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## **Exposing and addressing tobacco industry conduct in low and middle income countries**

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**5 key points panel**

- The tobacco industry's future depends on increasing tobacco use in low and middle income countries (LMICs), especially among women and youth and contrary to industry claims, tobacco marketing deliberately targets these groups. High levels of marketing are documented in LMICs.
- Tobacco companies consistently contest and seek to circumvent governments' authority to implement public health measures using highly misleading arguments frequently presented via third parties whose links to industry are obscured.
- In LMICs, tobacco companies harness their resource advantages in establishing partnerships with governments to address the trade in illicit tobacco in which there is evidence of their complicity and in using the threat of domestic litigation and arbitration under economic agreements (rarely drawing on the original intent of these agreements) to intimidate governments against comprehensive tobacco control measures.

- Article 5.3 of the Framework Convention on Tobacco Control and its guidelines offer governments a set of strategies to protect public health against the tobacco industry's appalling conduct, but are underutilised.
- An essential first step in addressing tobacco industry interference is changing attitudes to the industry through actively monitoring and exposing its conduct. Exemplar countries show that such efforts underpin the development of effective tobacco control.

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## INTRODUCTION

The inexorable rise in global deaths from tobacco is increasingly driven by trends in low and middle income countries (LMICs)<sup>1</sup> where, by 2030, it is estimated that 6.8 million of the 8.3 million tobacco-related deaths will occur.<sup>2</sup> The changing global patterns of tobacco use that underpin these mortality trends reflect the presence and actions of the tobacco industry, whose role in expanding tobacco use globally,<sup>3-5</sup> has led to its label as the vector of the tobacco epidemic.

In recognition that the factors driving the tobacco epidemic, notably the actions of the tobacco industry, transcend national borders, the World Health Organization (WHO) used its treaty making powers for the first time in developing the Framework Convention on Tobacco Control (FCTC). Given overwhelming evidence of the tobacco industry's efforts to subvert public health policy making,<sup>6</sup> the treaty includes Article 5.3, which requires parties to protect their public health policies from the "vested interests of the tobacco industry".<sup>7</sup> The FCTC, which is legally binding, entered into force in 2005 and, by December 2014, 180 of the UN's 193 member states were Parties to the Treaty. Yet FCTC implementation has been slow and uneven in large part because of tobacco industry efforts to subvert progress in tobacco control.<sup>8</sup>

This paper provides an overview of tobacco industry practices focusing on LMICs given (a) the growing importance of LMICs to the tobacco industry's future, (b) the increasing tobacco-related disease burden faced by LMICs<sup>9</sup> which will increase the policy priority afforded to this issue, and (c) the potential, through effective tobacco control policy implementation, to prevent full escalation of the tobacco epidemic, particularly in Africa. As well as exploring tobacco industry market expansion tactics and policy influence generally, we examine in detail three mechanisms through which tobacco companies are increasingly

attempting to prevent progress in tobacco control - the use of international economic agreements, litigation and the illicit trade in tobacco. Tobacco companies are also exploiting the opportunities presented by harm reduction<sup>10,11</sup> and regulatory developments such as Better Regulation to enhance their influence<sup>12,13</sup> but these currently have less resonance in LMICs and are not, therefore, covered in detail. Finally, we outline how these problems might be addressed and highlight that, despite the egregious examples of industry influence detailed, some LMICS are exemplars in tobacco control and show what can be achieved by prioritising health over tobacco industry interests.<sup>14</sup>

