

REVIEW ESSAY

## Lobbying, civil society organizations, and the international law of tobacco control

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Margherita Melillo, *Weaponising Evidence: A History of Tobacco Control in International Law*, Cambridge University Press, 2024, ISBN 9781009354356, 279 + xxix pp., \$ 125.00 (hb)

The title of this book, *Weaponising Evidence*, weaves together the two ‘investigative lenses’<sup>1</sup> through which Margherita Melillo has chosen to approach the international law of tobacco control: lawfare and evidence. Lawfare is a portmanteau that ‘capture[s] the idea of using law “as part of a hostile campaign against a country or group”’, though the author uses the term in a neutral way to describe ‘a battle between two factions (the tobacco control network and the tobacco industry)’ in the field of international tobacco control.<sup>2</sup> Similarly, she uses evidence as ‘a neutral term to refer to a broad array of different types of specialised knowledge on tobacco control, irrespective of whether they constitute science or not’.<sup>3</sup> Melillo explains that lawfare and evidence are entangled, the latter being ‘a central strategy’<sup>4</sup> of the former. The strategic use of evidence seems particularly apposite in the context of the World Health Organization (WHO), on which this book focuses, considering the organization’s ‘medical-scientific institutional culture’.<sup>5</sup>

In her study, Melillo examines ‘the transformation of the domestic tobacco wars into an international warlike effort’ and argues 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’.<sup>6</sup> This tool has been used in the context of the negotiation of the Framework Convention on Tobacco Control (FCTC), which was adopted in 2003 under the auspices of the WHO, but also in the context of the FCTC’s implementation (after 2003), as well as via international litigation.

The book has five chapters (including the introduction and the conclusion). The introductory chapter sets the scene for the rest of the study. The second chapter, which is the longest of the book, pertains to the negotiation of the FCTC, while the third chapter deals with the FCTC’s ‘post-conclusion phase’, after 2003.<sup>7</sup> These two chapters shed light on ‘the first two battles of the

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<sup>1</sup>M. Melillo, *Weaponising Evidence: A History of Tobacco Control in International Law* (2024), at 1.

<sup>2</sup>*Ibid.*, at 7 f. The Framework Convention on Tobacco Control (FCTC) contains definitions of the concepts of ‘tobacco control’ and ‘tobacco industry’, see 2003 WHO Framework Convention on Tobacco Control, Art. 1(d) and Art. 1(e).

<sup>3</sup>See Melillo, *supra* note 1, at 17.

<sup>4</sup>*Ibid.*, at 14.

<sup>5</sup>*Ibid.*, at 41.

<sup>6</sup>*Ibid.*, at 6.

<sup>7</sup>*Ibid.*, at 114.

international tobacco control lawfare'.<sup>8</sup> By contrast, the fourth chapter focuses on another kind of battle, namely on international disputes in the field of tobacco control. The concluding chapter, which is the shortest, is devoted to the 'lessons learnt on lawfare and evidence'.<sup>9</sup>

In terms of methodology, Melillo describes her study as 'a multi-composite book that departs from traditional legal analysis to embrace the "empirical turn in international legal scholarship"'.<sup>10</sup> Chapters 2 and 3, in particular, constitute 'a socio-legal analysis of the making and development of the FCTC from a historical perspective'.<sup>11</sup> The author conducted this research based on negotiation documents and first-person accounts,<sup>12</sup> adding her own observations under the heading 'fieldnotes'.<sup>13</sup> As regards Chapter 4, it consists in 'an analysis of international case law from a comparative perspective'.<sup>14</sup>

Throughout the book, it becomes evident that Melillo's study has implications that go well beyond the field of international tobacco control. One may for instance think of environmental (and especially climate) issues, which Naomi Oreskes and Erik M. Conway already analysed jointly with tobacco in their seminal book *Merchants of Doubt*.<sup>15</sup> In relation to both tobacco control and climate policy, the evidentiary strategy of regulatory-averse interest groups initially focused on denying the existence of a risk, before shifting to the dimension of risk management. While the author is careful to emphasize the specificities of tobacco control law compared to international environmental (and climate) law,<sup>16</sup> she explains that the FCTC regime draws from other fields of international law, including international environmental law.<sup>17</sup> One reason for this borrowing is that 'both environmental and tobacco control are divisive and sensitive areas of regulation, with one of the main obstacles to their realisation lying in the economic interests of industries'.<sup>18</sup>

This review essay examines three cross-cutting issues broached by the book in relation to the FCTC framework that are of particular interest from the perspective of international law-making: first, the influence of lobbyists and what the author refers to as 'civil society organizations' (CSOs) on the elaboration and implementation of the FCTC; second, the categorical exclusion of the tobacco industry from the FCTC framework, and how this exclusion affected the study's design and methodology; and, finally, the geographical location of the WHO's headquarters and its potential impact on the FCTC regime.

The first dimension that this review essay explores is the *lobbying dimension*. Indeed, lobbying (a term that this essay employs in a neutral way to designate the attempt by natural or legal persons without legal authority in the law-making process to influence those who possess such authority) and the strategic use of evidence go hand in hand: evidence (or 'expertise', as it is often called in the law-making context) is a prominent lever on which lobbyists rely to convince their interlocutors. Accordingly, the epistemic defence of lobbying – i.e., the claim that lobbyists and interest groups provide law-makers with crucial expertise and hence contribute to informed law-making – is one of the main arguments that lobbyists and law-makers put forward to explain why it is important for them to interact with each other.<sup>19</sup> Evidence was also used by the other side of

<sup>8</sup>*Ibid.*, at 183.

<sup>9</sup>*Ibid.*, at 257.

<sup>10</sup>*Ibid.*, at 23.

<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*, at 23 ff.

<sup>13</sup>*Ibid.*, at 27.

<sup>14</sup>*Ibid.*, at 23.

<sup>15</sup>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* (2010).

<sup>16</sup>See Melillo, *supra* note 1, at 20.

<sup>17</sup>*Ibid.*, at 52 f.

<sup>18</sup>*Ibid.*, at 55.

<sup>19</sup>For an example at the domestic level, see US Association of Government Relations Professionals, 'About AGRP', available at [grprofessionals.org/about-association-government-relations-professionals](http://grprofessionals.org/about-association-government-relations-professionals).

the international tobacco control lawfare (i.e., by the WHO and public health advocates) as ‘a powerful weapon against the power of the industry, and the best way to empower states to resist their lobbying’.<sup>20</sup> It is worth noting that the strategic reliance on evidence is not only typical of lobbying (and counter-lobbying): it also characterizes interpretation, including interpretation in international law. Indeed, like in a game,<sup>21</sup> interpretative methods are often used strategically to achieve a particular result. Evidence directly informs this interpretative game, as it is built into the various interpretive methods to show that they point in a specific direction.

