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Introduction

Lawfare and Evidence in the International Law on Tobacco Control

This book is about the international law on tobacco control. If you have never heard about it, it is because this is the first book that attempts to analyse it systematically. Although this is a niche area of international law, I have found it to encapsulate many of the most interesting and vital debates of our discipline, including the functioning of international organisations, the role of corporate actors and civil society organisations, and the importance and limits of science in law-making and litigation.

The following sections provide some background information on the contours and evolution of the international law on tobacco control, as well as an illustration of the merits of the investigative lenses I chose for this book: lawfare and evidence. The introduction concludes with an explanation of the methodology employed, a reflection on its limits, and an outline of the chapters.

1.1 Lawfare

1.1.1 The Tobacco Wars

Tobacco control is a field characterised by a high degree of conflict, to say the least. Modern regulation of tobacco is generally considered to have started in the 1950s or 1960s, when the first solid evidence of the hazardous effects of tobacco smoking emerged. After this point, it became much more difficult to deny what doctors had suspected for decades, or even centuries: tobacco products (and cigarettes in particular) are hazardous products that have severe and often fatal consequences on...
the health of the people who smoke them. The solution was ostensibly self-evident: tobacco products should be strictly regulated to limit their consumption.

However, tobacco control efforts did not follow with as much promptness as the doctors might have expected. By 1982, only fifty-seven countries had enacted some form of tobacco control legislation. By 1993, the number had risen to ninety-one, but only a few had adopted comprehensive tobacco control programmes. And by 1997, it was estimated that there were only ten countries with a truly comprehensive tobacco control programme: Australia, New Zealand, France, Sweden, Thailand, Norway, Finland, Iceland, Portugal, and Singapore – with only two countries not in the West. Estimates on the number of premature deaths due to tobacco smoking still appeared grim. Speculating about the causes of the delay, it appeared evident that one major obstacle to regulation was opposition by the tobacco industry.

By the 1990s, public health advocates already had strong opinions on the activities that the tobacco industry engaged in to defend its products. These views were confirmed in the mid-1990s, when the internal documents of the major tobacco companies of the United States (US) were unveiled during the pre-trial discovery phase of domestic litigation. Since then, millions of documents have been made publicly available, allowing researchers to give us a fuller picture of the nature and scale of the ‘tobacco tactics’. 

3 Roemer, Legislative Action to Combat the World Tobacco Epidemic, p. xi.
6 Roemer, Legislative Action to Combat the World Tobacco Epidemic, pp. 1 and 5.
7 Ibid., p. 165.
8 See, for example, some papers on the tobacco industry strategies that were presented at the World Conferences on Tobacco or Health: Tobacco and Health: Proceedings of the Ninth World Conference on Tobacco and Health Held October 10–14, 1994, in Paris, France, edited by Karen Slama (Springer Science+Business Media, 1995); Lu et al., Tobacco: The Growing Epidemic.
We now know that cigarettes have been carefully engineered to be as pleasurable and as addictive as possible. The tobacco industry has employed sophisticated marketing strategies to target young adults, as well as women, ethnic minorities, and generally any groups of people with 'specific psychological and psychosocial needs'. It has designed cigarette packs to make them look more attractive. It has used flavours such as menthol to make cigarette smoking less harsh and appear safer. It has started marketing 'light' and 'low-tar' cigarettes to prevent increasingly risk-aware smokers from quitting, despite evidence showing that they are not less harmful.

In addition to refining its marketing tools, the tobacco industry has widely interfered with policymaking. In 1953, the main US tobacco


companies joined forces and started a decades-long campaign to oppose tobacco control regulations.\textsuperscript{19} To this end, the industry has used murky and aggressive lobbying strategies at all levels of regulation, from domestic jurisdictions\textsuperscript{20} to the European Union (EU)\textsuperscript{21} and the World Health Organization (WHO).\textsuperscript{22} Even after the disclosure of the tobacco tactics documents in the 1990s, the tobacco industry tried in all possible ways to oppose or water down the negotiations of the WHO-sponsored treaty on tobacco, the Framework Convention on Tobacco Control\textsuperscript{23} (FCTC, 2000–3).\textsuperscript{24} Today, the tobacco industry is still actively engaged in hindering the implementation and elaboration of the FCTC.\textsuperscript{25} Old tactics are being used in new ways, and litigation appears to be increasingly employed.\textsuperscript{26} It seems that, even though their tactics have been revealed, the tobacco industry has not stopped using them; on the contrary, they have arguably become more blatantly antagonistic.

