

## CARICOM'S EFFORTS TO TACKLE UNHEALTHY DIETS: A CAUTIONARY TALE FOR LATIN AMERICA

### OS ESFORÇOS DA CARICOM PARA COMBATER DIETAS NÃO SAUDÁVEIS: UM CONTO PREVENTIVO PARA A AMÉRICA LATINA

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**ABSTRACT:** The Caribbean Community (CARICOM) is currently burdened with high rates of non-communicable diseases (NCDs). Unhealthy diets are a major factor driving the region's increased NCD rates. Since the 1990s, trade agreements have facilitated an influx of ultra-processed foods and sugary beverages into the region. These unhealthy commodities contain excess critical nutrients, which are closely linked to the top three NCDs risk factors in the Americas--high blood pressure, high blood sugar, and obesity. Mandating front-of-package warning labels (FOPWL) as part of a suite of public health interventions is a scientifically proven, human-rights compliant response to promoting healthier diets. FOPWL allows consumers to correctly, and quickly, identify pre-packaged food items that contain excess critical nutrients. Recognizing this, the CARICOM Regional Organization for Standards and Quality (CROSQ) revised its regional standards on the labeling of prepackaged foods to include FOPWL. However, the regional food and beverage industry worked assiduously to undermine CROSQ's normative effort. In its quest, the industry exploited regional integration mechanisms, co-opted human rights and decolonization narratives to decenter public health and to seize autonomy over the FOPWL process. This paper analyses these strategies to serve as a cautionary tale for Latin America.

**KEYWORDS:** CARICOM. Public Health. Latin America.

**RESUMO:** A Comunidade caribenha (CARICOM) está atualmente sobrecarregada com altas taxas de doenças não transmissíveis (DCNT). Dietas não saudáveis são um fator importante que impulsiona o aumento das taxas de DCNT na região. Desde a década de 1990, acordos comerciais têm facilitado um afluxo de alimentos ultraprocessados e bebidas açucaradas para a região. Essas mercadorias não saudáveis contêm excesso de nutrientes críticos, que estão intimamente ligados aos três principais fatores de risco das DCNT nas Américas - pressão alta, açúcar no sangue e obesidade. A obrigatoriedade dos rótulos de aviso front-of-package (FOPWL) como parte de um conjunto de intervenções em saúde pública é uma resposta cientificamente comprovada e compatível com os direitos humanos para promover dietas mais saudáveis. O FOPWL permite que os consumidores identifiquem corretamente e rapidamente itens alimentares pré-embalados que contenham excesso de nutrientes críticos. Reconhecendo isso, a Organização Regional de Padrões e Qualidade (CROSQ) da CARICOM revisou suas normas regionais sobre a rotulagem de alimentos pré-embalados para incluir o FOPWL. No entanto, a indústria regional de alimentos e bebidas trabalhou assiduamente para minar o esforço normativo do CROSQ. Em sua busca, a indústria explorou mecanismos de integração regional, cooptou os direitos humanos e as narrativas de descolonização para desacentar a saúde pública e aproveitar a autonomia sobre o processo FOPWL. Este artigo analisa essas estratégias para servir como um conto de advertência para a América Latina

**PALAVRAS-CHAVE:** CARICOM. Saúde Pública. América Latina.

## INTRODUÇÃO

In 2016, an estimated 71% of global deaths were attributed to non-communicable diseases (NCDs).<sup>4</sup> Approximately 38% occurred in people aged between 30 and 70 years, and 58% in people aged 70 and older.<sup>5</sup> During this time, NCDs accounted for at least 25% of all deaths in every age group above 10 years and more than half of deaths in age groups above 40 years.<sup>6</sup>

Within the Caribbean Community (CARICOM), except for Haiti, NCDs account for 62% – 80% of all premature deaths (30 – 70 years), with prevalence rates tending to be higher than in low- and middle-income countries in the Americas, as well as higher than global averages.<sup>7</sup> As NCD risk factors such as tobacco, alcohol consumption, physical inactivity, and unhealthy diets within the region are increasing, the region's prevalence rates seem set to remain above average for the foreseeable future.<sup>8</sup>

The CARICOM promotes regional integration among its twenty member and associate member states, strengthening constituent states' capacity to meet significant economic and social challenges.<sup>9</sup> As mentioned, presently, these countries are severely encumbered by noncommunicable diseases (NCDs), such as diabetes, cancers, cardiovascular diseases, and other chronic illnesses responsible for close to two-thirds of deaths in the region.<sup>10</sup> Unhealthy diets containing excessive "critical nutrients," such as sugars, total fats, saturated fats, and sodium, are a significant risk factor promoting increased NCD morbidity and mortality

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<sup>4</sup> NCD Countdown 2030 collaborators, *NCD Countdown 2030: worldwide trends in non-communicable disease mortality and progress towards Sustainable Development Goal target 3.4*, 392 *The Lancet* 1072–88, 1077 (2018).

<sup>5</sup> *Id.*, at 1077.

<sup>6</sup> *Id.*, at 1077.

<sup>7</sup> Caribbean Unity in Health, *The Evaluation of the 2007 CARICOM Heads of Government Port of Spain NCD Summit Declaration. The investigators' detailed report*, 26 (2017). *See also* The World Bank, *The Growing Burden of Noncommunicable Diseases in the Eastern Caribbean* (The World Bank, 2012); T. Alafia Samuels & Nigel Unwin, *The 2007 Caribbean Community Port-of-Spain Declaration on Noncommunicable Diseases: An Overview of a Multidisciplinary Evaluation*, 42 *Revista Panam. Salud Publica* e193 (2018).

<sup>8</sup> Caribbean Unity in Health, *The Evaluation of the 2007 CARICOM Heads of Government Port of Spain NCD Summit Declaration. The investigators' detailed report*, 26 (2017). *See also*, CARICOM Single Market and Economy, *CSME remains best vehicle for sustainable economic growth in the Region – CARICOM SG* (Jul. 05, 2017), <http://csme.caricom.org/press-releases/csme-remains-best-vehicle-for-sustainable-economic-growth-in-the-region-caricom-sg>.

<sup>9</sup> *Member States and Associate Members*, CARICOM, <https://caricom.org/member-states-and-associate-members/> (Last visited May 4, 2021), *Who We Are*, CARICOM, <https://caricom.org/our-community/who-we-are/> (Last visited May 4, 2021).

<sup>10</sup> Hilda Razzaghi, *10-Year Trends in Noncommunicable Disease Mortality in the Caribbean Region*, 43 *REV PANAM SALUD PUBLICA* E37 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6438409/>.

rates. These diets are associated with the top three NCD risk factors in the Americas—high blood pressure, high blood sugar, and obesity.<sup>11</sup>

CARICOM is paying a significant economic price for its high NCD prevalence and premature mortality rates. A 2018 Pan-American Health Organization (PAHO)/Harvard study found that the impact of NCDs and mental health on Jamaica's GDP was approximately \$17.22 billion, or 3.9% in GDP annually, over the 15 years from 2015 to 2030.<sup>12</sup> In addition, the 2015 Barbados NCD investment case study found that Bds\$64 million were spent on the treatment of cardiovascular diseases and diabetes and that the economy could be losing as much as Bds\$146million annually due to missed workdays, low productivity, and reduced workforce participation.<sup>13</sup> In the Eastern Caribbean, the aggregate economic burden of NCDs is conservatively estimated at around 3% of GDP.<sup>14</sup>

The CARICOM Heads of Government Summit on NCDs in 2007, termed the *Port-of-Spain Summit*, was the first meeting of its kind globally. The Port-of-Spain Declaration '*Uniting to Stop the Epidemic of Chronic Non-Communicable Diseases*' called for a 'whole of society' approach to tackling NCDs. It addressed both NCD prevention and control and contained 15 actionable mandates and 27 commitments. Among these mandates were calls by CARICOM Heads of Government for: promotion of programmes for healthy school meals and healthy eating in education sectors; mandatory labelling of foods; pursuit of trade policies allowing for greater use of indigenous agricultural products and foods; and elimination of trans-fats from diets of Caribbean citizens.<sup>15</sup>

Recognizing the severe NCD challenge in the region, the CARICOM Regional Organization for Standards and Quality (CROSQ) began revising the Regional Standard for Specification for labeling of prepackaged foods (CRS 2:2010) in 2018.

