



Rhetoric and the law, or the law of rhetoric: How countries oppose novel tobacco control measures at the World Trade Organization



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ABSTRACT

The tobacco industry has developed an extensive array of strategies and arguments to prevent or weaken government regulation. These strategies and arguments are well documented at the domestic level. However, there remains a need to examine how these arguments are reflected in the challenges waged by governments within the World Trade Organization (WTO). Decisions made at the WTO have the potential to shape how countries govern. Our analysis was conducted on two novel tobacco control measures: tobacco additives bans (Canada, United States and Brazil) and plain, standardized packaging of tobacco products (Australia, New Zealand, Ireland, EU and UK). We analyzed WTO documents (i.e. meeting minutes and submissions) ($n = 62$) in order to identify patterns of argumentation and compare these patterns with well-documented industry arguments. The pattern of these arguments reveal that despite the unique institutional structure of the WTO, country representatives opposing novel tobacco control measures use the same non-technical arguments as those that the tobacco industry continues to use to oppose these measures at the domestic level.

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1. Introduction

The tobacco industry does not like to be regulated. Tobacco industry resistance to government regulation through the strategies they employ has become the model of deceitful corporate practice (Negin, 2015). By tobacco industry, we are referring to the broad network of commercial interests associated with tobacco production, distribution and sale. For example, apart from transnational cigarette companies, tobacco growers associations such as the International Tobacco Growers Association are notorious opponents to tobacco control measures globally (McDaniel et al., 2008). The canon of tobacco industry strategies includes direct lobbying to shape government decision-making (Hiilamo, 2003; Howell, 2012; Neuman et al., 2002; Peeters et al., 2015); the production and manipulation of scientific evidence (McDaniel et al., 2008; Muggli et al., 2003; Ong and Glantz, 2000; Otanez et al., 2009); the creation, support and mobilization of manufacturers associations and other front groups (McDaniel et al., 2008; Mejia et al., 2008;

Nakkash and Lee, 2009; Ong and Glantz, 2000; Peeters et al., 2015); and the promotion of voluntary agreements and/or health education initiatives (Crosbie et al., 2012; Nakkash and Lee, 2009; Saloojee and Dagli, 2000). These strategies are supported by a systematic attempt to shape the discourses pertaining to tobacco in the health and economic domains. The tobacco industry has vigorously presented arguments that attempt to minimize the perceived harm of tobacco consumption while ensuring that the burden of responsibility for consumption is shifted to the consumer (Balbach et al., 2006; Saloojee and Dagli, 2000). In countries around the world, the tobacco industry has appropriated the individual rights frame to argue that consumers must be informed but not controlled (Crosbie et al., 2012; Hiilamo, 2003). Another perennial argument made by tobacco interests is that tobacco is an economic necessity, both as a revenue generator for governments (Howell, 2012; Shirane et al., 2012; K. E. Smith, Savell and Gilmore, 2013) and a source of employment for its citizens (McDaniel et al., 2008; Nakkash and Lee, 2009; Ong and Glantz, 2000). The arguments generated to resist regulation are invoked so often that they have formed a predictable pattern. In 2011, Action on Smoking and Health, a UK-based anti-tobacco civil society organization, categorized the three main industry arguments used to oppose all forms

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of tobacco control measures (ASH, 2011): 1) stand up for small businesses and defend those employed in the tobacco sector, 2) tobacco control measures will result in a rise in the illicit trade of tobacco and 3) tobacco control measures are/will be ineffective. The report's authors drew from empirical evidence to refute each of these arguments.

At the international level, there have also been efforts to identify tobacco industry strategies and patterns of argumentation to oppose global tobacco control. Specifically, work has been conducted to examine tobacco industry opposition to the Framework Convention on Tobacco Control (FCTC), the international treaty negotiated and ratified under the auspices of the World Health Organization (WHO) that creates an international legal framework to promote tobacco control amongst its now 180 member countries. This research found that the tobacco industry used familiar strategies, including lobbying specific governments in order to derail the negotiations (Grüning et al., 2011), and consistently asserting the economic benefits of tobacco production (Mamudu et al., 2008; Otanez et al., 2009).