After decades of fights, the tobacco industry’s tactics have effectively shaped the attitude that the WHO and public health advocates take vis-à-vis the industry. The gold standard policy is now that of complete exclusion of the tobacco industry, and outright distrust of any of its


\textsuperscript{23} WHO Framework Convention on Tobacco Control (signed on 21 May 2003 and entered into force on 27 February 2005), 2303 UNTS 166.


proposals or actions. The tobacco industry is the only industry, other than the arms industry, that is not permitted to engage with the WHO. Many advocates would agree that their ultimate goal is to drive the tobacco industry out of business. The belief, as Lawrence Gostin put it, is that the tobacco industry would ‘best contribute to public health by disappearing.

The polarisation of the field of tobacco control is exceptional in the field of public health regulation – and arguably more broadly. The food and alcohol industries have employed unscrupulous tactics against public health regulation, possibly following the tobacco industry’s ‘playbook’. However, in most cases, they are still considered a partner for regulation. They are allowed, if not invited, to meet with policymakers. The same is true of many other industries whose underground activities against public interest have also been widely exposed.

This polarisation has made regulatory efforts unprecedentedly confrontational – and, in effect, warlike. A militarised expression, ‘tobacco wars’, is indeed used in the scholarship to refer to the struggle of enacting tobacco control regulations in the context of the tenacious lobbying efforts by the tobacco industry, and of the subsequent aggressive lawsuits. The war language has been profusely used also in the context of the international law on tobacco control. Judith Mackay, one of the main promoters of the FCTC, called the war on tobacco in low- and

27 WHA, Resolution ‘Framework of Engagement with Non-State Actors’ (2016), Article 44.
middle-income countries the ‘Third World War’ and recommended following the advice of General Sun Tzu to win it.\footnote{J. Mackay, ‘Tobacco: The Third World War – Advice from General Sun Tzu’ (1996) 51 Thorax 562–63.} Heather Wipfli, one of the advocates involved in the FCTC negotiations, dubbed the making of the FCTC the ‘global war on tobacco’.\footnote{H. Wipfli, The Global War on Tobacco: Mapping the World’s First Public Health Treaty (Johns Hopkins University Press, 2015).} News on the relentless lobbying efforts by the tobacco industry has been commented on by the former Head of the FCTC Secretariat declaring: ‘it’s a real war’.\footnote{‘Inside Philip Morris’ Push to Subvert the Global Anti-smoking Treaty’.}

For the purposes of this book, I refer to the two opposing factions as the tobacco control network and the tobacco industry. The former includes all the actors supporting tobacco control regulation: civil society organisations, scientists, academics, officials from international organisations, as well as States committed to tobacco control.\footnote{M. E. Keck and K. Sikkink, Activists beyond Borders: Advocacy Networks in International Politics (Cornell University Press, 1998).} The latter faction includes not only the transnational tobacco companies (Philip Morris International, British American Tobacco, and Japan Tobacco International), but also the academics, scientists, and any other individuals supporting the tobacco industry. In some cases, this category also includes the States with strong interests in tobacco growth or manufacturing (like the US, Japan, or Indonesia).

### 1.1.2 The International Tobacco Control Lawfare

This book focuses on the transformation of the domestic tobacco wars into an international warlike effort. The main argument is that, since the 1990s, international law has been used as a double-edged tool: to spur action at the domestic level and at the same time to deter domestic regulation. This confrontation has occurred in three main battles, which are analysed in this book. The first battle was the negotiation of the FCTC. Chapter 2 examines how, under the auspices of the WHO, a group of like-minded individuals has promoted the negotiation of an international treaty on tobacco control, the FCTC. The conclusion of the FCTC has allowed the scaling up of existing domestic efforts to promote the adoption of tobacco control measures.\footnote{P. Cairney, H. Mamudu, and D. Studlar, Global Tobacco Control: Power, Policy, Governance and Transfer (Palgrave Macmillan, 2012), chap. 8.} After it entered into force in
2005, the FCTC has continued to serve the cause, becoming the main hub for intergovernmental discussions on tobacco control and continuing to provide guidance to its Members. This, as explained in Chapter 3, represents the second battle of the international law war on tobacco control.

