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Short-Interval Cortical Inhibition and 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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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.

Keywords: Tobacco control, Tobacco industry, Government regulation, Trade law

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 and Peeters et al., 2015); the production and manipulation of scientific evidence (McDaniel et al., 2008, Muggli et al., 2003, Ong and Glantz, 2000 and 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 and Peeters et al., 2015); and the promotion of voluntary agreements and/or health education initiatives (Crosbie et al., 2012, Nakkash and Lee, 2009 and 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](#) and [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](#) and [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](#) and [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](#) and [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 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](#) and [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](#) and [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](#) and [McGrady, 2011](#)). Since its founding in 2005, 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](#), [Drope and Lencucha, 2014](#), [Jarman, 2014](#), [Lencucha and Drope, 2015](#), [McGrady and Jones, 2013](#), [Mitchell and Voon, 2011a](#) and [Mitchell and Voon, 2011b](#)). 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 and 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 and McGrady, 2011; Mitchell and AuthorAnonymous, 2012 and 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 regulation) in a broader social, historical, political and economic context. This perspective is decidedly constructivist in its assumptions. These assumptions are best encapsulated by the two basic tenets of constructivism presented by Alexander Wendt: 1) "that the structures of human association are determined primarily by shared ideas" and, 2) "that the identities and interests of purposive actors are constructed by these shared ideas rather than by a given nature" ([Wendt, 1999](#)). As Robert Cover states "The rules and principles of justice [are] but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" ([Cover, 1983](#)). What Cover is characterizing is not a form of rule interpretation that uncovers the objective foundation of legal precepts making the original or intended form more clearly visible, but rather rules in a wider meaning-making process – a

shaping and reshaping of the original form. Formal rules are explicit and can be found in binding international agreements such as the WTO's TBT, and the WHO's FCTC. When we look to the patterns of argument within the WTO, we situate them first within the formal structure of rules. For example, it is not surprising to see arguments that novel tobacco control legislation is restrictive to trade, because the basic legal framework of the WTO is oriented towards facilitating the free movement of goods and services. What is more interesting from a social science perspective, however, is examining such argumentation as expressions of implicit norms perpetuated through discourse amongst countries. Our analytic framework thus categorizes patterns of argumentation used to support legal assertions. The specific arguments within these categories, once identified, can be predicted in future challenges and scrutinized for their accuracy. In addition, our analysis provides insights into conflicting norms at the intersection of public health and trade policy.

Our analytic framework draws from the three reactive-reactionary theses articulated by Albert Hirschman ([Hirschman, 1991](#)) that comprised common patterns of argumentative opposition to what he termed "progressive" political reform movements. We use Hirschman's theses as a heuristic to organize and present our analysis, as well as situate this analysis within a more general literature on rhetoric and opposition to policy change. Hirschman defined the first 'perversity' thesis as the assertion that "any purposive action to improve some feature of the political, social or economic order only serves to exacerbate the condition one wishes to remedy" ([Hirschman, 1991](#)). The 'futility' thesis "holds that attempts at social transformation will be unavailing, that they will simply fail to "make a dent"" ([Hirschman, 1991](#)). The 'jeopardy' thesis "argues that the cost of proposed change or reform is too high as it engenders some previous, precious accomplishment" ([Hirschman, 1991](#)). Hirschman contends that these theses "can be invoked by any group that opposes or criticizes new policy proposals or newly enacted policies".

3. Methods

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 reviewed documents for eight cases pertaining to these two measures, including meeting minutes of the TBT committee and TRIPS Council, individual country submissions to these meetings, and formal country submissions to the Dispute Settlement Body under the DSU (See [Table 1](#) for included documents). These cases were chosen because they were challenged either informally (representatives from members raised concerns about the measure) or formally (one or more members filed a WTO dispute). The tobacco additives cases were addressed under the TBT, while the plain packaging cases were addressed under the TBT, TRIPS and the DSU. The arguments against the novel tobacco control measures were first organized according to country and then were entered into NVivo10 qualitative software.

Table 1. Documents included for analysis.

