

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.¹ 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

¹ R. Roemer, *Legislative Action to Combat the World Tobacco Epidemic*, 2nd ed. (WHO, 1993), p. 2; R. Doll, 'Tobacco: A Medical History' (1999) 76 *Journal of Urban Health* 289–313 at 304; D. Reubi and V. Berridge, 'The Internationalisation of Tobacco Control, 1950–2010' (2016) 60 *Medical History* 453–72 at 456.

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.² By 1982, only fifty-seven countries had enacted some form of tobacco control legislation.³ By 1993, the number had risen to ninety-one, but only a few had adopted comprehensive tobacco control programmes.⁴ 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.⁵ Estimates on the number of premature deaths due to tobacco smoking still appeared grim.⁶ Speculating about the causes of the delay, it appeared evident that one major obstacle to regulation was opposition by the tobacco industry.⁷

By the 1990s, public health advocates already had strong opinions on the activities that the tobacco industry engaged in to defend its products.⁸ 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.⁹ 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’.¹⁰

² Doll, ‘Tobacco’, p. 309.

³ Roemer, *Legislative Action to Combat the World Tobacco Epidemic*, p. xi.

⁴ R. Roemer, ‘A Brief History of Legislation to Control the Tobacco Epidemic’, in *Tobacco: Science, Policy and Public Health*, edited by Peter Boyle, Nigel Gray, Jack Henningfield, John Seffrin, and Witold Zatonski (Oxford University Press, 2004), p. 682.

⁵ R. Lu, J. Mackay, S. Niu, and R. Peto, *Tobacco: The Growing Epidemic: Proceedings of the Tenth World Conference on Tobacco or Health, 24–28 August 1997, Beijing, China* (Springer Science & Business Media, 2000), p. 413.

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*.

⁹ S. A. Glantz, L. A. Bero, J. Slade, D. E. Barnes, and P. Hanauer, *The Cigarette Papers* (University of California Press, 1998).

¹⁰ L. Bero, ‘Implications of the Tobacco Industry Documents for Public Health and Policy’ (2003) 24 *Annual Review of Public Health* 267–88; A. Brandt, *The Cigarette Century: The*

We now know that cigarettes have been carefully engineered to be as pleasurable and as addictive as possible.¹¹ The tobacco industry has employed sophisticated marketing strategies to target young adults,¹² as well as women,¹³ ethnic minorities,¹⁴ and generally any groups of people with ‘specific psychological and psychosocial needs’.¹⁵ It has designed cigarette packs to make them look more attractive.¹⁶ It has used flavours such as menthol to make cigarette smoking less harsh and appear safer.¹⁷ 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.¹⁸

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

Rise, Fall, and Deadly Persistence of the Product That Defined America (Basic Books, 2009); R. N. Proctor, *Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition* (University of California Press, 2012); University of California, ‘Truth Tobacco Industry Documents’, www.industrydocuments.ucsf.edu/tobacco/ (last accessed 10 October 2022); University of Bath, ‘Tobacco Tactics’, <https://tobaccotactics.org/> (last accessed 10 October 2022).

- ¹¹ Food and Drug Administration, ‘How a Cigarette Is Engineered’ (April 2019), www.fda.gov/tobacco-products/products-ingredients-components/how-cigarette-engineered (last accessed 6 October 2022).
- ¹² P. M. Ling and S. A. Glantz, ‘Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence from Industry Documents’ (2002) 92 *American Journal of Public Health* 908–16.
- ¹³ C. M. Carpenter, G. F. Wayne, and G. N. Connolly, ‘Designing Cigarettes for Women: New Findings from the Tobacco Industry Documents’ (2005) 100 *Addiction* 837–51.
- ¹⁴ M. E. Muggli, R. W. Pollay, R. Lew, and A. M. Joseph, ‘Targeting of Asian Americans and Pacific Islanders by the Tobacco Industry: Results from the Minnesota Tobacco Document Depository’ (2002) 11 *Tobacco Control* 201–9; E. D. Balbach, R. J. Gasior, and E. M. Barbeau, ‘R.J. Reynolds’ Targeting of African Americans: 1988–2000’ (2003) 93 *American Journal of Public Health* 822–27.
- ¹⁵ D. E. Apollonio and R. E. Malone, ‘Marketing to the Marginalised: Tobacco Industry Targeting of the Homeless and Mentally Ill’ (2005) 14 *Tobacco Control* 409–15.
- ¹⁶ M. Wakefield, C. Morley, J. K. Horan, and K. M. Cummings, ‘The Cigarette Pack as Image: New Evidence from Tobacco Industry Documents’ (2002) 11 *Tobacco Control* i73–80.
- ¹⁷ G. F. Wayne and G. N. Connolly, ‘Application, Function, and Effects of Menthol in Cigarettes: A Survey of Tobacco Industry Documents’ (2004) 6 *Nicotine & Tobacco Research* S43–54; S. J. Anderson, ‘Marketing of Menthol Cigarettes and Consumer Perceptions: A Review of Tobacco Industry Documents’ (2011) 20 *Tobacco Control* ii20–28.
- ¹⁸ N. A. Rigotti and H. A. Tindle, ‘The Fallacy of “Light” Cigarettes’ (2004) 328 *British Medical Journal* E278–79; J. K. Cataldo and R. E. Malone, ‘False Promises: The Tobacco Industry, “Low Tar” Cigarettes, and Older Smokers’ (2008) 56 *Journal of the American Geriatrics Society* 1716–23.

companies joined forces and started a decades-long campaign to oppose tobacco control regulations.¹⁹ To this end, the industry has used murky and aggressive lobbying strategies at all levels of regulation, from domestic jurisdictions²⁰ to the European Union (EU)²¹ and the World Health Organization (WHO).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 Control²³ (FCTC, 2000–3).²⁴ Today, the tobacco industry is still actively engaged in hindering the implementation and elaboration of the FCTC.²⁵ Old tactics are being used in new ways, and litigation appears to be increasingly employed.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

¹⁹ N. Oreskes and E. M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming*, rept ed. (Bloomsbury Press, 2011), pp. 14–15.

²⁰ J. Barnoya and S. Glantz, 'Tobacco Industry Success in Preventing Regulation of Secondhand Smoke in Latin America: The "Latin Project"' (2002) 11 *Tobacco Control* 305–14; K. Alechnowicz and S. Chapman, 'The Philippine Tobacco Industry: "The Strongest Tobacco Lobby in Asia"' (2004) 13 *Tobacco Control* ii71–78.

²¹ M. Neuman, A. Bitton, and S. Glantz, 'Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation' (2002) 359 *The Lancet* 1323–30.

²² World Health Organization, 'Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization: Report of the Committee of Experts on Tobacco Industry Documents' (2000), <https://apps.who.int/iris/handle/10665/67429>.

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

²⁴ H. M. Mamudu, R. Hammond, and S. Glantz, 'Tobacco Industry Attempts to Counter the World Bank Report Curbing the Epidemic and Obstruct the WHO Framework Convention on Tobacco Control' (2008) 67 *Social Science & Medicine* 1690–99; H. Weishaar et al., 'Global Health Governance and the Commercial Sector: A Documentary Analysis of Tobacco Company Strategies to Influence the WHO Framework Convention on Tobacco Control' (2012) 9 *PLOS Medicine* e1001249.

²⁵ Reuters, 'Inside Philip Morris' Push to Subvert the Global Anti-smoking Treaty', www.reuters.com/investigates/special-report/pmi-who-fctc/ (last accessed 22 May 2018).