<sup>11</sup> Pan American Health Org., *Front-of-Package Labeling as a Policy Tool for the Prevention of Noncommunicable Diseases in the Americas* 25 (2020), [https://iris.paho.org/bitstream/handle/10665.2/52740/PAHONMHRF200033\\_eng.pdf?sequence=6&isAllowed=y](https://iris.paho.org/bitstream/handle/10665.2/52740/PAHONMHRF200033_eng.pdf?sequence=6&isAllowed=y)

<sup>12</sup> David E. Bloom, Simiao Chen & Mark E. McGovern, *The Economic Burden of Noncommunicable Diseases and Mental Health Conditions: Results for Costa Rica, Jamaica, and Peru*, 42 REVISTA PANAM. SALUD PUBLICA E18, 5 (2018).

<sup>13</sup> Pan American Health Organization (PAHO), UN Interagency Task Force on NCDs (UNTIF) & United Nations Development Programme (UNDP), *The Case for Investment in Prevention and Control of Noncommunicable Diseases in Jamaica: Evaluating the Return on Investment of Selected Tobacco, Alcohol, Diabetes, and Cardiovascular Disease Interventions* (PAHO, UNTIF & UNDP, 2018). See also Ministry of Health of Barbados, UNDP & WHO, *The Investment Case for Non-communicable Disease Prevention and Control in Barbados*, 2 (2017).

<sup>14</sup> The World Bank, *The Growing Burden of Noncommunicable Diseases in the Eastern Caribbean*, 36 (The World Bank, 2012).

<sup>15</sup> CARICOM, *Declaration of Port-Of-Spain: Uniting to Stop the Epidemic of Chronic NCDs* (Sept. 16, 2007).

The revision sought to incorporate the black and white warning labels,<sup>16</sup> and the changes the Food Agricultural Organization (FAO) and World Health Organization (WHO) made to the Codex Alimentarius (Codex), an internationally recognized compendium of standards for food safety and nutrition labeling, regarding prepackaged food labeling.<sup>17</sup> CRS 2:2010 was initially developed in 2010 upon the heels of the 2007 CARICOM Heads of State Port of Spain Declaration.<sup>18</sup> The Declaration distilled a strategy to eliminate NCDs in the region, including creating food labels to advance consumer nutrition literacy.<sup>19</sup> Although the Declaration is non-binding, CARICOM and PAHO, as the joint Secretariat for the Caribbean Cooperation in Health (CCH) Initiative, are empowered to monitor and evaluate states' progress with its objectives.<sup>20</sup>

Despite the significance of this process for efforts to protect public health in the region, since the inception of the CRS 2:2010 revision process, the food and beverage industry has employed several tactics, attempting to decenter public health, focus attention on protecting their economic interests, and delay, weaken and stop normative changes to promote healthier diets in the region.

Given CARICOM's proximity to Latin America and the similar NCD challenge faced by both regions, identifying, and understanding the food and beverage industry's tactics can be very beneficial in preparing Latin American states to ward off industry challenges against FOPWL. This paper examines CROSQ's FOPWL efforts in CARICOM and analyses the food and beverage industry's tactics to identify lessons that can serve as a cautionary tale to similar efforts in Latin America.

## 1. AS POLÍTICAS PÚBLICAS COMO CAMPO DE ESTUDO: PRESSUPOSTOS TEÓRICOS E METODOLÓGICOS

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<sup>16</sup> PAHO Urges Support for CARICOM Front-of-Pack Warnings Against Unhealthy Food, Pan-American Health Org. (Dec. 17, 2020), <https://www.paho.org/en/news/17-12-2020-paho-urges-support-caricom-front-pack-warnings-against-unhealthy-food>.

<sup>17</sup> Healthy Caribbean Coalition, The Caribbean Experience Moving Towards Front-of-Package Nutrition Labels 5 (2019), <https://www.healthycaribbean.org/wp-content/uploads/2019/10/2-HCC-NUTRITION-POLICIES-MEETING-SEPTEMBER-2019-CROSQ-FOPL-C-LEWIS.pdf>

<sup>18</sup> CARICOM Regional Org. for Standards & Quality [CROSQ], Price List for CROSQ Standards 2 (2017), <https://website.crosq.org/standards-catalogue/>.

<sup>19</sup> Declaration of Port-of-Spain: Uniting to Stop the Epidemic of Chronic NCDs, Healthy Caribbean Coalition (Sept. 15, 2007), <https://www.healthycaribbean.org/declaration-of-port-of-spain/>.

<sup>20</sup> T. Alafia Samuels & Nigel Unwin, *The 2007 Caribbean Community Port-of-Spain Declaration on Noncommunicable Diseases: An Overview of a Multidisciplinary Evaluation*, 42 REV PANAM SALUD PUBLICA E193 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6385896/>.

Since the early 1990s, trade agreements have facilitated an inundation of unhealthy foods into the region.<sup>21</sup> Today, CARICOM countries import 5 billion US dollars' worth of food—25% more than imported in 2015.<sup>22</sup> In some countries, imports account for over 80% of available food.<sup>23</sup> During this decades-long trade and economic liberalization era, the region has experienced a major nutritional transition. One-third of imported foods are energy-dense and contain excessive amounts of critical nutrients.<sup>24</sup> One study shows that imports of frozen potatoes used for French fries to Central American and Caribbean countries increased by 76% after trade deals with the United States.<sup>25</sup> The affordability of these unhealthy foods, which are easier to transport and less perishable,<sup>26</sup> has resulted in the proliferation of ultra-processed foods and beverages, which displaced legumes, fruits and vegetables from people's diet.<sup>27</sup> Unnervingly, childhood obesity doubled in the region between 2006 and 2016, and more than 60% of adults are obese.<sup>28</sup>

This nutritional transition in the region did not occur by accident. The food and beverage industry has invested heavily in promoting these unhealthy products, employing aggressive marketing and advertising strategies to increase demand for their products and consolidate their power in the food environment by targeting multiple cross-sections of populations globally.<sup>29</sup> For instance, to reach low-income communities and some rural areas, Big Soda invests in making smaller bottles

<sup>21</sup> See Healthy Caribbean Coalition, *NCDs and Trade Policy in the Caribbean 6* (2017), [https://www.healthycaribbean.org/wp-content/uploads/2017/11/Trade-Brief\\_web.pdf](https://www.healthycaribbean.org/wp-content/uploads/2017/11/Trade-Brief_web.pdf); see also Charlotte Hsu, *After Trade Deal, Unhealthy Foods Flowed into Central America, Dominican Republic, Study Finds*, U. of Buffalo Now (Nov. 13, 2019), <http://www.buffalo.edu/ubnow/stories/2019/11/werner-trade-diet.html>.

<sup>22</sup> *HCC Open Letter to CARICOM Heads of State and Government About Processed Food Imports*, Healthy Caribbean Coalition (Feb. 28, 2020), <https://www.healthycaribbean.org/hcc-open-letter-to-caricom-heads-of-state-and-government-about-processed-food-imports/>.

<sup>23</sup> Food & Agriculture Org. of the United Nations, *State of Food Insecurity in the CARICOM Caribbean 5* (2015), <https://reliefweb.int/sites/reliefweb.int/files/resources/a-i5131e.pdf>

<sup>24</sup> *Id.* at 11.

<sup>25</sup> See Hsu, *supra* note 18.

<sup>26</sup> Derek Headey & Harold Alderman, *Why Living in a Poor Country Means You Have Bad Food Choices*, *The Conversation* (Aug. 29, 2019), <https://theconversation.com/why-living-in-a-poor-country-means-you-have-bad-food-choices-121993>.

<sup>27</sup> B.M. Popkin & T. Reardon, *Obesity and the Food System Transformation in Latin America*, 19 *OBESITY R.* 1028 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6103889/>.

<sup>28</sup> Fitzroy J. Henry, *Globalization Challenges to Family Nutrition in the Caribbean: The Way Forward*, 2 *J. FAMILY MEDICINE DISEASE PREVENTION*, issue 2, at 1-2 (2016), <https://clinmedjournals.org/articles/jfmdp/journal-of-family-medicine-and-disease-prevention-jfmdp-2-036.pdf>.