Case	Documents
Brazil -Tobacco Additives Ban	G/TBT/M/53, G/TBT/M/54, G/TBT/M/55, G/TBT/M/56 and G/TBT/M/67, G/TBT/N/BRA/407
Canada - <i>Cracking Down on Tobacco Marketing Aimed at Youth Act</i> (Bill C-32).	G/TBT/M/49, G/TBT/M/50, G/TBT/M/51, G/TBT/M/52, G/TBT/M/53, G/TBT/W/329, G/TBT/W/330, G/TBT/W/331 and G/TBT/W/332
United States – Clove Cigarettes	G/TBT/M/49 and DS406/1 + country report: Indonesia: G/TBT/W/323
European Union – Tobacco Products Directive	G/TBT/M/59, G/TBT/M/60, G/TBT/M/61, IP/C/M/73 and IP/C/M/73Add.1 + country reports: Cuba: G/TBT/W/65 and G/TBT/W/371; Dominican Republic: G/TBT/W/358 and G/TBT/W/367; Malawi: G/TBT/W/360, G/TBT/W/369 and G/TBT/W/376; Zimbabwe: G/TBT/W/370; EU: G/TBT/N/EU/88
Australia – Plain Packaging Bill	IP/C/M/66, G/TBT/M/54, G/TBT/M/55, G/TBT/M/56, G/TBT/M/57, WT/DSB/M/322
Ireland – Plain Packaging Legislation (Proposed)	G/TBT/M/60, G/TBT/M/61 and G/TBT/M/62 + country reports: Malawi: G/TBT/W/368, G/TBT/W/375 and G/TBT/W/387; Dominican Republic: G/TBT/W/366 and G/TBT/W/374; Cuba: G/TBT/W/364 and G/TBT/W/380
New Zealand – Plain Packing Legislation (Proposed)	G/TBT/M/58, G/TBT/M/59, G/TBT/M/61 and G/TBT/M/62 + country reports: New Zealand: G/TBT/N/NZL/62 and G/TBT/N/NZL/62/Add.1; Malawi: G/TBT/W/388; Dominican Republic: G/TBT/W/355 and G/TBT/W/359; Cuba: G/TBT/W/356 and G/TBT/W/381; Ukraine: G/TBT/W/384
United Kingdom – Plain Packaging Legislation (Proposed)	G/TBT/M/62 and G/TBT/W/379

3.1. Analysis

We first analyzed the arguments using Hirschman's three theses framework to identify the different ways that representatives opposed novel tobacco control legislation. We then conducted a second level of analysis to identify the different sub-arguments used to bolster the overarching three theses. For example, a representative may argue that plain tobacco packaging will not work (futility thesis), but that tells us little about the nature of the argument. In this case we analyzed which arguments were asserted to support the futility claim. For example, we found that the argument that there was a "lack of scientific evidence" to support the legislation was used across all of our cases. We then deconstructed each sub-argument to assess what the claim was attempting to evoke or target. An overview of our findings is found in [Table 2](#). Despite a myriad of arguments made against novel tobacco control measures there is an internal logic to the arguments that cuts across the cases we analyzed. This logic is tied to the basic principles underlying the WTO system but draws from the common arguments put forward by the tobacco industry against tobacco control measures.

Table 2. Overview of findings.

Thesis	Argument
Futility	<ul style="list-style-type: none">• There is no scientific evidence that the tobacco control measure will achieve its intended objectives.• The government must demonstrate through scientific evidence that the measure will indeed be effective.
Perversity	<ul style="list-style-type: none">• The measure will lead to an increase in illicit products which will lead to an increase in consumption.• The measure will lead to an increase in the illicit market and potentially more harmful products.
Jeopardy	<ul style="list-style-type: none">• The measure will disproportionately disadvantage developing economies.• The measure will harm the livelihoods of tobacco farmers and their families.

3.2. Futility

All of the countries that opposed the two different tobacco additives bans established by Brazil and Canada asserted that such bans would not achieve the intended objectives, i.e. that the measures would be futile. Within these challenges was a reliance on the

argument captured in the following statement by the representative from Turkey: "there is no scientific evidence to demonstrate that additives used in blended tobacco made those products either more attractive for consumers, more harmful to health or more addictive and more attractive to youth" ([G/TBT/M/53, 2011](#)). Malawi, Zambia, Mexico, Tanzania, Zimbabwe, the Dominican Republic, Ecuador, Jordan, Former Yugoslav Republic of Macedonia, Nicaragua, Honduras, Cuba and the European Union echoed this argument ([G/TBT/M/53, 2011](#), [G/TBT/M/54, 2011](#) and [G/TBT/M/55, 2012](#)). This argument was used to support the contention that the measure was not "more trade restrictive than necessary," a requirement within the TBT agreement. Article 2.2 of the TBT agreement states:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