²⁶ S. A. Bialous, 'Impact of Implementation of the WHO FCTC on the Tobacco Industry's Behaviour' (2019) 28 *Tobacco Control* s94–96.

proposals or actions. The tobacco industry is the only industry, other than the arms industry, that is not permitted to engage with the WHO.²⁷ Many advocates would agree that their ultimate goal is to drive the tobacco industry out of business.²⁸ The belief, as Lawrence Gostin put it, is that the tobacco industry would ‘best contribute to public health by disappearing’.²⁹

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’.³⁰ 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.³¹

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.³² 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.

²⁸ N. Huet, ‘WHO’s Strategy to Put Big Tobacco “Out of Business”’ (May 2016), www.politico.eu/article/the-whos-strategy-to-put-big-tobacco-out-of-business-margaret-chan-tax-cigarettes-labeling-rules-trade/ (last accessed 11 January 2020).

²⁹ B. Thomas and L. O. Gostin, ‘Tackling the Global NCD Crisis: Innovations in Law and Governance’ (2013) 41 *The Journal of Law, Medicine & Ethics* 16–27.

³⁰ K. D. Brownell and K. E. Warner, ‘The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?’ (2009) 87 *The Milbank Quarterly* 259–94; Vital Strategies, *Fool Me Twice – An NCD Advocacy Report* (2017), www.vitalstrategies.org/wp-content/uploads/2019/06/FoolMeTwice_Report.pdf (last accessed 17 July 2019); M. Nestle, *Unsavory Truth: How Food Companies Skew the Science of What We Eat* (Hachette UK, 2018).

³¹ D. Michaels, *Doubt Is Their Product: How Industry’s Assault on Science Threatens Your Health* (Oxford University Press, 2008); D. Michaels, *The Triumph of Doubt: Dark Money and the Science of Deception* (Oxford University Press, 2020); M. E. Mann, *The New Climate War: The Fight to Take Back Our Planet* (Hachette UK, 2021).

³² R. Cunningham and I. D. R. Centre (Canada), *Smoke & Mirrors: The Canadian Tobacco War* (IDRC, 1996); S. A. Glantz and E. D. Balbach, *Tobacco War: Inside the California Battles* (University of California Press, 2000); K. E. Smith, ‘Understanding the Influence of Evidence in Public Health Policy: What Can We Learn from the “Tobacco Wars”?’ (2013) 47 *Social Policy & Administration* 382–98.

middle-income countries the ‘Third World War’ and recommended following the advice of General Sun Tzu to win it.³³ Heather Wipfli, one of the advocates involved in the FCTC negotiations, dubbed the making of the FCTC the ‘global war on tobacco’.³⁴ 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’.³⁵

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.³⁶ 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.³⁷ After it entered into force in

³³ J. Mackay, ‘Tobacco: The Third World War – Advice from General Sun Tzu’ (1996) 51 *Thorax* 562–63.

³⁴ H. Wipfli, *The Global War on Tobacco: Mapping the World’s First Public Health Treaty* (Johns Hopkins University Press, 2015).

³⁵ ‘Inside Philip Morris’ Push to Subvert the Global Anti-smoking Treaty’.

³⁶ M. E. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

³⁷ P. Cairney, H. Mamudu, and D. Studlar, *Global Tobacco Control: Power, Policy, Governance and Transfer* (Palgrave Macmillan, 2012), chap. 8.

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.³⁸ 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.³⁹ 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.⁴⁰ 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’.⁴¹ International law has started using the term lawfare relatively recently, and with different meanings.⁴² 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

³⁸ J. Liberman, ‘Four COPs and Counting: Achievements, under Achievements and Looming Challenges in the Early Life of the WHO FCTC Conference of the Parties’ (2012) 21 *Tobacco Control* 215–20; L. Gruszczynski, ‘FCTC’s COP6 Meeting and Its Implications for Tobacco Control Policies’ (2014) 5(4) *European Journal of Risk Regulation* 537–42; L. Gruszczynski, ‘COPing with the Global Tobacco Epidemic: FCTC COP7 and Its Implications’ (2017) 8 *European Journal of Risk Regulation* 428–36.

³⁹ S. Puig, ‘Internationalization of Tobacco Tactics’ (2017) 28 *Duke Journal of Comparative & International Law* 495.

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

⁴¹ ‘Lawfare | Definition of Lawfare in English by Oxford Dictionaries’, <https://web.archive.org/web/20211203170856/www.lexico.com/en/definition/lawfare>.

⁴² W. G. Werner, ‘The Curious Career of Lawfare Historical and Semiotic Origins of Lawfare’ (2010) 43 *Case Western Reserve Journal of International Law* 61–72.

more broadly.⁴³ 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,⁴⁴ as well as to reflect critically on this development.⁴⁵ 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’.⁴⁶

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.⁴⁷ 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

⁴³ J. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (W. W. Norton, 2007); L. R. Blank, ‘Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare’ (2010) 43 *Case Western Reserve Journal of International Law* 279–306; ‘The Lawfare Project’.

⁴⁴ C. J. Dunlap Jr, ‘Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts’ (2001), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6193&context=faculty_scholarship; O. F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, 2016); J. P. Trachtman, ‘Integrating Lawfare and Warfare’ (2016) 39 *Boston College International and Comparative Law Review* 267–82.

⁴⁵ D. Kennedy, *Of War and Law* (Princeton University Press, 2009).

⁴⁶ C. J. Dunlap Jr, ‘Lawfare Today: A Perspective Commentary’ (2008) 3 *Yale Journal of International Affairs* 146–54.

⁴⁷ C. J. Dunlap Jr, ‘Does Lawfare Need an Apologia?’ (2010) 43 *Case Western Reserve Journal of International Law* 121–44 at 126.

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,⁴⁸ 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.⁴⁹

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.⁵⁰ 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,⁵¹ to rule of law promotion and diffusion,⁵² and to international litigation.⁵³ The growing attention paid to discourses or narratives can

⁴⁸ P. M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1–35; M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887–917.

⁴⁹ Andrea Bianchi and Moshe Hirsch (eds.), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford University Press, 2021).

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

⁵¹ S. Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford University Press, 2003); F. Grimal, *Threats of Force: International Law and Strategy* (Routledge, 2013); S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press, 2014); T. F. McInerney, *Strategic Treaty Management: Practice and Implications* (Cambridge University Press, 2015); R. Deplano, *The Strategic Use of International Law by the United Nations Security Council: An Empirical Study* (Springer, 2015); T. Aalberts and T. Gammeltoft-Hansen, *The Changing Practices of International Law* (Cambridge University Press, 2018).

⁵² M. Zurn, A. Nollkaemper, and R. Peerenboom, *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge University Press, 2012).

⁵³ S. Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press, 2015); H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury Publishing, 2018); A. Pellet and T. Barsac, 'Litigation Strategy', in *Max Planck Encyclopedia of International Procedural Law* [MPEiP] (2019).

also be considered part of this trend, as these are often used as strategic tools.⁵⁴ 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,⁵⁵ from the literature on strategic management,⁵⁶ from Bourdieusian reflexive sociology,⁵⁷ or to reflect a focus on the dynamic relationship between law and politics.⁵⁸ 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'.⁵⁹

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).⁶⁰ The second contribution is a reflection on the effects of different strategies on fostering treaty compliance (Chapter 3).⁶¹ Finally, the last contribution

⁵⁴ T. Skouteris, *The Notion of Progress in International Law Discourse* (T.M.C. Asser Press, 2009); N. Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements' (2019) 30 *European Journal of International Law* 1359–97; A. Saab, *Narratives of Hunger: Feeding the World in Times of Climate Change* (Cambridge University Press, 2019); J. D'Aspremont: International Community Law Review, *The League of Nations and the Power of 'Experiment Narratives' in International Institutional Law* (2020).

⁵⁵ Grimal, *Threats of Force*.

⁵⁶ McInerney, *Strategic Treaty Management*.