<sup>29</sup> Benjamin Wood et al., *Market strategies used by processed food manufacturers to increase and consolidate their power: a systematic review and document analysis*, 17 *GLOBALIZATION AND HEALTH* 17 (2021), <https://doi.org/10.1186/s12992-021-00667-7>; See Rob Moodie et al., *Profits and pandemics: prevention of harmful effects of tobacco, alcohol, and ultra-processed food and drink industries*, 381 *LANCET* 670 (2013), <https://pubmed.ncbi.nlm.nih.gov/23410611/>.

while increasing bottle sizes elsewhere to boost consumption.<sup>30</sup> Furthermore, owing to the industry's manipulation of nutrition research and its use of critical nutrients "to mask and give flavor and texture to otherwise technologically degraded foods, and to simulate the taste of minimally processed foods and dishes," food has become less healthy.<sup>31</sup> Healthy food options are therefore limited, making it difficult for consumers to make healthier choices.<sup>32</sup>

Although some products carry back-of-pack nutrition labels, the food and beverage industry "obfuscates nutritional information to confuse consumers."<sup>33</sup> Many ultra-processed foods and sugary drink labels carry "health halo" claims, implying that they are healthy when they are not, misleading consumers to purchase unhealthy commodities more than they would.<sup>34</sup> Therefore, relying on nutritional labels is inadequate to help consumers identify food and beverages containing excessive amounts of critical nutrients.

The international community has increasingly recognized the need for countries to mandate conspicuous, front-of-package warning labels (FOPWL) as one key measure in a suite of public health interventions.<sup>35</sup> These labels allow consumers to correctly and quickly identify pre-packaged food items containing excess critical nutrients.<sup>36</sup> Although all nutritional labeling systems increase the proportion of healthy foods that consumers purchase and decrease the incidence of NCDs by

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<sup>30</sup> Barry M Popkin, Linda S Adair & Shu Wen Ng, *Global nutrition transition and the pandemic of obesity in developing countries*, 70 *NUTR. REV.* 3 (2012), <https://pubmed.ncbi.nlm.nih.gov/22221213/>.

<sup>31</sup> Gyorgy Scrinis, *Ultra-processed foods and the corporate capture of nutrition—an essay by Gyorgy Scrinis*, 371 *BRIT. MED. J.* M4601 (2020), [HTTPS://WWW.BMJ.COM/CONTENT/371/BMJ.M4601](https://www.bmj.com/content/371/bmj.m4601).

<sup>32</sup> Jennifer M Poti et al., *Is the degree of food processing and convenience linked with the nutritional quality of foods purchased by US households?* 101 *AM. J. CLINICAL NUTR.* 1251 (2015), <https://pubmed.ncbi.nlm.nih.gov/25948666/>; UNC GLOBAL FOOD RESEARCH PROGRAM, *Front-Of-Package (Fop) Food Labelling: Empowering Consumers To Make Healthy Choices* (2020), [https://globalfoodresearchprogram.web.unc.edu/wp-content/uploads/sites/10803/2020/08/FOP\\_Factsheet\\_UNCGFRP\\_2020\\_September\\_Final.pdf](https://globalfoodresearchprogram.web.unc.edu/wp-content/uploads/sites/10803/2020/08/FOP_Factsheet_UNCGFRP_2020_September_Final.pdf)

<sup>33</sup> Lawrence O. Gostin, *"Big Food" Is Making America Sick*, 94 *MILBANK Q.* 480 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5020160/>.

<sup>34</sup> See UNC GLOBAL FOOD RESEARCH PROGRAM, *supra* note 29; J. Craig Andrews, Scot Burton & Richard G. Netemeyer, *Are Some Comparative Nutrition Claims Misleading? The Role of Nutrition Knowledge, Ad Claim Type and Disclosure Conditions*, 29 *J. OF ADVERT.* 29 (2013), <https://www.tandfonline.com/doi/abs/10.1080/00913367.2000.10673615>; Aparna Sundar & Frank R. Kardes, *The Role of Perceived Variability and the Health Halo Effect in Nutritional Inference and Consumption*, 32 *PSYCHOL. & MARKETING* 512 (2015), <https://onlinelibrary.wiley.com/doi/abs/10.1002/mar.20796>.

<sup>35</sup> See Henry, *supra* note 25; Dainius Puras, *Statement by the UN Special Rapporteur on the right to health on the adoption of front-of-package warning labelling to tackle NCDs* (2020), [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E#\\_ednref3](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E#_ednref3); Pan American Health Org., *Superior Efficacy of Front-of-Package Warning Labels in Jamaica* (2021), <https://www.paho.org/en/documents/superior-efficacy-front-package-warning-labels-jamaica>; See also Pan American Health Org., *supra* note 8.

<sup>36</sup> See Henry, *supra* note 25.

3.4%,<sup>37</sup> PAHO and the UN Special Rapporteur on the Right to Health have recommended the adoption black and white octagonal “high in” warning labels that alert consumers to commodities containing excess critical nutrients.<sup>38</sup> The monochrome contrasts best with colorful packaging, and consumers easily interpret the stop signs to avoid or limit purchases of unhealthy food items.<sup>39</sup>

As established above, diets high in salt, fat and sugar are major drivers of the Caribbean’s alarming rates of obesity among adults and children as well its equally alarming rates of NCD mortality. From as early as 2004 the WHO recognised that front of pack labelling (FOPL) had a valuable role to play in transforming food environments by providing consumers with relevant nutrition information in a simple and accurate manner.<sup>40</sup> In 2017, the World Health Assembly endorsed an updated set of policy options known as ‘Appendix 3’ for NCD prevention and control which included front of package labelling as one of the ‘best buys’ (for reduction of salt intake) and nutritional labelling as a recommended intervention to assist with reduction of total energy intake, sugars, sodium and fats.<sup>41</sup> More recently, the Pan American Health Organisation (PAHO) specifically endorsed the black, octagonal front of package warning labelling (FOPWL) scheme pioneered by Chile as “the best performing system to allow consumers to correctly, quickly and easily identify products with unhealthy profiles.”<sup>42</sup> PAHO also highlighted that this particular scheme has the added benefit that was endorsed in July 2020 by the then UN Special Rapporteur on the Right to Health Dainius Pūras as a “rights-compliant response” consistent with states’ obligations to act through regulation to address NCDs.<sup>43</sup>

CARICOM’s work on FOPL can be traced back to the CARICOM Council for Human and Social Development’s September 2014 endorsement of the Caribbean Public Health Agency’s (CARPHA) Plan of Action for Promoting Healthy Weights in the Caribbean: Prevention and Control of Childhood Obesity 2014 – 2019 (the

<sup>37</sup>Manon Egnell et al., *Modelling the impact of different front-of-package nutrition labels on mortality from non-communicable disease*, 16 INT J. OF BEHAV. NUTR. & PHYS. ACT. 56 (2019), [https://www.researchgate.net/publication/334471630\\_Modelling\\_the\\_impact\\_of\\_different\\_front-of-package\\_nutrition\\_labels\\_on\\_mortality\\_from\\_non-communicable\\_chronic\\_disease](https://www.researchgate.net/publication/334471630_Modelling_the_impact_of_different_front-of-package_nutrition_labels_on_mortality_from_non-communicable_chronic_disease).

<sup>38</sup> See Henry, *supra* note 25.

<sup>39</sup>Pan American Health Org., *supra* note 8, at 11-12.

<sup>40</sup> WHO, *Global Strategy on Diet, Physical Activity and Health*, ¶ 40 WHA57.17 (May 22, 2004).

<sup>41</sup> WHO Director General, *Preparation for the third High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases*, U.N. Doc. A/70/27 (May 18, 2017)

<sup>42</sup>Pan American Health Org., *supra* note 8.

<sup>43</sup>See Pūras, *supra* note 32. This Statement was also endorsed by Michael Fakhri, Special Rapporteur on the Right to Food, and Surya Deva, Elżbieta Karska, Githu Muigai, Dante Pesce (Vice-Chair), Anita Ramasastry (Chair), Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises.

Plan of Action’).<sup>44</sup> Coming out of this Plan of Action CARPHA went on to select 6 policies to form part of a core 6 Point Policy Package consisting of: mandatory nutritional labelling of foods; regulation of the school feeding environment; reduction of marketing of unhealthy food to children; product reformulation to reduce fat, salt and sugar levels; fiscal and trade measures; and promotion of fruit and vegetable consumption. Of these six priority areas, it was decided to begin regional action with FOPL in part because of its link to other priority areas such as marketing to children and product reformulation, as well as a perception that FOPL was a less politically sensitive area and thus one that was more amenable regional work when compared with other priority areas such as restrictions on marketing.<sup>45</sup> The rationale for approaching FOPL at a regional rather than a national level was to try to have a harmonized approach across CARICOM and thereby avoid adverse impacts on intra-regional trade as well as increase the scheme’s impact and efficacy.

