

Discourse on Human Rights Issues and Public Policy Context: Prospect of Indonesia Tobacco Control Regulation

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Abstract: - The efforts on tobacco control are based on two main philosophies which are focused on human rights and the economy. This is observed for every country that is willing to reduce tobacco consumption and slightly ensure prosperity at the same time. It is being discussed in the international community that some countries are not a party to FCTC (Framework Convention on Tobacco Control) but have a domestic regulatory system for tobacco or are committed to implementing other obligations based on international norms at the minimum. This research specifically examined institutions and rules besides politics and judiciary enforcement in tobacco control regulation through the application of comparative and system approaches within the legal political context and a qualitative method. It was discovered that Indonesia has the ability to deliberate domestic regulatory systems to combat and reduce tobacco use despite the strong interference by tobacco industries and markets that are approaching legislatures, politicians, or executive apparatus to create different institutional interests. This usually leads to a mixture of verdict and judgment for the judiciary and legal enforcement.

Key-Words: Human Rights, Public Policy, Tobacco Control Regulation, Indonesia

Received: October 28, 2022. Revised: March 4, 2023. Accepted: March 26, 2023. Published: April 27, 2023.

1 Introduction

There is a recent shift to the discussion on the issue of tobacco with the focus on its management and control to attain the highest level of health, [1] and preserve the environment from any dangerous substance of tobacco and its product, [2], while pursuing liberalized trade and economy, [3]. The attention is also on shifting the protection of economic rights, [4] such as the freedom to trade as part of the efforts to improve public welfare, [5]. Moreover, the international community has agreed to deal with any international legally binding documents, especially under the UN framework, on matters relating to tobacco control such as the UDHR and ICESCR which are focused on human rights, WTO-GATT on liberalization of goods and service trades, and WHO that specifically designed (FCTC) and its protocols in 2003 and 2012 respectively to combat illicit tobacco trade.

FCTC is the landmark international law document widely recognized by UN members compared to other documents emphasizing tobacco control in recent times. This can be associated with its focus on the rights to health by reducing tobacco demand through the use of taxation, non-taxation, and control on tobacco and its products with

emphasis placed on information disclosure and packaging or labeling, broader public awareness on tobacco and its derivative products, advertisement and promotion or sponsor, the war against illicit tobacco and its products trade, environmental protection and producer liabilities, [6].

It was discovered that 12 countries considered to be members of both WHO and UN as well as 1 country, Liechtenstein, which is just a member of the UN are not parties to the FCTC. This is based on their argument to protect the domestic tobacco market, maintain income sources for local workers in tobacco industries, sustain the significant contribution of tobacco to domestic economic sources, and their doubt on the prospect of tobacco regulation when their countries are FCTC parties. Countries that do not agree to be bound by any international documents usually have domestic regulations to solve similar issues but it was discovered, in this case, that those that did not agree to be part of the FCTC do not automatically have a domestic regulatory system to manage and control tobacco matters.

This research is different than to the previous research, **first**, [7], observed on which focuses on the need to be parties to the FCTC and its

implication of the agreement on the member-states, and **second**, only taking their research into regulatory systems of the countries belonging to the FCTC parties based on national economic and institutional aspects, [8]. This paper has differences from other research, especially in relation to tobacco control based on developing countries' practice with an in-depth observance of human rights and policy perspectives, especially interaction between the legislative, executive, and judiciary branches of a regulatory state with each of their legal products including the legislation, policy or rule and judicial decision respectively analyzed hypothetically to determine legal variable and political variable relations. Regulations have the ability to cause a social change and fundamental paradigm shift for any problematic issues, [9], and this means this framework can be used as the qualitative analysis of the regulative ability of countries that do not belong to FCTC regarding tobacco management and control in accordance with human rights aspects.

The remaining parts of this research aim to observe human rights and policy perspectives on tobacco control practices in Indonesia. Based on human rights perspectives, this article focuses on the right to health, the right to a good environment, and the right to adequate living standards or economic access according to any of Indonesia's Constitutional Court decisions. Moreover, based on policy perspective, legal policy dynamics that observed roots cause no comprehensive rule framework on tobacco control in Indonesia that correlated with democracy, state apparatus abilities as well as the exhaustion of local remedies in legal enforcement and judicial decision in the tobacco control regulatory system of Indonesia.