The futility argument was combined with the contention that the country must provide scientific proof that the legislation will work. The asserted logic in this argument is that if a measure does not achieve its intended objective then it is not necessary and a *de facto* barrier to trade. This same logic was invoked by Malawi in its questioning of Ireland's proposal for plain packaging:

"Plain packaging will not work. It will not achieve Ireland's health objectives. We have stated earlier that protecting health and reducing youth smoking are entirely legitimate objectives. But plain packaging will not achieve these objectives, and no credible evidence exists to demonstrate that it will. Young people decide to smoke based on various social factors, including peer pressure – not on packaging.

Ireland's proposed measure will therefore be ineffective” ([G/TBT/W/387, 2014](#)).

The futility argument exposes the salient, but often overlooked, issue of burden of proof. All of the countries asserted that novel tobacco control legislation, namely tobacco additives bans and plain packaging requirements, required scientific evidence to prove that it would meet its intended objectives. For example, in one of three submissions to the TBT committee, Malawi challenged the European Union to provide “credible scientific evidence to support the Tobacco Products Directive”, specifically that the ingredients bans and packaging requirements will “reduce smoking initiation and smoking rates” ([G/TBT/W/360, 2013](#)).

3.3. Perversity

Our analysis of the documents revealed further arguments waged against novel tobacco control measures in the form of the perversity thesis. The basic argument representing this category is that the novel tobacco control measure will have unintended harmful consequences. In the 2011 ASH report, the authors noted that in addition to industry arguments that tobacco control measures will not work, the industry almost always asserts that the measure will lead to an increase in illicit trade and counterfeit tobacco products ([ASH, 2011](#)). Our analysis found the illicit trade argument was also used consistently and vigorously at the WTO, despite the fact that the WTO has no jurisdiction over illicit trade. In the Australia plain packaging case Cuba noted that plain packaging would lead to an increase in illicit trade “given that it would be easier to counterfeit a plain package” and could also promote the smuggling of “genuine packages” to satisfy demand ([G/TBT/M/54, 2011](#)). The Dominican Republic concurred that one of the “unwanted effects” of plain packaging would be a rise in illicit trade. Zambia furthered this argument by stating “Australia's legislation could expose consumers to more harmful tobacco products due to the proliferation of counterfeit products whose quality was not controlled by any regulatory body” ([G/TBT/M/55, 2012](#), p. 55). The first perversity argument is that the measure will lead to illicit trade and counterfeit products, which will lead to increased consumption. It was argued that not only will consumption

increase, but also the products being consumed may be more harmful because they are not regulated. The illicit trade-counterfeit argument was less dominant for the additives ban cases. It was referred to by Malawi in the Brazil, RDC/14/2012 case ([Brazil, 2012](#)), but no mention was made in Canada's Bill C-32 case.

The second argument asserting the perversity thesis is that plain packaging would place greater competitive pressure on price. Representatives from the Dominican Republic argued that "if tobacco products were to be sold in standard packs that make product differentiation difficult, sellers may feel compelled to compete solely on the basis of price, causing a drop in retail prices which might in turn produce an increase in the demand and consumption of tobacco products, including cigarettes and cigars" ([G/TBT/W/355, 2012](#)). This line of arguments aligns with Hirschman's observation that "reactionaries" argue that a particular "action will produce, via a chain of unintended consequences, the *exact contrary* of the objective being proclaimed and pursued" ([Hirschman, 1991](#)). Notably, it fails entirely to account for governments' ability to impose excise taxes to compensate for any price competition that tobacco firms might engage in.

3.4. Jeopardy

The jeopardy thesis was supported by two arguments. The first asserted that the novel tobacco control measure would harm the strides made by "developing countries" towards economic development. Referring to Brazil's additives ban, the Former Yugoslav Republic of Macedonia specifically invoked this concept when it stated, "This regulation jeopardizes the economy of countries under development" ([G/TBT/M/53, 2011](#)). Countries who were not major tobacco exporters to the country being challenged even asserted that the measure would serve as a "barrier to future growth potential" ([G/TBT/M/53, 2011](#)). Mozambique also referred to the effect that a tobacco additives ban would have on "export revenue and economic and development prospects" ([G/TBT/M/53, 2011](#)). Similarly, Nigeria referred to the implications of this measure to "agricultural and rural development objectives" ([G/TBT/M/55, 2012](#), p. 55). In a submission to the TBT committee pertaining to Australia's plain packaging

legislation, the Dominican Republic expressed that they are “worried about the impact that the proposed measures could have on small and vulnerable economies which are largely dependent on the production and export of tobacco and tobacco products” ([G/TBT/W/339, 2011](#)). Chile also highlighted the need for Members to “take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such measures did not create unnecessary obstacles to exports from developing country Members” ([G/TBT/M/54, 2011](#)).

