamentary hearings^{51–53} and issuing submissions to government opposing SB^{54–64} Framing SP consisted of key phrases, including ‘intellectual property overridden by government policy’,⁶⁵ ‘deprives trademarks of their very substance’⁶¹ and ‘a barrier to trade’.⁵⁹

Tobacco companies concentrated on the broader impact of SP and potentially future trademark violations for other businesses claiming that SP would set a ‘dangerous precedent’ in violating investors’ rights and that soon other industries would be targeted, ^{54–64} part of the tobacco companies’ broader slippery slope arguments evoking government over-regulation (eg, nanny state arguments).⁶⁶⁶⁷ Tobacco-sponsored media campaigns featured themes with catch phrases such as ‘what company would stand for this’ in Australia,⁴⁴ ‘I don’t mind if alcohol is next’ in New Zealand⁴⁵ and ‘tobacco first, what next?’ in the UK, Ireland and France (figure 2). Although similar, each campaign included tailored messaging for each country. In France, Imperial Brands’ campaign focused on the dangers of potentially plain wine bottles. BAT, in Australia and New Zealand, used plain alcohol bottles and JTI in the UK and Ireland used plain food and beverage products (eg, plain chocolate, fries and soda cans).

Detailing alleged legal violations concerning trade barriers, intellectual property and investment rights

Tobacco industry internal planning (1990s)—In the 1990s, tobacco companies sought legal advice on international treaties to protect their trademarks. BAT proposed to “take an international approach to brand protection” and that “all this groundwork should be aimed to ensure a legal framework is in place to defeat any further moves, anywhere”.³² BAT initially suggested that “the Paris Convention, provisions within GATT (General Agreement on Tariffs and Trade) and the European Community would seem a good starting point for finding out what existing protection there is for our brands under these conventions”.³² Initial discussions focused on verifying if SP constituted a barrier to trade among countries. These inquiries began with the GATT, the major trading system from 1945 to 1994, and then the World Trade Organization (WTO) Agreements (including the updated GATT, the Technical Barriers to Trade (TBT) Agreement and the Trade Related Aspects of Intellectual Property (TRIPS) Agreement). The industry viewed these agreements as a legal weapon to block or delay proposals, stating, “legal defenses could tie up legislators in litigation over a long period”.³²

In March 1994, the Plain Pack Group agreed to review “international conventions affording protection of trade marks”,⁶⁸ to develop “good arguments as to why minimal intellectual property and trademark infringement is the only reasonable policy”.³⁸ This included attempting to understand “what are the conditions under which what the intellectual property people call a ‘justified taking’ can occur?”.³⁸ In other words, if governments prohibited tobacco companies from using their trademarks on the package for public health reasons, would that be considered a justified reason? As pointed out by other studies,¹⁷²⁶ the industry solicited several internal legal opinions but found ‘little joy’⁶⁹ in these international treaties as they were told governments had the sovereign right to implement SP so long as it did not interfere with the *registration* of trademarks.

Tobacco industry public actions (2010–2016)—Ignoring unfavourable internal legal advice in the 1990s,¹⁷²⁶ tobacco companies continue to claim in each country that SP proposals would (1) constitute a barrier to trade under the WTO TBT and GATT, (2) violate the ‘rights of use’ of trademarks under various domestic laws and the WTO TRIPS

agreement, and (3) amount to expropriation of their trademark property and not represent fair and equitable treatment under various free trade agreements (FTAs) and bilateral investment treaties (BITs).

In each national context, tobacco companies used these arguments in public statements and in the media,^{46–50} through third parties (see below) and in submissions to government.^{54–64} The tobacco companies' public position in each country was that SP would result in the 'destruction', 'acquisition', 'expropriation' or 'deprivation' of their trademark property rights.^{5470–72} BAT's submission to New Zealand's parliamentary committee is typical of how these arguments were framed in each country:

Plain Packaging would breach New Zealand's legal obligations under Investment Treaties and the WTO agreements... Plain Packaging prevents the use of validly registered trade marks.⁵⁹

The tobacco companies argued that SP breached obligations under the WTO TRIPS in each country and specifically violated the European Charter of Fundamental Rights in France,⁷³ Ireland⁵⁶ and the UK,²⁵ an Australia–Hong Kong BIT in Australia⁷⁴ and a New Zealand–China FTA in New Zealand.^{57–59}

Threatening legal suits and reputational damage

Tobacco industry internal planning (1990s)—To increase pressure on governments, tobacco companies discussed the importance of conveying their trademark value and the potential negative impacts of denying their trademark usage. In March 1994, slides from a Plain Pack Group meeting stated that removing their trademarks “would result in significant devaluation in the value of companies and huge losses for shareholders”.⁷⁵ Recognising trademark value, the tobacco companies began planning how SP would be an ‘unlawful expropriation’ of their trademark rights and that compensation claims could amount to ‘hundreds of millions of dollars’.⁷⁶⁷⁷ Tobacco companies discussed framing SP to show a disregard for trademark rights that would ‘damage the reputation of governments’ and significantly impact ‘new investment decisions’ across all business.⁷⁸ They suggested to governments that proceeding with SP would be ‘unlikely to enhance its image as a host for investment’.⁷⁹

Tobacco industry public actions (2010–2016)—Tobacco companies claimed that SP would (1) incur considerable legal costs and (2) result in direct compensation to the tobacco companies. Tobacco companies emphasised that SP would expose each country to domestic and international legal challenges that would cost ‘millions in legal fees’ in procedural costs. They also stressed that losing in arbitration would result ‘billions in compensation’.⁷¹⁸⁰ Both of these claims stressed the cost to the taxpayers. For example, in Australia, BAT's media campaign headings included ‘Will plain packaging cost taxpayers billions of dollars?’ and ‘Don't let the taxpayer foot the bill’.⁴⁴

The threats of international legal suit and compensation were magnified by the actual challenges brought against Australia's SP law. PMI challenged the law through an Australia–Hong Kong BIT,⁸¹ and BAT and PMI provided legal and financial support to at least three of the five countries (Ukraine, Honduras and Dominican Republic) that

challenged the law through the WTO dispute resolution.⁸²⁸³ While this increased the pressure on Australia, these suits were intended to, and had the effect of, slowing the diffusion of SP globally by creating a legal fulcrum to caution others before proceeding. Tobacco companies continuously urged the other countries to adopt a ‘wait and see’ approach until these rulings were finalised,⁵⁸⁵⁹⁶²⁶³⁷¹ knowing that these international lawsuits typically take many years to resolve. (The WTO case remains ongoing after more than 5 years.) It took more than 5 years for the BIT challenge to be dismissed without proceeding to a merits hearing, which would have taken additional years to conclude.