Although prompted by and intended as a response to a *public health* problem, as was mentioned above, CARICOM’s FOPL work has been led, not by CARPHA, but rather, by CROSQ, the agency responsible for developing regional standards. CROSQ was established in 2002 and is intended “to facilitate the development of regional standards, promote the harmonization of metrology systems and support the sustainable production and trade of goods and services in the CARICOM Single Market and Economy (CSME).”<sup>46</sup> CROSQ reports to the CARICOM Council for Trade and Economic Development (COTED), which is made up of the respective CARICOM Ministers of Trade and all 15 CARICOM Member States are members of CROSQ.<sup>47</sup>

CROSQ’s standards development work is guided by the following principles: transparency, openness, impartiality, and consensus; demand driven relevance and effectiveness; coherence with policies, other standards, and consideration of developing country interests.<sup>1</sup> One of the key CROSQ Committees in the area of standards development is its Technical Management Committee (TMC) which is made up of technical experts from the respective National Standards Bureau i.e., both private and public sector representatives.

CROSQ’s work on FOPL began in April 2018 and as part of its broader work for revision of the existing CARICOM Standard for Labelling of Pre-Packaged Foods CRS 05:2010. CROSQ developed a proposed draft revision that incorporated both the 2018 Codex changes made by WHO and FAO for labelling of pre-packaged food

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<sup>44</sup> CARPHA, Plan of Action for Promoting Healthy Weights in the Caribbean: Prevention and Control of Childhood Obesity 2014 – 2019

<https://carpha.org/Portals/0/xBlog/documents/HealthyWeights.pdf>

<sup>45</sup> January 31, 2018 email exchange with former CARPHA Executive Director (on file with author).

<sup>46</sup> CROSQ, <https://website.crosq.org/organisation/> (last visited Sept. 6, 2021)

<sup>47</sup> These are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

as well as the black octagonal FOPWL scheme endorsed by PAHO. The timeline of events was as follows:<sup>48</sup>

- May 2018 – Regional Technical Sub-Committee (RTSC) established with 11 Member States. (This committee was composed by representatives of both the private and public sector).
  - May – June 2018 – working draft based on revision of the standard was developed by the RTSC Secretariat and circulated to RTSC Members for comment through their National Mirror Committees (NMCs). (These NMCs are also composed of both public and private sector representatives and in some cases the private sector representatives may dominate.)
  - July – September 2018: RTSC met online to review comments received from members and produce the Committee Draft.
  - October 2018 – March 2019: Draft CARICOM Regional Standard (DCRS) completed and circulated to Member States for comments. The Member State stakeholder/public comments period was extended twice at the request of Member States.
  - April – September 2019: Disposition of comments received and updating of DCRS. FOPL model scheme moved from the body of the standard into an “Informative Annex”.
  - October 2019 – January 2020 revised DCRS circulated to Member States for comments and consensus-building.
  - January 2020 – March 2020: disposition of comments received.
  - April 2020 – January 2021: Consensus achieved on progressing the DCRS to a Final Draft CARICOM Regional Standard (FDCRS).
  - February 2021 – April 2021: FDCRS circulated to Member States for voting. April 30 set as the final deadline for receipt of votes. (Based on CROSQ rules, to be recommended for approval, a draft standard has to attain 75% support.)<sup>49</sup>
- Ultimately, the voting summary on the FDCRS was: 6 positive votes, 6 abstentions and 3 negatives votes. In other words, it failed to secure the necessary 75% support to be put forward for approval. The process is therefore currently somewhat ‘on pause’ as Member States await further guidance from CROSQ on next steps. It must also be noted that the decisive negative vote in this process was the result of a controversial and unexplained reversal of position by Jamaica.<sup>50</sup>

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<sup>48</sup>Fulgence St Prix, Presenter: Jamaica Bureau of Standards webinar on The Human Rights Approach to Front-of-Package Warning Labels in the Caribbean (Feb. 25, 2020).

<sup>49</sup>CARICOM Regional Org. of standards & Quality [CROSQ], *Directive 1: Development/Harmonisation of Regional Standards*, at 6 (2013) [hereinafter *CROSQ Directive 1*], CROSQ Presentation at ASTM, *supra* note 25.

<sup>50</sup> Andrene Chung, *Front-of-Packaging Labelling – Jamaican Consumers Trumped by Vested Interests*, the gleaner, Aug. 15, 2021, <https://jamaica-gleaner.com/article/focus/20210815/andrene-chung-front-packaging-labelling-jamaican-consumers-trumped-vested>. See also Deborah Chen, *Is Evidence Being Ignored in Front-of- Package Labelling*, the gleaner, June 15, 2021, <https://jamaica-gleaner.com/article/focus/20210615/deborah-chen-is-evidence-being-ignored-in-front-of-package-labelling>.

At its March 30, 2021, meeting, Jamaica's NMC held a vote on the FDCRS with a comfortable majority voting in favor of the black octagonal FOPWL scheme. The four groups voting in favor were: Government (Ministry of Health & Wellness), the Scientific Research Council (SRC), the National Compliance and Regulatory Authority (NCRA); Non-governmental organizations (the Heart Foundation of Jamaica and Diabetes Association of Jamaica); Academia (The University of the West Indies and The University of Technology, Jamaica); and Consumers (Consumer Affairs Commission and the National Consumers League of Jamaica). In fact, the only opposing stakeholder group was the private sector (Jamaica Manufacturers and Exporters Association). Stakeholders were subsequently called to an 'emergency meeting' on June 4, 2021, to discuss a finalized position on the standard. At that time a 're-vote' on the FDCRS was facilitated and the consumer stakeholders reversed their original position to now oppose the black, octagonal FOPWL scheme. The Jamaican government is yet to explain this strange and highly irregular series of events. Jamaica's ultimate reversal of position is even more disturbing when one considers the overwhelming free of conflict of interest scientific evidence, including a randomized study done within Jamaica itself, pointing to the far superior performance of the black octagonal FOPWL scheme compared to any other available options, such as the traffic light or General Daily Allowance (GDA) scheme as well as the evidence that having multiple FOPL schemes in use only serves to confuse rather than inform consumers.<sup>51</sup> Considering the Jamaica Manufacturers and Exporters Association's (JMEA) very strong and vocal opposition (and lobbying) throughout this process, this reversal raises a number important questions about the extent and nature of industry involvement in and influence over policy-making in critical areas such as these.<sup>52</sup>

## 2. FOOD AND BEVERAGE INDUSTRY TACTICS IN THE CARIBBEAN

Although they have replicated industry interference tactics in other parts of the world in seeking to undermine CARICOM's FOPL process,<sup>53</sup> the food and beverage industry has also employed novel tactics specific to the CARICOM regional context

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[gleaner.com/article/commentary/20210615/deborah-chen-evidence-being-ignored-front-package-labelling](https://gleaner.com/article/commentary/20210615/deborah-chen-evidence-being-ignored-front-package-labelling)

<sup>51</sup> See Pan American Health Org., *supra* note 32.

<sup>52</sup> See Richard Pandohie, *Front of Package Labelling – The JMEA Perspective*, *j'ca observer* (Jun. 27, 2021) [https://www.jamaicaobserver.com/sunday-finance/front-of-package-labelling-the-jmea-perspective\\_224650](https://www.jamaicaobserver.com/sunday-finance/front-of-package-labelling-the-jmea-perspective_224650). In commenting on their vote reversal, the NCRA essentially articulated the same arguments put forward by industry (all of which had been clearly discredited previously).

<sup>53</sup> See, e.g., Melissa Mialon, et al., *"I had Never Seen so Many Lobbyists": Food Industry Political Practices During the Development of a New Nutrition Front-of-Pack Labelling System in Colombia*, *Public Health Nutrition*, Aug. 2020, [https://www.researchgate.net/publication/343787946\\_'I\\_had\\_never\\_seen\\_so\\_many\\_lobbyists'\\_food\\_industry\\_political\\_practices\\_during\\_the\\_development\\_of\\_a\\_new\\_nutrition\\_front-of-pack\\_labelling\\_system\\_in\\_Colombia](https://www.researchgate.net/publication/343787946_'I_had_never_seen_so_many_lobbyists'_food_industry_political_practices_during_the_development_of_a_new_nutrition_front-of-pack_labelling_system_in_Colombia).

that provide important lessons for similar efforts in other countries such as those in Latin America. Specifically, in addition to raising international trade law arguments, the food and beverage industry has also exploited regional integration mechanisms and co-opted human rights and decolonization narratives to advance their cause.