Transnational tobacco companies (TTCs) have also worked vigorously to strengthen their global presence through market liberalization. This process is facilitated by direct and indirect efforts to reduce government control of tobacco products and reduce barriers in the tobacco supply chain, such as tariff reductions to facilitate the movement of tobacco products across borders and the easing of investment rules to further enhance international supply chains. For example, Holden and colleagues demonstrate how TTCs attempted to facilitate China's accession to the World Trade Organization (WTO) in order to benefit from trade rules that require market access for foreign firms (Holden et al., 2010). Scholars have also argued that the greater the presence of TTCs along the supply chain (i.e. from leaf growing to sale of final products), the greater the opportunity to influence the policy landscape in favour of their policy preferences (Bump and Reich, 2013; Holden and Lee, 2009). Specific to the trade context, recent research has found that it is primarily low-income countries opposing tobacco control measures at the WTO (Eckhardt et al., 2015). Eckhardt et al. (2015) note that given a "lack of a clear pattern of economic interests among countries opposing tobacco control policies at the WTO lends support to the proposition that TTCs are exerting influence" (p. 5). Our study provides further support to this proposition by analyzing the actual arguments presented at the WTO in opposition to novel tobacco control measures. Our study provides a logical extension to existing literature by providing a qualitative analysis of how this opposition is framed and represented in relation to more generic patterns of oppositional rhetoric found in policy discourse.

The WTO is arguably the most important forum for agenda-setting and decision-making on international economic issues. Decisions made at the WTO have the potential to shape how countries govern, including in the areas of public health (Drope and Lencucha, 2014; McGrady, 2011). Since its founding in 1945, there have been over thirty tobacco-related challenges at the WTO (Lester, 2015), and it is widely recognized that states must now vet their tobacco control measures against WTO law (Drope and Lencucha, 2013, 2014; Jarman, 2014; Lencucha and Drope, 2015; McGrady and Jones, 2013; Mitchell and Voon, 2011a, b). In the WTO context, member states are granted the space to question the compatibility of tobacco control measures with the different agreements that make up the corpus of legal texts that constitute the WTO. For example, informal challenges (i.e. "questions" about compatibility) can be raised in the different committees of the WTO such as the Technical Barriers to Trade (TBT) committee or the Trade-Related Aspects of Intellectual Property Rights (TRIPS) committee. If they choose, a Member can also move a complaint to formal dispute settlement through the Dispute Settlement

Understanding (DSU). Challenges brought forward at the WTO involve states arguing against states (state-state), rather than the aforementioned dynamics in which the tobacco industry directly challenges state regulations (industry-state). This context is important for our analysis, as we argue that despite this state-state apparatus, the same industry arguments are observable. In other words, governments within this key international venue are repeating arguments often identical to those promoted by the tobacco industry.

The first tobacco-related trade dispute was brought forward under the WTO's precursor agreement, the General Agreement on Tariffs and Trade (GATT). This case involved the United States and Thailand, and resulted in a decision that forced Thailand to open its market to transnational tobacco companies (TTC) (McGrady, 2011; Vateesatokit et al., 2000). Since the panel report was adopted in 1990, there has been a stream of challenges to tobacco control measures at the WTO (Lester, 2015). These challenges have prompted a number of legal scholars and political scientists to analyze the relationship between tobacco control and the rules that exist in the WTO system. Much of the thrust of their analyses articulates the ways in which tobacco control legislation and regulations can be crafted to reduce the likelihood that such measures could be challenged as being inconsistent with trade law (Jarman, 2013; Jarman et al., 2012; Liberman, 2013; McGrady, 2011; Mitchell and Studdert, 2012; Mitchell and Sheargold, 2014).

The technical-legal scholarship in this field has provided a robust basis to defend most existing and novel tobacco control measures at the WTO. Our study complements this legal scholarship utilizing a sociolinguistic perspective to examine the various formal and informal challenges to novel tobacco control measures at the WTO. This type of analysis contributes to the broader understanding of challenges waged against tobacco control using trade law by identifying the arguments that governments use to oppose or at least question the technical-legal legitimacy of such measures. The pattern of these arguments reveals that country representatives oppose novel tobacco control measures using common non-technical arguments as a basis for the legal arguments; the same as those used by the tobacco industry to oppose these measures at the domestic level. We discuss how this alignment exposes the conflation of government and industry interests. From this baseline analysis we discuss how this conflation reveals a more important dynamic: the relationship between unsubstantiated or misrepresented information presented as fact and the rhetoric of opposition. Our examination and categorization of the rhetoric of opposition to novel tobacco control measures at the WTO also allows for scrutiny and verifiability of whether this opposition is indeed based in evidence.

2. Analytic framework

The first task of our analysis is to identify generic *patterns* of argumentation, the rhetorical strategies used by representatives to argue against novel tobacco control legislation. Patterns of argumentation uncover the expectations governments have of each other. At one level the expectations will be overt, derived from the written rules that constitute the system of international law. At another level the forum for deliberation is itself norm-generating. By this we mean that through deliberation, meaning is attached to the written rules, not simply through a technical explication of the "original" meaning of the rule, but the actual formation of a world of meaning surrounding these rules, embedding these rules in a system of facts, values and morality. In this respect, the dialogue and argumentation within a particular institution, like the WTO, draws from existing norms and serves to reconfigure such norms by giving meaning to political practices (such as product

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