Tobacco companies also threatened each government that SP would severely damage their country’s international reputation in terms of foreign trade and investment. In each country, tobacco companies emphasised that SP was ‘disturbing’, ‘detrimental’, ‘destructive’, ‘damaging’ and would ‘adversely impact’ each government’s reputation with foreign investors and trading partners.^{54–5658–61} In particular, tobacco companies argued that SP would deter all business sectors from investing in these countries and disregard established intellectual property norms, particularly trademarks, which are ‘considered the cornerstone of corporate identity and consumer information’.⁶⁰ Tobacco companies argued that each country risked facing ‘adverse consequences’ with trading partners as SP would diminish each country’s ‘international standing’ and reduce their negotiating ability in trade negotiations as well as potentially lead to ‘retaliatory’ countermeasures in the WTO.
545658–61

These threats were tailored for each country. In Ireland, JTI argued how SP would ‘cause anxiety amongst multinationals who are considering investing there’⁵⁵ and Philip Morris asked whether Ireland would ‘be happy if other countries required plain packaging for alcohol’⁶⁵ (a major Irish export). In New Zealand, BAT emphasised that SP ‘would compromise its credibility’ to oppose similar public health measures when they ‘affect New Zealand’s exports’.⁵⁹ Imperial also highlighted an Australian/New Zealand WTO dispute involving apples in which New Zealand successfully challenged Australia’s unreasonable import restrictions to argue that SP would also create an unnecessary barrier to trade for its trading partners.⁵⁷ In Australia, BAT argued it would be hypocritical for the government to object to Thailand’s HWLs on alcoholic beverages while simultaneously advocating for tobacco SP.⁶⁰

Garnering third-party support

Tobacco industry internal planning (1990s)—In 1993, tobacco companies recommended developing alliances with other multinational industries,⁸⁴ recruiting support from the alcohol and pharmaceutical industries, and manufacturers in general, who ‘may be affected by packaging suggestions’,³²³⁵ and ‘may be vulnerable to packaging warnings which expropriate their intellectual property’.⁸⁵ During a March 1994 Plain Pack Group meeting, the objective was ‘to heighten awareness of the issue’⁷⁵ and contact potential allies including ‘pharmaceuticals, alcohol, cosmetics, Unilever, Colgate, Pepsi and Coca-Cola’.⁸⁴ Similar to finding ‘little joy’ with protections in international treaties, tobacco companies reported ‘other industry groupings little support’ in opposing SP.⁶⁹

Tobacco companies also attempted to acquire support from business groups, intellectual property and trademark associations, including the International Chamber of Commerce (ICC) and the International Trademark Association (INTA).⁶⁹⁸⁴⁸⁶ ICC and INTA strongly supported the tobacco companies in opposing SP in Australia and to a larger extent in Canada.^{87–89} This included lobbying policy-makers, writing letters to top government officials, speaking in the media to help frame SP as a trade and investment issue, and emphasising potential legal and reputational costs of SP.

In addition, tobacco companies contracted legal experts to support their arguments.⁸⁴ In March 1994, the Plain Pack Group agreed to recruit supportive legal experts to create an open debate on the legality of SP, which included ‘intellectual property rights specialists’ with favourable understandings of international law to the tobacco companies that ‘could form the basis for papers to be presented’ to policy-makers.³² The tobacco companies financed a book, which was referred to as a ‘plain packs Bible’⁹⁰ that was used as a credible and citable resource to influence academic debates and referred to policy-makers when debating SP proposals.

Tobacco industry public actions (2010–2016)—Similar to the 1990s, tobacco companies have received little support publicly from other industries in opposing tobacco SP. In fact, the Winemakers Federation of Australia was quick to reject any link between alcohol and tobacco, stating, “Our industry does not like any association between tobacco and alcohol”. Although not complaining about the possibility of plain olive packs, the Australian Olive Association also rejected any association to tobacco complaining about the characterisation of SP being wrapped in ‘olive green’ as “to associate any food with cigarettes is a thoughtless thing to do”.⁹²

However, tobacco companies received active support from various business associations, which again included the ICC and INTA as well as other longtime industry allies (table 2). These business associations commented in the media,^{93–99} and issued submissions to government in all five countries,^{100–112} echoing the industry’s trade arguments.

Tobacco companies also received active support from various legal experts and think tanks¹¹³¹¹⁴ (table 2), including assistance from longtime industry allies such as the Washington Legal Foundation.¹¹⁵ These groups attempted to create a legal debate around SP¹¹⁶ and validate the industry’s position against SP by producing position papers and policy briefs.¹¹⁷

DISCUSSION

During the early 1990s, tobacco companies developed a multi-pronged trade strategy to prevent the diffusion of SP, which they continue to employ to contain the spread of SP since 2010.

As with courtesy of choice,^{118–120} youth smoking prevention^{121–123} and corporate social responsibility programmes,¹⁰¹²⁴¹²⁵ the industry’s multipronged trade strategy consists of similar tactics tailored for each country.

The strategy has had a clear ‘regulatory chilling effect’ in New Zealand where SP legislation was explicitly delayed for almost 3 years pending the outcome of Australia’s legal disputes.¹⁹ There is evidence that tobacco companies also employed their trade strategy in Georgia, Hungary, Norway, Slovenia and Thailand, which have each enacted initial SP legislation (although delays to progress in Georgia are reported to be due to industry interference,¹²⁶ and in Thailand the Ministry of Commerce has raised trade concerns and it appears the government is waiting until the results of the WTO dispute with Australia before moving forward).¹²⁷ In Turkey and Malaysia, ministers had announced strong intentions to proceed with SP but then shortly afterwards made statements delaying or cancelling the proposals citing industry arguments on intellectual property or trade.¹²⁸¹²⁹ Other governments that plan to implement SP should expect, and be prepared to counter, a similar multipronged trade strategy as part of the industry’s opposition.

Policy implications

Avoiding trade and investment framing diversions—Governments should be weary of accepting arguments that SP has significant international trade and investment implications— whether those arguments are delivered by the tobacco companies or third-party organisations. In Australia²⁰ and Ireland,¹³⁰ key government officials consistently framed SP as a public health and protection of children issue to address the ‘unique problem of tobacco’, and were undeterred by the industry’s threats of trade and investment lawsuits. This contributed to relatively swift passage of SP laws in these countries. With positive rulings in the Australian and Uruguay investment arbitrations,²⁰¹³¹ and the WTO ruling expected in 2017, governments can have confidence to publicly and internally resist the industry’s attempts to frame SP as a trade and investment issue.

Exposing exaggerated industry legal and reputational claims—Despite continued industry legal threats, the Australian²⁴ and UK High Courts²⁵ (and Court of Appeal) and the French Constitutional Council and Council of State⁷³ each upheld SP laws, concluding that restricting trademark usage was justified, proportionate and consistent with WTO rules, and that SP was not an expropriation of their intellectual property rights. In December 2015, an international investment tribunal dismissed Philip Morris’ investment treaty claim against Australia’s SP law, without hearing the merits of the case, because Philip Morris had undergone corporate restructuring for the sole purpose of brining the arbitration, which was held to be an abuse of process.¹³² Philip Morris’ 2010 investment treaty challenge against Uruguay’s packaging and labelling law was also based on similar intellectual property, expropriation of trademark property and trade law arguments, and the tribunal dismissed the claim in full using strong terms applicable to SP and to wider public health policies.¹³¹ On 5 May 2017, news sources reported that the WTO dispute panel’s interim report upheld the Australian SP law.¹³³ Although the final ruling was expected in 2017, as of March 2018, it still has not been made public.

Before these rulings, civil society groups in Australia recruited legal experts to expose these exaggerated legal claims to policy-makers²⁰ whereas in New Zealand this was less evident.¹⁹ These rulings now provide greater legal clarity surrounding a country’s sovereign right to implement progressive tobacco packaging and labelling regulations. Given the favourable

legal rulings to date, governments should ignore any ‘wait and see’ arguments by the industry and their allies.

Tobacco companies, and not taxpayers, have been ordered to pay the legal fees for the majority of their lost challenges against SP. Legal fees for investment arbitration can range from approximately US\$4-10 million¹³⁴; however, PMI had to compensate Uruguay US\$7 million for its lost BIT challenge¹³¹ and has been ordered to pay Australia’s fees (reported to be in the tens of millions of US dollars).¹³⁵ Furthermore, the public health benefits of SP outweigh these costs as SP in Australia is estimated to save the government US\$273 million over 10 years in health expenditures.⁸

Contrary to industry claims about reputational harm, the International Property Rights Index scores all increased in countries that enacted SP.¹³⁶ Furthermore, these countries have been recognised by the international public health community and international agencies including WHO as leaders in public health.