## **THE TOBACCO INDUSTRY AND MARKET EXPANSION**

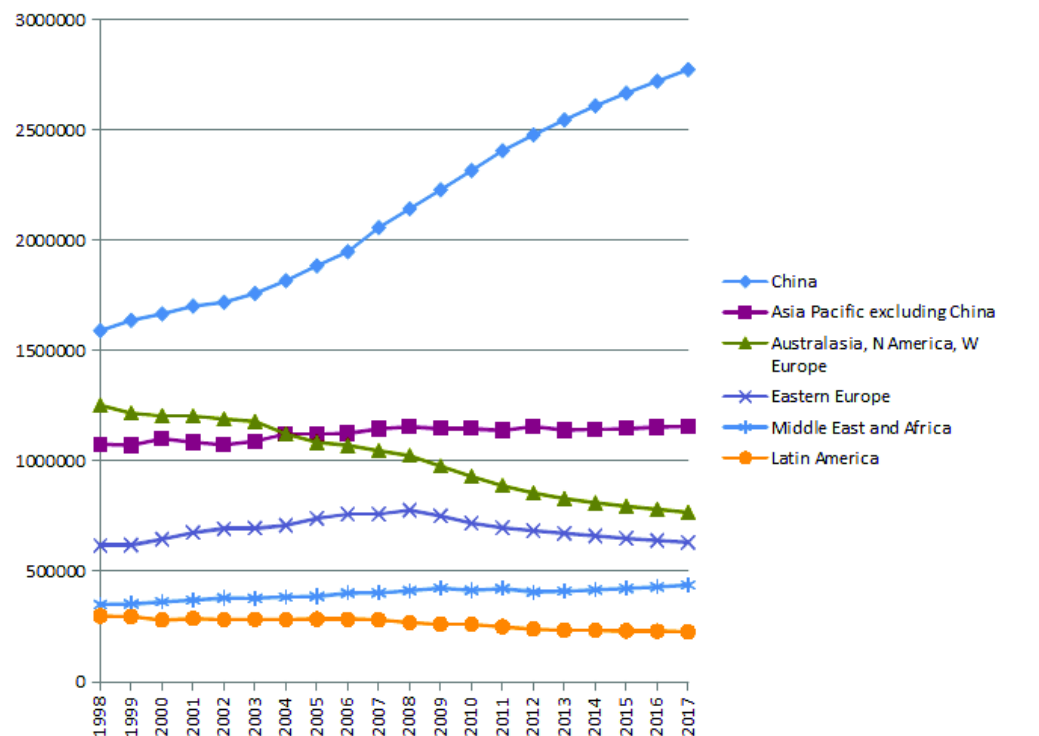
### **The importance of LMICS**

Tobacco industry conduct can be understood in the context of the global tobacco market and the growing importance of and opportunities presented by LMICs. Historically western based tobacco companies expanded their global sales by using investment and trade liberalisation to enter new markets and acquire smaller companies – Latin America in the 1970s, parts of Asia in the 1980s and the former communist bloc in the 1990s.<sup>4,5</sup> So assiduous was this expansion that the global industry is now dominated by just four privately owned transnational tobacco companies (TTCs) - Philip Morris International, British American Tobacco (BAT), Japan Tobacco International (JTI) and Imperial Tobacco(**Table w1**).<sup>15</sup> While TTCs persistently seek to make inroads into the world's largest and most rapidly growing market, China (**Figure 1**), it remains dominated by the state owned Chinese National Tobacco Company (CNTC), the world's largest tobacco company by volume, which has fiercely guarded TTCs' access<sup>16</sup> and is instead emerging as a competitor, producing brands for export to South East Asia.<sup>17</sup> Beyond this, there are now very few additional state-owned or private companies left to acquire (Table w1).

Consequently, the TTCs' future now depends on driving consumption and stretching profit margins in existing markets. With China largely closed to TTCs and consumption falling in most high income countries (HIC), Latin America and Eastern Europe, their main opportunities for driving consumption arise through promoting smoking in the hitherto underexploited markets of Asia Pacific, Africa and the Middle East, where consumption continues to increase (**Figure 1**).<sup>15</sup> The greatest potential lies in Africa where the largest increases in smoking prevalence are predicted.<sup>18</sup> Population growth<sup>15</sup> and the burgeoning number of adolescents consequent to declining childhood mortality rates<sup>9</sup> further enhance

the attractiveness of LMICs. So too do the limited opportunities elsewhere. In HICs, the TTCs have been able to increase profits despite declining sales<sup>19</sup> by overshifting taxes (increasing prices over and above a tobacco excise increase)<sup>20</sup>. Yet this practice, on which TTCs' share prices depend, looks increasingly threatened.<sup>21</sup> Finally, the opportunities e-cigarettes present may be more limited than some had assumed - sales growth in HICs is already slowing<sup>22</sup> and profits on e-cigarettes remain lower than on cigarettes with sales accounting for just 0.4% of total value in the combined, global nicotine and tobacco market in 2013.<sup>21</sup> Further, evidence suggests that the tobacco industry may simply seek to harness the reputational and access benefits of e-cigarettes while constraining their ability to genuinely compete with cigarettes.<sup>10,11</sup> This is supported by media reports that tobacco companies are arguing for greater regulation of more innovative (refillable tank) e-cigarette products than cig-a-like products.<sup>23</sup>

**Figure 1. Cigarette consumption (millions of sticks) by region (historic and forecast data on retail volumes), 1998-2017**



Source: Euromonitor data downloaded 7<sup>th</sup> May 2014

### Market Expansion

The tobacco industry's aggressive approach to market expansion has been widely documented and shown to drive rapid increases in tobacco use.<sup>3-5,24,25</sup> Historic evidence

shows that to drive up sales they market heavily, sell cheaply, systematically flaunt existing tobacco control policies and prevent future policies by lobbying aggressively.<sup>4,26-32</sup> While such strategies are best documented in HICs, Latin America, parts of Asia and the former Eastern bloc, it is clear they are being repeated worldwide (**Boxes 1 and 2**).<sup>33-36</sup>

### **Marketing**

Despite tobacco industry claims that it markets only to existing smokers to encourage brand switching, historical industry documents make it abundantly clear that they have deliberately targeted non-smokers, notably young people and women, and that their future depends on driving smoking uptake among these groups.<sup>24</sup> For example, as one executive explained “[T]he base of our business is the high school student”,<sup>37</sup> while BAT’s marketing plans for its brand Players Gold Leaf referred to targeting those aged “16+” and of “low income low literacy”.<sup>38</sup>

The industry’s targeting of women in HICs dates back to the 1920s and linked smoking to emancipation, selling cigarettes as ‘torches of freedom’.<sup>24,39</sup> Consequently the gender gap in smoking narrowed in most HICs, parts of Latin America and Eastern Europe, yet elsewhere, particularly in Asia, Africa and the Middle East, smoking among women remains considerably lower than men.<sup>40</sup> Such tactics have, therefore, now been repeated worldwide with the industry capitalising on social and economic change by using marketing to make female smoking more socially acceptable (**Box 1**).<sup>24,39,41</sup>

#### **Box 1. Tobacco Industry Expansion into Emerging Markets: Targeting Women and Children**

Sub-Saharan Africa’s rapidly expanding young population and blossoming middle class makes it a prime target for tobacco industry expansion and tobacco companies have been strategically targeting the largely untapped opportunities there.

Historical corporate documents indicate that the sale of single stick cigarettes, which continues to this day and makes smoking affordable and accessible particularly for the poor and young, underpins industry expansion in Africa<sup>33,42,43</sup> and efforts to ban their sale have been contested and circumvented.<sup>44,45</sup> Numerous other efforts are made to market cigarettes to youth. In many African countries children aged 13-15 are frequently offered free cigarettes by tobacco company representatives.<sup>46</sup> Recent reports document companies marketing candy-cigarettes near schools,<sup>42</sup> and sponsoring youth-oriented concerts and events.<sup>47</sup> Indirectly, youth promotion is also achieved through corporate social responsibility (CSR) activities such as publicly donating sickle cell anaemia screening machines in the Democratic Republic of Congo<sup>48</sup> where many children are affected by the disease, and sponsoring the education of hundreds of children in Uganda.<sup>49</sup>