This article has importance to deliver prospective context, especially to interest parties including the government to guarantee and fulfill human rights on tobacco control, especially to ensure the right to health, the right to a good environment, and the right to adequate living standard or economic access into a comprehensive law concerning tobacco control on a national level.

2 Method

Micro-legal research approaches were applied to the legal-political context in addition to the qualitative method used in this research. It can also be embedded in one system associated with the arrangements and alteration based on substantial gain and political institutions performing their function within a governance system and this is the reason it was applied in this context to compare

domestic law and the regulatory system, [10]. It focused on comparing FCTC signatory or non-signatory states, WHO members or non-members, and their classification based on democracy and rule of law. The recent data retrieved from WHO showed that the organization has 194 members but this research compares Argentina, Cuba, Dominican Republic, Eritrea, Haiti, Indonesia, Malawi, Morocco, Monaco, Somalia, South Sudan, Switzerland, and the United States of America as well as 1 non-WHO member, Liechtenstein. The comparison was further narrowed to the Asia region represented by Indonesia which is non-signatory to FCTC. The two countries are both considered developing, [11], and playing prominent roles as a middle power with major economies in the world.

The system approach was applied to the legal-political context with emphasis on the concept of regulatory state with its system analyzed based on the legal and political variables. These products strengthen a regulatory state, especially concerning the balancing of democracy and rule of law with public demands on any specific issues or matters. In the context of tobacco control, the regulatory state directly measures, determines, and regulates or prevents the impact of tobacco through enforcement, taxation, education, environmental health awareness, production, trade, and management of any potential problem caused by tobacco, [12].

This approach introduced the concept of dependent and independent variables such that the legal aspect was used as the dependent variable in relation to the legislative process while executive decision-making directly influenced by the political aspect was used as the independent variable. Meanwhile, the political aspect was also used as the dependent variable concerning the ability of law to arrange and formulate the political spectrum or affect the political system while the legal aspect was used as an independent variable.

This approach was hypothetically used to determine the interaction between legislation, policy/decision, and the judicial decision to determine the ability of the regulatory system to work based on the mutual interaction between the legal and political aspects of a regulatory state. This involves linking regulatory issues and governance to solve specific issues with the potential to cause paradigmatic change. It is also to pursue good regulation with effective and efficient governance or support from the political class to strengthen the legal aspects, [13]. Meanwhile, Table 1 shows the seven elements reflecting the ties between the political and legal variables of a regulatory state.

Table 1. Elements of the Tobacco Control Regulation Based on Political and Legal Variables

Element	Concept and Limitation of the tobacco control regulation
NRA Institutions (Element 1)	The regulator institutions have the power or authority to regulate tobacco control
Constitutional Design (Element 2)	Basic laws and norms related to health, environment, economy, and any related issues on tobacco control
General/Specific Statute (Element 3)	Statutory law, especially legislation norms, on the tobacco control issue
Executive Decision/Rule policy (Element 4)	Executive rules, policies, or <i>beleid</i> on the tobacco control issue
Judiciary role in the regulatory state (Element 5)	The ability of judiciary power to review problematic norms on statutory law, rules, policy, or <i>beleid</i> , and the enforcement of any wrongful acts, administrative, civil, or criminal matters related to tobacco control
Political demands, social-economic groups, or stakeholders (Element 6)	The role of political parties, socio-political groups, or interest groups with direct or indirect bargaining points with a policymaker, rule-maker, legislature, or judges concerning tobacco control
Political process/participation in regulations passed/agreed/annulled-revoke (Element 7)	The substantive and meaningful or less participation in the process of formulating regulations on the tobacco control issue

Source: Analyzed and proposed in combination with the FCTC

The legal elements of the FCTC as the international legal frameworks on tobacco management and control which are formulated specifically to promote national action, besides global cooperation, on the countermeasure to the tobacco epidemic are presented in the following Table 2 with the focus on the legal and political aspects.

