Weaponising Evidence provides the first analysis of the history of the international law on tobacco control. By relying on a vast set of empirical sources, it analyses the negotiation of the WHO Framework Convention on Tobacco Control (FCTC) and the tobacco control disputes lodged before the WTO and international investment tribunals (Philip Morris v Uruguay and Australia – Plain Packaging). The investigation focuses on two main threads: the instrumental use of international law in the warlike confrontation between the tobacco control advocates and the tobacco industry, and the use of evidence as a weapon in the conflict. The book unveils important lessons on 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.

Margherita Melillo is an associate at the O’Neill Institute for National and Global Health Law of Georgetown University, where she works on research, training, and advocacy for non-communicable diseases prevention policies.
Established in 1946, this series produces high-quality, reflective and innovative scholarship in the field of public international law. It publishes works on international law that are of a theoretical, historical, cross-disciplinary or doctrinal nature. The series also welcomes books providing insights from private international law, comparative law and transnational studies which inform international legal thought and practice more generally.

The series seeks to publish views from diverse legal traditions and perspectives, and of any geographical origin. In this respect it invites studies offering regional perspectives on core problématiques of international law, and in the same vein, it appreciates contrasts and debates between diverging approaches. Accordingly, books offering new or less orthodox perspectives are very much welcome. Works of a generalist character are greatly valued and the series is also open to studies on specific areas, institutions or problems. Translations of the most outstanding works published in other languages are also considered.

After seventy years, Cambridge Studies in International and Comparative Law sets the standard for international legal scholarship and will continue to define the discipline as it evolves in the years to come.

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Professor of International Law, University of Manchester and Sciences Po Law School

A list of books in the series can be found at the end of this volume.
WEAPONISING EVIDENCE

A History of Tobacco Control in International Law

MARGHERITA MELILLO

O’Neill Institute for National and Global Health Law, Georgetown University
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Studying at the Scuola Superiore Sant’Anna also gave me the opportunity to learn a great deal from incredible lecturers and talented students. The opportunities that the Scuola gave me (particularly early exposure to research, and funding for unpaid internships) have been pivotal in defining my research interests and my whole academic persona. I am immensely grateful to the Italian Ministry of Education for this exceptional education. I hope one day I will be able to truly pay this back.

Like many international lawyers, my interest in tobacco control started with the plain packaging saga, which I chose as the topic of my final dissertation in law school. I am very grateful to Giuseppe Martinico and to the late Paolo Carrozza for supporting me in my choice and for encouraging me to pursue my interest by applying for a PhD.

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After many years of working on parallel tracks, we now share an adorable joint project named Bruno, who gives us unparalleled joy – and who has even been helpful, for he acted as a hard deadline for this book.

Washington DC,
CHRONOLOGY

1950s Publication of the first studies presenting solid evidence linking tobacco smoking to lung cancer.
1962 First report on smoking of the Royal College of Physicians of London.
1964 First report by the US Surgeon General.
1970 The WHO starts working and making recommendations on tobacco control.
1993–94 Ruth Roemer (professor and WHO consultant) meets Allyn Taylor (PhD student); they develop the idea of a treaty on tobacco control and start advocating for it.
1994–98 Publication of the 'tobacco papers’, proving that the tobacco industry had engaged in a decades-long activity of lobbying against tobacco control measures.
1995 The WHO Executive Board first and the WHA later adopt resolutions requesting the Director-General of the WHO to draft a report ‘on the feasibility of developing an international instrument . . . to be adopted by the United Nations'; the background paper for the report is prepared by Allyn Taylor and Ruth Roemer.
1996 The WHA requests the Director-General to start the negotiations for a framework convention on tobacco control.
1998 Gro Harlem Brundtland is elected WHO Director-General and decides to make tobacco one of her two cabinet projects; on her input, the WHO Secretariat starts the technical preparatory work for the negotiation of the FCTC.
1999 The World Bank releases its ‘Curbing the Epidemic’ report during the WHA; the WHA formally establishes the INB for the negotiations.
1999–2000 Pre-negotiations; a working group is established with the task of preparing a first draft of the FCTC for the INB.
2000–3 FCTC negotiations.
2003 The first commercially successful ENDS are invented in China.
2004–5 Open-ended Intergovernmental Working Group, tasked with organising the work of the FCTC once it enters into force.
2005 The FCTC enters into force.
2006 The first COP of the FCTC takes place.
ENDS introduced in European and US markets.

2006–16 Elaboration and adoption of the guidelines for implementation of the FCTC by the COP.

2010 Request for arbitration under ICSID rules by Philip Morris against two tobacco control measures adopted by Uruguay.

2012–13 Requests for consultations in accordance with the rules of the WTO dispute settlement system by Ukraine, Indonesia, Honduras, Cuba, and the Dominican Republic against the plain packaging measure adopted by Australia.

2014 Lodging of disputes challenging the new EU Directive on tobacco control before the CJEU (either directly or through preliminary rulings).
The first HTP (IQOS, developed by Philip Morris) is introduced in selected pilot markets: Italy and Japan.