Monitoring third-party support—The industry’s trade strategy also consists of support from international business groups and trademark and intellectual property organisations including most notably the U.S. and International Chambers of Commerce, which aggressively oppose SP in several countries.^{137,138} Given the industry’s low credibility, increasingly these international groups are becoming the mouthpiece to frame and oppose SP, especially to government departments of foreign affairs and trade where they can be highly influential stakeholders.¹³⁹ Thus, continued monitoring and revealing their link to tobacco companies like in Australia and Ireland is needed to avoid any potential roadblocks during the policy-making process.

Limitations

It is possible that governments introduced proposals for SP between 1995 and 2007, but we could not find relevant data regarding this. This study focused primarily on the development and enactment process of SP and not the implementation stage, in which the multitrade strategy may include an additional series of tobacco industry attacks.

CONCLUSION

Governments seeking to implement SP must be prepared to resist and counter the tobacco industry’s well-known multi-pronged trade strategy by avoiding trade diversions, exposing industry legal and reputational claims, and monitoring third-party support.

Acknowledgments

We thank Emmanuelle Béguinot, Figen Eker and Fenton Howell for the information provided for this study.

Funding This work was supported by the National Cancer Institute Training Grant 2T32 CA113710-11 and Tobacco-Related Disease Research Program (University of California) Mackay California-Pacific Rim Tobacco Policy Scholar Award 25MT-0033 and Dissertation Research Award 24DT-0003.

References

1. World Health Organization. WHO framework convention on tobacco control. Geneva, Switzerland: 2003. <http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf> (accessed 12 Nov 2015)
2. World Health Organization. WHO framework convention on tobacco control (2009) guidelines for implementation of article 11: packaging and labelling of tobacco products. 2009. http://whqlibdoc.who.int/publications/2009/9789241598224_eng.pdf (accessed 1 Nov 2009)
3. Thrasher JF, Hammond D, Fong GT, et al. Smokers' reactions to cigarette package warnings with graphic imagery and with only text: a comparison between Mexico and Canada. *Salud Publica Mex.* 2007; 49(Suppl 2):s233–s240. [PubMed: 17607485]
4. Thrasher JF, Rousu MC, Hammond D, et al. Estimating the impact of pictorial health warnings and "plain" cigarette packaging: evidence from experimental auctions among adult smokers in the United States. *Health Policy.* 2011; 102:41–8. [PubMed: 21763026]
5. Yong H-H, Borland R, Hammond D, et al. Smokers' reactions to the new larger health warning labels on plain cigarette packs in Australia: findings from the ITC Australia project. *Tob Control.* 2016; 25:181–7. [PubMed: 25700365]
6. Hammond D. Health warning messages on tobacco products: a review. *Tob Control.* 2011; 20:327–37. [PubMed: 21606180]
7. Borland R, Wilson N, Fong GT, et al. Impact of graphic and text warnings on cigarette packs: findings from four countries over five years. *Tob Control.* 2009; 18:358–64. [PubMed: 19561362]
8. Australia Department of Health. Tobacco plain packaging post-implementation review. Canberra, Australia: 2016. <http://ris.pmc.gov.au/sites/default/files/posts/2016/02/Tobacco-Plain-Packaging-PIR.pdf> (accessed 14 Apr 2016)
9. Sebríe EM, Sandoya E, Bianco E, et al. Hospital admissions for acute myocardial infarction before and after implementation of a comprehensive smoke-free policy in Uruguay: experience through 2010. *Tob Control.* 2014; 23:471–2. [PubMed: 25324157]
10. Crosbie E, Sosa P, Glantz SA. The importance of continued engagement during the implementation phase of tobacco control policies in a middle-income country: the case of Costa Rica. *Tob Control.* 2017; 26:60–8. [PubMed: 26856614]
11. Canadian Cancer Society. Plain packaging—international overview. Montreal, Canada: 2017. (accessed 10 May 2017)
12. Hatchard JL, Fooks GJ, Evans-Reeves KA, et al. A critical evaluation of the volume, relevance and quality of evidence submitted by the tobacco industry to oppose standardised packaging of tobacco products. *BMJ Open.* 2014; 4:e003757.
13. Ulucanlar S, Fooks GJ, Hatchard JL, et al. Representation and misrepresentation of scientific evidence in contemporary tobacco regulation: a review of tobacco industry submissions to the UK Government consultation on standardised packaging. *PLoS Med.* 2014; 11:e1001629. [PubMed: 24667150]
14. Evans-Reeves KA, Hatchard JF, Gilmore AB. 'It will harm business and increase illicit trade': an evaluation of the relevance, quality and transparency of evidence submitted by transnational tobacco companies to the UK consultation on standardised packaging 2012. *Tob Control.* 2015; 24:e168–e177. [PubMed: 25472733]
15. Chapman, S, Freeman, B. Removing the emperor's clothes: Australia and tobacco plain packaging. Sydney, Australia: Sydney University Press; 2014.
16. Jarman H. Attack on Australia: tobacco industry challenges to plain packaging. *J Public Health Policy.* 2013; 34:375–87. [PubMed: 23739175]
17. Crosbie E, Glantz SA. Tobacco industry argues domestic trademark laws and international treaties preclude cigarette health warning labels, despite consistent legal advice that the argument is invalid. *Tob Control.* 2014; 23:e7.
18. Yaqub F. Plain packaging for tobacco products faces UK legal challenge. *Lancet Respir Med.* 2015; 3:511. [PubMed: 26041402]
19. Crosbie E, Thomson G. Regulatory chills: tobacco industry legal threats and the politics of standardized plain packaging in New Zealand. *New Zealand Medical Journal.* 2017

20. Crosbie E, Thomson G, Freeman B, et al. Advancing progressive health policy to reduce NCDs amidst international commercial opposition: tobacco standardized packaging in Australia. *Global Public Health*. 2017
21. Tienhaara, K. Regulatory chill and the threat of arbitration: a view from political science. In: Brown, C, Miles, K, editors *Evolution in investment treaty law and arbitration*. Cambridge: Cambridge University Press; 2011. 606–28.
22. McGRADY B. TRIPs and trademarks: the case of tobacco. *World Trade Review*. 2004; 3:53–82.
23. Voon, T, Mitchell, AD, Liberman, J. , et al. *Public health and plain packaging of cigarettes: legal issues*. Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing; 2012.
24. High Court of Australia. *Japan Tobacco International SA v Commonwealth of Australia; British American Tobacco v Commonwealth of Australia* [2012] HCA 43. Judgement given on 5 October 2012. <http://www.tobaccocontrolaws.org/litigation/decisions/au-20121005-jt-intl.-and-bat-australasia-1> (accessed 25 May 2016)
25. High Court of England and Wales. *R (British American Tobacco and others) v Secretary of Health* [2016] EWHC 1169. Judgement given on 19 May 2016. <https://www.judiciary.gov.uk/judgments/british-american-tobacco-others-v-department-of-health/> (accessed 25 Aug 2016)
26. Physicians for a Smoke Free Canada. *FCTC-related interventions at the World Trade Organization 2005-2012* 2013. <http://www.smoke-free.ca/factsheets/pdf/FCTCatWTO-2013.pdf> (accessed 29 Apr 2013)
27. Malone RE, Balbach ED. Tobacco industry documents: treasure trove or quagmire? *Tob Control*. 2000; 9:334–8. [PubMed: 10982579]
28. Hiilamo H, Crosbie E, Glantz SA. The evolution of health warning labels on cigarette packs: the role of precedents, and tobacco industry strategies to block diffusion. *Tob Control*. 2014; 23:e2. [PubMed: 23092884]
29. Cullman, H. Remarks by Hugh Cullman, Vice Chairman Philip Morris at corporate affairs world conference. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/-id=lhhm0128>
30. Morris, P. Corporate Affairs 1991/E 1991. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/-id=qsld0116>
31. Bacon, D; Limited B-ATC. Australian Visit. June 01 1992. British American Tobacco Records. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/phbv0200>
32. Owen, J. Tobacco control regulations. 1993. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/-id=xscn0203>
33. Friedman FC, Cheyne A, Givelber D, et al. Tobacco industry use of personal responsibility rhetoric in public relations and litigation: disguising freedom to blame as freedom of choice. *Am J Public Health*. 2015; 105:250–60. [PubMed: 25521876]
34. Waa AM, Hoek J, Edwards R, et al. Analysis of the logic and framing of a tobacco industry campaign opposing standardised packaging legislation in New Zealand. *Tob Control*. 2017; 26:629–33. [PubMed: 27694401]
35. Thompson, MJ; Tobacco Institute of New Zealand Limited T. Protection of Intellectual Property: Initial Report and Backgrounder. May 10 1993. British American Tobacco Records. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/-id=kspk0200>
36. Wills, WD; Limited, HW. Submission to the industry commission inquiry: the tobacco growing and manufacturing industries. January 1994. British American tobacco records. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/fpmp0199>
37. Plain Pack Group. A meeting of the Plain Pack Group held in Staines. 1993:502592179–359.
38. Niagara Institute T. Luik, J. Letter from John Luik to Tony Wood regarding Gatt/Trips process. December 31 1993. British American Tobacco Records. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/nmxn0198>
39. Velicer C, Glantz SA. Hiding in the shadows: Philip Morris and the use of third parties to oppose ingredient disclosure regulations. *PLoS One*. 2015; 10:e0142032. [PubMed: 26717245]
40. Wakefield M, McLeod K, Smith KC. Individual versus corporate responsibility for smoking-related illness: Australian press coverage of the Rolah McCabe trial. *Health Promot Int*. 2003; 18:297–305. [PubMed: 14695361]