⁵⁷ Y. Dezalay and M. R. Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 *Annual Review of Law and Social Science* 433–52.

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

⁵⁹ 'Strategy | Definition of Strategy by Oxford Dictionary on Lexico.com', www.lexico.com/definition/strategy (last accessed 14 August 2020).

⁶⁰ Finnemore and Sikkink, 'International Norm Dynamics and Political Change'; A. Moravcsik, 'A New Statecraft? Supranational Entrepreneurs and International Cooperation' (1999) 53 *International Organization* 267–306; M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, 2004).

⁶¹ A. Chayes and A. H. Chayes, *The New Sovereignty* (Harvard University Press, 1998); J. E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2006); McInerney, *Strategic Treaty Management*; J. E. Alvarez, *The Impact of International Organizations on International Law* (Brill, 2016).

is on how actors can purposefully use in their favour some of the challenges that ICTs have in adjudicating scientifically intensive disputes (Chapter 4).⁶²

1.1.4 *Lawfare as an Analytical Tool to Investigate the International Law on Tobacco Control as a Single Story*

Lawfare not only represents the chosen approach of this book but also an analytical tool that I use for my investigation. Viewing the international law on tobacco control as lawfare allows me to see it as a single story and to critically assess it.

The history of the FCTC, and of tobacco control more broadly, has been mostly told by its participants⁶³ and analysed by political scien-

⁶² J. Peel, *Science and Risk Regulation in International Law* (Cambridge University Press, 2010); M. Wagner, 'Law Talk v. Science Talk: The Languages of Law and Science in WTO Proceedings' (2011) 35 *Fordham International Law Journal* 151; M. Mbengue, 'International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 53; J. E. Alvarez, 'Are International Judges Afraid of Science: A Comment on Mbengue Symposium Issue' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 81–98; C. E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, 2011); J. D'Aspremont and M. M. Mbengue, 'Strategies of Engagement with Scientific Fact-Finding in International Adjudication' (2014) 5 *Journal of International Dispute Settlement* 240–72.

⁶³ R. Roemer, A. Taylor, and J. Lariviere, 'Origins of the WHO Framework Convention on Tobacco Control' (2005) 95 *American Journal of Public Health* 936–38; D. Yach, R. Hammond, H. Wipfli, and S. Glantz, 'Globalization and Tobacco', in *Globalization and Health*, edited by Ichiro Kawachi and Sarah Wamala (Oxford University Press, 2007), pp. 39–67; Vera Luiza da Costa e Silva and Douglas Bettcher, 'Origins and Status of the WHO Framework Convention on Tobacco Control', in *Tobacco: Science, Policy and Public Health*, edited by Peter Boyle, Nigel Gray, Jack Henningfield, John Seffrin, and Witold Zatonski (Oxford University Press, 2010), pp. 697–704; D. Yach, 'The Origins, Development, Effects, and Future of the WHO Framework Convention on Tobacco Control: A Personal Perspective' (2014) 383 *The Lancet* 1771–79; Katherine DeLand, Gemma Lien, and H. Wipfli, 'The WHO Framework Convention on Tobacco Control and the Tobacco Free Initiative', in *The Global Tobacco Epidemic and the Law*, edited by Andrew D. Mitchell and Tania Voon (Edward Elgar, 2014), pp. 11–31; H. Wipfli, *The Global War on Tobacco: Mapping the World's First Public Health Treaty* (Johns Hopkins University Press, 2015).

tists,⁶⁴ anthropologists,⁶⁵ and historians.⁶⁶ However, it has received only limited attention from legal scholars. Gian Luca Burci and Claude-Henri Vignes provided a review of the FCTC negotiations as part of their analysis of the law of the WHO.⁶⁷ Some of the features and developments of the FCTC have been individually reviewed.⁶⁸ Sometimes the FCTC has been analysed as part of broader studies on international law-making.⁶⁹ In almost twenty years of life, nonetheless, no legal scholar has systematically analysed the history of the FCTC.

The international tobacco control disputes have, conversely, immediately attracted much attention.⁷⁰ In that context, some scholars have

⁶⁴ H. M. Mamudu, R. Hammond, and S. A. Glantz, 'International Trade versus Public Health during the FCTC Negotiations, 1999–2003' (2011) 20 *Tobacco Control* e3; H. M. Mamudu, M. Gonzalez, and S. Glantz, 'The Nature, Scope, and Development of the Global Tobacco Control Epistemic Community' (2011) 101 *American Journal of Public Health* 2044–54; Cairney et al., *Global Tobacco Control*; Wipfli, *The Global War on Tobacco*.

⁶⁵ A. Russell, M. Wainwright, and H. Mamudu, 'A Chilling Example? Uruguay, Philip Morris International, and WHO's Framework Convention on Tobacco Control' (2015) 29 *Medical Anthropology Quarterly* 256–77.

⁶⁶ L. A. Reynolds, E. M. (Tilli) Tansey, and Witness Seminar: WHO Framework Convention on Tobacco Control (26-02-2010: London), *WHO Framework Convention on Tobacco Control: The Transcript of a Witness Seminar Organised by the Wellcome Trust Centre for the History of Medicine at UCL, in Collaboration with the Department of Knowledge Management and Sharing, WHO Held in Geneva, on 26 February 2010* (London: The History of Modern Biomedicine Research Group at UCL, 2012); Reubi and Berridge, 'The Internationalisation of Tobacco Control, 1950–2010'.

⁶⁷ G. L. Burci and C.-H. Vignes, *World Health Organization* (Kluwer Law International, 2004).

⁶⁸ C. Lo, 'Establishing Global Governance in the Implementation of FCTC: Some Reflections on the Current Two-Pillar and One-Roof Framework' (2006) 1 *Asian Journal of WTO and International Health Law and Policy* 569; S. F. Halabi, 'The World Health Organization's Framework Convention on Tobacco Control: An Analysis of Guidelines Adopted by the Conference of the Parties' (2010) 39 *Georgia Journal of International and Comparative Law* 121; R. L. Haffajee and M. G. Bloche, 'The FCTC and the Psychology of Tobacco Control' (2010) 5 *Asian Journal of WTO & International Health Law and Policy* 87–114; Gruszczynski, 'COPing with the Global Tobacco Epidemic'.

⁶⁹ A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2007); McInerney, *Strategic Treaty Management*; Alvarez, *The Impact of International Organizations on International Law*; J. Klabbers, 'The Normative Gap in International Organizations Law: The Case of the World Health Organization' (2019) 16 *International Organizations Law Review* 272–98; S. Chesterman, D. M. Malone, and S. Villalpando, *The Oxford Handbook of United Nations Treaties* (Oxford University Press, 2019).

⁷⁰ T. Voon, A. D. Mitchell, and J. Liberman, *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012); Benn McGrady and Alexandra Jones, 'Tobacco Control and Beyond: The Broader Implications of United States – Clove

examined the legal questions on the role that the FTC could play in the disputes.⁷¹ However, no effort has been made to understand how the making of the FTC and international litigation of tobacco control measures are interrelated. This book aims to fill this gap by reconstructing the whole history of international law on tobacco control and highlighting the elements of continuity between law-making and litigation.

These insights are, in turn, used in Chapter 5 to contribute to some contemporary international law debates. In exploring these perspectives, this book broadens the scope of the existing literature on lawfare. As noted above, most of the debates about lawfare have focused on its definition,⁷² with some authors questioning whether it is a useful concept at all.⁷³ By contrast, this book tests whether the concept of lawfare can enrich our thinking and allow us to better narrate and analyse why and how actors strategically use international law.