Table 2. Legal Elements of the FCTC Concerning Tobacco Control Measurement

Legal Substance on FCTC	The related elements
✓Ban tobacco advertising, promotion, and sponsorship. (Article 13)	General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4) Political demands, political parties, social-economic groups, or stakeholders

✓Government approval rotation of health warnings on tobacco packaging. (Article 11)	(Element 6) NRA Institutions (Element 1) General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4)
✓ Prohibiting any misleading and deceptive terms. (Article 11)	General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4) Political demands, political parties, social-economic groups, or stakeholders (Element 6)
✓Protect people from secondhand smoke and total ban on indoor smoking. (Article 8)	General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4) Judiciary role in the regulatory state (Element 5)
✓Tobacco tax measurement and further restriction or ban duty-free tobacco products sale. (Article 6)	NRA Institutions (Element 1) General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4)
✓Require all tobacco packages and packets. (Article 15)	Political demands, political parties, social-economic groups, or stakeholders (Element 6) Judiciary role in the regulatory state (Element 5)
✓Tobacco cessation services in health policy programs. (Article 14)	NRA Institutions (Element 1) Constitutional Design (Element 2) General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4)
✓Ban free tobacco product distribution. (Article 16.2)	NRA Institutions (Element 1) General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4) Judiciary role in the regulatory state (Element 5)
✓Mechanism and focal point on tobacco control at a national level. (Article 5)	NRA Institutions (Element 1) General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4)
✓Periodical implementation and national tobacco control strategy, including plans review. (Article 5.1)	NRA Institutions (Element 1) General/Specific Statute (Element 3) Executive Decision/Rule policy (Element 4)
✓Public health policy prevents pressure or	Constitutional Design (Element 2)

intervention of tobacco industry influence. (Article 5.3)	General/Specific (Element 3)	Executive Decision/Rule policy (Element 4)	Statute
		Judiciary role in the regulatory state (Element 5)	
✓Promote participation unaffiliated governmental organizations in the development and tobacco control programs. (Article 12 (e))	the of non-	Constitutional (Element 2)	Design
		General/Specific (Element 3)	Statute
		Executive Decision/Rule policy (Element 4)	Political
		process/ participation in regulations	
		passed/agreed/annulled-revoke (Element 7)	

Source: Analyzed and proposed in combination with the FCTC, [14].

The qualitative approach applied focused on the collection, classification, observation, and analysis of empirical legal facts to justify research findings, [15]. It was also related to the social facts and evidence developed with argumentative descriptive claims that have no relation with numerical data but focus on legal facts and qualitative data sources.

3 The Regulatory System Observance on Tobacco Control in Indonesia: Human Rights and Public Policy Aspects

These narrative results focus on the regulatory tobacco control system designed through the combination of the legal and political variables reflected in the elements of an institution, rule, political and legal enforcement, and judiciary role concerning tobacco control. Moreover, tobacco control has also been explained by other scholars, besides the WHO FCTC, as a concept not limited to the reduction of tobacco demands by the public or in the market alone but related to smoke-free regulation, a decline in the sale of tobacco to the young generation, economic issues on the tobacco market, prevention from illicit trade, tobacco cessation, health concerns, banning advertisement, promotion, and sponsor by tobacco industries and taxation for tobacco and its derivative products, [16].

Countries usually prioritize welfare when focused on the development agenda, [17] and this involves formulating regulations to ensure the citizens are prosperous by serving as the regulatory state considering the impact of globalization, free-market flows, liberalization, privatization, or the

popular regulatory capitalism, [18]. The regulations can be in the form of both informal and formal rules which are to be formulated and implemented through the executive actors, bureaucrats, legislative, judiciary, and regulatory agencies within the formal and informal sectors, public and private sectors, and multilevel regulatory order with hybrid processes and strategies on social, political, and economical order, [19]. Moreover, the formulation stage cannot be protected from public judgments and this sometimes leads the regulatory agencies and other actors to develop perceptions, bureaucratic roles, and presentation strategies, [20]. This implies there is a need to ensure the strategy and institutional empowerment, [21], align to be accountable and solve problems associated with the regulations passed, [22]. It is also important to acknowledge that the regulatory state with its system shifts the responsive regulation associated with citizen participation, combined with government interventions, and ensures self-regulation. The state also seeks compliance persuasively, implements deterrence penalties, applies full force of law with criminal sanctions, and revokes permits transparently and systematically, [23].

Indonesia is also considered the only Asia-Pacific country that is not a party nor a signatory to FCTC but a party to ICESCR, CEDAW, and CRC with a focus on deliberating on different approaches to tobacco control. The pace of the country is evolutionary but its regulatory system is focused on broadening tobacco countermeasures and control. This is necessary because tobacco industries have been existing since the Dutch Indies era and play a significant role in the exploitation and commercialization of tobacco as the economic commodity for both the industries and the colonial government. This trend continued for decades, especially with minor efforts shown by previous regimes on tobacco control regulations.