As the chronological table that precedes the first chapter of the book makes clear, the ‘tobacco papers’, which were published in 1994–1998 and documented the tobacco industry’s ‘decades-long activity of lobbying against tobacco control measures’, marked a turning point in the history of international tobacco control.<sup>22</sup> The first concrete efforts within the WHO to elaborate an international treaty on tobacco control date back to this period. In 2000, an expert committee convened by the WHO’s Director-General published a report<sup>23</sup> that ‘contained not unexpected but nevertheless shocking findings: the industry had extensively and constantly lobbied to divert attention from tobacco control or to discredit the WHO’s actions’.<sup>24</sup> Melillo explains that ‘the [tobacco] industry has used murky and aggressive lobbying strategies at all levels of regulation, from domestic jurisdictions to the European Union and the World Health Organization’, including with regard to the ‘implementation and elaboration of the FCTC’.<sup>25</sup>

While the author speaks of ‘unethical and aggressive efforts of the tobacco industry to oppose and delay the adoption of tobacco control policies’,<sup>26</sup> she does not explicitly state what these lobbying strategies consisted in, nor whether they were illegal. While this aspect was likely omitted for reasons of scope, it is of utmost interest to lobbying law scholars. Building on the aforementioned expert committee report of 2000, Melissa Durkee (whose work is mentioned several times in Melillo’s study<sup>27</sup>) has shown that the tobacco industry’s lobbying activities constituted a prime example of ‘astroturf activism’ due to its reliance on front groups.<sup>28</sup> Another strategy of the tobacco industry has consisted in funding scientific research on tobacco and in challenging existing studies on the subject.<sup>29,30</sup> Today, the regulation of both international and domestic lobbying remains patchy, though the WHO now takes an unusually strong – but

<sup>20</sup>See Melillo, *supra* note 1, at 51–2.

<sup>21</sup>On the game metaphor in international legal interpretation see A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (2015); O. Ammann, ‘International Legal Interpretation as a Game: A Compelling Analogy?’, (2016) 5 *Harvard International Law Journal*, available at [journals.law.harvard.edu/ilj/2016/05/international-legal-interpretation-as-a-game-a-compelling-analogy](http://journals.law.harvard.edu/ilj/2016/05/international-legal-interpretation-as-a-game-a-compelling-analogy).

<sup>22</sup>See Melillo, *supra* note 1, at xii.

<sup>23</sup>Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization: Report of the Committee of Experts on Tobacco Industry Documents (July 2000), available at [iris.who.int/handle/10665/67429](http://iris.who.int/handle/10665/67429) (Report of the Committee of Experts).

<sup>24</sup>See Melillo, *supra* note 1, at 49.

<sup>25</sup>*Ibid.*, at 4.

<sup>26</sup>*Ibid.*, at 34 f.

<sup>27</sup>See *ibid.*, at 261 ff.

<sup>28</sup>M. Durkee, ‘Astroturf Activism’, (2017) 69 *Stanford Law Review* 201, 209 ff. On the concept of astroturf see, e.g., E. Walker, ‘Grassroots Mobilization and Outside Lobbying’, in M. Grossmann (ed.), *New Directions in Interest Group Politics* (2014), 44, at 46. On the use of front groups see also 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, at 1691, 1695.

<sup>29</sup>See Oreskes and Conway, *supra* note 15. See also Mamudu, Hammond and Glantz, *ibid.*, at 1692 ff; 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, at 6.

<sup>30</sup>For a literature-based overview of the various strategies employed by tobacco companies see Weishaar et al., *ibid.* For a more recent overview see WHO, ‘New WHO Campaign Highlights Tobacco Industry Tactics to Influence Public Health Policies’, 16 November 2023, available at [www.who.int/news/item/16-11-2023-new-who-campaign-highlights-tobacco-industry-tactics-to-influence-public-health-policies](http://www.who.int/news/item/16-11-2023-new-who-campaign-highlights-tobacco-industry-tactics-to-influence-public-health-policies).

controversial – stance on the issue of industry interference (*infra*). The expert committee report already contained several recommendations on ‘countering tobacco lobbying’.<sup>31</sup>

This last expression leads us to our next point: in line with broader debates and reports about the issue, the book seems to use ‘lobbying’ as a pejorative term to describe the activities of the opponents of tobacco control regulation. By contrast, the activities of CSOs<sup>32</sup> are implicitly distinguished from these lobbying efforts and tend to be pictured in a more positive fashion. This dichotomy between lobbying and civil society involvement is not surprising: it is already reflected in the preamble of the FCTC, which distinguishes between ‘the special contribution of nongovernmental organizations and other members of civil society not affiliated with the tobacco industry . . . to tobacco control efforts nationally and internationally’, and ‘the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts’. A similar dichotomous approach also appears to have been adopted in other research on tobacco control and the FCTC framework.<sup>33</sup> More generally, in the field of interest group studies, the term ‘lobbying’ is often avoided due to its negative connotation (among other reasons).<sup>34</sup> In addition, tobacco lobbying is usually viewed in a particularly negative light: because of its addictive<sup>35</sup> and potentially lethal character, tobacco is considered the archetype of what some lobbying scholars have called a ‘harmful industry’, together with other industry sectors such as ‘alcohol, gambling, and ultraprocessed foods’.<sup>36</sup>

Arguably, any industry that seeks to extract profit from marketing a product or service that it knows to possess addictive (and, in the case of tobacco, lethal) or otherwise harmful qualities should be subjected to heightened scrutiny on the part of regulators. Yet, for law-makers, drawing the line between addictive v. non-addictive (and, *a fortiori*, harmful v. harmless) products and services may not always be straightforward. Tobacco may seem like a particularly obvious case, but what about sugar, opioids, or even social media platforms? Regulators will likely be influenced by other factors than the addictive and/or harmful properties of a given product or service (e.g., the degree and likelihood of harm that it causes). In this context, scientific evidence can be expected to play an important role – which brings us back to the strategic use of evidence as a tool of lawfare.

What remains unclear when reading the book is the nature of the relationship between lobbying, on the one hand, and the important contribution made by CSOs in the elaboration and implementation of the FCTC, on the other, especially given the difficulty of distinguishing between ‘good’ lobbying (or advocacy, as it is often called) v. ‘bad’ lobbying. As the author explains, ‘the growing expertise of civil society organizations has made them valued and influential actors’,<sup>37</sup> including in the context of the FCTC regime, where they are ‘the most important source of expertise and authority’ and, accordingly, ‘the most influential actors’.<sup>38</sup>

One reason why the relationship between lobbying and the activities of CSOs is fuzzy is that the author does not provide a definition of the concept of CSO. However, she does offer examples of networks and initiatives, such as GLOBALink, ‘an online international network of experts created in the 1980s’, or ‘the experts that every few years convened at the World Conferences on Tobacco and Health’.<sup>39</sup> In Chapter 3, she mentions the Framework Convention Alliance (FCA), now called

<sup>31</sup>See Report of the Committee of Experts, *supra* note 23, at 104 f.

<sup>32</sup>E.g., Melillo, *supra* note 1, at 87 ff.