Marketing to women and girls who, in LMICs, have lower rates of smoking than men, is also widespread.<sup>50 51</sup> Efforts include using ‘trend setters’ to promote and normalise the image of the African woman smoker (see below) in an attempt to mollify the cultural barriers to female smoking. The industry’s success is evidenced by the rising uptake of smoking in girls in many developing parts of the world.<sup>24</sup>



Congo Tobacco Company Celebration of Women in Goma, Eastern DRC, on Women’s Day, March 8 2012

Evidence indicates a causal relationship between tobacco advertising and smoking initiation, and that even brief exposure to advertising has an impact on adolescents.<sup>52</sup> The high levels of marketing observed across LMICs<sup>53,54</sup> is therefore of major concern. For example, large numbers of children report being given free cigarettes by tobacco company representatives while the vast majority (between 35% and 97% by country) of professional respondents in schools believe the tobacco industry deliberately encourages youth to use tobacco.<sup>53</sup>

### **Price**

Price/tax increases are the most effective means of reducing tobacco use.<sup>55</sup> A key industry tactic in emerging markets, used as part of its aggressive approach to driving up sales, is to keep prices cheap in order to encourage uptake and establish use.<sup>15,56,57</sup> Given the oligopolistic nature of most tobacco markets, only in some instances are such practices driven by genuine price competition.<sup>55</sup> Dumping, price discounting, absorbing taxes rather than passing them onto smokers, using smuggling to avoid taxes (see below) and lobbying to keep tobacco taxes low have all been documented as elements of such a strategy.<sup>4,56,57</sup> BAT has referred to this approach as “share at all costs market dynamics”.<sup>15</sup> Once smoking uptake, tobacco sales and disposable incomes have increased sufficiently, the industry increases prices or encourages consumers to trade up to more expensive brands with larger profit margins; the aim as one PMI document explains, “to trade consumers up to premium brands as economies develop”.<sup>56</sup>

Thereafter, as companies become more established in these markets, the extent of price competition weakens, enabling pricing above competitive levels and generating excess

profits.<sup>19,55</sup> Evidence from as far afield as Ireland, UK, US, Jamaica and South Africa suggests that tobacco companies then begin to overshift taxes, ie increases prices on top of tax rises, at least on premium brands.<sup>20,55</sup> This enables them to both increase profits and pretend that the government, through tax increases, is solely responsible for the price rise.<sup>55</sup> Simultaneously they lobby for low tobacco taxes, arguing *inter alia* that price rises drive illicit trade.<sup>58 59</sup> Given that the industry itself is responsible for a significant proportion of the price increase, such arguments defy logic.<sup>20,59</sup> What the industry is effectively appealing for is lower taxes so that it has greater scope to increase prices (and profits).<sup>20,59</sup> This pattern, and the excess profits enjoyed by tobacco companies in such markets,<sup>19</sup> instead signal scope for governments to further increase tobacco taxes, an opportunity that is frequently overlooked.<sup>20,59</sup> Where governments have increased taxes, consumption has fallen and tax revenue increased simultaneously.<sup>55</sup>

More detailed analysis shows that, while the overall pattern in established markets is one of overshifting, the tobacco industry simultaneously absorbs the tax increases on its cheapest brands to ensure their real price remains steady or even falls.<sup>20</sup> These cheap brands appear to perform two functions – they provide a route into the market for price-sensitive (young) smokers and keep price sensitive (poorer) smokers in the market.<sup>20</sup> Such efforts are combined with price-based marketing which has increased in importance consequent to restrictions on other forms of marketing and is also targeted at the least well off.<sup>60</sup> Collectively they undermine the intended impact of tobacco tax policy and are likely to explain inequalities in smoking rates.<sup>20</sup>

## **INFLUENCING POLICY**

### **Political Influence in LMICs**

The evidence, including systematic reviews of tobacco industry political activity, indicates that tobacco companies predominantly use the same tactics and arguments repeatedly over time and across jurisdictions.<sup>34,58,61</sup> Consequently, the existing literature, despite its predominant focus on HICs, can be used to anticipate and, therefore, counter industry activities elsewhere.<sup>34</sup> The evidence also suggests some differences in approach, most notably that efforts to influence health policy in LMICs are bolder and, where possible, take advantage of state incapacity and corruption.<sup>41,62</sup>

Overall tobacco companies continue to place considerable emphasis on economic arguments, rely heavily on third parties, and use litigation aggressively to weaken and



prevent public health measures.<sup>6,14,34,58,61,63</sup> However, they have also adapted techniques to take account of both challenges to their political legitimacy, now formalised in Article 5.3 of the FCTC, and the opportunities presented by globalisation. For example, in response to their declining political legitimacy, they have increased their use of third parties<sup>64,65</sup> and attempted to signify a commitment to the public good by rebranding their political activities as corporate social responsibility (CSR) initiatives<sup>66-69</sup> and exploiting the political opportunities presented by harm reduction.<sup>10,11</sup> In response to globalisation, tobacco companies are now actively using economic agreements and the opportunities presented by the global trade in illicit tobacco products to undermine progress in tobacco control. As outlined below, both efforts restrict informed scrutiny to experts - international lawyers or experts in illicit tobacco - and particularly threaten countries without the financial means to mount a legal defence or independently investigate the illicit tobacco trade and industry involvement therein.