The representatives aligned their argument with Article 12.3 of the TBT, which requires representatives to take into account the special needs of developing countries. In the additives ban cases, representatives argued that the measure was a *de facto* ban on traditional blended tobacco that use Burley tobacco leaf produced by countries like Malawi and Zambia. In response to the European Union Tobacco Products Directive (EUTPD), Malawi noted, “25% of the tax base that supports government operations comes from the tobacco industry” and “tobacco contributes at least 60% of Malawi's foreign export earnings” ([G/TBT/W/369, 2013](#)). In the plain packaging cases the challenges represented a more generic argument that the measure would “impact small economies that largely depend on the production and export of tobacco” ([G/TBT/W/339, 2011](#)). A similar argument was made against the EUTPD measure where countries like Zimbabwe expressed concern that the measure would have a “negative impact on tobacco producing of developing countries” ([G/TBT/M/59, 2013](#)). This is a salient argument in the context of the WTO regime, where commentators have noted the challenges that many least-developed states encounter with the rules of open trade ([Amorim, 2000](#), [Mitchell and Wallis, 2010](#) and [Sell, 2004](#)). Sell notes that “the costs of participating in venues such as the WTO can be prohibitive for those without substantial resources” ([Sell, 2004](#)).

The second argument was similar to the first and asserted more specifically that the tobacco control measure would have a detrimental effect on the livelihoods of tobacco farmers, personalizing the costs rather than focusing solely on the aggregate economy. In the Brazil case, countries such as Malawi, Tanzania and Zimbabwe argued that the tobacco additives ban would bring social problems to the families that rely on tobacco growth. Honduras argued that the Brazil case

would lead to “job losses” as did Malawi, stating that the measure would impact the approximately 700,000 farmers who cultivated tobacco in Malawi ([G/TBT/M/53, 2011](#)). Pointing to the use of this group as a rhetorical strategy, this number almost doubled in a statement made two years later for the EUTPD case where Malawi argued that the measure would harm the lives of “1.5 million tobacco farmers” ([G/TBT/W/369, 2013](#)). The same two arguments were made against Australia's plain packaging measure. The principal argument put forward in the plain packaging cases was that changing the packaging requirements the measure would place an added economic burden on the tobacco manufacturers. More generally, as Cuba argued, such measures were worrisome “above all for the developing countries with small economies” ([G/TBT/W/356, 2012](#), p. 356).

4. Discussion

Despite the unique legal context of the WTO system, we find that common tobacco industry arguments have surfaced to challenge novel tobacco control measures. We discuss two dimensions of this finding. The first pertains to the rhetoric of opposition and nature of these types of arguments. The second pertains to the relationship between industry interests and representation of these interests at the WTO.

Rhetoric is meant to persuade. One could argue that the ability for rhetoric to do this is to first assert compelling facts. The tobacco industry is perhaps the least trustworthy source of scientific information and interpretation ([Gilmore et al., 2015](#) and [Saloojee and Dagli, 2000](#)). Despite decades of evidence that discredits the tobacco industry's ability to make scientific claims, it is clear that the misrepresentation and misuse of science is a tool that the industry continues to use. A dominant argument across the cases we analyzed was the assertion that novel tobacco measures will not work and that there is no scientific evidence to claim effectiveness. This assertion exists despite the obvious logic that one cannot prove the effectiveness of something until it is implemented. Moreover, recent analysis has demonstrated that the industry-sponsored research to demonstrate the ineffectiveness of plain packaging legislation is methodologically weak ([Hatchard et al., 2014](#), [Lavery et al.,](#)

2015 and Ulucanlar et al., 2014), while suggesting that the legislation in Australia (the first country to implement this measure) is indeed having the intended effect (Scollo et al., 2015 and Wakefield et al., 2013). Experimental studies have also supported the effectiveness of plain packaging legislation (Hammond, 2010, Hammond et al., 2013 and Thrasher et al., 2011). Another analysis has demonstrated that the evidence used by tobacco interests to oppose plain packaging legislation was weak and exaggerated (Evans-Reeves et al., 2014).