Cigarettes for Non-Communicable Diseases' (2013) 39(2-3) *American Journal of Law and Medicine* 265-89; M. E. Muggli et al., 'Tracking the Relevance of the WHO Framework Convention on Tobacco Control in Legislation and Litigation through the Online Resource, Tobacco Control Laws' (2014) 23 *Tobacco Control* 457-60; Mitchell and Voon, *The Global Tobacco Epidemic and the Law*; S. Puig, 'Tobacco Litigation in International Courts' (2016) 57 *Harvard International Law Journal* 383-432; H. H. Koh, 'Global Tobacco Control as a Health and Human Rights Imperative' (2016) 57 *Harvard International Law Journal* 433; Puig, 'Internationalization of Tobacco Tactics'; S. Y. Zhou, J. D. Liberman, and E. Ricafort, 'The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures' (2018) 28 *Tobacco Control* s113-18.

⁷¹ Halabi, 'World Health Organization's Framework Convention on Tobacco Control'; L. Gruszczynski, 'The WHO Framework Convention on Tobacco Control as an International Standard under the TBT Agreement?' (2012) 9(5) *Transnational Dispute Management* 1-14; Jonathan Liberman, 'The Power of the WHO FTC: Understanding Its Legal Status and Weight', in *The Global Tobacco Epidemic and the Law*, pp. 48-63; T. Lin, 'The Status of FTC in the Interpretation of Compensable Indirect Expropriation and the Right to Adopt Stricter Tobacco Control Measures under Bits' (2014) 9 *Asian Journal of WTO and International Health Law and Policy* 123; N. Devillier and T. Gleason, 'Consistent and Recurring Use of External Legal Norms: Examining Normative Integration of the FTC Post-Australia Tobacco Plain Packaging' (2019) 53 *Journal of World Trade* 533-66; Z. Lin and K. V. der Borgh, 'Commentary on the Guidelines for the Implementation of the WHO Framework Convention on Tobacco Control' (2019) 8 *Global Journal of Comparative Law* 80-93.

⁷² M. Scharf and E. Andersen, 'Is Lawfare Worth Defining - Report of the Cleveland Experts Meeting - September 11, 2010 Lawfare' (2010) 43 *Case Western Reserve Journal of International Law* 11-28.

⁷³ L. N. Sadat and J. Geng, 'On Legal Subterfuge and the So-Called Lawfare Debate Is Lawfare a Useful Term?' (2010) 43 *Case Western Reserve Journal of International Law* 153-62.

The first debate to which the concept of lawfare contributes is the role of business actors in shaping international law-making and regulation (Section 5.1.1).⁷⁴ Second, inspired by previous reflexive accounts of my experience as a researcher in a particular field, I provide a reflection on the research methods and their limits in a highly polarised field like that of tobacco control (Section 5.1.2).⁷⁵

1.2 Evidence

In addition to lawfare, this book follows a second *fil rouge*: how evidence is used to shape international law. Although at first one may think that lawfare and evidence are two distant focuses for a narration, this book shows that they are rather closely intertwined in this story. The international tobacco control lawfare, in fact, illustrates how both the tobacco control network and the tobacco industry have strategically used evidence and evidentiary arguments to fight their battle. Evidence, thus, has been used as a central strategy of lawfare.

1.2.1 Defining Evidence on Tobacco Control

Before proceeding to discuss how evidence has been used, one may wonder: what is evidence, exactly? For lawyers, the word ‘evidence’ immediately evokes the documents, testimonies, and materials used in courts and tribunals to prove a disputed fact.⁷⁶ As a word, evidence is

⁷⁴ M. J. Durkee, ‘International Lobbying Law’ (2018) 127 *The Yale Law Journal* 1742–826; M. (MJ) Durkee, ‘Industry Groups in International Governance: A Framework for Reform’ (2023) 14(1) *Journal of Human Rights and the Environment* 4–26; B. M. R. Dambacher, M. T. Stilwell, and J. S. McGee, ‘Clearing the Air: Avoiding Conflicts of Interest within the United Nations Framework Convention on Climate Change’ (2020) 32 *Journal of Environmental Law* 53–81; A. Berman, ‘Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors’ (2021) 32 *European Journal of International Law* 227–54.

⁷⁵ S. M. H. Nouwen, ‘As You Set out for Ithaka: Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict Hague International Tribunals: International Criminal Courts and Tribunals: Symposium: Expertise, Uncertainty, and International Law (Part 2)’ (2014) 27 *Leiden Journal of International Law* 227–60; O. Simic, ‘Feminist Research in Transitional Justice Studies: Navigating Silences and Disruptions in the Field’ (2016) 17 *Human Rights Review* 95–113.

⁷⁶ C. Brown, *A Common Law of International Adjudication* (Oxford University Press, 2009), chap. 3; M. T. Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press, 2009); Foster, *Science and the Precautionary*

rarely, if ever, used in the context of treaty-making. Lawyers typically prefer to speak of the involvement of experts/expertise⁷⁷ or about science⁷⁸ to describe the role of specialised knowledge in law- or decision-making processes.

Conversely, ‘evidence’ is a common word in the context of policymaking, including public health. The term ‘evidence-based’ has become popular precisely to describe a type of policymaking that is, at least in principle, based on a systematic review of the relevant knowledge.⁷⁹ For several reasons that are explored in Chapter 2, evidence is

Principle in International Courts and Tribunals; W. M. Reisman and C. Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law* (Cambridge University Press, 2014); V. Vadi and L. Gruszczynski, ‘Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration: Converging Parallels?’, in *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, edited by Lukasz Gruszczynski and Wouter Werner (Oxford University Press, 2014), pp. 152–74; A. Riddell, ‘Evidence, Fact-Finding, and Experts’, in *The Oxford Handbook of International Adjudication*, edited by Cesare Romano, Yuval Shany, and Karen Alter (Oxford University Press, 2014), pp. 848–70; A. Appazov, *Expert Evidence and International Criminal Justice* (Springer, 2016); P. Viebig, *Illicitly Obtained Evidence at the International Criminal Court* (T. M. C. Asser Press, 2016), vol. iv; J. Devaney, *Fact-Finding before the International Court of Justice* (Cambridge University Press, 2016); F. G. Sourgens, K. A. N. Duggal, and I. A. Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018).

⁷⁷ T. Meyer, ‘Institutions and Expertise: The Role of Science in Climate Change Lawmaking’, in *Oxford Handbook on International Climate Change Law*, edited by Cinnamon Carlarne, Kevin R. Gray and Richard Tarasofsky (2014), pp. 441–63; M. Ambrus, K. Arts, E. Hey, and H. Raulus, *The Role of ‘Experts’ in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?* (Cambridge University Press, 2014); G. Edmond, *Expertise in Regulation and Law* (Taylor & Francis, 2017); H. Cullen, J. Harrington, and C. Renshaw, *Experts, Networks and International Law* (Cambridge University Press, 2017); D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2018).

⁷⁸ S. Andresen and J. B. Skjærseth, ‘Science and Technology: From Agenda Setting to Implementation’, in *The Oxford Handbook of International Environmental Law*, edited by Daniel Bodansky, Jutta Brunnée, and Ellen Hey (Oxford University Press, 2008), pp. 183–200; Peel, *Science and Risk Regulation in International Law*; F. Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013) chap. 5; L. Susskind, S. H. (Saleem H. Ali), and Z. A. Hamid, ‘The Need for a Better Balance between Science and Politics’, in *Environmental Diplomacy Negotiating More Effective Global Agreements* (Oxford University Press, 2014).

⁷⁹ R. Pawson, *Evidence-Based Policy: A Realist Perspective* (SAGE, 2006); Smith, ‘Understanding the Influence of Evidence in Public Health Policy’; K. Smith, *Beyond Evidence Based Policy in Public Health: The Interplay of Ideas* (Springer, 2013); J. Parkhurst, *The Politics of Evidence: From Evidence-Based Policy to the Good Governance of Evidence* (Routledge, 2016); P. Cairney, *The Politics of Evidence-Based Policy Making* (Springer, 2016).

also generally the preferred term by the actors involved in the FCTC's making and development.