<sup>33</sup>E.g., H. M. Mamudu and S. A. Glantz, ‘Civil Society and the Negotiation of the Framework Convention on Tobacco Control’, (2009) 4 *Global Public Health* 150.

<sup>34</sup>E.g., (referring to the Swiss context) P. Sciarini, ‘Groupes d’intérêt’, in *Politique suisse – Institutions, acteurs, processus* (2023), 385.

<sup>35</sup>See Melillo, *supra* note 1, at 3.

<sup>36</sup>H. Chung, K. Cullerton and J. Lacy-Nichols, ‘Mapping the Lobbying Footprint of Harmful Industries: 23 Years of Data From OpenSecrets’, (2024) 102 *The Milbank Quarterly* 212.

<sup>37</sup>See Melillo, *supra* note 1, at 22.

<sup>38</sup>*Ibid.*, at 126.

<sup>39</sup>*Ibid.*, at 88.

the Global Alliance for Tobacco Control (GATC), as another example of CSO influence.<sup>40</sup> As a matter of fact, scholars have described the FCA's 'direct lobbying efforts' which, during the FCTC negotiations, consisted in 'briefings, providing expertise for delegates, particularly those from developing countries, submission of amendments to texts, face-to-face meeting in the corridors, and distribution of position papers'.<sup>41</sup>

Given that 'civil society' is a normative<sup>42</sup> and essentially contested concept,<sup>43</sup> its definition poses inherent difficulties. Some definitions exclude the economy<sup>44</sup> (and, hence, tobacco corporations), but not all of them do.<sup>45</sup> Moreover, one could argue that interest groups like trade associations, which are not profit-oriented as such, but defend the interests of their (profit-oriented) members, are part of civil society.<sup>46</sup> If one takes the case of the UN Economic and Social Council (ECOSOC), NGOs may apply for observer status, as may trade associations, but not individual businesses.<sup>47</sup> According to Durkee, '[i]t was not until the late 20<sup>th</sup> century that commentators began to regard [business groups] separately from "civil society" organisations working for the public benefit'.<sup>48</sup>

The WHO's Framework of Engagement with Non-State Actors (FENSA), which was adopted in 2016, distinguishes between four types of non-state actors (i.e., NGOs, private sector entities, philanthropic foundations, and academic institutions<sup>49</sup>). As Melissa Durkee points out in her work on international lobbying law, such 'categorical distinctions' may be counterproductive by leading to untransparent lobbying and the infiltration of CSOs by corporate actors.<sup>50</sup> As she explains (quoting from the aforementioned 2000 expert report), tobacco multinationals 'transformed the International Tobacco Growers' Association (ITGA) "from an underfunded and disorganized group of tobacco farmers into a highly effective lobbying organization" purporting to speak on behalf of developing world tobacco farmers'.<sup>51</sup> Because CSOs may have vested (including economic) interests, the distinction between CSOs and economic interest groups is not always clear-cut. Moreover, the former are often funded by the latter.<sup>52</sup> This is why categorizing some organizations as 'public interest groups' (as some political scientists do<sup>53</sup>) is tricky, especially if one views the public interest as a procedural concept, the content of which needs to be determined in an open and inclusive process. Accordingly, Durkee considers that the WHO's attempt, through FENSA, to 'distinguish between public-interest and private-sector

<sup>40</sup>*Ibid.*, at 154. See also Mamudu and Glantz, *supra* note 33.

<sup>41</sup>See Mamudu and Glantz, *ibid.*, at 159.

<sup>42</sup>N. Barber, *The Principles of Constitutionalism* (2018), 121 f.

<sup>43</sup>S. Besson, 'La constitution de la société civile', (2005) *Revue fribourgeoise de jurisprudence* 323, 327.

<sup>44</sup>*Ibid.*, at 328 f.

<sup>45</sup>See Barber, *supra* note 42, 121 ff.

<sup>46</sup>See also the special status of 'international business associations' in the WHO's Framework of Engagement with Non-State Actors, WHA69.10 (28 May 2016), para. 10.

<sup>47</sup>1945 Charter of the United Nations, Art. 71; ECOSOC, Res. 1996/31, Consultative Relationship between the United Nations and Non-Governmental Organizations; Durkee, *supra* note 28, at 225 ff.

<sup>48</sup>M. Durkee, 'Industry Groups in International Governance: A Framework for Reform', (2023) 14 *Journal of Human Rights and the Environment* 4, 7.

<sup>49</sup>See Framework of Engagement with Non-State Actors, *supra* note 46, paras. 8–13.

<sup>50</sup>M. Durkee, 'International Lobbying Law', (2018) 127 *Yale Law Journal* 1742, 1780. For further critical views see, e.g., K. Buse and S. Hawkes, 'Sitting on the FENSA: WHO Engagement with Industry', (2016) 388 *The Lancet* 446; D. H. Rached and D. de Freitas Lima Ventura, 'World Health Organization and the Search for Accountability: A Critical Analysis of the New Framework of Engagement with Non-State Actors', (2017) 33 *Cadernos de Saúde Pública* e00100716. But see 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, at 72 f.

<sup>51</sup>See Durkee, *ibid.*, at 1170; see also at 1807 f. See also Mamudu and Glantz, *supra* note 33, at 164.

<sup>52</sup>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, at 248 f.

<sup>53</sup>See, e.g., J. M. Berry, *Lobbying for the People: The Political Behavior of Public Interest Groups* (1977); F. R. Baumgartner, 'Public Interest Groups in France and the United States', (1996) 9 *Governance* 1.

groups in order to regulate each separately ... is ill-advised and likely will not produce the intended results'.<sup>54</sup> In light of the multifaceted – and potentially ambiguous – character of CSOs, future research could endeavour to establish a typology<sup>55</sup> of CSOs involved in the FCTC system and study the interactions between (and respective level of influence of) different CSOs.

FENSA has led to further criticism in more recent scholarship, which considers that this framework does not properly address the problem of conflicts of interest within the WHO, be it in general<sup>56</sup> or in the specific case of the tobacco industry.<sup>57</sup> According to Berman, FENSA suffers from four main weaknesses, namely (i) the absence of effective enforcement, (ii) the WHO's limited resources, (iii) the lack of attention given to domestic sources of influence, and (iv) the difficulty of finding the right balance between giving the WHO Secretariat too much v. not enough flexibility in managing FENSA.<sup>58</sup> In relation to FENSA, one may also mention the launch of the WHO Foundation in May 2020, the purpose of which is to 'increase funding available to WHO from non-state actors', especially 'private and commercial' ones, while preserving the WHO's institutional independence (which is also the objective of FENSA). Yet, in practice, things are more complicated. Scholars observe that 'decision-making within the Foundation has become increasingly decoupled from the claimed norms and principles used to justify its creation', especially because the Foundation prioritizes fundraising, and that the creation of this separate entity by the WHO constitutes a problematic strategy of 'institutional depoliticisation'.<sup>59</sup>