In many ways, these dynamics are consistent with the broader so-called "precautionary principle" that has become particularly salient in discussions and negotiations around environmental policy. The 1992 Rio Declaration states in Principle 15: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason to prevent environmental degradation" (UN, 1992). In the case of novel tobacco control measures, the harm of tobacco products is irrefutable and the preliminary evidence for most novel measures clearly suggests that there is considerable potential for effectiveness, and certainly enough to permit trying these newer tobacco control interventions. Stewart calls this the "non-preclusion precautionary principle" and argues that "scientific uncertainty should not automatically preclude regulation of activities that pose risk of significant harm" (Stewart, 2002).

The second element of rhetorical power is the ability to induce an emotional connection with the audience. One of the ways that the rhetoric opposing novel tobacco control measures has attempted to connect with the hearts of those involved in the inter-state enterprise is by evoking the protection and promotion of "economic development". The jeopardy thesis evokes this development rhetoric on two levels, one being the gross economic development of the country and the second being the more personal dimension of individual employment and economic sustenance. This framing is resonant in a context where some have argued that the very legitimacy of the WTO rests on its ability to lift "developing" economies towards greater parity with high-income countries (Amorim, 2000, Barton et al., 2010 and Broude, 2006). Broude traces the history of development objectives within the WTO, arguing that the past two decades have resulted in the supplanting of the original objectives of the GATT to expand the production and trade of goods as an end in

itself, to a development agenda that he attributes to the WTO's "continued and frustrating quest for legitimacy" ([Broude, 2006](#)). A body of literature reflects this challenging quest for equity among states in the global economy and the role of the WTO in facilitating this process. Mitchell and Wallis point out the challenges in the conceptualization and application of the "special and differential treatment" principle that is embedded in the WTO legal framework while suggesting that this principle remains important for small states or developing economies ([Mitchell and Wallis, 2010](#)). Reference to this scholarship is simply meant to illustrate that arguments about the development needs of smaller or "developing" economies will likely resonate in the current context where the issue of equity and the different needs of states are salient and hotly debated, particularly when many argue that the WTO dispute settlement system serves to "exacerbate existing inequalities" between countries ([Smith, 2004](#))

Our findings provide a surprising counterpoint to research that shows that developing countries do not utilize the WTO dispute settlement system to the same extent as wealthier countries ([Bown and Hoekman, 2005](#), [Busch and Reinhardt, 2003](#), [Smith, 2004](#) and [Wade, 2003](#)). We find that those who oppose novel tobacco control measures are primarily developing countries. It should also be noted that most of the challenges are informal complaints expressed in the least costly venue, that of WTO committees. Countries like Zambia have never filed a formal complaint under the DSU at the WTO but are vociferous opponents in WTO committees to tobacco control measures ([WTO, 2016](#)). Malawi is another vocal opponent of tobacco control measures and has third party status in the Australia plain packaging case, while they have only been involved in one other case at the WTO ([WTO, 2016](#)). Cuba and the Dominican Republic have only served as a complainant in one case at the WTO: the Australia plain packaging case ([WTO, 2016](#)). It is well documented that companies such as Philip Morris International and British American Tobacco are providing funds for governments to pursue these disputes ([Stumberg, 2013](#)). Our findings provide more evidence, albeit indirect, of just how close the relationship is between the tobacco industry and government in these countries.

One way to undercut the jeopardy argument brought forward by low-income countries is to demonstrate that the economic benefits of