The legal products on tobacco control are separated from the norms in national regulations, thereby, reflecting the rivalry between issues related to the economy and health in the process of discussing tobacco control. Indonesia also has several big tobacco industries with soft power and abilities to fuel the national economic pocket, [24], due to their widespread influence and campaigns, a different approach to assist education, the creation of local job fields, and the application of different pragmatic methods to ensure its existence and role in the economy as observed in Indonesia.

Indonesia's regulatory system has norms designed for health rights in line with the UDHR

principles and other human rights instruments as reflected in Article 28I Par. (3) and Article 33 Par. (4) of the 1945 Indonesian Constitution after the second amendment in 2000 is specifically formulated to regulate the rights to health and economic activities towards fulfilling the green economic principles. The Basic Law norms, Law Number 39 of 1999, also recognize the right to health as the fundamental issue to ensure development in the country, [25]. Furthermore, the comprehensive health law passed in 2009 in the form of Law on Health (Law Number 36 of 2009) has minor provisions on tobacco control to separately regulate advertising, promotion, and sponsorship of tobacco products, [26], smoke-free places, and packaging and labeling of smoked tobacco products, [27]. Meanwhile, efforts have been made by stakeholders for decades to prevent a specific bill and other regulations on tobacco control as indicated by the failure of bills concerning Comprehensive Tobacco Control and the denouncement by the Parliament in the 2004-2009 and 2015-2016 periods, respectively.

In recent years, international reviews on human rights implementation in Indonesia have criticized the lack of regulatory institutions to countermeasures and combat the widespread tobacco issues in the country. Some specific rules have, however, been enacted such as the Government Regulation Number 109 of 2012 which revokes previous Government Regulation Number 81 of 1999, 38 of 2000, and 19 of 2003 and focuses on restricting the use of tobacco and its derivative products, advertisement, promotion, and sponsor from tobacco industries as well as Law Number 32 of 2002 on Broadcasting, Law Number 40 of 1999 on Press, and Law Number 33 of 2009 on Film, and health warnings on package and label of tobacco products. Meanwhile, the regulator under the Ministry of Health is using soft power despite the decree of the Minister of Health Regulation Number 28 of 2013 and 56 of 2017 which contains further pressure on health warnings for packages and labels of tobacco products. It is also important to acknowledge that a strong staunch was implemented by the Ministries of Health and Home Affairs through the issuance of a Joint Regulation Number 188/MENKES/PB/I/2011 and 7 of 2011 on the Guidelines for Non-Smoking Areas to implement smoke-free areas in each region.

Moreover, the Ministry of Trade restricted e-cigarettes in 2017, the Ministry of Finance provided further taxation on tobacco products in 2015 and 2019 through a Minister Regulation, and finally, implement strong efforts to recover the national

economy using the fiscal instrument, [28], by lobbying political factions and government representatives to pass Law Number 7 of 2021 on Harmonization of Taxation Regulation, [29]. The regulatory system in the country is observed to be soft in regulating tobacco control and this can be associated with the pressure from the international community and NGOs on the one hand and tobacco industries and their market, [30], on another hand. Therefore, the regulators are not definitive in issuing any Ministerial Regulation to restrict tobacco and control its products, [31].

The *Reformasi* recently launched after Soeharto stepped down from power, [32], which led to the establishment of the Constitutional Court has significantly strengthened rule of law and democracy under the Indonesian Constitution, [33]. Moreover, the Constitutional Court has received an application to review Law on Broadcasting, Law on Press, and Law on Health nine times with a focus on the control of tobacco and its products, and 7 cases were rejected or failed to be upheld by *niet van ontvankelijk* between 2009 and 2014.

These include the Constitutional Court Decision Number 6/PUU-VII/2009 on the constitutional review of Law on Broadcasting and Law on Press rejected by the Constitutional Court on 10 September 2009, Number 19/PUU-VIII/2010 on constitutional review of Law on Health rejected for all petitions on 1 November 2011, Number 55/PUU-IX/2011 on the constitutional review of Law on Health declared *niet van ontvankelijk* on 17 January 2012, Number 66/PUU-X/2012 on the constitutional review of Law on Health rejected and declared *niet van ontvankelijk* on 18 September 2012, Number 24/PUU-X/2012 on the constitutional review of Law on Health declared *niet van ontvankelijk* on 18 September 2012, Number 64/PUU-XI/2013 on the constitutional review of Law on Regional Taxation and Retribution for tobacco taxes rejected on 19 May 2014, and Number 71/PUU-XI/2013 on the constitutional review of Law on Broadcasting and Press for tobacco taxes rejected on 9 October 2014.