The third battle is the litigation battle, examined in Chapter 4. As a counter-offensive against the successes of the FCTC, the tobacco industry lodged a wave of disputes before international courts and tribunals (ICTs) against the tobacco control measures adopted by some States. These lawsuits have been regarded as the international law extension of the tobacco tactics, with one of their main goals being to delay and hamper tobacco control regulation. The number and types of different ICTs involved are already impressive: the European Free Trade Association Court (EFTA Court), the Court of Justice of the European Union (CJEU), the WTO dispute settlement system, and two investment tribunals – one established under the United Nations Commission on International Trade Law (UNCITRAL) rules and one under the International Centre for Settlement of Investment Disputes (ICSID) rules. To my knowledge, no other industry has ever had recourse to so many different bodies and sub-areas of international law.

To underline the antagonistic dimension that underpins the international law on tobacco control, I use the concept of ‘lawfare’. This term has been coined as a ‘blend of law and warfare’ to capture the idea of using law ‘as part of a hostile campaign against a country or group’. International law has started using the term lawfare relatively recently, and with different meanings. Some authors and practitioners have employed lawfare as a pejorative term, to discredit the legal actions taken against governments in the context of a conflict or of national security


40 A comprehensive list of the cases is provided in Chapter 4.


more broadly. In its original intention, however, lawfare was employed as a value-free term to describe the increasing use of law as an alternative or complement to military action, as well as to reflect critically on this development. In the words of the author who popularised it, the original concept of lawfare was limited to describing a strategy in which law is used as a ‘weapon’, which in turn ‘can be used for good or bad purposes’.

Following the original meaning of the term, I use the concept of ‘lawfare’ as a descriptive, value-free tool in order to narrate the increasing emergence of the ‘international law on tobacco control’ as a battle between two factions (the tobacco control network and the tobacco industry), in which the events (the making of the FCTC and the subsequent litigation) are closely linked.

1.1.3 Lawfare as an Approach to Studying Strategic Aspects of Treaty-Making, Treaty Compliance, and International Litigation

In addition to being a powerful and captivating descriptive device, the concept of lawfare allows me to explore and narrate the international law on tobacco control from the angle of strategic actions.

The concept of lawfare was initially created for an action-oriented and practical objective: to explain to high-ranking military officials why law needed to be an important tool in their planning. Similarly, I use the lawfare concept for an equally concrete purpose, which is to understand how international law has been used in the context of a significant conflict in the domain of public health. In adopting this dynamic viewpoint, this book deliberately chooses to focus on the actions of the actors


involved in the international tobacco control lawfare (the tobacco control network and the tobacco industry, introduced above).

To this end, this book draws from several different traditions in legal scholarship and international relations, borrowing additional insights from sociology and public health. Despite being influenced by constructivist scholarship, the book does not adopt a unitary theory or a single method of inquiry. Rather, it belongs to the recent body of international law projects that go beyond the traditional disciplinary barriers to study the processes that influence the production of international law.

The approach chosen by this book opens the door to investigate the strategic aspects of international tobacco control lawfare. In its original definition, lawfare was conceived as a strategy, and specifically as a strategy to wage war with alternative, non-military means.

By the same token, I see the international tobacco control lawfare as a strategy to escalate the conflict between the tobacco control network and the tobacco industry from its original locus belli (domestic jurisdictions).

The choice to focus on this aspect of the story reflects the increased attention by the literature to strategic approaches to international law-making, to rule of law promotion and diffusion, and to international litigation. The growing attention paid to discourses or narratives can

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50 Dunlap, 'Does Lawfare Need an Apologia?'.


also be considered part of this trend, as these are often used as strategic tools. Although these works do not represent a cohesive body of scholarship, I view them as expressing a common interest in how actors avail themselves of the indeterminacy and flexibility of international law to achieve their own goals and to influence the production of international law.

Undoubtedly, ‘strategy’ is a catch-all word used in a variety of ways. Different authors use the concept of strategy for different purposes: to draw insights from strategic studies in international relations, from the literature on strategic management, from Bourdieusian reflexive sociology, or to reflect a focus on the dynamic relationship between law and politics. For the purposes of this book, ‘strategy’ is used in its ordinary meaning to describe a ‘plan of action designed to achieve a long-term or overall aim’.

By focusing on strategic approaches as a tool for lawfare, this book contributes to three main strands of scholarship. The first contribution is an analysis of some of the tools available to the secretariats of international organisations to carry out strategic actions (Chapter 2). The second contribution is a reflection on the effects of different strategies on fostering treaty compliance (Chapter 3). Finally, the last contribution


55 Grimal, Threats of Force.

56 McInerney, Strategic Treaty Management.


58 Ranganathan, Strategically Created Treaty Conflicts and the Politics of International Law.