41. Tobacco SI. Communiqué de Presse: Marques et descripteurs bannis: Sieta attaque la mesure en justice. Paris, France: 2016. http://www.paquetneutre.com/wp-content/uploads/2016/10/CP-REP-Conseil-dEtat_17-10-2016.pdf
42. British American Tobacco. Media release: campaign questions expensive plain packaging experiment. 2011
43. British American Tobacco. Media release: plain packaging likely to cost taxpayers billions. 2011
44. British American Tobacco Australia. Don't let the taxpayer foot the bill for a bad Bill. <http://www.plainpack.com/home.html> (accessed 5 May 2014)
45. British American Tobacco New Zealand. Agree disagree. 2012. <http://www.agreedisagree.co.nz/home.html> (accessed 20 Nov 2014)
46. Staff. Le cigarettier Seita dépose un recours contre le paquet neutre. <http://www.europe1.fr/sante/le-cigarettier-seita-depose-un-recours-contre-le-paquet-neutre-2740918> (accessed 2 Sep 2016)
47. Gomez, M. Tabac, le conseil d'État se penche sur le paquet neutre. La Croix. <https://www.la-croix.com/Sciences-et-ethique/Sante/Tabac-le-conseil-dEtat-se-penche-sur-le-paquet-neutre-2016-12-23-1200812485> (accessed 20 Dec 2016)
48. One News. Q+A: Transcript interview with Christopher Bishop. Television. <http://tvnz.co.nz/q-and-a-news/transcript-interview-christopher-bishop-4921995>
49. Hartevelt, J. Plain-packaged tobacco no sure thing. Dominion Post. <http://www.stuff.co.nz/national/health/7333603/Plain-packaged-tobacco-no-sure-thing> (accessed 23 Jul 2016)
50. Staff. Smoking out the spin. ABC Media Watch. <http://www.abc.net.au/mediawatch/transcripts/s2895480.htm> (accessed 12 Mar 2016)
51. Ireland Government. Report on hearings in relation to the general scheme of the public health (standardised packaging of tobacco) bill. Dublin, Ireland: Houses of the Oireachtas: Joint Committee on Health and Children; 2014. <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Public-Health-SPT-Bill-Vol-1.pdf> (accessed 10 Nov 2015)
52. New Zealand Parliament. Smoke-free environments (tobacco plain packaging) amendment bill: as reported from the health committee. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2014. http://www.parliament.nz/resource/en-nz/50DBSCH_SCR57000_1/3b7b2a74d0e52515fe202f3cdfaac3c15fd156d4
53. Commonwealth of Australia. Trade marks amendment (tobacco plain packaging) bill 2011. Canberra, Australia: Senate Legal and Constitutional Affairs Legislation Committee; 2011. (accessed 10 Mar 2015)
54. Imperial Tobacco. Submission to public health (Standardised Packaging of Tobacco) bill 2013. Dublin, Ireland: 2014. https://www.oireachtas.ie/parliament/media/committees/healthandchildren/Vol-2-Final-2-04-14_Part2.pdf (accessed 11 Aug 2016)
55. Japan Tobacco International. Submission to public health (standardised packaging of tobacco) bill 2013. Dublin, Ireland: 2014. <https://www.jti.com/sites/default/files/key-regulation-pdfs/submissions/ireland/1jti-submission-to-the-oireachtas-joint-committee-on-health-and-children.pdf> (accessed 15 Jul 2016)
56. Philip Morris International. Submission to public health (standardised packaging of tobacco) bill 2013. Dublin, Ireland: 2014. <https://www.jti.com/sites/default/files/key-regulation-pdfs/submissions/ireland/1jti-submission-to-the-oireachtas-joint-committee-on-health-and-children.pdf> (accessed 15 Jul 2016)
57. Imperial Tobacco New Zealand Limited. Submission on smokefree environments (tobacco plain packaging) amendment bill. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2013. https://www.parliament.nz/resource/en-NZ/50SCHE_EVI_00DBHOH_BILL12969_1_A385113/6e51b2632a575e49502d37dfcb2f6d_d2b9abf68a
58. Philip Morris (New Zealand) Limited. Submission on the smoke-free environments (tobacco plain packaging) amendment bill. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2013. https://www.parliament.nz/resource/en-NZ/50SCHE_EVI_00DBHOH_BILL12969_1_A385101/f049ad52ef7a7391762e5dc770a174403ada5e91