In addition to being the preferred term of FCTC actors, 'evidence' appears as a particularly well-fitting term in this context because it can be used to refer to many different types of specialised knowledge, in a non-normative manner. Using the term evidence avoids the difficulties of defining the meaning and the scope of the notion of science.⁸⁰ Are social sciences science? How do we distinguish between good science and junk science? Furthermore, the term evidence underlines that the knowledge we have is inherently limited by the studies that have been carried out. Evidence is a constitutive part of science, but it is not science itself. One publication does not make science; only scientific consensus does.⁸¹ Some specific evidence may not be available simply because research has not (yet) been undertaken.

In this regard, talking of evidence highlights better the contingent and social character of scientific knowledge – something that lawyers and policymakers often seem to forget,⁸² revering science as a 'supra-legal precipitant',⁸³ or as indisputable decision-making authority in controversial matters.⁸⁴ The reader will probably know that the aura of objectivity in science has long been demystified. We now consider it an established truth that science does not always progress linearly⁸⁵ and that with its increasing complexity, any scientific knowledge has an inherent degree of uncertainty.⁸⁶ Post-modernist thought has also made us aware that the construction of scientific knowledge is all but neutral and value-free, as it is influenced by social factors and interactions.⁸⁷ To add an additional layer of strain, in the last few decades, the pressure to publish innovative and original work in academia has increased, creating incentives for

⁸⁰ T. F. Gieryn, 'Boundaries of Science', in *Handbook of Science and Technology Studies*, edited by Sheila Jasanoff, Gerald E. Markle, James C. Petersen, and Trevor Pinch (SAGE, 1995).

⁸¹ N. Oreskes, *Why Trust Science?* (Princeton University Press, 2019).

⁸² Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge, 2004).

⁸³ Johns, *Non-Legality in International Law*, chap. 5.

⁸⁴ Peel, *Science and Risk Regulation in International Law*.

⁸⁵ T. S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962).

⁸⁶ B. Wynne, 'Uncertainty and Environmental Learning: Reconceiving Science and Policy in the Preventive Paradigm' (1992) 2 *Global Environmental Change* 111–27; Oreskes, *Why Trust Science?*

⁸⁷ B. Latour and S. Woolgar, *Laboratory Life: The Construction of Scientific Facts* (Princeton University Press, 1986); Jasanoff, *States of Knowledge*.

scientists to publish unreliable but clamorous studies.⁸⁸ Finally, as this book extensively illustrates, science can be captured by corporate interests.⁸⁹

For all these reasons, this book expressly avoids characterising the evidence on tobacco control as scientific evidence, or even distinguishing between scientific and non-scientific evidence. Evidence on tobacco control is here used as a neutral term to refer to a broad array of different types of specialised knowledge on tobacco control, irrespective of whether they constitute sound science or not.

1.2.2 *Weaponising Evidence in the Tobacco Wars and in the International Tobacco Control Lawfare*

Arguably, the most pervasive and insidious of the tobacco industry's tactics has been that of manipulating evidence, or 'merchandising doubts'.⁹⁰ This strategy entailed hiring or funding experts to produce studies that would create the impression that there was no consensus in the scientific community on the hazards of smoking. In parallel, the tobacco industry hired public relations firms to oppose tobacco control measures on the basis that there was no sufficient evidence to justify regulation. The essence of the tobacco industry's playbook on merchandising doubts has been described as 'us[ing] normal scientific uncertainty to undermine the status of actual scientific knowledge'.⁹¹ Casting doubts on scientific knowledge, in fact, is much easier than proving that the same scientific facts are incontrovertible. As one cigarette executive famously affirmed, 'doubt is our product'.⁹²

Manipulation of evidence has not been limited to policymaking, but has expanded to courtrooms, where the tobacco industry has employed dozens of well-paid experts to support its defence.⁹³ A well-known example is the case of a Nobel laureate in economics who was paid as much as €1,000 an hour to serve as an expert for the tobacco industry in

⁸⁸ M. Baker, '1,500 Scientists Lift the Lid on Reproducibility' (2016) 533 *Nature News* 452.

⁸⁹ Michaels, *Doubt Is Their Product*; Oreskes and Conway, *Merchants of Doubt*; Nestle, *Unsavory Truth*; Michaels, *The Triumph of Doubt*.

⁹⁰ Oreskes and Conway, *Merchants of Doubt*.

⁹¹ *Ibid.*, p. 34.

⁹² Michaels, *Doubt Is Their Product*.

⁹³ M. Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics*, 3rd ed. (CQ Press, 2012); R. Delafontaine, *Historians as Expert Judicial Witnesses in Tobacco Litigation: A Controversial Legal Practice* (Springer, 2015).

several cases.⁹⁴ He used very sophisticated econometric techniques to demonstrate the ineffectiveness of tobacco control measures.

Nonetheless, it is important to underline that the tobacco industry is not alone in its focus on evidence. A strong component of the tobacco control network is an epistemic community of scientists and experts in tobacco control.⁹⁵ As such, the regulatory approach of this network has been very evidence driven. As Paul Cairney has remarked, in tobacco control evidence has been

a resource used by public health advocates during a decades-long struggle to form alliances, challenge-vested interests, engage in a ‘battle of ideas’, encourage major social change, shift policymaking responsibility to a more sympathetic department, and persuade governments to completely rethink the ways in which they understood the tobacco issue.⁹⁶

These two stories cannot be read separately. In the same way as the tobacco industry has used its evidence (or arguments on lack of evidence) to discourage governments from taking tobacco control measures, the tobacco control network has used other evidence to advocate for stricter regulation. Taken together, the two stories tell the story of a war where evidence is used instrumentally as a weapon.

In the same way as it has been used in the domestic tobacco wars, evidence has also become one of the key elements of the international tobacco control lawfare. As Chapter 2 shows, evidence has been one of the essential constituents of the FCTC negotiations, resulting in a so-called ‘evidence-based’ treaty. Chapter 3 illustrates how evidence has become the key element in the development of the FCTC after its entry into force, both through the adoption of evidence-based guidelines and through initiatives aimed at stimulating domestic and international research. Finally, and as explained in Chapter 4, evidence has been one of the most controversial issues in the ensuing disputes before ICTs. This resulted in the litigants submitting an astounding number of pieces of evidence and in the ICTs having to engage in complex evidentiary assessments.

⁹⁴ ‘Tobacco on Trial “Blog Archive” DAY 93: Heckman on the Economics of Youth Smoking Initiation’, www.tobacco-on-trial.com/2005/04/19/day-93-heckman-on-the-economics-of-youth-smoking-initiation/ (last accessed 23 May 2008).

⁹⁵ Mamudu et al., ‘The Nature, Scope, and Development of the Global Tobacco Control Epistemic Community’.

⁹⁶ Cairney, *The Politics of Evidence-Based Policy Making*.

Against this backdrop, this book focuses on the strategic use of evidence in the FCTC negotiations and development, as well as in tobacco control litigation before ICTs. In doing so, it shows how evidence can be strategically used in international law to advance actors' goals and wage their battle. These insights are then used in Sections 5.2.2–5.2.4 of the conclusions to contribute to the scholarship that criticises international law's overreliance on science.⁹⁷

1.2.3 *Evidence for Risk Assessment and for Risk Management*

This book contends that an investigation into the role of evidence in international tobacco lawfare is not only apt but also valuable insofar as it allows us to appreciate the different types of evidence, and related challenges, that can be used in international law.