Bearing in mind the relatively small size of their economies, and industry's important role as a driver of the economy, it is perhaps not surprising that CARICOM governments enjoy a special relationship with the private sector with private industry being seen very much as key partners and allies of government in the joint enterprise of economic development. What is of particular concern in this context is the potential that exists for the private sector to (formally and informally) access and influence policy making at the national and regional level and advance their peculiar interests at the expense of those of the wider society. To guard against such an occurrence, there's need for appropriate checks and balances to help insulate policymaking from any potential conflict of interest or undue influence in policy making. Unfortunately, these checks and balances are sorely lacking in a Caribbean context.

The extent and nature of the challenge being faced within the region was vividly illustrated by the CARICOM FOPL process. While soliciting the views of affected industries is understandable, the real problem is the imbalance of representation and power that is often present in these situations and how that can undermine the integrity of the process and compromise expected outcomes. For example, COTED's traditionally strong relationship with private industry was recently further strengthened and formalized by the designation of the Caribbean Private Sector Organisation (CPSO) as an Associate Institution of CARICOM which has given the private sector privileged access to lobby and argue against FOPWL.<sup>54</sup> By contrast, civil society and public health advocates encounter real difficulties registering their interests and concerns at the national level within the respective NMCs as well as at the regional level within CROSQ or COTED itself - there is simply not the same level of access and opportunity to influence outcomes. Along similar lines, in discussing how best to arrive at healthier commitments free of commercial interests, Buse et al usefully reference the Suzuki et al's conclusions that "'consensus-based,' whole-of-society decision-making in the context of power asymmetries will lead to shallow and weak commitments, particularly where corporate interests are affected."<sup>55</sup> Returning to the CARICOM-specific context,

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<sup>54</sup> The creation of the CPSO was prompted by CARICOM Heads of Government's call at their 18th Special Meeting in Trinidad and Tobago in December 2018 for deeper and more structured involvement of private sector in the CARICOM regional integration process and the amendment of the RTC to include representative bodies of the private sector and the labour movement as Associate Institutions.

<sup>55</sup> Kent Buse et al., *Thinking Politically about UN Political Declarations: A Recipe for Healthier Commitments - Free of Commercial Interests: Comment on "Competing Frames in Global Health Governance: An Analysis of Stakeholder Influence on the Political Declaration on Non-communicable*

while declarations and statements such as the 2002 Liliendaal Statement of Principles on Forward Together show greater appreciation of civil society's important role in regional development, and the need to engage with them more consistently, the fact remains that when CARICOM engages civil society, labour and the private sector tend to predominate to the exclusion of other interests.<sup>56</sup>

In addition to the problem of power asymmetries between industry and civil society actors, the CARICOM FOPL process experienced significant industry interference from the food and beverage industry, which adopted the usual tactics to prevent the adoption of a FOPWL standard. Thus, public health advocates had to deal with industry's misrepresentation of the facts and the science with respect to FOPL, their efforts to drag out the process by asking for additional time to conduct even more studies in the area, general scaremongering as well as them questioning the integrity of the process and that of important public health partners such as PAHO. It has also been interesting to note the correlation between the food and beverage industry's activities and arguments and those of the tobacco industry regarding tobacco control and implementation of the Framework Convention on Tobacco Control several years ago. By far the bulk of industry's effort to stall the FOPL process, however, focused on the trade dimensions of the problem with industry consistently seeking to frame the question as purely one of trade and arguing initially that measures such as the black, octagonal FOPWL scheme were inconsistent with CARICOM Member States' WTO obligations.

#### A. Regional integration and trade<sup>57</sup>

Trade and trade relations are central to CARICOM and its work. CARICOM is governed by the Revised Treaty of Chaguaramas Establishing the Caribbean Community (RTC) including the CARICOM Single Market and Economy (CSME) 2001 and its stated objectives include 'expansion of trade and economic relations with third States', 'enhanced levels of international competitiveness' and 'the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description.'<sup>58</sup> The central aim of the RTC is the creation of a fully integrated

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*Diseases*, 10 INT J HEALTH POLICY MANAG. 1 (2021),  
[https://www.ijhpm.com/article\\_4094\\_296067d6431710882f78c4fe98b56824.pdf](https://www.ijhpm.com/article_4094_296067d6431710882f78c4fe98b56824.pdf)

<sup>56</sup> KRISTINA HINDS, CIVIL SOCIETY ORGANISATIONS, GOVERNANCE AND THE CARIBBEAN COMMUNITY 9 (2019)

<sup>57</sup> For further details of the consistency of CARICOM's FOPL work with its Member States' trade obligations more generally see Nicole Foster, *International Trade and Childhood Obesity – A Caribbean Perspective*, in *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law* 185, 194 (Amandine Garde, Olivier de Schutter & Joshua Curtis eds., Edward Elgar Publishing 2020).

<sup>58</sup> Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy 2001, art 6, May 7, 2001, 2259 UNTS 293

internal market within CARICOM.<sup>59</sup> Article 79 of the RTC makes provision for the free movement of goods and services and Member States are to refrain from behaviour which nullifies or impairs the benefits conferred by the RTC.<sup>60</sup> As a customs union, CARICOM Member States also operate a Common External Tariff.

Besides their internal arrangement under the RTC, CARICOM Member States participate in a wide range of extra-regional trading arrangements. The WTO regime is a key one of these arrangements. It is therefore not surprising that the majority of industry's initial trade arguments against FOPL focussed on questioning the WTO-consistency of the DCRS under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and its linkage to ongoing Codex Alimentarius on FOPL discussions.<sup>61</sup>

Under the TBT Agreement WTO members must ensure that technical regulations, such as food labelling requirements, are non-discriminatory and do not create unnecessary obstacles to trade. WTO members are also encouraged to base their technical regulations on internationally agreed standards and must ensure that they are not more trade restrictive than necessary. These rules all combine to create a strong network protecting exporters from unnecessary and arbitrary trade barriers and ensuring the free flow of goods across and within WTO members' borders. However, it is important to note that:

i) the WTO Appellate Body has consistently stressed that it is for individual WTO Members to determine their desired level of health protection and that health is one of the most important human interests;<sup>62</sup> and

ii) there are a number of flexibilities built into the TBT and other WTO agreements that accommodate *bona fide* public health concerns, within WTO rules. Notably, while Article 2.2 of the TBT Agreement provides that technical regulations are not to be 'more trade-restrictive than necessary to fulfil a legitimate objective taking account of the risks non-fulfilment would create' it also explicitly recognises protection of human health or safety as one such legitimate objective.

In countering industry's arguments about the perceived WTO-inconsistency of the DCRS, health advocates were able to successfully draw attention to the important connection between the TBT Agreement 2.2 and the general public health exception in Article XX(b) of the General Agreement on Tariffs and Trade 1994, especially Article XX jurisprudence regarding interpretation of the necessity

<sup>59</sup> *Id.* art 78(2)(a).

<sup>60</sup> *Supra* art 79(2).

<sup>61</sup> Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994, UNTS 1868 120.

<sup>62</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R 168 (adopted March 12, 2001) [hereinafter *EC-Asbestos*]; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WTO Doc. WT/DS332/R (adopted June 12, 2007) [hereinafter *Brazil-Retreaded Tyres*].

standard.<sup>63</sup> They were further able to highlight cases such as *United States – Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5 of the DSU by Canada and Mexico)* where the WTO Appellate Body explained that a measure's contribution to the legitimate objective, the trade restrictiveness of the measure and the nature of risks at issue as well as the seriousness of the consequences from non-fulfilment and whether it was reasonably available were all relevant in making determinations under Article 2.2.<sup>64</sup> They also pointed to *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, where the WTO Appellate Body found that the US' 'dolphin-safe' labelling provisions were not more trade-restrictive than necessary since the alternative proposed by Mexico would not make a contribution to the US' legitimate objective that was equivalent to that of the challenged measure (much like how the alternative FOPL schemes being proposed by industry were proven to be less effective than the black, octagonal FOPWL in terms of conveying nutrition information accurately and quickly and ultimately influencing consumers' choice).<sup>65</sup> Importantly from a FOPL/NCD perspective, the Appellate Body also found in this case that if a proposed alternative would involve greater 'risks of non-fulfilment' it could not be considered a valid alternative, even if it were less trade-restrictive.<sup>66</sup> Finally, in *US – COOL (Art.21.5)*, the Appellate Body confirmed that the process of determining whether a measure is more trade restrictive than necessary under Article 2.2 as involving 'the holistic weighing and balancing' of the relevant interests and values involved.<sup>67</sup>

The recent WTO Appellate Body ruling in *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* was another powerful tool for public health advocates in providing a strong counter to industry's efforts to

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<sup>63</sup>Consistent with WTO Appellate Body jurisprudence in cases such as *EC – Asbestos* and *Brazil – Retreaded Tyres* a measure is considered 'necessary' under GATT Article XX(b) where there are no reasonably available alternatives to secure the level of protection desired by the respondent State, and the balance of interests or values at stake supports the conclusion that the measure is necessary.