59. British American Tobacco New Zealand. Submission opposing the smoke-free environments (tobacco plain packaging) amendment bill. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2013. https://www.parliament.nz/resource/en-NZ/50SCHE_EVI_00DBHOH_BILL12969_1_A385351/c1fb0ae0f98dce9f518f832e24c1529a62ebb567
60. British American Tobacco Australia Limited. Submission to the tobacco plain packaging bill 2011 and the trade marks amendment (tobacco plain packaging) bill 2011. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing; 2011. http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa./billtobaccopackage/subs.htm (accessed 11 Nov 2014)
61. Imperial Tobacco Australia Limited. Inquiry into plain tobacco packaging. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing; 2011. http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa./billtobaccopackage/subs.htm (accessed 14 Nov 2014)
62. Japan Tobacco International. Response to consultation on standardised packaging of tobacco products. London, United Kingdom: 2012. http://www.tobaccotactics.org/images/c/c2/JTI_UK_submission.pdf (accessed 15 Aug 2016)
63. British American Tobacco. Response to consultation on standardised packaging of tobacco products. London, United Kingdom: 2012. http://www.tobaccotactics.org/images/a/a3/BAT_UK_submission.pdf (accessed 17 Aug 2016)
64. Philip Morris International. Response to consultation on standardised packaging of tobacco products. London, United Kingdom: 2014. <http://www.tobaccotactics.org/images/5/56/PMI2014consultation.pdf> (accessed 19 Aug 2016)
65. Philip Morris International. Written submissions on the public health (standardised packaging of tobacco) bill 2013. Dublin, Ireland: 2014. <http://health.gov.ie/wp-content/uploads/2014/07/Philip-Morris-i.pdf> (accessed 5 Aug 2016)
66. Hoek J. Informed choice and the nanny state: learning from the tobacco industry. *Public Health*. 2015; 129:1038–45. [PubMed: 25956554]
67. Magnusson RS. Case studies in nanny state name-calling: what can we learn? *Public Health*. 2015; 129:1074–82. [PubMed: 26074167]
68. Porter A, Imperial Tobacco Limited. Plain pack group British American tobacco records. 1994
69. Bacon, D. Note from David Bacon to A Andrade enclosing CBRC report. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/-id=lkxn0198>
70. Green, C. Philip Morris international threatens to sue government if plain packaging introduced. *Independent*. <http://www.independent.co.uk/life-style/health-and-families/health-news/philip-morris-international-threatens-to-sue-government-if-plain-packaging-introduced-9664968.html> (accessed 10 Jul 2016)
71. Morris, P. Submission to the tobacco packs consultation. London, United Kingdom: Department of Health; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/3239_71/PDF_2.pdf (accessed 16 Jul 2016)
72. Staff. Philip Morris sues Australia over packaging plan. *The Sydney Morning Herald*. 2011. <http://www.smh.com.au/business/philip-morris-sues-australia-over-packaging-plan-20111121-1nqhz.html> (accessed 10 Jul 2016)
73. Le Conseil d'État F. CE, Japan Tobacco International SA, Philip Morris France SA, Republic Technologies France. National Confederation of Tobacconists and British American Tobacco France SA. Nos 399117, 399789, 399790, 399824, 3998883, 399938, 399997, 402883, 403472, 403823, 404174, 404381, 404394, 23 December 2016. <https://www.tobaccocontrolaws.org/litigation/decisions/fr-20161223-japan-tobacco-international-an> (accessed 25 Aug 2016)
74. Robinson, AA. Notice of Arbitration Australia/Hong Kong agreement for the promotion and protection of investments: Philip Morris Asia Limited and the Commonwealth of Australia. New York City, United States: United Nations Commission on International Trade Law; 2011. <https://www.italaw.com/sites/default/files/case-documents/ita0665.pdf> (accessed 15 Feb 2015)
75. Anon. Plain Pack Group: initiatives for consideration. British American Tobacco Records. Mar 14, 1994. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/qmxn0198>

76. Reynolds, RJ. Plain packaging of tobacco products submission of R. J Reynolds Tobacco Company. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/-id=kqch0077>
77. Canadian Tobacco Manufacturers Council. Plain tobacco packaging: a brief to the House of Commons Standing Committee on Health British American Tobacco records. 1994
78. Morris P. PM-USA business planning competitor review. 1994:2074358967–85.
79. Tobacco Institute of New Zealand Limited. ICSID convention. 1993:502610742–8.
80. Letessier, I. Paquet neutre: les cigarettiers prêts à réclamer 20 milliards. Le Figaro. 2014. <http://www.lefigaro.fr/societes/2014/09/24/20005-20140924ARTFIG00346-paquet-neutre-les-cigarettiers-prets-a-reclamer-20milliards.php> (accessed 20 Jun 2016)
81. United Nations Commission on International Trade Law. Philip Morris International Limited v. Commonwealth of Australia (Procedural Order Order No. 4). Geneva, Switzerland: Australia-Hong Kong Bilateral Investment Treaty; 2012. <http://www.tobaccocontrolaws.org/litigation/decisions/au-20121130-philip-morris-asia-limited-v.-> (accessed 12 Jul 2016)
82. Martin, A. Philip Morris Leads Plain Packs Battle in Global Trade Arena. Bloomberg. 2013. <http://www.bloomberg.com/news/articles/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena> (accessed 12 Mar 2015)
83. Nebehay, S. Australia says big tobacco aiding WTO challengers. Reuters. 2012. <http://www.reuters.com/article/trade-tobacco/australia-says-big-tobacco-aiding-wto-challengers-idUSL5E8GMHBW20120522> (accessed 10 Sep 2016)
84. Anon. Plain Pack Group—a meeting of the Plain Pack Group held in Staines—29 November 1993. British American Tobacco Records. <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/xlpb0194>
85. Pendelton MD. Letter from Michael D Pendleton to Donna Staunton regarding initial academic advice. 1993:502592862–72.
86. Wells, JK. Letter from J Kendrick Wells to David Bacon regarding report on the November 29 meeting of the Plain Pack Group. 1993. <http://legacy.library.ucsf.edu/tid/yps48a99>
87. McDonald J. Letter to Bruce McPherson concerning plain packaging initiative in Canada. Rothmans BHI. 1994
88. Berman R. Plain packaging of tobacco products: INTA’s submissions. Tobacco BA. 1994
89. Rouher, JC. Letter from Joan-Charles Rouher to Roy MacLaren regarding proposal for plain packaging of tobacco product in Canada. <http://legacy.library.ucsf.edu/tid/kbw24a99>
90. Smithson J. Plain packs book proposed. 1994:502592646–9.
91. Metherell, M. Alcohol industry upset over link in plain packaging. The Sydney Morning Herald. 2011. <http://www.smh.com.au/business/alcohol-industry-upset-over-link-in-plain-packaging-ads-20110628-1gp2p.html> (accessed 14 Nov 2015)
92. Stark, J. Seeing red over olive ciggie packs. The age. <http://www.theage.com.au/national/seeing-red-over-olive-ciggie-packs-20110507-1edg1.html>
93. Comité National Contre Le Tabagisme. Petit décryptage d’une rencontre soi-disant consacrée à la protection industrielle. <http://www.cnct.fr/dernieres-actus-59/petit-decryptage-d-une-rencontre-soi-disant-consacree-a-la-protection-142.html> (accessed 25 May 2016)
94. Comité National Anti Contregaçon. La propriété intellectuelle, un trésor national en péril?. <http://www.blogpresidentcnac.fr/la-propriete-intellectuelle-un-tresor-national-en-peril/> (accessed 10 May 2016)
95. Comité National Contre Le Tabagisme. Premières caractéristiques du lobbying contre le paquet neutre. <http://www.cnct.fr/pression-sur-la-decision-politique-69/premieres-caracteristiques-du-lobbying-contre-le-paquet-neutre-1-127.html> (accessed 15 May 2016)
96. APRAM. Reflexion on to the adoption of “plain packaging” legislations. <http://www.tobaccotactics.org/images/9/9b/184.pdf> (accessed 20 Jun 2016)
97. Staff. Objection to the adoption of restrictive legislation or policy options frequently referred to as “generic” or “plain packaging”. PR Newswire. <https://web.archive.org/web/20160824134606/http://www.prnewswire.com/news-releases/objection-to-the-adoption-of-restrictive-legislation-or-policy-options-frequently-referred-to-as-generic-or-plain-packaging-149064845.html> (accessed 10 Jun 2016)