tobacco to the tobacco leaf farmers are overstated. Again we return to the importance of facts in this context of competing rhetoric. Persuasion is undermined in part if proponents of tobacco control can demonstrate that the rhetoric of opposition is false. There is a need to continue to produce sound empirical evidence of the economic risks of tobacco production and particularly evidence that the desirability of tobacco farming (i.e. the employment argument) is overstated. This appears to be the case with Malawi in its own statements at the WTO, where we found that the stated number of farmers reliant on tobacco for their livelihoods is exaggerated. A recently published review finds that tobacco farmers struggle with high labour costs and inflated costs of inputs provided by the tobacco industry ([Lecours, 2014](#)). Perhaps more importantly, Lecours finds that there is a desperate need for more research on the economics of tobacco production in low- and middle-income countries. However, the existing research suggests that despite the appeal of the rhetoric of protecting the livelihoods of farmers, the reality may be much different. What this research does suggest is that tobacco farmers are indeed vulnerable, but not because of the regulation of the tobacco market. They are vulnerable because the inequities along the supply chain that make it difficult for them to sustain a decent livelihood ([Otañez and Glantz, 2011](#) and [Otañez et al., 2009](#)). For example, recent economic survey research from Zambia illuminates a common scenario in which contracted farmers pay inflated input costs to leaf-buying companies that – in an oligopsonistic or even monopsonistic market – then pay farmers at below-global-market prices, typically trapping the farmers in a downward spiral of debt that condemns them to more years of growing tobacco at substantial losses ([Goma et al., 2015](#)). As the tobacco leaf buying firms appear to have calculated, the buyer-friendly situation is greatly helped by limited markets for other types of goods and that farmers do not perceive many better options even when there are some, such as bamboo in Kenya's tobacco-growing regions ([Magati et al., 2012](#)). Tobacco farming and other employment along the value chain is intrinsically problematic, but for reasons that stem from tobacco industry practices, limited access to other agricultural supply chains and a lack of strategic approaches to alternative livelihoods ([Altman et al., 1996](#), [Beaglehole et al., 2015](#) and [Otañez et al., 2007](#)). The lack of supply chains for alternative agricultural products is not simply a matter of for market, but also warrants the attention of

governments to support these alternatives through investment incentives or other policy instruments. In contrast, countries continue to incentivize investment in the tobacco sector ([Lencucha et al., 2016](#)).

Returning to the earlier question about the nature of the relationship between the tobacco industry and governments. Our findings point to the conflation of the economic and development objectives of many low- and middle-income countries (LMICs) with the interests of the tobacco industry through the discourses that align the two. It is troubling that this dynamic seems particularly common among governments in LMICs, which in a context of often-higher vulnerability to undue influence, raises serious questions of good governance in public health. Our findings suggest that some governments are readily accepting these problematic arguments and are willing to promote them in prominent international fora like the WTO, either because they partly buy into the rhetoric or because they are complicit in the tobacco industry's malfeasance. However, there is a need to continue to uncover the internal dynamics of governments and the relationships among different economic sectors of government and tobacco interests. The analysis presented in this paper points to the "what" of argumentation, but does not identify the origins or process in which these arguments are constructed. We can speculate that these arguments, because they mirror familiar industry arguments, are derived from tobacco industry influence but this postulation needs to be substantiated and explicated through more qualitative ethnographic research. Our own research in tobacco-growing countries suggests that the relationship between the economic sector of government and tobacco interests is both overtly and covertly visible ([Bialous et al., 2014](#), [Chavez et al., 2014](#), [Lencucha et al., 2015](#), [Lencucha et al., 2015](#) and [Lencucha et al., 2015b](#)).

In what is probably the best-case scenario, governments' "buy-in" in some tobacco-growing countries may derive in part from their precarious economic situations and the perceived role that tobacco growing might play in improving them. However, the existing evidence of meagre livelihoods for many tobacco farmers and widespread environmental degradation associated with tobacco farming suggests that governments should revisit these dynamics for the sake of

sustainable development more broadly (i.e. both economic and ecological) ([Lecours, 2014](#)).

Our study provides the “geography” of the arguments used by government representatives to resist tobacco control at the WTO. Tobacco control proponents can use this geography to target engagement with the economic, agricultural and other sectors of government. This type of intersectoral engagement within government is not without its challenges. Communicating information about health policy issues to non-health sectors is only part of a larger need to develop institutions within government that can bring together the different sectors while developing rules, norms and strategies that work to integrate the different mandates in a way that does not dilute health policy ([Malone and Bialous, 2014](#) and [Malone et al., 2012](#)). For example, our research conducted in the Philippines and Zambia points to the continued, often formal, collaboration between the tobacco industry and economic sectors of government, one obvious component that would hinder intersectoral work ([Lencucha et al., 2015](#) and [Lencucha et al., 2015b](#)). Finally, the themes we identified under the three reactionary theses can serve as starting points to provide evidence and support to correct misconceptions of the economic significance of tobacco.

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