The boundary between lobbying and CSOs' contribution to the elaboration and implementation of the FCTC becomes even more blurred if one considers the evidentiary role played by CSOs in this context, and the fact that evidence, as Melillo emphasizes, is often used strategically. In Chapter 2, which pertains to the stage of the FCTC's elaboration, Melillo explains that the WHO acted as 'a catalyst of additional evidence' establishing the need for greater tobacco control,<sup>60</sup> including evidence provided by CSOs.<sup>61</sup> While she acknowledges, in line with existing scholarship, that CSOs engaged in lobbying in the context of the FCTC negotiations,<sup>62</sup> she emphasizes their 'very strong scientific component',<sup>63</sup> which seems to strengthen the credibility of CSOs as evidence providers. Yet, as she recognizes herself, evidence is a double-edged sword, including when it is provided by CSOs: '[e]vidence, in fact, can be framed like any other form of human knowledge'.<sup>64</sup> Interest groups, *qua* interest representatives, tend to present evidence in a way that supports these interests, and this also applies to CSOs. Of course, even scientific research is not immune from biases, though it is constrained by various institutional measures (including deontological norms) aiming to safeguard its open-ended, disinterested character.

Melillo eventually concludes that the epistemic and lobbying roles of CSOs cannot be neatly isolated from each other, except perhaps on an abstract, conceptual level: '[CSOs] were certainly

<sup>54</sup>See Durkee, *supra* note 50, at 1823. Similarly, Berman, *supra* note 52, cautions that FENSA 'could lead to more unchecked participation' (see at 254).

<sup>55</sup>See already the important reflections provided in Durkee, *supra* note 50, at 1800 ff.

<sup>56</sup>See Berman, *supra* note 52, at 251 ff.; M. A. Rodwin, 'WHO's Attempt to Navigate Commercial Influence and Conflicts of Interest in Nutrition Programs While Engaging with Non-State Actors: Reflections on WHO Guidance for Nation States', (2022) 11 *International Journal of Health Policy and Management* 386, at 387.

<sup>57</sup>See, regarding WHO consultations, J. Y. Y. Leung and S. Casswell, 'Management of Conflicts of Interest in WHO's Consultative Processes on Global Alcohol Policy', (2022) 11 *International Journal of Health Policy and Management* 2219, at 2224.

<sup>58</sup>See Berman, *supra* note 52, at 251 ff.

<sup>59</sup>R. Ralston et al., 'The WHO Foundation in Global Health Governance: Depoliticizing Corporate Philanthropy', (2024) 344 *Social Science & Medicine* 116515. See also N. Maani et al., 'The New WHO Foundation – Global Health Deserves Better', (2021) 6 *BMJ Global Health* e004950.

<sup>60</sup>See Melillo, *supra* note 1, at 83.

<sup>61</sup>*Ibid.*, at 87 ff.

<sup>62</sup>*Ibid.*, at 88.

<sup>63</sup>*Ibid.*, at 89.

<sup>64</sup>*Ibid.*, at 96.

expected to have a broad role in lobbying and pressuring’, but also to ‘have a technical “expert” role in sharing evidence’.<sup>65</sup> Overall, this ambiguous role of CSOs would deserve to be acknowledged more prominently, from the very beginning of the book. For Melillo and other scholars on whose work she relies, this double role of CSOs is almost inevitable, since ‘when it comes to scientific issue areas like global health, the traditional divide between the epistemic community and the advocacy network does not stand’.<sup>66</sup> This intertwining of expertise and advocacy could have been emphasized more in the book, not only with regard to CSOs, but also in relation to the tobacco industry, and would be worth exploring further in future work. It is reminiscent of the ‘scholactivism’ debate that has been resurfacing in recent years,<sup>67</sup> a debate that shows that some entanglements are often viewed as more problematic than others.

The ambiguous role of CSOs as evidence providers also comes to the fore when Melillo discusses the Bloomberg Initiative to Reduce Tobacco Use, a philanthropic organization that ‘is helping cities and countries implement measures that are proven to reduce use and protect people from [tobacco] harm’.<sup>68</sup> As Melillo explains, the Bloomberg Initiative has ‘significantly affected the outlook of the tobacco control network by deciding which organizations it does or does not support’.<sup>69</sup> Importantly, it ‘has given substantial support to the WHO – so substantial, that [the WHO’s Tobacco Free Initiative (TFI)] has a project officer for the Bloomberg initiative clustered within it’; what is even more striking is that ‘in the face of persistently decreasing contributions from States, this is the new normal for the WHO’.<sup>70,71</sup> Thus, as Melillo shows, institutional vulnerabilities – e.g., the structural weakness of the FCTC Secretariat – are liable to increase the leverage that CSOs enjoy.<sup>72</sup> This illustrates the risks that institutional dependencies on specific organizations may create for an institution’s integrity or purpose (or, as Durkee puts it, for the institution’s ‘mission accountability’<sup>73</sup>), especially dependencies on organizations that have substantial financial resources to offer. Such threats to institutional integrity are a typical problem that can be observed in the context of lobbying.<sup>74</sup> Currently, ‘about half of the WHO’s budget’ is funded by ‘non-state actors . . . with philanthropic foundations alone accounting for 17 per cent, and other international organizations and private entities contributing to the rest’.<sup>75</sup> Besides creating institutional dependencies, such funding can also lead to inefficiencies, like duplication. The Bloomberg Initiative does not fund the FCTC; instead, together with the TFI, it has created a six-point policy package called MPOWER.<sup>76</sup>

In light of these caveats concerning CSOs’ evidentiary contribution, it seems all the more important to emphasize that while ‘[k]nowledge is arguably among the most important assets that civil society organisations can leverage in treaty-making’,<sup>77</sup> CSOs provide other assets that are

<sup>65</sup>*Ibid.*, at 91.

<sup>66</sup>*Ibid.*

<sup>67</sup>See, e.g., the debate on ‘Scholactivism’ hosted by the *Verfassungsblog* in 2022, available at [verfassungsblog.de/category/debates/scholactivism-debates](https://verfassungsblog.de/category/debates/scholactivism-debates).

<sup>68</sup>Bloomberg Philanthropies, ‘Bloomberg Initiative to Reduce Tobacco Use’, available at [www.bloomberg.org/public-health/reducing-tobacco-use/bloomberg-initiative-to-reduce-tobacco-use](https://www.bloomberg.org/public-health/reducing-tobacco-use/bloomberg-initiative-to-reduce-tobacco-use).

<sup>69</sup>See Melillo, *supra* note 1, at 118.

<sup>70</sup>See also Berman, *supra* note 52, at 243 f.; Rached and de Freitas Lima Ventura, *supra* note 50, at 2.

<sup>71</sup>See Melillo, *supra* note 1, at 118 f.

<sup>72</sup>*Ibid.*, at 120.

<sup>73</sup>See Durkee, *supra* note 48, at 19. See also Berman, *supra* note 52, at 231 ff., who distinguishes between three types of capture, namely information, representational, and resource capture.