98. APRAM. Objections to the adoption of “plain packaging” and excessive measures restricting normal use of trademarks. <http://www.tobaccotactics.org/images/9/9b/184.pdf> (accessed 20 Jun 2016)
99. U.S. Chamber of Commerce. Joint statement on plain packaging in the UK. PR Newswire. 2012. <http://www.prnewswire.co.uk/news-releases/business-groups-issue-statement-expressing-deep-concern-following-announcement-by-her-majestys-government-that-the-united-kingdom-is-starting-a-public-consultation-to-review-the-mandated-destruction-of-trademarks-and-branding-in-147327455.html> (accessed 10 May 2016)
100. U.S. Chamber of Commerce. Submission to public health (standardised packaging of tobacco) bill 2013. Dublin, Ireland: 2014. http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Vol-2-Final-2-04-14_Part1.pdf (accessed 15 Jul 2016)
101. International Chamber of Commerce. Submission to public health (standardised packaging of tobacco) bill 2013. Dublin, Ireland: 2014. http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Vol-2-Final-2-04-14_Part1.pdf (accessed 15 Jul 2016)
102. International Trademark Association. Submission to public health (standardised packaging of tobacco) bill 2013. Dublin, Ireland: 2014. http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Vol-2-Final-2-04-14_Part1.pdf (accessed 15 Jul 2016)
103. National Foreign Trade Council. Submission on the smoke-free environments (tobacco plain packaging) amendment. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2014. https://www.parliament.nz/resource/en-NZ/50SCHE_EVI_00DBHOH_BILL12969_1_A384418/d70aa888870570b0c40dc3aaad4485b03819ce7d
104. U.S. Chamber of Commerce. Submission on the smoke-free environments (tobacco plain packaging) amendment. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2014. https://www.parliament.nz/resource/en-NZ/50SCHE_EVI_00DBHOH_BILL12969_1_A385171/98270f037878f394f787664ff7b674a392c6f873
105. International Trademark Association. Submission on the smoke-free environments (tobacco plain packaging) amendment. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2014. https://www.parliament.nz/resource/en-NZ/50SCHE_EVI_00DBHOH_BILL12969_1_A384991/de8760c5fe954c723e6fa2a11635178130b1cb4f (accessed 10 May 2016)
106. United States Council for International Business. Submission on the smoke-free environments (tobacco plain packaging) amendment. Wellington, New Zealand: House of Representatives Standing Committee on Health; 2014. https://www.parliament.nz/resource/en-NZ/50SCHE_EVI_00DBHOH_BILL12969_1_A385014/c276b5e015b3d1b4b9f393c9a55280a3fa922624
107. International Trademark Association. Submission to the plain packaging bill. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing; 2011. http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa/.billtobaccopackage/subs.htm (accessed 14 Nov 2014)
108. National Foreign Trade Council Inc. Submission to the plain packaging bill. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing; 2011. http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa/.billtobaccopackage/subs.htm (accessed 18 Nov 2014)
109. United States Chamber of Commerce. Submission to the plain packaging bill. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing; 2011. http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa/.billtobaccopackage/subs.htm (accessed 14 Nov 2014)
110. International Chamber of Commerce. ICC BASCAP comments on tobacco plain packaging bill 2011 and trade marks amendment (tobacco plain packaging) bill 2011. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing; 2011. http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa/.billtobaccopackage/subs.htm (accessed 14 Nov 2014)

111. National Foreign Trade Council. Submission to consultation on the introduction of regulations for standardised packaging of tobacco. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404449/PDF_11.pdf
112. U.S. Chamber of Commerce. Submission to consultation on the introduction of regulations for standardised packaging of tobacco. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404449/PDF_11.pdf
113. Law Society of Ireland. Submission to public health (standardised packaging of tobacco) bill 2013. Dublin, Ireland: 2013. http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Vol-2-Final-2-04-14_Part1.pdf (accessed 14 Jun 2016)
114. Democracy Institute. Inquiry into tobacco plain packaging: submission to the health and ageing committee. Canberra, Australia: House of Representatives Standing Committee on Health and Ageing; 2011. http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=haa/.billtobaccopackage/subs.htm
115. Washington Legal Foundation. A proposal to the tobacco institute requesting a renewal charitable grant for the Washington Legal Foundation's litigation and legal studies programs. Tobacco Institute; 1992. <http://legacy.library.ucsf.edu/tid/ppf40c00>
116. Hawthorne, M; Desloires, V. Big Tobacco distributes report bullying plain packaging laws. The Sydney Morning Herald. 2014. <http://www.smh.com.au/federal-politics/political-news/big-tobacco-distributes-report-bullying-plain-packaging-laws-20141127-11v7ov.html>
117. Basham, P, Luik, J. Erasing intellectual property: "plain packaging" for consumer products and the implications for trademark rights. Washington DC: United States Washington Legal Foundation; 2011. <http://www.wlf.org/Upload/legalstudies/monograph/LuikBashamMonographFnl.pdf> (accessed 18 Aug 2016)
118. Sebrie EM, Glantz SA. "Accommodating" smoke-free policies: tobacco industry's Courtesy of Choice programme in Latin America. *Tob Control*. 2007; 16:e6. [PubMed: 17897975]
119. Bialous SA, Presman S, Gigliotti A, et al. Response of the tobacco industry to the creation of smoke-free environments in Brazil. *Rev Panam Salud Publica*. 2010; 27:283–90. [PubMed: 20512231]
120. Crosbie E, Sebrie EM, Glantz SA. Strong advocacy led to successful implementation of smokefree Mexico City. *Tob Control*. 2011; 20:64–72. [PubMed: 21059606]
121. Sebrie EM, Glantz SA. Attempts to undermine tobacco control: tobacco industry "youth smoking prevention" programs to undermine meaningful tobacco control in Latin America. *Am J Public Health*. 2007; 97:1357–67. [PubMed: 17600260]
122. Crosbie E, Sebrie EM, Glantz SA. Tobacco industry success in Costa Rica: the importance of FCTC article 5.3. *Salud publica de Mexico* Jan. 2012; 54:28–38.
123. Uang R, Crosbie E, Glantz SA. Smokefree implementation in Colombia: monitoring, outside funding, and business support. *Salud Pública de México*. 2017; 59:128–36. [PubMed: 28562713]
124. Fooks GJ, Gilmore AB, Smith KE, et al. Corporate social responsibility and access to policy elites: an analysis of tobacco industry documents. *PLoS Med*. 2011; 8:e1001076. [PubMed: 21886485]
125. Lee K, Bialous SA. Corporate social responsibility: serious cause for concern. *Tob control*. 2006; 15:419.
126. Montanari, L. Georgia should protect IP rights not weaken them with plain packaging. *Forbes*. 2017. <https://www.forbes.com/sites/lorenzomontanari/2017/07/30/georgia-should-protect-ip-rights-not-weaken-them-with-plain-packaging/-2ddea2eb6b84> (accessed 30 Aug 2017)
127. Sancelme, N. The era of plain packaging is coming in Thailand. *Vidon*. 2017. <https://www.vidon.com/en/news/249-the-era-of-plain-packaging-is-coming-in-thailand.html>
128. Staff. Cigarette sales to be banned in Turkish universities. *Daily News*. 2016. <http://www.hurriyetdailynews.com/cigarette-sales-to-be-banned-in-turkish-universities.aspx?pageID=238&nID=98032&NewsCatID=373>
129. Lin, MM. Health Ministry hits pause on plain tobacco packaging plan. *Malay Mail Online*. 2016. <http://www.themalaymailonline.com/malaysia/article/health-ministry-hits-pause-on-plain-tobacco-packaging-plan>