### **Misrepresenting the Costs and Benefits of Tobacco Control**

The tobacco industry tends to underplay the potential benefits of proposed policies while emphasising their costs.<sup>34,70</sup> Consequently, despite the important work of the World Bank showing both the limited economic dependence of LMICs on tobacco and substantial economic benefits of tobacco control,<sup>71</sup> the industry continues to exploit policymakers' misconceptions of the economic importance of tobacco, limited knowledge of the socio economic benefits of tobacco control and short-term interests in revenue generation..<sup>29,70,72,73</sup>

Its ability to do this is underpinned by efforts to shape understanding of the economic impacts of tobacco through the production of lopsided assessments of the economic benefits of tobacco designed to create what, in most cases, is a false choice between health and economic well-being.<sup>74-80</sup> These reports highlight foreign exchange earnings, public revenue and employment associated with tobacco production (agriculture and manufacturing) and use (retail and hospitality), providing a foundation for alliance building with tobacco supply chain workers.<sup>79,80</sup> Predictably, however, they ignore the economic and social costs associated with tobacco use and growing, the fact that money not spent on tobacco will be spent on other goods generating alternative employment and public revenue,<sup>71</sup> and the potential for tobacco farmers, with targeted support, to diversify.<sup>81</sup>

A key audience for such efforts is non-health ministries, whose support is crucial to tobacco companies.<sup>14,63,82</sup> Recent evidence from Vietnam indicates that concerns over unemployment and public and private debt in LMICs create a particularly receptive policy environment for industry arguments: officials from departments with interests in revenue generation took a “politics-as-usual” approach to tobacco control, characterised by a low priority for health reform and interdepartmental rivalry.<sup>73</sup> This reinforces past studies focusing on African and Western Pacific countries.<sup>29,63</sup>

Such efforts appear to enjoy particular influence in tobacco leaf-growing countries (**Box 2**).<sup>29</sup> Yet, it is increasingly apparent that much of the industry’s argumentation on tobacco farming is misleading.<sup>81</sup> Claims that tobacco control measures in leaf-growing nations will suddenly decimate tobacco farming when the majority of the crop is exported and reductions in local consumption will be small and gradual are simply not credible.<sup>81</sup> The vast majority of LMICs are not dependent on tobacco farming<sup>71</sup> and economically sustainable alternatives have been identified in various world regions.<sup>81</sup> While their application may be complex in some countries, perhaps particularly Malawi and Zimbabwe, the only two heavily dependent on tobacco for foreign earnings,<sup>71</sup> continued dependence on tobacco also reflects political choices. By refusing to sign the FCTC, countries like Malawi have cut themselves adrift from international efforts to find alternatives to tobacco through FCTC Articles 17 and 18. Government inertia may also be explained by the dead hand of economic conflicts of interest; Malawi has many high-ranking government officials who grow tobacco.<sup>83</sup> Serious concerns are also being raised about the industry’s treatment of tobacco farmers, with bonded labour and child labour key issues.<sup>81</sup> In the absence of competition, tobacco companies have control over leaf grading and price, and can lock farmers into a repetitive cycle of debt in exchange for supplies.<sup>29,33</sup> Consequently, tobacco farmers are increasingly supporting tobacco control and diversification efforts. In Uganda, for example, a group of farmers who had switched to growing alternative crops recently submitted a petition to the Speaker of the Parliament in support of the Uganda Tobacco Control Bill 2014, stating that “Tobacco growing is tantamount to making a contract with poverty.”

**Box 2. Tobacco Industry Influence in Emerging Markets: preventing, stalling and circumventing legislation in Africa**

Progress in tobacco control in Africa has been significantly hindered by tobacco industry interference. In Kenya, it took over 13 years for the Tobacco Control Act 2007 to be approved by Parliament and Namibia’s Tobacco Products Control Act, initially introduced in

the early 1990s, was not passed until 2010. These delays were attributed in large part to industry interference.<sup>33,84</sup> In Nigeria, where tobacco control NGOs have pushed for limitations on tobacco industry involvement in policy-making, BAT Nigeria ran a full page advert in a July 2014 issue of *The Guardian* (Nigerian) attempting to undermine the NGOs by informing the public of the “aggressive propaganda against the Tobacco Industry” and claiming the industry had contributed to stronger tobacco control there and therefore “must be part of the solution”.<sup>85</sup> In Uganda, where the Tobacco Control Bill was tabled in 2014, BAT claimed that the bill, although having little impact on demand for leaf which is almost entirely exported,<sup>86</sup> would decimate the livelihoods of over 14,000 farmers with negative economic consequences.<sup>87</sup> BAT initially cancelled their contracts with the 709 tobacco farmers from the constituency represented by the mover of the bill and later announced they would no longer contract any tobacco farmers in Uganda.<sup>45,87</sup> While BAT has now blamed the bill for these decisions, it had previously cited the unpredictability of the tobacco crop in Uganda as the primary reason for withdrawal, while its 2013 closure of a leaf processing plant, relocated to Kenya, hinted that the company had been planning its exit for several years.

Even once legislation is passed, the tobacco industry finds innovative ways to circumvent it. For example, in Kenya mandated health warnings on cigarette packages are often applied as removable stickers.<sup>33</sup> In Nigeria, BAT has been accused of misleading senior police staff on the definition of “public places” in order to prevent enforcement of smoke-free legislation.<sup>88</sup> In Namibia, BAT used legal intimidation to prevent implementation of the 2010 Act.<sup>84</sup>

### **Corporate Social Responsibility (CSR)**

CSR is increasingly central to the tobacco industry’s business strategy, yet what appears under the rubric of this ill-defined term indicates that CSR is aimed at maintaining their status as political insiders with a legitimate role to play within health policymaking.<sup>15,66-68</sup>

BAT documents indicate that these considerations have driven its CSR programmes from the outset:

“The approach should succeed in hauling us closer to a position of co-operation with governments and other important stakeholders in the developed world, while helping to limit the spread of "demonisation" from the developed world to the emerging markets..”<sup>89</sup>