The war on evidence has made tobacco control an area where arguments on evidence are very sophisticated, and evidence is used for two complementary but different exercises: risk assessment (or the existence and extent of a risk) and risk management (or how to address a risk). This distinction, traditionally employed in the field of risk regulation, has been criticised by several authors, and particularly by the social studies on science, on the grounds that it creates an artificial and ultimately faulty distinction between a more scientific risk assessment phase and a more political risk management one.⁹⁸ Without entering into this complex debate, this book uses the distinction for descriptive purposes to explain why the evidentiary challenges in tobacco control are different from those that we typically encounter in international law.

Historically, the tobacco industry first focused its arguments on the alleged lack of evidence on the causal link between smoking and cancer; then, on the risks associated with second-hand smoke (risk assessment).⁹⁹ By the start of the FCTC negotiations, however, the tobacco industry's strategy had changed. It acknowledged the hazardous effects of tobacco smoking and admitted the risks of second-hand smoke.¹⁰⁰ The industry's arguments, therefore, turned to the second dimension of

⁹⁷ Peel, *Science and Risk Regulation in International Law*.

⁹⁸ For a summary of these criticisms, see Lukasz Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement* (Oxford University Press, 2010), pp. 28–30.

⁹⁹ Oreskes and Conway, *Merchants of Doubt*.

¹⁰⁰ Wipfli, *The Global War on Tobacco*, p. 48.

tobacco control: the reasonableness of the proposed tobacco control measures,¹⁰¹ as well as economic arguments on the cost-effectiveness of such measures (risk management).¹⁰² As Chapter 2 illustrates, the promoters of the FCTC adjusted their strategy to the industry's new tactics and sought the World Bank's support to strengthen the evidence base on risk management. However, the fight over the evidence on the risk management dimension of tobacco control measures has not ended with the conclusion of the FCTC. On the contrary, it has become one of the main points of contention in the challenges against tobacco control measures before ICTs (Chapter 4).

This shift in focus from risk assessment to risk management implies that, when we talk about evidence in the context of the international tobacco control lawfare, we talk about different types of evidence than those we see in other areas of international law. Risk management questions, in fact, are essentially social science questions on the appropriateness of the measures and, as such, pose specific challenges and difficulties, as described in Sections 3.4.1 and 4.2.1. These questions are different from those that we typically encounter in international environmental law or in the international trade law on food safety, where the bulk of the discussions focus on whether we can conclusively say that a substance or action creates a certain risk.¹⁰³

Although most of the international tobacco lawfare has focused on the risk management dimension of tobacco control measures, it should be noted that the emergence of new products is also posing some new risk assessment questions. In the last decade, two new products have emerged and become widespread: electronic cigarettes (also known as electronic nicotine delivery systems, ENDS) and heated tobacco products (HTPs,

¹⁰¹ 'WHO Director General's Response to the Tobacco Hearings, Statement WHO/6' (October 2000), www.who.int/tobacco/framework/public_hearings/dghearings_en.pdf?ua=1 (last accessed 19 August 2020).

¹⁰² Mamudu et al., 'Tobacco Industry Attempts to Counter the World Bank Report Curbing the Epidemic and Obstruct the WHO Framework Convention on Tobacco Control'; D. Yach, "In Their Own Words . . ." Using Tobacco Industry Documents to Advance Truth' (January 2001), www.who.int/tobacco/dy_speeches1/en (last accessed 19 August 2020).

¹⁰³ S. Andresen, *Science and Politics in International Environmental Regimes: Between Integrity and Involvement* (Manchester University Press, 2000); P. Haas, 'When Does Power Listen to Truth? A Constructivist Approach to the Policy Process' (2004) 11 *Journal of European Public Policy* 569–92; Peel, *Science and Risk Regulation in International Law*; Foster, *Science and the Precautionary Principle in International Courts and Tribunals*.

such as IQOS and Glo). The questions that scientists are currently investigating about these products are very similar to those that their colleagues answered many decades ago about cigarettes: are these products hazardous to health? And if so, to what extent? The nature of these questions and their regulatory implications are analysed in Section 3.6.1.

1.2.4 *The Role of Evidence in Treaty-Making, Treaty Management, and International Litigation*

The focus on evidence allows us not only to make a general contribution to international law's reliance on science but also to make several additional contributions to existing scholarship on treaty-making, treaty management, and international litigation.

With respect to treaty-making, Section 2.2 contributes to the scholarship on the role of secretariats of international organisations to present the FCTC as a case study where a group of treaty entrepreneurs put in place a 'strategy on evidence' to support the negotiation of a treaty.¹⁰⁴ Starting from this theoretical background, Section 2.3 explores how the choice to borrow legal expertise from a specific area of international law can be explained by rational factors linked to the strategy on evidence.¹⁰⁵ Section 2.4 presents the FCTC as a paradigmatic case of mobilisation of knowledge by international organisations.¹⁰⁶ Section 2.5 builds on the literature on the use of frames in international law, and particularly on the framing of scientific knowledge,¹⁰⁷ to explore the power of labels in building the FCTC as an evidence-based treaty. Section 2.6, finally, sketches the advantages and drawbacks of this approach.

¹⁰⁴ E. B. Haas, *When Knowledge Is Power: Three Models of Change in International Organizations* (University of California Press, 1990); Barnett and Finnemore, *Rules for the World*; Frank Biermann and Bernd Siebenhüner, eds., *Managers of Global Change: The Influence of International Environmental Bureaucracies* (MIT Press, 2009); G. F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).

¹⁰⁵ A. Florini, 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 363–89.

¹⁰⁶ A. Littoz-Monnet, *The Politics of Expertise in International Organizations: How International Bureaucracies Produce and Mobilize Knowledge* (Taylor & Francis, 2017).

¹⁰⁷ K. T. Litfin, 'Framing Science: Precautionary Discourse and the Ozone Treaties' (1995) 24 *Millennium* 251–77; A. Gupta, 'Problem Framing in Assessment Processes: The Case of Biosafety', in *Global Environmental Assessments: Information and Influence*, edited by Ronald Bruce Mitchell and William C. Clark (MIT Press, 2006), pp. 57–86; C. Epstein, *The Power of Words in International Relations: Birth of an Anti-whaling Discourse* (MIT Press, 2008).

Going into treaty management, Section 3.2 shows that the choice to focus on evidence as a strategy for treaty development can be the result of the normal path-dependence dynamics of international organisations.¹⁰⁸ Starting from the literature on managerial treaties,¹⁰⁹ as well as on treaty bodies and treaty systems,¹¹⁰ Sections 3.3 and 3.4 provide an analysis of how evidence has been strategically used to advance the FCTC and how this advancement is considered key to enhancing compliance with its provisions. Section 3.5 focuses on the role of civil society organisations as knowledge actors¹¹¹ and illustrates how, in a regime that values technical knowledge above everything else, the growing expertise of civil society organisations has made them valued and influential actors.¹¹² Lastly, Section 3.6 illustrates the limits of this approach, by focusing on the lack of progress in the regulation of new products like ENDS and HTPs, as well as the delayed attention to finding a strategy for compliance that is not based on evidence.

With respect to, concerning international litigation, the contribution that this book makes is about the increasingly scientific and technical evidentiary challenges that ICTs are facing.¹¹³ Section 4.2 demonstrates that some specific sets of disputes like the tobacco control ones deserve specific considerations. Building on this diagnostic analysis,

¹⁰⁸ Barnett and Finnemore, *Rules for the World*, p. 43; M. Barnett and L. Coleman, 'Designing Police: Interpol and the Study of Change in International Organizations' (2005) 49 *International Studies Quarterly* 593–619 at 600; T. Hanrieder, 'The Path-Dependent Design of International Organizations: Federalism in the World Health Organization' (2015) 21 *European Journal of International Relations* 215–39.

¹⁰⁹ McInerney, *Strategic Treaty Management*; Alvarez, *The Impact of International Organizations on International Law*.