The panel in *United States – Measures Affecting the Production and Sale of Clove Cigarettes* did however caution against a wholesale adoption of Article XX(b) jurisprudence in respect of Article 2.2: Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶46, WTO Doc. WT/DS406/AB/R (adopted April 4, 2012) [hereinafter *US – Clove Cigarettes*].

<sup>64</sup>Article 21.5 Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 21.5 of the DSU by Canada and Mexico)* WTO Doc. WT/DS384/AB/RW (adopted May 18, 2015) [hereinafter *US – Cool (Art. 21.5)*].

<sup>65</sup> Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter *US-Tuna II*]. The Appellate Body adopted the same approach in *US – Clove Cigarettes supra* note 66.

<sup>66</sup> *US – Tuna II*, *supra* note 69, at ¶ 46.

<sup>67</sup> *US – Cool (Art. 21.5) supra* note 68, at ¶ 5.198

mislead and confuse the public on the WTO requirements.<sup>68</sup> Among the highlights from the ruling that proved useful were:

- the Appellate Body's reiteration of their earlier statement in *EC – Asbestos* that health is “vital and important to the highest degree.”<sup>69</sup>
- the Appellate Body's confirmation that determining whether a technical regulation is ‘more trade-restrictive than necessary’ under the TBT Agreement Article 2.2. involves weighing and balancing:
  - the challenged measure's degree of contribution to the legitimate objective at issue;
  - the trade-restrictiveness of the challenged measure; and
  - the nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure.
- the Appellate Body's confirmation that for an alternative measure to ‘trump’ the challenged (public health) measure, it would have to:
  - be less trade-restrictive than the challenged measure;
  - make “an equivalent contribution” to the legitimate objective in question, taking account of the risk non-fulfilment would create; *and*
  - be ‘reasonably available’ to the Member against whom the claim was being brought.

As part of their trade arguments, industry also sought to selectively read the TBT Agreement Annex 3 Code of Best Practice to argue that it required any adopted FOPL scheme to be based on an international standard (and therefore, *inter alia*, needed to await an outcome from the Codex Alimentarius FOPL discussions before it could move forward). Public health advocates were able to easily refute this by pointing out that while Annex 3 does indicate that international standards ‘shall be used’ as a basis for standard development, this only applies where international standards exist or their completion is imminent (which was not the case for FOPL) and that it in any event Annex 3 expressly preserves Member States’ right to take action not based on an international standard where said international standard would be ineffective or inappropriate.<sup>70</sup>

Public health advocates were ultimately able to successfully counter this aspect of industry's strategy because they were committed to engaging on *all* aspects of the FOPL issue i.e they did not limit themselves to simply engaging on purely health-related arguments alone. They therefore invested the necessary time and energy to ensure that they were adequately equipped to face the challenge presented by industry head on. The success of their efforts in this regard is reflected in the fact

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<sup>68</sup>Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441/AB/R (adopted June 29, 2020).

<sup>69</sup>*EC – Asbestos*, *supra* note 66, at ¶ 172.

<sup>70</sup>Agreement on Technical Barriers to Trade, *supra* note 65, at Annex 3 ¶ f.

that industry ultimately abandoned their WTO-based arguments, preferring instead simply to emphasise the costs that would supposedly be associated with implementation of the FOPLW and related arguments.

### **B. Co-opting human rights narrative**

Over the past seventy-five years, human rights have unfolded under international law as a basis for public health, providing a foundation for human rights realization through public health practice and global health policy.<sup>71</sup>

Human rights advocates worldwide have crafted a narrative underpinned by basic shared principles, such as universality, equity, accountability, transparency, and participation.<sup>72</sup> This narrative has facilitated the inclusion of the voices of the most vulnerable in society and safeguarded their entitlement to realizing the highest possible standard of mental and physical health—the right to health. Indeed, appeal to a human rights narrative is necessary to center people’s needs, by requiring accountability and transparency from decision-makers whose acts or omissions shape and impact the distribution of health across the population.

Resort to the human rights framework can be a powerful tool to efforts to tackle diet related NCDs. The right to health and other health-related rights provides a normative basis for the protection of people from unhealthy food products and contribute to shaping and clarifying the foundations for governmental action and regulation by mandating governments to adopt measures to prevent and control diseases, while allowing people to hold governments accountable and claim the enforcement and protection of their rights.

Even without recourse to courts, the use of a human rights discourse can play a fundamental role in naming and shaming, thereby fostering dialogue and defining a human rights-based approaches. A human rights-based approach can also help ensure active and meaningful participation of civil society in holding governments and companies accountable for their practices.

Participation has played a key role in amplifying health and human rights narratives. In particular, the right to participation in public affairs has enabled civil society advocates to persuade governments to be inclusive, transparent and to hold them accountable.<sup>73</sup> Importantly, recognizing this right promotes democratic

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<sup>71</sup> LAWRENCE GOSTIN & BENJAMIN MASON MEIER, *FOUNDATIONS OF GLOBAL HEALTH AND HUMAN RIGHTS, GLOBAL HEALTH AND HUMAN RIGHTS IN THE AGE OF POPULISM* (2020).

<sup>72</sup> Alicia Ely Yamin & Andres Constantin, *A Long and Winding Road: The Evolution of Applying Human Rights Frameworks To Health*, 49 *GEO J. INT’L L.* 191 (2018), <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/07/GT-GJIL180006.pdf>.

<sup>73</sup> UN Human Commission of Human Rights, OHCHR, *Guidelines for States on the effective implementation of the right to participate in public affairs* (2018), [https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs\\_web.pdf](https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf)

governance, the rule of law, social inclusion, and economic development, all of which are necessary to safeguard human rights.<sup>74</sup>

Relying on a narrative underpinned by the right to participation, and its connection with the right to health,<sup>75</sup> advocates in South Africa, Latin America and India were able to persuade and mandate governments to provide access to treatment for persons living with HIV/AIDS.<sup>76</sup> Similarly, progress in tobacco control, especially *vis-a-vis* the adoption and implementation of the WHO Framework Convention on Tobacco Control, can be credited to a novel framing of tobacco control as collective action to protect health.<sup>77</sup>

However, despite the promising power of human rights, unhealthy commodities industries, the food and beverage industry have co-opted human rights narratives in recent years. Recognising that human rights is a universally recognized language that has permeated large layers of society, these industries have resorted to human rights narratives to pursue their economic interests further.

The industry's appeal to human rights has eroded democratic deliberation and institutions by encouraging power imbalances that have weakened governmental efforts to adopt public health measures. When the industry has succeeded in changing government incentives, protecting the right to health and health-related rights has taken a back seat, alongside citizen deliberation and participation, crucial to improving public health programs and strengthening health systems.<sup>78</sup> This has been the case of FOPWL efforts in the CARICOM.

In the Caribbean, the food and beverage industry has argued that they have a *right to participate* in all deliberations around the adoption of FOPWL as they will be the most affected by the measure. Their argument stems in part from the 2007 Port of Spain Declaration, calling for a "whole of society" approach to tackling NCDs, which they interpret as including them.

Whereas industry participation may seem harmless at first sight, and even consistent with human rights standards, the argument is flawed. First, expanding the human rights paradigm to conceptualize private actors as right-holders is

<sup>74</sup>*Id.*

<sup>75</sup>OHCHR & World Health Org., The Right To Health, Fact Sheet No. 31 (2008)

<https://www.ohchr.org/documents/publications/factsheet31.pdf>

<sup>76</sup>LAWRENCE GOSTIN, *GLOBAL HEALTH LAW*, 265 (2014); See Mark Heywood, *South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health*, 1 J. OF HUM. RIGHTS PRACT. 14, at issue 1 (2009), <https://academic.oup.com/jhrp/article/1/1/14/2188684>.