CSR practices work politically by either facilitating conventional political activities (by generating goodwill amongst policymakers, for instance, charitable donations work to make access to political élites more likely) or creating alternative means of putting conventional political activities, such as constituency building and political access, into effect.<sup>14,67-69,90,91</sup> Many initiatives do both by exploiting LMICs’ acute need for investment in social projects. Thus, BAT sponsored community water projects and PMI sponsored education projects in tobacco farming areas of Sri Lanka, East Africa and Colombia, for example, build and

maintain alliances with farming communities while simultaneously emphasising the value of the industry to social and economic development.<sup>67,92</sup> This is taken to extreme lengths by aligning industry charitable donations with governments' objectives of achieving the Millennium Development Goals in, for example, Nigeria and Brazil.<sup>67,93,94</sup> Given the practice of LMICs defending tobacco on the basis of poverty alleviation and development, such approaches promise to be highly effective.<sup>95</sup> Certainly, internal industry documents claim such activities enabled them to prevent advertising bans in Sierra Leone and Uganda, and to weaken a tobacco bill in Kenya.<sup>96</sup>

Tobacco industry CSR programmes' underlying narrative of co-operation and commitment to "sensible" regulation<sup>97</sup> also provide a political lubricant for the industry's other activities including the partnerships they are attempting to establish on illicit tobacco (see below). In Ecuador, for example, companies gained acceptance into policymaking networks by emphasising a commitment to regulation under the FCTC but then using the position to push for weak legislative proposals.<sup>72,75,98</sup> These are designed to have a limited effect on tobacco consumption and, by filling regulatory space, decrease the likelihood of tobacco legislation being strengthened in the future.<sup>72,99,100</sup> Continued industry demands to be part of national governments' efforts to develop tobacco legislation<sup>97,101,102</sup> underline the ongoing risk that such efforts pose to FCTC implementation. A similar strategy involves voluntarily introducing weak versions of FCTC measures with a view to preventing or delaying the implementation of comprehensive ones. In the mid-2000s, BAT increased the size of weak, text-only warnings on cigarette packs in Colombia, Honduras, Costa Rica, and Trinidad & Tobago, it then taking several years for these countries to eventually approve legislation mandating health warnings aligned with Article 11 Guidelines.<sup>103</sup>

### **Constituency Building and Third Parties**

The tobacco industry makes extensive use of third parties to influence health policy in LMICs.<sup>34,61,75</sup> Third party advocacy carries greater weight with policy élites,<sup>104</sup> colours policymakers' perceptions of the political risks associated with public health measures, and amplifies tobacco industry messaging about the negative impacts of policy, not least because news outlets frequently fail to expose the underlying financial conflicts of interest.<sup>105</sup>

Different organisations are used to manage different aspects of the regulatory environment. International business organisations, such as the US Chamber of Commerce and US-ASEAN Business Council,<sup>106</sup> are used to lobby officials on the legal and economic implications of public health measures. For example, in 2013 and 2014 when Jamaica and Ireland, respectively, were legislating on tobacco packaging (Jamaica mandated pictorial health warnings covering 75% of the pack while Ireland aims to introduce standardised packaging of tobacco products), the US Chamber of Commerce wrote to both governments claiming the measures would contravene intellectual property obligations under international trade and investment agreements.<sup>107,108</sup> The International Tax and Investment Center (ITIC), which describes itself as an independent clearinghouse for best practices in taxation is, as acknowledged on its website, sponsored by all four TTCs, which are also represented on its Board of Directors.<sup>109</sup> It hosts seminars, publishes reports, and sponsors conferences on tobacco tax policy and the illicit tobacco trade which promote the tobacco industry's position on these issues and give it "a seat at the policy-making table".<sup>109</sup> Such tactics have proved successful in influencing tax policies in some countries.<sup>109</sup> In October 2014 it hosted a meeting for finance ministers the day before the FCTC Conference of the Parties meeting (COP) in Moscow where FCTC Article 6 guidelines on tobacco taxation were to be agreed.<sup>109</sup> Clearly intended to threaten progress of the guidelines, ITIC billed the event as a pre-COP meeting giving the impression that it was officially associated with the COP. This prompted WHO to write to all parties explaining that the meeting "is in no manner supported by the Convention Secretariat and cannot be considered as being in any way linked to the COP".<sup>110</sup>

The International Tobacco Growers Association (ITGA) was established and continues to be funded by the industry as a "front" for its "Third World lobby activities".<sup>82,111</sup> ITGA presents itself as the voice of the tobacco farmer in contemporary tobacco policy conflicts.<sup>112</sup> Its financial links to tobacco companies are rarely disclosed<sup>111,112</sup> although it is increasingly clear they use ITGA strategically to oppose tobacco control policies.<sup>82</sup> Farmers are mobilised using misleading arguments about the impacts of policies<sup>82</sup> and encouraged to intervene using a variety of means, including protests, media outreach, policy submissions and promotion of research, to highlight the negative economic impacts of public health measures.<sup>112,113</sup> The tobacco industry has even managed to have ITGA oppose FCTC Articles 17 and 18 which aim to help farmers by finding viable alternatives to tobacco growing.<sup>82</sup> Recently, civil society organisations and farmers groups in Africa have launched a campaign highlighting the ITGA's lack of credibility and independence.<sup>114</sup>

## **The use of international trade and investment agreements and domestic litigation to deter and challenge progress in tobacco control**

The tobacco industry is increasingly using international trade and investment agreements, including those overseen by the World Trade Organization (WTO),<sup>115,116</sup> and domestic litigation<sup>34,61</sup> to challenge existing and deter future tobacco control policies.<sup>115,116</sup>

### Use of trade and investment agreements

Industry documents suggest argument that innovative health warning policies including standardised packaging contravened trade and investment treaties was developed as a deliberate strategy in the 1990s.<sup>115</sup> Despite consistent legal advice that the agreements then in existence did not offer protection, the industry successfully used these arguments to deter policy implementation.<sup>115</sup> With the growing number of bilateral and multilateral investment treaties including the emerging Transatlantic Trade and Investment Partnership (T-TIP) between the EU and US and Transpacific Partnership (TPP), involving 12 countries and approximately 40% of world trade, this trend looks set to intensify. Moreover, given changes in the nature of such agreements and evidence of industry efforts to influence their content in ways that make it easier to challenge policies, these agreements may now pose even greater challenges to tobacco control.<sup>116-118</sup> Key concerns are that bilateral investment treaties (BITs) enhance intellectual property rights and, in contrast to most current major economic agreements which only allow governments to lodge formal complaints, give corporations legal standing to directly challenge governments' regulation through investor state dispute settlement (ISDS) arrangements. ISDS arbitration can be costly and uncertain and grants compensation (not sanctioned retaliation, like in the WTO), thereby significantly increasing the financial risks to countries facing such disputes.<sup>116,117</sup>