130. Reilly, J. Ireland refused to be bullied by Big Tobacco. Irish Examiner. 2015. <http://www.irishexaminer.com/viewpoints/analysis/ireland-refused-to-be-bullied-by-big-tobacco-319429.html>
131. Crosbie E, Sosa P, Glantz SA. Defending strong tobacco packaging and labelling regulations in Uruguay: transnational tobacco control network versus Philip Morris International. *Tob Control*. 2018; 27
132. Permanent Court of Arbitration under The United Nations Commission on International Trade Law Rules. Philip Morris Asia and v Commonwealth of Australia. PCA Case No. 2012-12 Award on jurisdiction and Admissibility <http://www.tobaccocontrolaws.org/litigation/decisions/au-20151217-philip-morris-asia-v-australia> (accessed 12 Jul 2016)
133. Miles, T; Geller, M. Australia wins landmark WTO tobacco packaging case. Reuters. 2017. <http://www.reuters.com/article/us-wto-tobacco-australia-idUSKBN1801S9>
134. Hodgson, M. Counting the costs of investment treaty arbitration. Allen & Overy: Global Arbitration Review. 2014. http://www.allenoverly.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf
135. Gartrell, A. Philip Morris ordered to pay Australia millions in costs for plain packaging case. The Sydney Morning Herald. 2017. <http://www.smh.com.au/federal-politics/political-news/philip-morris-ordered-to-pay-australia-millions-in-costs-for-plain-packaging-case-20170709-gx7mv5.html>
136. Intellectual Property Rights Index. IPRI 2017 All Countries 2017. 2017. <https://www.internationalpropertyrightsindex.org/countries> (accessed 1 Aug 2017)
137. Tavernise, S. Tobacco Firms' strategy limits poorer nations' smoking laws. New York Times; 2013. <http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?pagewanted=all&r=0>
138. Hakim, DUS. Chamber of commerce works globally to fight antismoking measuring. New York Times; 2015. <https://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html>
139. Hakim, D. Big tobacco's staunch friend in Washington: U.S. Chamber of Commerce. New York Times; 2015. <https://www.nytimes.com/2015/10/10/business/us-chamber-of-commerces-focus-on-advocacy-a-boon-to-tobacco.html> (accessed 10 Jul 2016)

What this paper adds

- ▶ Tobacco companies have threatened and challenged governments over their tobacco packaging and labelling laws with international trade and investment lawsuits since the 1980s.
- ▶ Tobacco companies continue to legally threaten governments that propose adopting tobacco standardised packaging (SP), but to date there has been no review or comparative analysis of how the tobacco industry employs these threats in various contexts.
- ▶ This is the first study that uses internal tobacco industry documents, government documents and media sources to reveal the tobacco companies' multipronged trade strategy to challenge SP, which consists of (1) framing the health issue in terms of trade and investment, (2) detailing alleged legal violations concerning trade barriers, intellectual property and investment rights, (3) threatening legal suits and reputational damage, and (4) garnering third-party support.
- ▶ Governments seeking to adopt progressive tobacco packaging and labelling policies, including SP, should anticipate and expose the industry's trade strategy to avoid delays and help stimulate the diffusion of SP globally.

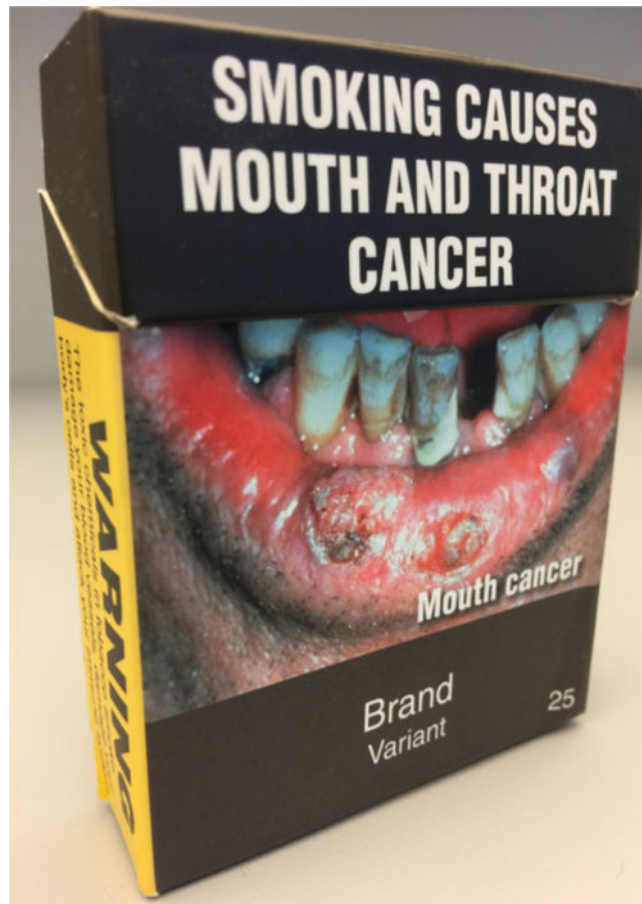


Figure 1.
Sample of tobacco standardised packaging.



Figure 2. Tobacco industry media campaigns against standardised packaging in Australia, New Zealand, UK, Ireland and France. BAT, British American Tobacco; JTI, Japan Tobacco International.

Table 1

Tobacco industry multipronged trade threat strategy against SPP

Components	Explanations and examples	Comments from industry documents
1. Framing the health issue in terms of trade and investment	<ul style="list-style-type: none"> ▶ Shift focus away from public health and concentrate on convoluted issues regarding trade and investment. ▶ Eliminate tobacco industry isolationism and frame the issue as a broad attack on all industries (slippery slope arguments—dangerous precedent for other products). 	<ul style="list-style-type: none"> ▶ “Any issue affecting cigarette packs should be treated as expropriation of Intellectual Property and contested politically on that basis. If this strategy is followed the industry has a greater chance of both setting its own agenda and avoiding the need to critique anti-smoking proposals from a back foot position”³⁵ ▶ “If we can tap in to the international forces at work on Intellectual Property issues we stand a better chance of setting our own agenda and developing argumentation for which the anti-smoking forces have not yet developed propaganda”³⁵ ▶ “The industry should set the agenda in an effort to confine the argumentation to political, economic, international trade, and intellectual property issues”³⁵ ▶ “The Company does not oppose a review of health warnings, only pack design regulations which take no account of registration of trade marks and pack designs, intellectual properties and rights advocated by GATT”³⁶ ▶ “(It would) help to context the issue as a problem that other industries also face so as to eliminate the perception of tobacco industry isolation”³⁸ ▶ “It would be to our advantage to broaden the issue away from tobacco to include prime international consumer brands... If we are to protect our brands, we must use those international laws which do exist not only for tobacco products but wherever multi-national products are marketed”³² ▶ “A trademark ban would establish dangerous precedents that could affect hundreds of other products and services”³⁷
2. Legal violations concerning trade barriers, intellectual property and investment rights	<p>SPP would:</p> <ul style="list-style-type: none"> ▶ Constitute a barrier to trade under the WTO TBT ▶ Violate the usage of trademarks under domestic law, the Paris Convention and the WTO TRIPS ▶ Not represent fair and equitable treatment under various FTAs and BITs 	<ul style="list-style-type: none"> ▶ “The industry’s argumentation against generic packs should be reviewed with the aim of focusing our thinking on brand protection. All this groundwork should be aimed to ensure a legal framework is in place to defeat any further moves, anywhere... The Paris Convention, provisions within GATT and the European Community would seem a good starting point for finding out what existing protection there is for our brands under these conventions... The bottom line of this could ultimately be legal defenses that could tie up legislators in litigation over a long period and, hopefully attract legal attention from intellectual property rights specialists”³² ▶ “Plain Pack Group Initiatives for Consideration... summary paper on international conventions affording protection of trade marks”⁶⁸ ▶ “Findings: Current conventions & treaties afford little protection, GATT/TRIPS little Joy”⁶⁹
3. Threatening legal suits reputational damage	<ul style="list-style-type: none"> ▶ Potential legal costs for proceedings and compensation to tobacco companies ▶ Potential reputational costs with trading partners and investors (investment climate) 	<ul style="list-style-type: none"> ▶ “Trademarks and brands are the main assets of cigarette manufacturers—their removal would result in significant devaluation in the value of companies and huge losses for shareholders”⁷⁵ ▶ “Plain packaging legislation would be an unlawful expropriation of trademarks and investments for which proper and full compensation, in the hundreds of millions of dollars, would have to be paid”⁷⁶ ▶ “Our trademarks are our most valuable asset. As indicated above, any attempt by government to expropriate them via plain packaging laws will result in a significant claim for compensation”⁷⁷