<sup>77</sup> See World Health Org., The human rights dimension of tobacco control: a tool to advance the WHO FCTC implementation (last visited Aug. 24, 2021),

<https://www.who.int/fctc/mediacentre/news/2019/tobacco-control-human-rights/en/>; See also Sharanappa, *Collective Action for effective tobacco control: one province at a time*, 16 TOB. INDUC. DIS. A642 (2018), <http://www.tobaccoinduceddiseases.org/Collective-action-for-effective-tobacco-control-one-province-at-a-time,84562,0,2.html>.

<sup>78</sup> Thomas J. Bollyky et al., *The relationships between democratic experience, adult health, and cause-specific mortality in 170 countries between 1980 and 2016: an observational analysis*, 393 LANCET 1628 (2019), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)30235-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)30235-1/fulltext).

wrong under the current international human rights law framework. It is inconsistent with recent international developments that, rather than categorize them as right-holders, consider them to be duty-bearers. Second, it is naïve to think that industry participation comes with altruistic intentions. These industries have significant influence over global and national policy and can easily influence government decision-making processes to their benefit. The food and beverage industry has posed a direct threat to the right to health by employing a range of tactics to influence, prevent, or postpone government decision-making processes to protect public health, including by disseminating misinformation on the health or economic impacts of public health measures.

Additionally, evidence shows that industry-funded research usually aims at casting doubt on established scientific evidence by promoting loosely based data and making unsubstantiated claims to the industry's advantage. Frequently, food and beverage industries sponsor and manipulate research to downplay links to health problems, thus covering up the harmful effects of their products. These industries usually engage in practices intended to misrepresent evidence, such as selective quoting from studies and omitting important information to promote alternative evidentiary narratives; misleadingly using references to provide false support for key claims; or exaggerating the economic impact of public health measures.<sup>79</sup>

As CROSQ seeks to facilitate the adoption of FOPWL in CARICOM, the food and beverage industry has co-opted a human rights narrative to delay, weaken, and stop this normative effort. In particular, the industry has appropriated the persona of a marginalized and disenfranchised rights holder, arguing, albeit implicitly, that it has a right to participate in the policymaking process. In addition to questioning the suitability of FOPWL for CARICOM, the industry has commissioned its own impact assessment, claiming it is seeking to identify the best FOPL for the region.<sup>80</sup> However, the commissioning of an impact assessment based on a right to participation is disingenuous and constructively another tactic to weaken, delay and stop CROSQ's efforts to facilitate the adoption of FOPWL in CARICOM.

Private actors do not have any *de jure* right of participation. Moreover, although no right of participation inures to the industry, CROSQ's process significantly facilitates multi-stakeholder participation. However, this is a privilege, not a right. Industry is therefore estopped from claiming a right to participate, not only because

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<sup>79</sup> Andres Constantin, *Front-of-package warning labels—CARICOM can either follow science or protect private interests*, THE GLEANER, Jun. 11, 2021, <https://jamaica-gleaner.com/article/commentary/20210611/andres-constantin-front-package-warning-labels-caricom-can-either-follow>.

<sup>80</sup> Neville Graham, *Caricom to study, then pick, best-fit front labelling model*, THE GLEANER, Apr. 4, 2021, <https://jamaica-gleaner.com/article/business/20210404/caricom-study-then-pick-best-fit-front-labelling-model>.

the right does not exist, but because it has been privileged to participate in the process and a claim for participation indicates that such right or privilege has been interfered with, which not the case here.

In line with its Directive 1,<sup>81</sup> which sets out the rules and procedures CROSQ should comply with to meet international norms for standards creation, CROSQ develops harmonized standards as a cooperative network of National Standards Bureaux (NSBs). These Bureaux operate as the standards creation authority in their home nation.<sup>82</sup> The directors of each member nation's NSB sits on the CROSQ Council,<sup>83</sup> responsible for creating CROSQ policy and standards.<sup>84</sup> While NSBs comprise the CROSQ Council, stakeholders from private and public sectors support the organization's work and help formulate the standards.<sup>85</sup> Specifically, the CROSQ council delegates standards development to Regional Technical Committees whose membership may be drawn from regulated industries.<sup>86</sup> Of note, in the initial stages of the CROSQ process, the 2010 Regional Standard for Labelling of Pre-Packaged Foods underwent several rounds of consultations, including with the industry. In addition, in early 2021, CROSQ submitted the final draft standard of octagonal front-of-package warning labels for voting among CARICOM members. In some countries, for instance Jamaica, the industry was represented on the committee established by the NSB, providing it the opportunity to contribute to the discussions that led to that country's national position on FOPWL. Together, these facts indicate that the industry has had ample opportunity *vis-a-vis* CROSQ's process to weigh in on FOPWL. Either way, it may even be argued that the industry is granted too great a privilege since policy should be premised on conflict-free evidence and be less concerned about multi-stakeholder inclusion.

Industry's efforts to claim a right to participation are not only disingenuous, but

<sup>81</sup> This regional directive outlines the procedures that govern the technical work, as it pertains to the development and harmonization of regional standards and deliverables under the purview of CROSQ and conducted by CARICOM Member States, associated Member States, national standards bodies and the CROSQ Secretariat. The directive complies with the Agreement establishing the CARICOM Regional Organisation for Standards and Quality (CROSQ), CROSQ Rules of Procedure, WTO Agreement on Technical Barriers to Trade, Rules for the Structure and drafting of CARICOM Regional Standards, ISO/IEC 1994 Guide 59 – Code of Good Practice for Standardization, and ISO/IEC Directives Part 1: 2014, among other normative instruments related to standards creation.

<sup>82</sup> CROSQ *Directive 1*, CROSQ Presentation at ASTM, *supra* note 46.

<sup>83</sup> CROSQ *Directive 1*, *supra* note 46, at §3.1.8.

<sup>84</sup> CARICOM Regional Org. for Standards & Quality (Feb. 5, 2014), <https://website.crosg.org/organisation/>.

<sup>85</sup> *Id.*

<sup>86</sup> CROSQ *Directive 1*, *supra* note 46, at §3.1.16; *see also* CARICOM Regional Org. for Standards & Quality [CROSQ], *CARICOM Regional Standard: Labelling of Foods - Pre-Packaged Foods - Specifications*, at iv., CRS 5:201x (2018), <https://docplayer.net/186308627-Caricom-regional-standard.html> [hereinafter *CARICOM Regional Standard: Labelling of Foods*].

they represent an instance of corporate capture. Corporate capture refers to private actors' interference in decision-making processes to hinder the adoption and implementation of conflict-free, evidence-based laws and regulations.<sup>87</sup> Of note, the Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA) of the Inter-American Commission on Human Rights (IACHR) has classified corporate capture as a form of corruption on the basis that it is an activity predominantly performed by "private actors who have the power to influence the decision-making of state authorities and obtain a benefit from said decision-making power."<sup>88</sup> According to REDESCA, corporate capture implies direct violations of human rights insofar as "for the benefit of private interests the exercise of regulatory and supervisory functions of the States is weakened or canceled."<sup>89</sup> Furthermore, "[i]n these assumptions, corruption is used as a direct way to affect the protected rights, either as an obstacle to direct access to their full enjoyment or by reducing specific resources destined for their guarantee".<sup>53</sup> Finally, the undue influence of companies on public decision-makers, for the benefit of their interests, weakens democratic values and the rule of law, at the same time that "it can have a decisive influence on the respect and guarantee of human rights, increase inequality and poverty gaps".<sup>54</sup>

In this same sense, the ESCR Committee in the UN System and the Inter-American Court in the Inter-American Human Rights System have highlighted that States violate human rights by not effectively controlling the activities of companies that violate fundamental rights, prioritizing their interests to the detriment of recognized rights.<sup>90</sup> The precedents above manifest the inescapable duty of the States to take measures to prevent acts of corporate capture to satisfy their human rights obligations. Furthermore, according to the United Nations Guiding Principles on Business and Human Rights, companies have an autonomous responsibility to act with due diligence to prevent violations of fundamental rights<sup>58</sup>. Therefore, any tactics the food and beverage industry has used to interfere with the CROSQ process can be construed as corporate capture. This reasoning extends to narratives used to persuade governments to adopt laws and regulations, which are unfavourable to the industry, such as FOPWL.

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<sup>87</sup> Melissa Mialon & Fabio Gomes, *Public health and the ultra-processed food and drink products industry: Corporate political activity of major transnationals in Latin America and the Caribbean*, 22 PUB. HEALTH NUTR. 1 (2019), <https://pubmed.ncbi.nlm.nih.gov/30859929/>.