<sup>74</sup>L. Lessig, *Republic, Lost: The Corruption of Equality and the Steps to End It* (2015); L. Lessig, ‘Foreword: “Institutional Corruption” Defined’, (2013) 41 *Journal of Law, Medicine and Ethics* 553; B. Solaiman, *Evaluating Lobbying in the United Kingdom: Moving From a Corruption Framework to ‘Institutional Diversion’* (2017); O. Ammann, *Influencing Lawmakers: A Comparative Constitutional Analysis of Legislative Lobbying* (forthcoming).

<sup>75</sup>See Melillo, *supra* note 1, at 119.

<sup>76</sup>*Ibid.*

<sup>77</sup>*Ibid.*, at 94.

important from the perspective of democratic law-making, such as aggregating preferences or representing natural or legal persons that are affected by tobacco control measures. Given that the author's focus lies on evidence, it is understandable that she does not examine these other dimensions in more depth (though she implicitly recognizes their existence and importance<sup>78</sup>). Even if one chooses to remain within the epistemic (or evidentiary) frame, the distinction between what some scholars call policy information v. political information could be useful to acknowledge these nuances: while policy information provides information about substantive issues (which appears to be CSOs' main contribution in the context of Melillo's study), political information gives insight into public opinion (i.e., preferences, wishes, and perspectives).<sup>79</sup> Whether CSOs provide not only policy information, but also political information, would be worth exploring in future research. Doing so is important since output legitimacy is but one dimension of legitimacy, besides input and throughput legitimacy.<sup>80</sup>

CSOs also feature prominently in Chapter 3, where Melillo analyses their 'growing role . . . as knowledge actors' in the FCTC's implementation phase.<sup>81</sup> Several FCTC provisions acknowledge the importance of CSO participation.<sup>82</sup> The FCTC's preamble highlights:

the special contribution of nongovernmental organizations and other members of civil society not affiliated with the tobacco industry, including health professional bodies, women's, youth, environmental and consumer groups, and academic and health care institutions, to tobacco control efforts nationally and internationally and the vital importance of their participation in national and international tobacco control efforts.

Another example is Article 1.7 FCTC, which declares that '[t]he participation of civil society is essential in achieving the objective of the Convention and its protocols'. Contrary to what these provisions might suggest, and as Melillo emphasizes, 'the role of civil society organisations in the post-conclusion phase of the FCTC has not been limited to *implementation*': CSOs 'have arguably become the most relevant actors in the *elaboration* of the FCTC and specifically in the making of the guidelines'.<sup>83</sup> The Guidelines for implementation pertaining to Article 5.3 FCTC (*infra*) are particularly noteworthy in the context of this review essay, as they aim to prevent interference by the tobacco industry.

This brings us to the second dimension that this review essay aims to discuss, namely the *exclusion of the tobacco industry* from the FCTC framework. This exclusion has been based<sup>84</sup> on Article 5.3 FCTC and the accompanying guidelines<sup>85</sup> (on the content of Article 5.3 FCTC and these guidelines, see *infra*) and can be viewed as a direct consequence of the industry's lobbying tactics. As Melillo notes, the tobacco industry's aggressiveness has 'effectively shaped the attitude that the WHO and public health advocates take vis-à-vis the industry',<sup>86</sup> and 'the outlook of the FCTC regime has been significantly influenced by the constant threatening presence of the tobacco industry'.<sup>87</sup> As we will see, this exclusion also affects the work of researchers in the field of international tobacco control.

<sup>78</sup>See *ibid.*, at 111, 160.

<sup>79</sup>See (referring to B. S. McQuide) M. Weingartner, 'The Right to Petition as Access and Information', (2021) 169 *University of Pennsylvania Law Review* 1235, 1246.

<sup>80</sup>See, building on work by Fritz Scharpf in particular, V. A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"', (2013) 61 *Political Studies* 2.

<sup>81</sup>See Melillo, *supra* note 1, at 151 ff.

<sup>82</sup>*Ibid.*, at 93. See, e.g., FCTC, *supra* note 2, Art. 12(e), Art. 20.3(b), Art. 23.5(g).

<sup>83</sup>See Melillo, *supra* note 1, at 152.

<sup>84</sup>For a critique, see G. F. Jacob, 'Administering the Mark of Cain: Secrecy and Exclusion in the FCTC Implementation Process', (2018) 41 *Fordham International Law Journal* 669, at 684 ff.

<sup>85</sup>See Melillo, *supra* note 1, at 263.

<sup>86</sup>*Ibid.*, at 4.

<sup>87</sup>*Ibid.*, at 258.



The author specifies that '[t]he tobacco industry was initially allowed to participate in the FCTC discussions',<sup>88</sup> but that it was eventually 'prohibited from participating in the [International Negotiating Body]' due to 'risks of "interferences" during the negotiations'.<sup>89</sup> This exclusion became even more pronounced in the FCTC's post-conclusion phase.<sup>90</sup> Today, '[t]he tobacco industry is the only industry, other than the arms industry, that is not permitted to engage with the WHO'.<sup>91</sup> The WHO's FENSA provides that the organization 'does not engage with the tobacco industry or non-State actors that work to further the interests of the tobacco industry'.<sup>92</sup> Moreover, the preamble of the FCTC emphasizes 'the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts'. Importantly, Article 5.3 FCTC states that '[i]n setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law'.

Melillo writes that the Conference of the Parties (COP) 'used a good degree of creativity' to maintain and reinforce this exclusion, *inter alia* by adopting the Guidelines to Article 5.3 FCTC.<sup>93</sup> These guidelines were 'seen as the natural continuation of the work that could not be completed during the FCTC negotiations because of interference by the tobacco industry';<sup>94</sup> '[a]bsent the US and the other tobacco industry's proxy states that have not ratified the FCTC, the COP could now work with few(er) obstacles'.<sup>95</sup> Strikingly, the Guidelines to Article 5.3 FCTC declare that '[t]here is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests'.<sup>96</sup> In other words, they contain an *a priori* definition of the public interest (which categorically excludes tobacco corporations) instead of approaching it as a procedural concept, the content of which needs to be ascertained in an open-ended process by taking all affected interests – and, importantly, all the available *evidence* – into account. Among other measures, the guidelines recommend 'limit[ing] interactions with the tobacco industry and ensur[ing] the transparency of those interactions that occur', as well as '[a]void[ing] conflicts of interest for government officials and employees'.<sup>97</sup>

Besides adopting these guidelines, the COP also tried to address 'interference in governmental delegations', which 'have been infiltrated by the tobacco industry from the beginning of the FCTC negotiations'.<sup>98</sup> Proposals aiming to disclose or even prohibit conflicts of interests within delegations did not garner enough support within the COP,<sup>99</sup> which eventually decided that 'only members of civil society organizations, the public, and members of international organisations [should] submit declarations of interest'.<sup>100</sup> This requirement acknowledges the risk for CSOs to be subject to conflicts of interest. By contrast, the COP decided that FCTC parties should merely certify that their representatives had been chosen in line with Article 5.3 FCTC and

<sup>88</sup>*Ibid.*, at 38.