¹¹⁰ R. R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623–59; G. Ulfstein, 'Treaty Bodies', in *The Oxford Handbook of International Environmental Law*; T. Gehring, 'Treaty-Making and Treaty Evolution', in *The Oxford Handbook of International Environmental Law*; Biermann and Siebenhüner, *Managers of Global Change*; S. Jinnah, *Post-Treaty Politics: Secretariat Influence in Global Environmental Governance* (MIT Press, 2014).

¹¹¹ Haas, 'Introduction'; Mamudu et al., 'The Nature, Scope, and Development of the Global Tobacco Control Epistemic Community'.

¹¹² M. M. Betsill and E. Corell, *NGO Diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations* (MIT Press, 2008).

¹¹³ Mbengue, 'International Courts and Tribunals as Fact-Finders'; Alvarez, 'Are International Judges Afraid of Science'.

as well as on international law¹¹⁴ and constitutional law theory,¹¹⁵ Section 4.3 examines why proportionality analyses typically include an analysis of the effectiveness of the challenged measures and whether an alternative could be envisaged. Finally, building on the literature that investigates the common procedural rules and practices of ICTs, Section 4.3 also provides a critical review of the specific sources of evidence relied upon by the adjudicators.¹¹⁶

1.3 Methodology

This book is a multi-composite work that departs from traditional legal analysis to embrace the ‘empirical turn in international legal scholarship’.¹¹⁷ The work carried out for this book can be divided into two main parts: an international legal historical analysis (Chapters 2 and 3) and an analysis of international case law from a comparative perspective (Chapter 4). The diversity and variety of the sources used for this book warrant a few clarifications that can help the reader understand the strengths, but also the limits, of the methodology employed.¹¹⁸

Chapters 2 and 3 undertake a socio-legal analysis of the making and development of the FCTC from a historical perspective. These chapters have been built on a vast number of sources, and more specifically on a triangulation of documents and first-person accounts, described below.

¹¹⁴ M. Newton and L. May, *Proportionality in International Law* (Oxford University Press, 2014); C. Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015); V. Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar, 2018); A. D. Mitchell, J. Munro, and T. Voon, ‘Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks’, in *Yearbook on International Investment Law & Policy 2017* (Oxford University Press, 2019), pp. 305–55.

¹¹⁵ A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

¹¹⁶ C. Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007); Foster, *Science and the Precautionary Principle in International Courts and Tribunals*; A. Wiik, *Amicus Curiae before International Courts and Tribunals* (Nomos Verlag, 2018); H. R. Fabri, *International Law and Litigation: A Look into Procedure* (Nomos Verlagsgesellschaft, 2019); S. Dothan, *International Judicial Review: When Should International Courts Intervene?* (Cambridge University Press, 2020).

¹¹⁷ G. Shaffer and T. Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ (2012) 106 *American Journal of International Law* 1–46.

¹¹⁸ R. Deplano, *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Edward Elgar, 2019).

1.3.1 *Negotiation Documents*

Several documents have been analysed and used for this book:

- The documents on the work of the WHO on tobacco control that can be found in its online database, IRIS;¹¹⁹
- The official documents of the FCTC negotiations, the *travaux préparatoires*;¹²⁰
- The official documents related to the work of the COP of the FCTC;¹²¹
- The Truth Tobacco Industry Documents online repository;¹²²
- The documents produced by the Framework Convention Alliance.¹²³

Thanks to all these sources, I was able to gather a significant amount of material. While the analysis of documents for this book was primarily qualitative, I have used some simple computational programmes (Agent Ransack, NoteTab) to refine keyword searches and enhance my ability to review such a vast number of documents. I should point out that I did not obtain all the documents I wished for. In particular, I have tried but not succeeded in obtaining additional documents from the WHO archive in Geneva.

1.3.2 *First-Person Accounts*

For the purposes of this book, by first-person accounts, I refer both to the interviews I personally carried out and to the historical accounts of participants in the FCTC negotiations or at the COPs that have been published. These sources are an important part of this research for two main purposes:

- to gather information on past events and hence corroborate or integrate the documentary sources described above;
- to gather opinions and impressions about the process and its dynamics, as is typical in socio-legal research.

¹¹⁹ Institutional Repository for Information Sharing (IRIS), <http://apps.who.int/iris/> (last accessed 19 August 2020).

¹²⁰ Documentation in all official language of the Conference of the Parties, <https://apps.who.int/gb/fctc/E/index.html> (last accessed 19 August 2020).

¹²¹ Ibid.

¹²² Truth Tobacco Industry Documents, www.industrydocumentslibrary.ucsf.edu/tobacco/ (last accessed 19 August 2020).

¹²³ Framework Convention Alliance, www.fctc.org (last accessed 19 August 2020).

The FCTC process started around twenty-five years ago. This makes the FCTC part of a not-so-near past. Unfortunately, some of the people who have been involved in it have passed away or have retired and are unreachable. At the same time, however, I discovered that some of the people who have been involved in the FCTC negotiations from the very early days are still part of the tobacco control network and were very happy to share their experiences with me.

I have personally interviewed twenty-six people who are or have been involved in the FCTC negotiations and the work of the COPs. My interviewees have been identified with a snowball technique.¹²⁴ I first contacted the members of the tobacco control network whose names I encountered in the literature, and then I asked them if they knew someone else who could be interesting to interview. A list of all the people I interviewed is provided as an Annex to this book. Most of the interviewees are cited in the book, but their contribution is much broader than what the footnotes can reflect. Speaking to these very committed and knowledgeable people has helped me gather general information and ideas about the FCTC.

The people I interviewed represent a broad spectrum of participants in the FCTC. I have interviewed several current or former WHO officials. FCTC officials have been, by contrast, surprisingly reluctant to speak to me. Additionally, I have managed to talk to a few people who were involved in the FCTC negotiations as part of the national delegations. Finally, I interviewed several representatives from civil society organisations. The people I interviewed represent a large time window (1980s–today) in terms of their involvement with the FCTC. Some people who were active in tobacco control in the early days are now retired or in a different field. Some people have joined later, or only for a few months or years. A few have been consistently involved since the very beginning of the FCTC negotiations or a little after.

In addition to the members of the tobacco control network, I have decided to seek the opinions of two former members of the tobacco control network: Derek Yach and Clive Bates. These two individuals have parted ways with the tobacco control network. The estrangement has not been silent, leading to scathing comments. While the reasons for their departure are different, recently their point of contention with the tobacco control network has been mainly focused on whether new products (and particularly on electronic cigarettes, or ENDS) should be

¹²⁴ L. Mosley, *Interview Research in Political Science* (Cornell University Press, 2013), p. 87.

promoted as an alternative to cigarette smoking.¹²⁵ Nonetheless, I have chosen to interview them because they both had very important roles in the FCTC negotiations. Some of the members of the tobacco control network I interviewed acknowledged their role and recommended that I interview them too. Nonetheless, I have taken some precautions in deciding when and how to quote them. For the most general and important points, I have tried to cite them only if their view was corroborated by someone else's. In this regard, I have obviously treated their views on new products with particular caution. Furthermore, for reasons of transparency, I have always referred to them by their full names.

The reasons expressed above should already make it clear why I have decided not to interview anyone from the tobacco industry. Interviewing the industry would have meant becoming a possible target of their lobbying activities and would have risked compromising my objective and apparent impartiality. This choice has been made after several incidents where my impartiality has been questioned by my interviewees. This and some other issues concerning research on lawfare are discussed more in depth in the conclusions of this book.