<sup>88</sup> Inter American Commission on Human Rights, *Corruption and Human Rights: Inter-American Standards: Approved by the Inter-American Commission on Human Rights*, (Dec. 6, 2019) <http://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf>

<sup>89</sup> *Id.*

<sup>90</sup> *Case of Indigenous Communities Members of the Lhaka Honhat Association (Our Land) v. Argentina*; Judgement; Series C No. 400; 221; Inter. Am. Ct. Hum. Rts. (Feb. 6, 2020); *See also* CESCR, General comment no. 24 (2017) on the obligations of States under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (Aug. 10, 2017), <https://www.refworld.org/docid/5beaecba4.html>;

Admittedly, all CARICOM member states have not fully embraced the Inter-American system. The abovementioned precedents may therefore be persuasive, but not binding on those states, as they are for Latin American countries. Of the fourteen member states that are members of the Organisation of American States, only six are parties to the American Convention on Human Rights — Barbados,<sup>91</sup> Dominica,<sup>92</sup> Grenada,<sup>93</sup> Haiti,<sup>94</sup> Jamaica,<sup>95</sup> and Suriname.<sup>96</sup> In addition, only Jamaica has recognised the competence of the Inter-American Commission on Human Rights, while Barbados, Haiti, and Suriname have recognised the Inter-American Court of Human Rights' jurisdiction.<sup>97</sup> Notwithstanding this, the views of the Inter-American Court and Commission are indicative of the international, or at least regional, consensus on the issue of corporate capture.

Although reflective of corporate capture, worldwide, the industry's right to participation claim is somewhat novel, showing that the industry has moved beyond targeting government officials, and are now targeting narratives being used to persuade governments and society in general to avoid regulation. This claim is even more powerful because the industry is using a human rights narrative to undermine an initiative premised on human rights. In the context of NCD prevention, States must guarantee the adoption of the policies recommended by scientific evidence free of conflict of interest and prevent companies from interfering in the decision-making processes.<sup>98</sup> As stated by the UN Special Rapporteur on the Right to Health, States must "counteract *decisively* the undue influence of companies in government decision-making, strengthening legal frameworks and safeguarding policies that protect the right to health, such as frontal warning labeling, against commercial interests and other particular interests of the food and beverage industry."<sup>99</sup> Along the same lines, it highlighted that "[t]he failure to regulate the activities of the food and beverage industry to prevent them from violating the right to health of others and to protect consumers from

<sup>91</sup> See Organisation of American States, *Basic Documents Pertaining to Human Rights in the Inter-American System*, *loc. cit.* note 12, p.41. Date of ratification: November 5, 1981.

<sup>92</sup> *Id.* Date of ratification: June 3, 1993.

<sup>93</sup> *Id.* Date of ratification: July 14, 1978.

<sup>94</sup> *Id.* Date of ratification: September 14, 1977.

<sup>95</sup> *Id.* Date of ratification: July 19, 1978.

<sup>96</sup> *Id.* Date of ratification: November 12, 1987.

<sup>97</sup> See STEPHEN VASCIANNIE, *CARIBBEAN ESSAYS ON LAW AND POLICY*, 112-113 (2020).

<sup>98</sup> O'NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW, FRONT LABELLING WARNING COMPLIANCE WITH HUMAN RIGHTS OBLIGATIONS AND COMPATIBILITY WITH OTHER INTERNATIONAL LEGAL FRAMEWORKS, [HTTPS://ONEILL.LAW.GEORGETOWN.EDU/WPCONTENT/UPLOADS/2021/02/ETIQUETADO\\_FRONTAL\\_ADVERTENCIAFINAL.PDF](https://oneill.law.georgetown.edu/wpcontent/uploads/2021/02/ETIQUETADO_FRONTAL_ADVERTENCIAFINAL.PDF)

<sup>99</sup> See Puras, *supra* note 32.

practices that are harmful to their health may constitute a violation of the right to health.”<sup>100</sup> By and large, FOPWL is a legal intervention premised on human rights.

### C. Co-opting decolonization and foreign intervention narrative

Implicit in the industry’s published opposition against FOPWL, is an insinuation that efforts to adopt and implement the measure are being driven by extraneous forces. In particular, the industry has tacitly argued that FOPWL is a ploy being used by international actors to “play” CARICOM and that states should exercise resilience against these anti-trade friendly efforts. The industry has classified FOPWL as a unique requirement that will choke productivity and is misaligned with global norms. At the same time, the industry argues for consideration to be given to FOPL models being used by metropolitan countries even though it has given cognizance to FOPWL as a Global South innovation. Unsurprisingly, the industry’s opposition is premised on trade-related rather than health concerns, echoing its call for consideration to be given to FOPL models used by major trading partners. Manifestly, the industry is attempting to utilize the decolonization-foreign-institution narrative to distract policymakers from the substantive matter—reducing the burden of diet-related NCDs. In doing so, the industry is making a bad faith argument, asking CROSQ to denounce scientific evidence coming from international organizations, such as PAHO and consider any externally suggested scheme to be a foreign intervention in internal affairs and a form of “colonization”. This argument should be dismissed as yet another industry tactic to undermine CROSQs FOPWL efforts by decentering public health and consolidating autonomy over the policymaking process.

Public health policies can profoundly impact people’s lives. To ensure that policies positively impact people’s lives and achieve the intended public health goal they should be evidence-based. Evidence-based policymaking refers to the practice of using data to inform the policy process, content, and outcome. Essentially, scientific evidence should be used to identify the specific issues requiring solutions and develop targeted strategies to deal with those issues. This approach comports with the international right to enjoy the benefits of science framework, which requires policymaking to be evidence-based. Article 15 of the ICESCR requires states to respect, protect and fulfill the right to participate in and to enjoy the benefits of scientific progress and its applications. This includes refraining from interfering with the enjoyment of the right to science, adopting measures to prevent any person or entity from doing so; and promoting the fulfillment of the right. In line with this obligation, states are required to integrate scientific advances into decision-making processes for the realization of other economic, social, and cultural rights, as well as the acceleration of social and economic development. In the context of NCDs, FOPL is an evidence-based

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<sup>100</sup> *Id.*

regulatory intervention. FOPWL is supported by scientific evidence free from conflict of interest, as noted above. While the industry has been granted a privilege to contribute to the policymaking process, it is not entitled to control the process nor dictate what kind of evidence should be used in determining the appropriate FOPL. This determination should be guided by states' right to science obligations. The unsustainable basis of the industry's position also lays bare its quest to use the decolonization-foreign-institution narrative to choke CROSOs FOPWL efforts. The industry, in its quest to undermine the conflict-free scientific evidence underpinning FOPWL, has argued that while warning labels have helped to change consumer behavior, they have not been proven effective in reducing diet-related NCDs. Therefore, CROSO should not adopt FOPWL but allow the industry time to conduct an independent impact assessment in which it will consider FOPL schemes used by its major trading partners –all of which are developed countries. Again, the industry is advocating for special consideration to external systems developed for use in those spaces to be transplanted to the region. At the same time, it is arguing that extraneous forces are pushing for FOPWL. The glaring irreconcilability of the industry's arguments shows that its intention is not to find the best policy for the region but to transplant weaker and ineffective FOPL systems to the region.

### 3. CONCLUSION

It is undeniable that corporations will continue to find new ways to manoeuvre and interfere in developing public health policies; what should be clear enough is that their efforts should be carefully guarded against and should never find a place in the universe of human rights. The experience of CARICOM's efforts to adopt front-of-package warning labels to tackle the rising rates of diet-related noncommunicable diseases in the region serves as a cautionary tale for similar efforts in Latin America.

The food and beverage industry capture of the State undermines human rights, the Rule of Law, the public interest and, ultimately democracy itself. The undue influence of food and beverage companies in public health policymaking impacts the protection of fundamental rights. It directly affects the enjoyment of the rights to health and adequate food, by opposing and hindering the adoption of measures of proven effectiveness to discourage the consumption of unhealthy products; hence, frustrating efforts to prevent their negative impacts on health.

Accordingly, any meaningful effort to protect public health needs to give priority to safeguarding decision-making processes from private sector capture. There also needs to be clear procedures for public access to information about these processes and accountability in respect of the decisions reached, particularly where they are counter to public health and the interests of the society more broadly. Governments and civil society actors must also be prepared to challenge industry's

attempts to set the narrative by ensuring that they equip themselves with the knowledge and the evidence to counter and neutralise these efforts.

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