<sup>89</sup>*Ibid.*, at 39.

<sup>90</sup>*Ibid.*, at 114.

<sup>91</sup>*Ibid.*, at 5. See also *ibid.*, at 262.

<sup>92</sup>See Framework of Engagement with Non-State Actors, *supra* note 46, Art. 44. See also Art. 45.

<sup>93</sup>See Melillo, *supra* note 1, at 120.

<sup>94</sup>*Ibid.*, at 133.

<sup>95</sup>*Ibid.*, at 134.

<sup>96</sup>FCTC Guidelines, Art. 5.3, Guiding Principle 1.

<sup>97</sup>*Ibid.*, Recommendations, (1) and (2). See also Recommendations 1.2, 2.1, and 5.3. With regard to monitoring, the Guidelines state that '[n]ongovernmental organizations and other members of civil society not affiliated with the tobacco industry could play an essential role in monitoring the activities of the tobacco industry'.

<sup>98</sup>See Melillo, *supra* note 1, at 122.

<sup>99</sup>*Ibid.*, at 123 f.

<sup>100</sup>*Ibid.*, at 124.

recommendations 4.9 and 8.3 of the Guidelines.<sup>101</sup> Still, as Melillo points out, ‘adding any criteria to the sovereign act of designating one’s diplomatic representatives is an unprecedented act in international law’.<sup>102</sup> Yet another measure that reinforces the tobacco industry’s exclusion is ‘the decision to exclude members of the public from COP meetings’ to avoid further infiltration by the tobacco industry.<sup>103</sup>

There is no doubt that tobacco companies’ lobbying tactics have been particularly problematic from a public health perspective. Still, excluding the tobacco industry is a radical approach that seems problematic from the perspective of democratic law-making and that certainly raises ‘normative questions on what roles business actors should have in international law’.<sup>104</sup> One may hence question whether it should serve as ‘a model for other regimes’,<sup>105</sup> a question that Melillo examines towards the end of her study. Another question is whether this exclusion ‘is truly fulfilling its own purpose’ or whether it is counterproductive; according to Melillo, ‘a critical assessment of this question has not been undertaken’.<sup>106</sup> Melillo offers three valuable thoughts on this<sup>107</sup> which, given the importance of these questions, would deserve to be mentioned even more prominently in her study (and the same applies to the normative questions that she mentions, and which appear relatively late in the book).

First, as Melillo explains, because different influence venues are linked, restricting access to one venue is likely to affect the others.<sup>108</sup> In line with the hydraulics metaphor that is used in relation to campaign finance,<sup>109</sup> one could argue that lobbying, like water, has to go somewhere. Because lobbying is likely to happen anyway, if not in the particular venue to which access is restricted, the different venues may as well remain accessible. Second, and relatedly, Melillo notes that ‘the exclusion does not prevent interference’, though, as already mentioned in relation to the book’s ambiguity about the legality of tobacco lobbying, further clarity is needed about what ‘interference’ consists in, i.e., at which point lobbying becomes problematic or even illegal. In any case, given the pervasiveness of lobbying, one may wonder ‘whether direct access could at least improve transparency’.<sup>110</sup> Third, Melillo points out that ‘excluding the tobacco industry from international fora hardly affects the capacity of national governments to exclude it from their own regulatory space – which is exactly where the most important public health regulations should be adopted’: as she emphasizes, ‘the influence of the tobacco industry at the national level is still very strong’, but ‘the model of exclusion of the tobacco industry implemented in the FCTC regime appears simply unable to influence domestic politics’.<sup>111</sup> This last point shows the importance of shedding light on domestic law-making and its potential permeability to tobacco industry interests (*infra*).

Melillo acknowledges that the WHO’s reluctance to engage is based on sound and weighty reasons.<sup>112</sup> However, from a democratic theory perspective, one could argue that all those affected

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<sup>101</sup>Recommendation 4.9 provides that ‘Parties should not nominate any person employed by the tobacco industry or any entity working to further its interests to serve on delegations to meetings of the Conference of the Parties, its subsidiary bodies or any other bodies established pursuant to decisions of the Conference of the Parties’. Recommendation 8.3 provides that ‘Parties should ensure that representatives of State-owned tobacco industry does not form part of delegations to any meetings of the Conference of the Parties, its subsidiary bodies or any other bodies established pursuant to decisions of the Conference of the Parties’.

<sup>102</sup>See Melillo, *supra* note 1, at 124.

<sup>103</sup>*Ibid.*

<sup>104</sup>*Ibid.*, at 261.

<sup>105</sup>*Ibid.*, at 260.

<sup>106</sup>*Ibid.*, at 263.

<sup>107</sup>*Ibid.*, at 263 ff.

<sup>108</sup>*Ibid.*, at 263 f.

<sup>109</sup>S. Issacharoff and P. S. Karlan, ‘The Hydraulics of Campaign Finance Reform’, (1999) 77 *Texas Law Review* 1705.

<sup>110</sup>See Melillo, *supra* note 1, at 264.

<sup>111</sup>*Ibid.*, at 265.

<sup>112</sup>*Ibid.*, at 266.

by a given legal norm should have the possibility to participate in its elaboration.<sup>113</sup> Including the tobacco industry is also indispensable to prevent the formation of ‘echo chambers’<sup>114</sup> in this field. For instance, Melillo writes that ‘the fear of interference by the tobacco industry makes the tobacco control network frame the evidence they have as incontrovertible’,<sup>115</sup> even if it is ‘fundamentally imperfect and incomplete’.<sup>116</sup>

What is also noteworthy is that the exclusion of the tobacco industry has further boosted the position of CSOs: ‘as far as the FCTC regime is concerned, the marginalisation of the enemy *par excellence* has significantly reduced opposition and increased the ability of civil society organisations to influence the process’.<sup>117</sup> Due to their growing involvement, these CSOs have acquired substantial ‘institutional knowledge’, including compared to governments,<sup>118</sup> which has further strengthened their place in the FCTC framework.<sup>119</sup> CSOs are ‘participating in their own right as observers to the COPs’, ‘joining the Parties’ delegations’, and ‘supporting the elaboration of the guidelines’.<sup>120</sup> Yet, as mentioned, the participation of CSOs is ambivalent. The requirement for CSOs to submit declarations of interest (*supra*) is a positive development, but it does not solve the problem of potential conflicts of interest altogether. For example, with regard to delegations, Melillo notes that ‘[a]t COP8, [she] counted at least seven people who simultaneously held a double badge, i.e. a government and a civil society one’.<sup>121</sup> While one could argue that this ‘shows that governments hold the expertise of civil society organisations in high regard’,<sup>122</sup> such double roles are vulnerable to conflicts of interest. Similarly, when Melillo mentions that CSOs signalled their willingness to help in elaboration of guidelines due to their expertise and that ‘[t]he offer was gladly accepted’, which arguably shows that ‘civil society representatives are invited by reason of, and according to, their expertise’,<sup>123</sup> it seems important to also recall that CSO participation rarely consists in only providing information; far more common is for it to also influence the process.<sup>124</sup>