Components	Explanations and examples	Comments from industry documents
4. Third-party support	<ul style="list-style-type: none"> ▶ Develop alliances with other multinational industries ▶ Acquire support from business groups, intellectual property and trademark associations ▶ Seek assistance from industry-friendly legal experts to support their legal arguments 	<ul style="list-style-type: none"> ▶ “A plain packaging law would amount to an expropriation of Philip Morris’ trademarks and a threat to all its businesses in Canada. If Canada adopts legislation in total disregard for internationally recognized trademark rights, this would be a significant consideration for any new investment decisions”⁷⁸ ▶ “The foreign entity (tobacco companies) needs to be able to show any removal of the right to use its trade mark gives rise to a legal dispute arising out of an investment... Any government which shields itself behind the need for (ICSID Arbitration) consent is unlikely to enhance its image as a host for investment”⁷⁹ ▶ “It would be to our advantage to broaden the issue away from tobacco to include prime international consumer brands. It might well be that a ‘blind trust’ could be set up to commission the writing of papers by intellectual property rights specialists reviewing these implications that could form the basis for papers to be presented to say, in the New Zealand case, Treasury, Justice Department officials and relevant Ministers as well as to groups influential in developing government policy such as, Chambers of Commerce, Manufacturers’ bodies, local industry and other industries which may be affected internationally”³² ▶ “Various other industries who may be affected by packaging suggestions. These are likely to include the liquor industry, the packaging industry, advertising industry, ‘legal’ industry, grocery manufacturers, supermarkets and manufacturers in general. Their support needs to be recruited”³² ▶ “Plain Pack Group Initiatives For Consideration: Objective—to heighten awareness of the issue, therefore generating some support from other industry groupings... Increase participation in industry grouping such as WIPO, ICC, INTA, etc.”⁷⁵ ▶ “Potential allies were identified and initial contact is to be made: Pharmaceuticals, Alcohol, Cosmetics, Unilever, Colgate, Pepsi, Coke”⁸⁴ ▶ “Presumably the liquor industry may be vulnerable to packaging warnings which extinguish their intellectual property. The pharmaceutical industry may face similar dilemmas”⁸⁵ ▶ “It could be positive to create an international debate on this whole issue in general terms with the aim of placing pressure on individual governments. One way of achieving this might be to arrange an international conference on the theme of intellectual property rights/trademarks with the aim of producing precedings document for international circulation to business leaders and governments around the world”³² ▶ “Findings: Other industry groupings little support... Promote issue to groups such as ICC, WIPO, Promote international debate, Publication & distribution of papers & materials”⁶⁹

BIT, Bilateral Investment Treaty; FTA, Free Trade Agreement; ICC, International Chamber of Commerce; INTA, International Trademark Association; Paris Convention, Paris Convention for the Protection of Industrial Property; TBT, Technical Barriers to Trade; TRIPS, Trade-Related Intellectual Property Rights; WIPO, World Intellectual Property Organization; WTO, World Trade Organization.

Table 2

Standardised packaging (SP) political process, tobacco company market share and third-party opposition to SP in Australia, New Zealand, UK, Ireland and France

Issue	Australia	New Zealand	UK	Ireland	France
SPP introduction	April 2010	April 2012	April 2012	April 2013	April 2014
SPP enactment date	November 2011	September 2016	March 2015	February 2015	December 2015
SPP implementation date	December 2012	March 2018 (projected)	May 2016	September 2017	January 2017
Tobacco company market share	2010: BAT (43.9%), PMI (35.4%), Imperial (18%)	2012: BAT (68.3%), Imperial (20.0%), PMI (7.1%)	2012: Imperial (41.2%), JTI (40.3%), PMI (8.4%), BAT (6.6%)	2013: JTI (45.8%), Imperial (19.0%), BAT (11.9%), PMI (7.9%)	2013: PMI (39.4%), Imperial (24.3%), JTI (17.6%), BAT (15.5%)
Third-party opposition to SP from business groups, intellectual property and trademark associations, legal firms and think tanks	<ul style="list-style-type: none"> ▶ ALEC ▶ ABPI ▶ Inter-American Association of Intellectual Property ▶ Business Civil Liberties ▶ Democracy Institute ▶ ECAT ▶ ICC ▶ Institution for Policy Innovation ▶ Institute of Patent and Trade Mark Attorneys of Australia ▶ INTA ▶ MARQUES ▶ NAM ▶ NFTC ▶ Property Rights Alliance ▶ USCIB ▶ U.S. Chamber of Commerce 	<ul style="list-style-type: none"> ▶ American Chamber of Commerce in New Zealand Inc. ▶ ECAT ▶ ECTA ▶ European Chamber of Commerce in Korea ▶ IEAT ▶ Indonesian Chamber of Commerce and Industry ▶ INTA ▶ Japan Intellectual Property Association ▶ MARQUES ▶ NAM ▶ NFTC ▶ Scandinavian Tobacco Group Australia Pty Ltd ▶ US-ASEAN Business Council ▶ U.S. Chamber of Commerce ▶ USCIB ▶ Confederation of Netherlands Industry and Employers 	<ul style="list-style-type: none"> ▶ AIPPI ▶ APRAM ▶ ASIPI ▶ ECTA ▶ IEA ▶ ICC ▶ ICC UK ▶ INTA ▶ ITMA ▶ NFTC ▶ Portuguese Association of Branded Products Manufacturers ▶ TIPA ▶ Trademark Committee of Japan Intellectual Property Association 	<ul style="list-style-type: none"> ▶ ALEC ▶ Association of Patent Trade Mark Attorneys ▶ British Chamber of Commerce ▶ US Chamber of Commerce ▶ ICC ▶ IBEC ▶ Intellectual Property Committee of the Law Society of Ireland ▶ INTAD ▶ John Player and Sons Ltd ▶ P.J. Carroll ▶ Property Rights Alliance 	<ul style="list-style-type: none"> ▶ APRAM ▶ Association des Praticiens du Droit des ▶ CNAC ▶ ECTA ▶ Generacion Libre ▶ ICC ▶ INTA ▶ Sciences Po ▶ UNIFAB

Author Manuscript

Author Manuscript

Author Manuscript

Author Manuscript

ABPI, Brazilian Intellectual Property Association; AIPPI, The Lithuanian Group of the International Association for the Protection of Intellectual Property; ALEC, American Legislative Exchange Council; APRAM, Association of Trademark and Model Law Practitioners; APTMA, Association of Patent and Trade Mark Attorneys; APRAM, Association of Trade Marks and Designs rights Practitioners; ASEAN, Association of Southeast Asian Nations; ASIPI, Inter-American Association of Intellectual Property; AUSFTA, Australian-US Free Trade Agreement; BAT, British American Tobacco; BIT, bilateral investment treaty; CNAC, National Anti-Counterfeiting Committee; ECAT, Emergency Committee for American Trade; ECTA, European Communities Trade Mark Association; FTA, Free Trade Agreement; GATT, General Agreement on Tariffs and Trade; IBEC, Irish Business and Employers Confederation; ICC, International Chamber of Commerce; IEA, Institute of Economic Affairs; IEAT, Importers and Exporters Association; INTA, International Trademark Association; ITMA, Institute of Trade Mark Attorneys; JTI, Japan Tobacco International; MARQUES, European Association of Trade Mark Owners; NAM, National Association of Manufacturing; NFTC, National Foreign Trade Council; PMI, Philip Morris International; TBT, Technical Barriers to Trade; TIPA, Trade related IPR Protection Association; TRIPS, Trade-Related Investment for Intellectual Property Rights; UNIFAB, Union of Manufacturers; USCIB, United States Council for International Business; WTO, World Trade Organization.