Although corporations are unable to directly bring a case to WTO, certain LMIC governments appear willing to act as tobacco industry puppets. Currently, five countries – Ukraine (DS434), Honduras (DS435), the Dominican Republic (DS441), Cuba (DS458) and Indonesia (DS467) – are complainants in a formal WTO dispute against Australia's standardised packaging legislation. These countries, alongside other (predominantly leaf-producing) LMICs, also challenged Australia for many months before the formal dispute within WTO committees<sup>119</sup> and expressed concerns about the European Union's Tobacco Product's

Directive when notified to the WTO in 2013.<sup>120</sup> Similar countries, Malawi among them, continue to vocally challenge other' tobacco control measures in the WTO including bans on tobacco additives Canada and Brazil.<sup>121,122</sup>

These disputes are rarely genuinely about trade. They are rather about the threat that regulation poses to tobacco companies and their ability to convince governments to challenge such innovation on their behalf. In the case of standardised packs in Australia, the complainants' do not export large volumes of tobacco products to Australia, if at all.<sup>123</sup> Instead, PMI or BAT funding for four of the five claims against Australia has been acknowledged.<sup>124,125</sup> In Malawi, the tobacco industry is thoroughly integrated into official international trade policymaking – it plays leadership roles on the National Working Group on Trade Policy and the Private-Public Dialogue Forum.<sup>126,127</sup> While the tobacco industry is clearly adept at cultivating strong political ties in countries where tobacco growing is widespread, it is also apparent that they take advantage of poor governance and corruption: 18 of the 27 countries that directly challenged Canada's ban on tobacco additives scored in the corrupt or highly corrupt range on Transparency International's Corruption Perceptions Index, and only 3 in the "Clean" range.<sup>128</sup>

LMICs have also been the victims of industry efforts to use economic treaties to threaten innovative tobacco control policies both historically<sup>129,130</sup> and recently. Uruguay is currently defending its large, graphic warning labels in international arbitration.<sup>131</sup> PMI (with 2013 revenues of more than US\$59 billion and profits near \$9 billion<sup>132</sup>) claims that Uruguay (with total budget revenues of approximately \$17 billion and expenditures of \$19 billion<sup>133</sup>) is violating the provisions of a BIT that the country has with Switzerland (PMI's corporate home), even though Article 2.1 of the BIT clearly provides for a public health exception.<sup>134</sup> Without an international NGO, Bloomberg Philanthropies, supporting its legal costs, Uruguay would likely have abandoned its regulatory efforts.<sup>135</sup>

#### Use of Domestic Litigation

Tobacco companies are aggressive litigants, bringing legal challenges even when their own advisers indicate that action is likely to fail,<sup>136</sup> and reports suggest a fourfold increase in tobacco industry litigation against public health measures between 2005 and 2011.<sup>137</sup> Such challenges seek to delay, overturn or weaken (allowing, for example, smoking in ventilated areas or limiting the size of health warnings (**Box 3**))<sup>138</sup> public health measures. Amongst other measures, proposals in LMICs to increase the size of health warnings (Thailand,<sup>139</sup> Sri

Lanka,<sup>140,141</sup> Nepal<sup>142</sup>) and introduce graphic health warnings (Paraguay,<sup>143</sup> Philippines<sup>1,144</sup>), and restrictions on public smoking (Uganda,<sup>138</sup> Kenya,<sup>138</sup> Mexico,<sup>79,145</sup> Argentina,<sup>1,146</sup> Brazil<sup>1</sup>), marketing (South Africa,<sup>138,140</sup> Panama,<sup>1</sup> Colombia<sup>1</sup>, Brazil<sup>1</sup>), and additives (Brazil<sup>147-149</sup>) have all recently been challenged in national courts. Interestingly, many of these cases fail,<sup>1,138,140-142,150-152</sup> reflecting a similar pattern in Europe.<sup>1,136,140</sup> Given the frequency with which court challenges are made and the breadth of measures that have been subject to legal challenge, the number of informal threats of litigation to policymakers that never come to light but may have deterred progress in tobacco control is likely to be significant.<sup>34</sup>

### **Box 3: BAT's efforts to challenge health warning legislation in Sri Lanka**

In August 2012 the Sri-Lankan Ministry of Health passed regulations requiring pictorial health warning covering 80% of the front and back of tobacco packs and in February 2014, the Sri-Lankan parliament approved legislation to this end. Meanwhile, however, Ceylon Tobacco Company (CTC), a BAT subsidiary, has brought a series of legal challenges against the legislation that have led ultimately to a significant delay in implementation and a shrinking in size of the warnings to 60%.

The initial lawsuit claimed the regulations were impossible to implement, the company would only comply if the requirements were "reasonable" (35% of the pack surface) and that the Ministry of Health did not have the authority to issue such regulations. The case went through several layers of the court system which at one point suggested that both parties settle with the Ministry of Health reducing the size of the warnings, a suggestion it refused, until CTC ultimately filed the case in the Supreme Court. The Supreme Court first delayed implementation of the warnings before ruling, in May 2014, that the Ministry of Health had the right to impose the health warnings but ordered a reduction in size to between 50-60% of the pack surface. The new warnings were due to be in place by July 1<sup>st</sup> 2014 but, just two weeks before that, CTC filed a further appeal with the Supreme Court requesting a 10-11 months extension to the date of implementation for the company to sell already available stocks. On July 11th 2014 a final ruling has delayed the 60% pictorial health warnings until January 1 2015.