Another difficulty that should be of particular concern to international legal scholars is that the WHO’s categorical, exclusionary approach contributes to a high degree of ‘polarisation’<sup>125</sup> not only in the field of international tobacco control in general but also, consequently, in *research* on international tobacco control. Melillo talks about the use of evidence by ‘two opposing factions’,<sup>126</sup> which may seem schematic, but reflects current trends within this area of international law. Importantly, this polarization creates significant constraints on researchers working in the field of tobacco control. Mair and Kierans talk about a ‘field organized around a fundamental opposition, that between “tobacco industry research” and “tobacco control research”’.<sup>127</sup> In the methodology section, Melillo explains that she ‘decided not to interview anyone from the tobacco industry’, as doing so ‘would have meant becoming a possible target of their lobbying activities and would have

<sup>113</sup>See, e.g., M. E. Warren, ‘The All Affected Interests Principle in Democratic Theory and Practice’, IHS Political Science Series Working Paper 145, June 2017.

<sup>114</sup>C. Bates, ‘First Build Your Echo Chamber – How WHO Excludes Dissent and Diversity’, 11 October 2016, available at [clivebates.com/first-build-your-echo-chamber-how-who-excludes-dissent-and-diversity](http://clivebates.com/first-build-your-echo-chamber-how-who-excludes-dissent-and-diversity). See also Jacob, *supra* note 84, at 683.

<sup>115</sup>See Melillo, *supra* note 1, at 140.

<sup>116</sup>*Ibid.*, at 141.

<sup>117</sup>*Ibid.*, at 157.

<sup>118</sup>*Ibid.*

<sup>119</sup>*Ibid.*, at 158.

<sup>120</sup>*Ibid.*

<sup>121</sup>*Ibid.*, at 158 f.

<sup>122</sup>*Ibid.*, at 159.

<sup>123</sup>*Ibid.*, at 159 f.

<sup>124</sup>For a critique of NGOs’ influence and practices in the context of the negotiation of the FCTC, see G. F. Jacob, ‘Without Reservation’, (2004) 5 *Chicago Journal of International Law* 287, at 295–7.

<sup>125</sup>See Melillo, *supra* note 1, at 275, with reference to M. Mair and C. Kierans, ‘Critical Reflections on the Field of Tobacco Research: The Role of Tobacco Control in Defining the Tobacco Research Agenda’, (2007) 17 *Critical Public Health* 103.

<sup>126</sup>See Melillo, *supra* note 1, at 6. See also *ibid.*, at 275.

<sup>127</sup>See Mair and Kierans, *supra* note 125, at 104.

risked compromising [her] objective and apparent impartiality'; she made this decision 'after several incidents where [her] impartiality ha[d] been questioned by [her] interviewees'.<sup>128</sup> At the same time, she acknowledges the limitations of 'consciously [choosing] to speak to only one side of the actors involved in international lawfare', which, '[n]aturally . . . represents only a partial view of the history of the FCTC'.<sup>129</sup>

What should one think of this methodological choice? On the one hand, this partiality simply reflects the fact that the tobacco industry is excluded from the FCTC framework. One could also argue that a research project is different from judicial or administrative proceedings, where both parties have the right to be heard. On the other hand, given that the author questions the tobacco industry's one-sided exclusion from the FCTC framework in the last part of her book (*supra*), she could have reached the conclusion that this exclusion should not affect her research methodology, including when it comes to interviews. Given the open-ended nature of scientific research and the empirical approach pursued in the book, the reader could hence find this selective outlook unwarranted.

Yet, from a feasibility perspective, the fact that interviewing one side would have threatened the possibility of speaking with the other – which is the problem Melillo was confronted with – provides a powerful argument in support of selectivity. Moreover, the author faced significant obstacles in her research, as she acknowledges openly. Some of them relate to the confidentiality of the WHO's tobacco control documents.<sup>130</sup> More fundamentally, she encountered reluctance on the part of her interviewees<sup>131</sup> and was 'amazed to see how similar most of the views of the people [she] interviewed were' and how '[s]ome opinions and statements were repeated' almost verbatim by different interviewees.<sup>132</sup> These anecdotes and examples show that polarization in international law is problematic not only for its own sake, but also because it can affect research *about* international law. It may drive researchers away from certain areas deemed too politicized and hence too risky to investigate, despite the important and pressing questions that these areas may raise. It is Melillo's great merit to have held on to her endeavour and to candidly alert us about these trends. In light of the constraints she was confronted with, the fact that, '[i]n almost 20 years of life . . . no legal scholar has systematically analyzed the history of the FCTC'<sup>133</sup> is astonishing, but probably no coincidence.

A third and last dimension that this review essay wishes to highlight and that, for reasons of scope, is not explored in detail in the book relates to the *geographical location of the WHO's headquarters*. While the pre-negotiation meetings in 1998 and 1999 were held outside Switzerland,<sup>134</sup> the WHO's headquarters are based in Geneva, which is where the elaboration of the FCTC took place. Besides acting as a host state for the WHO, Switzerland is the seat of several major tobacco multinationals. It has been categorized as the country with the second-weakest tobacco regulation in Europe after Bosnia and Herzegovina,<sup>135</sup> and with the second-highest influence of the tobacco industry worldwide after the Dominican Republic.<sup>136</sup> Besides being deemed one of the countries with the strongest tobacco lobbies,<sup>137</sup> Switzerland is also among

<sup>128</sup>See Melillo, *supra* note 1, at 26.

<sup>129</sup>*Ibid.*, at 27.

<sup>130</sup>*Ibid.*, at 269.

<sup>131</sup>*Ibid.*, at 268 f.

<sup>132</sup>*Ibid.*, at 27.

<sup>133</sup>*Ibid.*, at 12.

<sup>134</sup>*Ibid.*, at 44.

<sup>135</sup>L. Joossens et al., 'The Tobacco Control Scale 2021 in Europe', Smoke Free Partnership, Catalan Institute of Oncology, 2022, available at [www.tobaccocontrolscale.org](http://www.tobaccocontrolscale.org), at 12.

<sup>136</sup>M. Assunta, 'Global Tobacco Industry Interference Index 2023', Global Center for Good Governance in Tobacco Control, 2023, available at [globaltobaccoindex.org](http://globaltobaccoindex.org), at 4.

<sup>137</sup>P. Turuban, 'Why Switzerland Has One of the World's Strongest Tobacco Lobbies', *Swissinfo*, 14 February 2022, available at [www.swissinfo.ch/eng/politics/why-switzerland-has-one-of-the-world-s-strongest-tobacco-lobbies/47333036](http://www.swissinfo.ch/eng/politics/why-switzerland-has-one-of-the-world-s-strongest-tobacco-lobbies/47333036).

the few states in Europe that have not ratified the FCTC (together with Monaco and Liechtenstein).