There are, however, two monumental Constitutional Court Decisions that strongly ensure rights to health and placement of warnings on labels and packages of tobacco products (including cigarettes). The first decision was Number 34/PUU-VIII/2010 which granted protection for the tobacco workers by showing full concern for the obligation of health warnings on tobacco products that seem discriminatory to their work as well as the declaration of the graphical warning requirement to be part of the constitutional review on Articles 113-

114 and 199 in the Law on Health granted on 1 November 2011.

Constitutional Court Decision Number 57/PUU-IX/2011 provided a contrasting opinion to the first decision by focusing on the right to health as stated in the constitutional review of Article 115 in the Law on Health. The petitioners applied the constitutionality issue on no-smoking areas and zero second-hand smoke based on the uncertainty phrases “can” and “may” used in Article 115 of the Law on Health which was declared unconstitutional and no longer have legally binding force. The decision also proposed that no-smoking areas should be implemented within legal certainty as confirmed in the final decision on 17 April 2012.

4 Relations between Human Rights and Public Policy Aspects on Tobacco Control in Indonesia

These related elements cannot be separately and independently analyzed as single elements in this research and this is due to the previous explanation that the inseparable relations between legal and political aspects caused interrelations between the two variables in tobacco control processes. Moreover, the seven proposed elements were scrutinized into four main pillars of regulatory system flows within the legal-political perspective. These were projected to be used as the basic framework to determine the interaction between the legislative, executive, and judiciary of a regulatory state in relation to the special case of tobacco control. Table 3 shows the regulatory system for tobacco control issues in Indonesia.

Table 3. The Interaction between Main Pillar Elements and Sub-Elements that reflect Legal and Political dynamics on the tobacco control regulatory system in Indonesia

Compared States	Compared Elements						
	Main Pillar Element: Institutions	Main Pillar Element: Rule			Main Pillar Element: Judiciary Enforcement	Main Pillar Element: Political Ability	
		Element 1	Element 2	Element 3		Element 4	Element 5
Indonesia	Widespread	Unspecific norms	Unspecific norms	Specific norms	Moderate role	Strong interference	Partially

Source: Proposed and analyzed by the Researcher

Note:

Element 1 - NRA Institutions: Single or Widespread
 Element 2 - Constitutional Design, Element Statute, and Element Rule policy: Specific or Unspecific
 Element 3- Political demands: Weak, Moderate, or Strong interference
 Element 4- Political process and participation: Absolute, Partially, or Full.
 Element 5- Judiciary role: Weak, Moderate, or Strong role.

The table shows diverse regulatory institutions with special competencies in tobacco control and these include the Ministries of Health, Economy, Finance, and Home Affairs, regional government, and specifically authorized institutions such as the Press Censorship Bureau, Broadcasting Bureau, and Taxation Agency working on different issues including the economy, [34], health, environment, public order and fiscal monetary issues on tobacco control. The variations in the interests on tobacco countermeasures and its control were observed several times in Argentina but there is no specific arrangement in the constitutional design of both countries as indicated by the absence of adequate norms on sensitive-tobacco issues while there are diverse Laws and regulations passed by the Parliament and executive authorities to restrict the use of tobacco and its products.

It is interesting to note that Indonesia partially conduct broader political participation in the process of formulating regulations, [35]. In Indonesia, big tobacco industries have been trying to use soft power to increase economic income by recruiting more local workers, spending their funds on different educational programs for social interest,

and approaching politicians, legislatures, or executive members, to provide 'haven fields' for tobacco industries in the country. Moreover, the voice of NGOs and other parties are also heard and considered by the government and regulators. This shows that both countries are faced with a similar problem related to the strong pressure from tobacco industries concerning the tobacco control regulatory framework.