Sources:<sup>141,153</sup>

### **Tobacco smuggling**

The availability of cheap, illicit tobacco undermines attempts to reduce tobacco use and is a public health concern which has prompted the inclusion of an Illicit Trade Protocol within the FCTC. Yet a far greater concern is the way the tobacco industry is increasingly manipulating the problem of tobacco smuggling for policy gain in ways that seriously threaten progress in tobacco control. Tobacco companies make their profit when they sell to the distributor and whether the cigarettes are then sold through legal or illegal channels makes little difference. However, the sale of cigarettes through illegal channels has a number of advantages for tobacco companies (**Web Box 1**). Despite overwhelming evidence



of the industry's historical involvement in cigarette smuggling (**Web Box 1**) and growing evidence of ongoing complicity, for example through over-producing or over-supplying markets with product that then leaks into illicit channels,<sup>154-156</sup> tobacco companies have managed to shift the illicit tobacco issue from a public relations disaster in which they were identified as the pariah supplier of illicit product<sup>157,158</sup> to a public relations success story in which they are increasingly perceived as the victim of and solution to the problem. Through their assiduous efforts over recent years, tobacco companies have effectively hijacked the Illicit Trade Protocol (**Box 4**) and are actively using the threat of illicit to counter tobacco control policies by arguing, misleadingly, that tobacco control policies drive increases in illicit.<sup>58,59,159,160</sup>

Tobacco companies have worked assiduously to achieve this position by taking advantage of the complexity of the issue and using their resource advantage to dominate every aspect of the debate. First, by commissioning reports and surveys, tobacco companies have come to control the data and evidence on illicit and use this to dominate media coverage, secure access to authorities and promote industry messaging on illicit,<sup>161-163</sup> for example that illicit is driven by public health policies rather than weaknesses in customs and law enforcement and that counterfeiting and intellectual property crime are the primary concerns.<sup>164</sup> The volume of industry reports of this nature produced in recent years has been overwhelming, making it impossible for tobacco control groups to adequately respond. Where industry evidence and data from Europe, Africa, Asia, Latin America and Australia have been examined, they have been found to be seriously flawed, to significantly exaggerate the scale of illicit (and the counterfeit element) and underplay industry involvement.<sup>154,161,163,165-170</sup>

Second, tobacco companies fund activities under the umbrella of CSR (training for border patrol and customs officials, funding for sniffer dogs<sup>171-173</sup>) to further cement access and signal the need for "partnership" between industry and authorities. These activities have enjoyed success as far afield as Azerbaijan, Mali, Namibia, South Africa, as well as at supranational level (**Box 4**).<sup>174</sup> Consequently tobacco companies are now cooperating, both formally and informally, with various governments and intergovernmental agencies, contrary to Article 5.3. Alongside extensive CSR efforts (see above) and claimed commitments to harm reduction (which have hitherto largely featured in HICs<sup>10,11</sup>), such efforts are undoubtedly intended to counter the TTCs' gradual exclusion from the policy arena and undermine Article 5.3. More worryingly, if the norm of cooperation the industry is

seeking to establish in illicit trade seeps over into other areas of policy, it threatens tobacco control more generally.<sup>175</sup>

Third, tobacco companies have been funding a growing number of third parties – organisations and individuals (notably ex-policemen) - who provide credibility and are deliberately used as ‘media messengers’ or report authors, their links to industry rarely disclosed.<sup>176</sup> The 2014 report produced by KPMG for the tobacco industry’s Digital Coding and Tracking Association (**Box 4**) and ITIC’s activities (see above) are just recent examples. Press coverage frequently fails to expose industry backing for these reports or their inaccuracy.<sup>162</sup>

Collectively such efforts are enjoying considerable success and should be seen as part of the industry’s audacious attempt to secure control over the Illicit Trade Protocol and ensure it is put in charge of the global track and trace system that the protocol envisages as addressing global cigarette smuggling (**Box 4**). Yet the danger of regulatory capture with the industry coming to control both the data on and how the illicit trade is dealt with is illustrated by the legally binding deals reached between the four TTCs and the European Commission, which growing evidence suggests have failed. While data show that genuine tobacco industry products are still being smuggled in significant volumes in the EU, the payments TTCs have had to make have been so tiny as to provide no effective disincentive.<sup>156,177</sup> If a legally binding deal in a well-resourced jurisdiction has failed, this raises major concerns about the deals, binding and voluntary, negotiated elsewhere. As experts note, no deal with the tobacco industry has ever led to a positive outcome for public health.<sup>174</sup>

**Box 4: The tobacco industry’s ongoing attempts to infiltrate and undermine global efforts to address cigarette smuggling**

The illicit trade protocol (ITP), a supplementary treaty to the FCTC, was adopted in November 2012 and puts technology, via a global track and trace system, at the heart of addressing illicit tobacco. It specifies clearly that the tobacco industry should play no part in such a system. Leaked industry documents show the TTCs had prepared for this by secretly developing a plan to promote Codentify, a pack labelling system developed and controlled by PMI, as the track and trace system of choice. Not only does Codentify not meet the ITP requirements for a track and trace system,<sup>178</sup> but this would put the TTCs in control of a global system seeking to address the illicit tobacco trade in which they have been extensively involved. Further, it directly contravenes both Article 5.3 and the ITP’s requirement for the system to be independent of industry.