The only time Switzerland is explicitly mentioned in the study is in relation to the *Philip Morris v. Uruguay* ICSID arbitration case of 2010. As the author notes, Philip Morris based its arbitration request on the Bilateral Investment Treaty (BIT) between Uruguay and Switzerland.<sup>138</sup> Indeed, under the terms of the BIT, it can be considered an investor of Switzerland, as it is a 'legal entit[y] . . . constituted or otherwise duly organised' under Swiss law and 'having [its] seat in the territory' of Switzerland (Article 1(1)(b) BIT).<sup>139</sup> Still, when analysing the negotiation of the FCTC, Melillo talks about 'recalcitrant States'<sup>140</sup> and 'countries that were likely to oppose the FCTC or had shown lukewarm support'.<sup>141</sup> She also refers to the 'tobacco industry's proxy states that have not ratified the FCTC'.<sup>142</sup> In some rare instances, she provides specific examples, e.g., when noting that 'one of the most persuasive reasons for having a more independent FCTC Secretariat was to reduce interference by the tobacco industry, and specifically by WHO Members that are not party to the FCTC (*like the US*)'.<sup>143</sup>

Switzerland is a WHO member that is not a party to the FCTC. It signed the Convention in 2004, but has never ratified it, which has been criticized by some WHO officials<sup>144</sup> and CSOs.<sup>145</sup> Moreover, as mentioned, Switzerland is deemed receptive to the interests of the tobacco industry. The case of Switzerland raises the question of the role of states (including states that are not parties to the FCTC) as potential proxies for tobacco industry lobbying. As Melillo explains, 'the tobacco industry and the States that represent its interests have been increasingly excluded from the FCTC regime'.<sup>146</sup> In this context, one dimension that would need to be clarified pertains to the criteria that should be relevant to determine whether a given state has become a proxy for this influence. At which point does the boundary between public and private law-making begin to erode in the field of tobacco control? As far as Switzerland is concerned, the fact that the WHO's headquarters are located on its territory makes this question all the more relevant. While the mere existence of major tobacco companies on a state's territory is unlikely to be a sufficient criterion for proxy influence, the importance of the tobacco industry for its economy already provides a more reliable – if not decisive – indicator, as does a state's unwillingness to ratify the FCTC. Another important indicator is the lack of robust lobbying regulation and related mechanisms to disclose, or even limit, the influence of tobacco industry lobbying on domestic law-making processes.

For reasons of scope, Melillo had to leave out 'interactions between domestic and international law in tobacco control',<sup>147</sup> but she encourages researchers to tackle this issue and others. As she points out, '[a]lthough the influence of the tobacco industry in policymaking processes is far from over, it is now considerably focused on the domestic level'<sup>148</sup> and on international litigation (which

<sup>138</sup>UN Conference on Trade and Development, Switzerland-Uruguay BIT (1988), available at [investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3004/switzerland—uruguay-bit-1988-](http://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3004/switzerland—uruguay-bit-1988-).

<sup>139</sup>See also paras. 57–58 of the arbitration request, available at [www.italaw.com/cases/460](http://www.italaw.com/cases/460). The protocol to the BIT specifies that '[t]he term "seat" refers to the place of the principal administration of a company or, if this place cannot be established, to the centre of its economic interests'.

<sup>140</sup>See Melillo, *supra* note 1, at 46.

<sup>141</sup>*Ibid.*, at 48.

<sup>142</sup>*Ibid.*, at 134.

<sup>143</sup>*Ibid.*, at 116 (emphasis added). Mamudu and Glantz write that during the FCTC negotiations, '[t]he "big four" China, Japan, Germany and the USA were the leading opponents of key FCTC provisions to minimise its effectiveness and practical impact on the tobacco industry efforts to promote tobacco use': see Mamudu and Glantz, *supra* note 33, at 160.

<sup>144</sup>'Switzerland Criticised for Tobacco Control Treaty Stance', *Swissinfo*, 21 September 2018, available at [www.swissinfo.ch/eng/politics/who-fctc\\_switzerland-criticised-for-tobacco-control-treaty-stance/44416974](http://www.swissinfo.ch/eng/politics/who-fctc_switzerland-criticised-for-tobacco-control-treaty-stance/44416974).

<sup>145</sup>'Pressure to Ratify FCTC', *Tobacco Reporter*, 5 October 2018, available at [tobaccoreporter.com/2018/10/05/pressure-to-ratify-fctc](http://tobaccoreporter.com/2018/10/05/pressure-to-ratify-fctc).

<sup>146</sup>See Melillo, *supra* note 1, at 157 (emphasis added).

<sup>147</sup>*Ibid.*, at 276.

<sup>148</sup>*Ibid.*, at 157.

is analysed in Chapter 4). In this context, the role of Switzerland as the host state of the WHO, a non-party to the FCTC, and a magnet for the tobacco industry, would deserve to be clarified, be it only to dispel suspicions of a potential permeability to tobacco interests,<sup>149</sup> but also, more generally, to clarify the corresponding duties of states in the context of domestic and international<sup>150</sup> law-making, especially in the field of tobacco control. Recent political science scholarship has qualified international organizations' headquarters – including Geneva – as 'ecosystems'<sup>151</sup> to express the idea that international organizations interact with, and are affected by, their broader environment. This environment includes the city in which international organizations are located, but also the broader 'political national context'<sup>152</sup> in which they are embedded. The relationship between IOs and their host state would deserve further study, both in this context and in others.

To conclude, Melillo has succeeded at writing a real page-turner on the international law of tobacco control. The book is well researched, concise, and captivating. It builds on, contributes to, and stimulates thinking on, several areas of international law, including international lobbying law, the place of NGOs, experts, corporations, and states in international law-making, and the law of international organizations. While the book inevitably leaves some questions unanswered, it can be sure to be of interest to a broad and diverse readership, and to have sown the seeds for future studies on these and related topics.

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<sup>149</sup>E.g., Commission fédérale pour la prévention du tabagisme, 'Pratiques d'ingérence de l'industrie du tabac dans les politiques de santé publique en Suisse : Un aperçu', November 2019 ; 'Attention, ce parlement peut nuire à votre santé', Temps Présent, RTS, 6 September 2018, available at [www.rts.ch/emissions/temps-present/2018/video/attention-ce-parlement-peut-nuire-a-votre-sante-26612886.html](http://www.rts.ch/emissions/temps-present/2018/video/attention-ce-parlement-peut-nuire-a-votre-sante-26612886.html).

<sup>150</sup>On this dimension see, for instance, S. Besson, 'Democratic Representation within International Organizations: From International Good Governance to International Good Government', (2022) 19 *International Organizations Law Review* 489.

<sup>151</sup>E. Dairon and F. Badache, 'Understanding International Organizations' Headquarters as Ecosystems: The Case of Geneva', (2021) 12 *Global Policy* 24.

<sup>152</sup>*Ibid.*, at 31.