2016 The rulings by the CJEU and by the ICSID tribunal uphold the tobacco control measures.

2018 The WTO panels uphold the plain packaging measure introduced by Australia.
Adoption of the Global Strategy at the COP.

2020 The WTO Appellate Body upholds the panels’ ruling
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- R (on the Application of) Philip Morris Brands SARL, et al. v Secretary of State for Health, (4 May 2016), C-547/14

**European Free Trade Association (EFTA) Court**

- Philip Morris Norway AS v The Norwegian State, (12 September 2011), E-16/10

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- Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay, (8 July 2016), ICSID Case No. ARB/10/7

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- Philip Morris Asia Limited v The Commonwealth of Australia, (8 March 2017), PCA Case No. 2012-12
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Appellate Body Report, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, (9 June 2020), WT/DS435/AB/R

Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, (3 December 2007), WT/DS332/R


Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, (22 May 2014), WT/DS401/AB/R

Appellate Body Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, (18 May 2011), WT/DS316/AB/R


Appellate Body Report, United States – Continued Suspension of Obligations in the EC – Hormones Dispute, (16 October 2008), WT/DS320/AB/R

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<td>(20 October 2015), WT/DS384/R</td>
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<td>Panel Report, United States – Continued Suspension of Obligations in the EC –</td>
<td>Hormones Dispute, (31 March 2008), WT/DS320/R</td>
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<td>Panel Report, United States – Measures Affecting the Production and Sale of Clove</td>
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<td>Switzerland</td>
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<tr>
<td>Australia</td>
<td>Hong Kong</td>
<td>Bilateral Investment Treaty (signed on 26 March 2019 and entered into effect on 17 January 2020)</td>
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### International Instruments

- The International Convention for the Regulation of Whaling, Washington, DC (signed on 3 December 1946 and came into effect on 10 November 1948), 364 UNTS 1953
- General Agreement on Tariffs and Trade, Geneva (signed on 30 October 1947 and entered into effect on 1 January 1948), Marrakesh Agreement Establishing the World Trade Organization, Annexe 1A, 1867 UNTS 187, 33 ILM 1153 (1994)
- International Convention for the Prevention of Pollution from Ships (signed on 2 October 1973 and entered into force on 2 October 1983), MARPOL 73/78
- Vienna Convention for the Protection of the Ozone Layer, Vienna (signed on 22 March 1985 and entered into force in 1988), 26 ILM 1516
- The Montreal Protocol on Substances That Deplete the Ozone Layer, Montreal (adopted on 16 September 1987 and entered into force on 1 January 1989), No. 26369
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The Agreement on the Application of Sanitary and Phytosanitary Measures (entered into effect on 1 January 1995)


Protocol to Eliminate Illicit Trade in Tobacco Products, Geneva (signed on 10 January 2013 and entered into force on 25 September 2018), ISBN 9789241505246ik
ABBREVIATIONS

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<tr>
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<tr>
<td>1999–2000 WG</td>
<td>pre-negotiation working group tasked with preparing the elements of the FCTC</td>
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<tr>
<td>2004–2005 WG Open-ended Intergovernmental Working Group</td>
<td></td>
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<tr>
<td>BIT</td>
<td>bilateral investment treaty</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<tr>
<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>EFTA Court</td>
<td>Court of the European Free Trade Association</td>
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<tr>
<td>ENDS</td>
<td>Electronic Nicotine Delivery System</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>COP</td>
<td>Conference of the Parties of the Framework Convention on Tobacco Control</td>
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<tr>
<td>FCA</td>
<td>Framework Convention Alliance, recently renamed Global Alliance for Tobacco Control (GATC)</td>
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<tr>
<td>FCTC</td>
<td>Framework Convention on Tobacco Control</td>
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<tr>
<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
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<tr>
<td>ICI</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTs</td>
<td>international courts and tribunals</td>
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<tr>
<td>IHR</td>
<td>International Health Regulations</td>
</tr>
<tr>
<td>INB</td>
<td>International Negotiating Body</td>
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<tr>
<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<tr>
<td>Montreal Protocol</td>
<td>Montreal Protocol on Substances that Deplete the Ozone Layer</td>
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<tr>
<td>Ozone Treaty</td>
<td>Vienna Convention on the Protection of the Ozone Layer</td>
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<tr>
<td>PAHO</td>
<td>Pan-American Health Organization</td>
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<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<tr>
<td>PMI</td>
<td>Philip Morris International (sometimes also referred to as Philip Morris)</td>
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<tr>
<td>SPS Agreement</td>
<td>WTO Agreement on the Application of Sanitary and Phytosanitary Measures</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>TBT Agreement</td>
<td>WTO Agreement on Technical Barriers to Trade</td>
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<tr>
<td>TFI</td>
<td>Tobacco Free Initiative, a unit of the WHO Secretariat established in 1998</td>
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<tr>
<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCTIRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WHO</td>
<td>World Health Organization</td>
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<tr>
<td>WHO Executive Board</td>
<td>Executive Board of the World Health Organization</td>
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<td>World Trade Organization</td>
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