The interviews have been corroborated or supplemented by other sources, and particularly:

- the accounts of the history of the FCTC negotiations published in journal articles or books by participants;¹²⁶
- the transcripts of a witness seminar on the history of the FCTC negotiations carried out by the Wellcome Trust Centre for the History of Medicine at University College London;¹²⁷
- some interviews that I have found available online.¹²⁸

¹²⁵ The issue is described in-depth in Chapter 2.

¹²⁶ A. L. Taylor and D. W. Bettcher, 'WHO Framework Convention on Tobacco Control: A Global Good for Public Health' (2000) 78 *Bulletin of the World Health Organization* 920–29; G. F. Jacob, 'Without Reservation' (2004) 5 *Chicago Journal of International Law* 287–302; Roemer et al., 'Origins of the WHO Framework Convention on Tobacco Control'; Costa e Silva and Bettcher, 'Origins and Status of the WHO Framework Convention on Tobacco Control'; Yach, 'The Origins, Development, Effects, and Future of the WHO Framework Convention on Tobacco Control'; DeLand et al., 'The WHO Framework Convention on Tobacco Control and the Tobacco Free Initiative'; Wipfli, *The Global War on Tobacco*.

¹²⁷ Reynolds, Tansey, and Witness Seminar: WHO Framework Convention on Tobacco Control (26-02-2010: London), *WHO Framework Convention on Tobacco Control*.

¹²⁸ A. D. Lopez, 'Video Q&A: Tobacco-Related Mortality: Past, Present and Future. An Interview with Alan Lopez' (2014) 12 *BMC Medicine* 162; G. H. Brundtland,

Interviewing people has been incredibly interesting and possibly one of the most rewarding opportunities offered by this research. Thanks to these people, I have been able to peek into the world of the tobacco control network and understand their point of view and internal dynamics. A lot of people have taken the time to explain to me some more technical or scientific aspects of tobacco control.

On the other hand, interviews of this kind have obvious limits. My interviews only represent a part of the story. Due to logistics and time constraints, the number of people I could reach is naturally limited. Moreover, as noted above, I have consciously chosen to speak to only one side of the actors involved in international lawfare. Naturally, this represents only a partial view of the history of the FCTC. Reading back my notes, I was amazed to see how similar most of the views of the people I interviewed were. Some opinions and statements were repeated in different interviews, almost with the same wording. The surprising consistency of these opinions is certainly due to the fact that the tobacco control network is, after all, a relatively small and close community that meets and shares ideas often. However, there is another factor that should be considered. The lawfare context has certainly made most of my interviewees very cautious and wary of expressing their views, even to me.

Finally, a few remarks made in the book are based on some observations I gathered during my interviews or trips to Geneva, speaking with people from the WHO or the tobacco control network. These remarks are not attributable to my interviewees, but rather to my own reactions and views (my own 'first-person account') in meeting my interviewees and in observing them interact. My observations have been recorded in writing and reproduced in this book under the tag 'fieldnotes'.

1.3.3 Litigation Documents

Chapter 4 provides an analysis of the international tobacco control disputes based on litigation documents, doctrinal sources, and a comparison with previous case law.

In line with the whole approach of the book, this chapter departs from the traditional approach that focuses solely on the litigation's outcome

'Harvard School of Public Health, The Role of WHO: A Leader's Perspective' (2011), www.hsph.harvard.edu/voices/events/brundtland/.

(the judgment/award/report). Rather, it seeks to investigate the parties' behaviour in the litigation, from the perspectives of both the claimants and the respondents. To this end, this chapter has reviewed all the documents available for the disputes, including the parties' submissions. While the disputes' documents are not always easy to find, sometimes they are available online. This is the case, for example, of the *Philip Morris v Uruguay*¹²⁹ and *Australia – Plain Packaging* disputes.¹³⁰ In other cases, it is possible to officially request access to the disputes' documents. However, while my request to access the documents in the EFTA Court case has been granted,¹³¹ the CJEU has regrettably taken the policy not to disclose them under any circumstances before the expiration of the thirty-year archival rule.¹³²

To the extent that this is possible, Chapter 4 adopts a comparative approach to analysing the international tobacco control disputes. Comparative studies on ICTs have emerged in the last fifteen years and are now burgeoning.¹³³ Comparing ICT disputes has, however, obvious limitations. Most ICTs have a different jurisdiction *ratione personae* or *ratione materiae*. Moreover, they have different traditions, different procedures, different degrees of institutionalisation, and different

¹²⁹ Campaign for Tobacco-Free Kids, Tobacco Control Laws, www.tobaccocontrolaws.org/litigation/spotlight_uruguay/documents (last accessed 6 April 2020).

¹³⁰ Australian Government, Department of Foreign Affairs and Trade, www.dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/wto-disputes-tobacco-plain-packaging (last accessed 6 April 2020).

¹³¹ EFTA Court, Legal and Executive Affairs Department, email, 13 December 2017; on file with the author.

¹³² ECJ Registry email, 4 December 2017; on file with the author.

¹³³ Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003); C. Brown, *A Common Law of International Adjudication*; R. Mackenzie, C. P. R. Romano, Y. Shany, and P. Sands, *Manual on International Courts and Tribunals* (Oxford University Press, 2010); Filippo Fontanelli, Giuseppe Martinico, and Paolo Carozza, *Shaping Rule of Law through Dialogue* (Europa Law Publishing, 2010); C. Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff Publishers, 2012); C. Romano, K. Alter, and Y. Shany, *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014); Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014); I. Venzke and A. von Bogdandy, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press, 2014); M. Andenas and E. Bjorge, *A Farewell to Fragmentation* (Cambridge University Press, 2015); Y. Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge University Press, 2015); W. A. Schabas and S. Murphy, *Research Handbook on International Courts and Tribunals* (Edward Elgar, 2017).

capacities. Bearing in mind these important differences, nonetheless, this analysis of the international tobacco control disputes has been a useful prism to analyse some common features and procedures of ICTs.

1.4 Outline of the Book

This book consists of five chapters. After this first one, the next three correspond to what I identify as the three main battles of international tobacco control lawfare. Specifically, Chapter 2 analyses how the FCTC has been negotiated as an evidence-based treaty to counteract the attacks on evidence by the tobacco industry. In doing so, it contends that the making of the FCTC has been made possible by the work of a group of 'treaty entrepreneurs', who adopted a series of strategies to build consensus and to use the available evidence to this end. The strategies I analyse are borrowing legal expertise, mobilisation of evidence, and framing of evidence.

Chapter 3 analyses how, showing an inclination for path dependence, evidence has become a central element of the life of the FCTC after its entry into force. The FCTC and the institutions created by it have pursued an implementation strategy focused on using evidence to issue detailed evidence-based guidelines. Moreover, several initiatives have been taken in order to support the development of evidence at the domestic level. Lastly, this chapter analyses why the strategy on evidence has made it difficult to reach a consensus on the regulation of new products such as ENDS and HTPs, as well as on adopting additional strategies for enhancing treaty implementation.

Chapter 4 examines the reaction of the tobacco industry to the evidence-based FCTC. Faced with a powerful treaty, and a surging amount of tobacco control measures implemented around the world, the tobacco industry struck back. One of the loudest and most visible strategies has been to initiate (directly or indirectly) a wave of cases before ICTs against the most innovative measures. Although their legal claims were broad and complex, I argue that one of the main objectives of this litigation strategy by the tobacco industry was to attack the evidence supporting the most innovative measures supporting evidence had not fully been integrated into the FCTC. Furthermore, this chapter analyses the judgments rendered by the ICTs on these tobacco control cases, using the tobacco control cases as a lens to understand the differences in the assessment of the evidence. It reflects on the role of

the 'effectiveness' test in the proportionality analysis of policy measures and on the sources of evidence that can be used in such an assessment.

Chapter 5, finally, zooms out from the three battles to offer some reflections on what the history of the international law on tobacco control can teach us about lawfare and evidence in international law.