In Indonesia, the cases related to tobacco were not challenged from ordinary to Supreme Court as indicated by the lawsuits from NGOs or applicants in civil matters as well as criminal cases on tobacco, [36]. There were, however, mixed reactions to the Constitutional Court decisions observed to be protecting the tobacco industry, [37], in some such as the issue of advertisement and the workers' status including its rights as well as the need to strengthen and defend the taxation policy introduced by regulators and the defense provided for the health aspect in connection to the certainty of free-smoke areas and the stoppage of secondhand-smoke, [38].

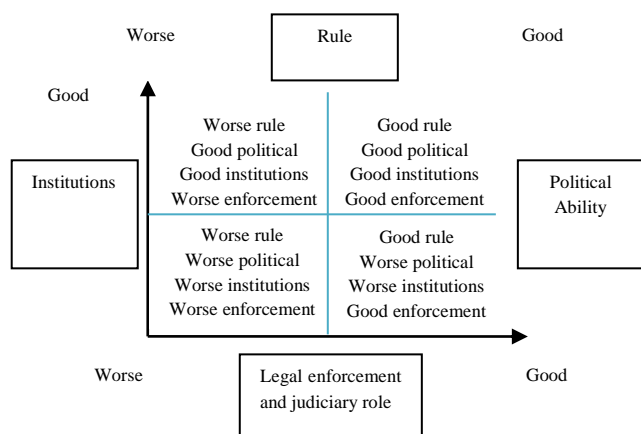


Fig. 1: Interaction between Institutions, Rule, Political Ability, Legal Enforcement, and Judiciary
 Source: Proposed and analyzed by the Researcher.

It was discovered that Indonesia has good rule and enforcement strategies in recent years but strong pressure has been evolving from tobacco industries and markets over several decades on the progress of their tobacco control regulatory systems, [39]. Moreover, the interest and perception of tobacco control issues of their institutions differ as indicated by the fact that Indonesia has been showing an economic interest rather than a comprehensive approach to restrict tobacco use for many years. Meanwhile, the institutions have been recently pressured through international legal documents with direct or indirect correlation to tobacco control on health and economy such as ICESCR, UDHR, CEDAW, CRC, and GATT-WTO Agreement

(including TRIPS) guiding the countries to implement strict measures on tobacco control.

5 Conclusion

Indonesia is one of the few countries in the world that does not belongs to FCTC parties because they are upper-middle-income countries using tobacco as one of the major commodities to develop their economies, and GDP, and employ local workers despite their prioritization of health in line with their participation in several international regimes requiring domestic implementation of tobacco control directly or indirectly. It was discovered that both countries have a quite strong judiciary role and legal enforcement but several policies were observed to be neutral to cases related to tobacco industries while some verdicts or judgments strongly supported health concerns and reduction in tobacco consumption. There are also strong pressures from political or interest groups concerning rules that cannot successfully ban and reduce tobacco consumption as well as its broader impact on any spheres. This is due to the different interests of the institutions including the legislature and regulatory aspect of the executive branches to formulate and pass strong rules to ensure comprehensive reduction of tobacco in all aspects.

A hypothetical relationship between the institution, rule, political ability, and judiciary body and its enforcement considered the four main pillars of the tobacco control regulatory system was proposed. It was discovered that legal and political variables are interdependent in the process of formulating regulations to be used as effective tools to govern tobacco control. The findings also showed that Indonesia has good rules and judiciary and enforcement but is weakened by strong pressure from the political aspect which further led to weak institutions despite the improvement recorded in recent years in controlling tobacco use and its impact.

This article also intends to propose ideas on prospective contexts, there is a need to arrange a comprehensive and specific law concerning tobacco control in Indonesia.

Acknowledgement:

Sincere gratitude was delivered to the Doctoral of Law Program, Udayana University for any assistance that was provided related to research sources and article improvement. Many thanks are also delivered to the proofreader for their efforts to ensure this article's language clarity and grammatical. Also, sincere gratitude to the Editorial Board and anonymous peer reviewers for insightful comments on this article's improvement.

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Contribution of Individual Authors to the Creation of a Scientific Article (Ghostwriting Policy)

Nyoman Mas Aryani has responsibility and in-depth contribution to the introductory part, method, first analysis part, and conclusion of this article.

Gede Yusa is responsible for an in-depth contribution to the methods and the second analysis part of this article.

Sources of Funding for Research Presented in a Scientific Article or Scientific Article Itself

No funding was received for conducting this study.

Conflict of Interest

The authors have no conflicts of interest to declare.

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