In 2011 the four TTCs collectively established the Digital Coding and Tracking Association

(DCTA) in Switzerland to collaborate with governments and international organisations and promote Codentify, and PMI alone donated Euro15 million to INTERPOL, the world's largest police organisation. By July 2012, DCTA had begun working with INTERPOL to make Codentify accessible to law enforcement agencies globally via INTERPOL's Global Register. Subsequent to the donation, Interpol controversially applied for Observer Status at the November 2012 Conference of the Parties claiming its ability to coordinate and facilitate international cooperation to eliminate illicit trade would be an asset.<sup>154,164</sup>

In 2014, the industry's DCTA was a major sponsor of the World Customs Organisation conference on illicit tobacco in Brisbane, Australia. KPMG's Robin Cartwright presented in DCTA's timeslot but his presentation did not mention that he is leading a £10million project on behalf of PMI.<sup>154,179</sup> Simultaneously, KPMG and GS1 UK launched a new report promoting Codentify.<sup>180</sup> While this report acknowledges that KPMG has worked for the tobacco industry and cites funding from DCTA, it fails to note that DCTA is effectively the tobacco industry.

As part of their apparent efforts to further ingratiate themselves with the international law enforcement community, in 2011 PMI donated 55,000Euros to the International Anti-Corruption Academy,<sup>181</sup> an organisation initiated by the European Antifraud Office (OLAF) and the UN Office on Drugs and Crime (UNODC)<sup>182</sup> to provide anti-corruption education and research.

## THE WAY FORWARD

Addressing tobacco industry interference should be simple. FCTC Article 5.3 guidelines outline the measures needed,<sup>7</sup> technical reports flesh these out in detail,<sup>183-186</sup> while this paper shows that industry tactics are repeated over time and place and could therefore be predicted and countered.<sup>34</sup> Yet, while growing numbers of countries have taken steps to prevent tobacco industry interference, successful implementation of Article 5.3 is almost non-existent.<sup>174</sup>

In practice, countering tobacco industry influence is complex. Even where efforts have been made to implement Article 5.3, tobacco companies offset such efforts by expanding their use of third parties, changing the regulatory architecture in a way that cements corporate access and influence<sup>12,13,187,188</sup> and influencing economic agreements to enable them to challenge policies.<sup>117</sup> Tobacco companies will continue to secure access and influence as long as it remains acceptable to do so. A necessary first step, therefore, and a pre-requisite to advancing tobacco control, is to change attitudes to the tobacco industry. This requires civil society to actively monitor and publicise industry misconduct (as detailed in Article 5.3) and for ministries of health to help disseminate these findings within government and beyond. As tobacco companies spend millions each year attempting to rehabilitate their image<sup>189-192</sup> and as institutional memories are short, such efforts must be ongoing. It is no coincidence

that the countries (in all income groups) with the most successful tobacco control policies also have the most active programmes of industry monitoring (witness Thailand, Brazil, UK, Australia)<sup>14,193</sup> and that recent progress in others has come in part through recognition of industry malfeasance and efforts to implement 5.3 (**Box 5**). While such efforts currently focus at the national level, industry influence also increasingly occurs at supranational level (the deals with INTERPOL, lobbying by ITIC and regional business organisations, for example). To address this, parties to the FCTC must cooperate, share knowledge, raise awareness among and hold intergovernmental agencies to account, and ensure that industry activity beyond national boundaries is monitored and reported. While WHO has a mandate to monitor the industry's supranational activity, funding for such efforts would need to be met by member states or international NGOs. Finally, TTCs' HIC host governments should play a more active role in holding TTCs to account. In contrast to Switzerland (now home to two TTCs, PMI and Japan Tobacco International), the UK government (home to BAT and Imperial Tobacco) has made a start in developing guidelines for diplomatic posts.<sup>194</sup>

#### **Box 5: Progress in the Philippines**

In January 2013, after a hard-fought political battle against the tobacco industry (led by PMI) and its allies, and following active efforts to implement Article 5.3,<sup>183</sup> the Philippines government implemented a major reform of tobacco excise tax structure and rates including hypothecating the tax for health purposes. The reform sought to eventually eliminate a structure that favoured incumbent firms and kept taxes and therefore prices of tobacco products low. Though the country has long endured a reputation for poor governance and corruption<sup>195,196</sup>, governments can change. In this case, there was strong overt support for the reform from the highest political levels, including the President, the finance minister, the commissioner of the revenue authority and the leaders in both houses of the national legislature<sup>197,198</sup>. More importantly for countries seeking to replicate this success, the government successfully linked the reform strongly to health, both in terms of mitigating tobacco use but also by earmarking hypothecating the vast proportion of new revenues to providing universal health coverage to the country's most vulnerable populations. These linkages engendered widespread legislative and public support, which ensured the reform's success. As of mid-2014, early estimates suggest that tax revenues have increased and are going to the earmarked hypothecated programs, and smoking prevalence among the young and those of lower income are now declining.<sup>199,200</sup>

This approach does not overlook the fact that industry influence is a manifestation of the inequalities in power and resources between TTCs on one hand, and nation states and civil society on the other. This is particularly the case in LMICs. Instead it recognises that this resource imbalance can only be directly addressed through radical measures that curtail the tobacco industry's excess profits<sup>19</sup> or fundamentally alter its structure.<sup>201</sup> The difficulties countries face in implementing even simple tobacco control policies underline that these more radical 'endgame' solutions, while much needed, are unlikely to be achieved without first changing attitudes to the industry through the actions above.

Yet, while the ability of tobacco control policies to rapidly reduce non-communicable diseases in LMICs is widely recognised, the political complexities of implementing such measures are overlooked.<sup>9</sup> The Gates Foundation and Bloomberg Initiative to Reduce Tobacco Use are exceptional in recognising this problem and supporting policy advocacy for tobacco control, including efforts to address tobacco industry interference. However, until this need is more widely recognised and tobacco control embedded more firmly in the development agenda, progress will remain slow. Economies of scale can be realised by collectively addressing the corporate vectors of NCDs, including tobacco, alcohol, processed food and sugary drinks, and the shared mechanisms (eg international economic agreements) through which their influence is mediated.<sup>202,203</sup> Governments should also look to, polluter pays principles, hypothecated taxes or price regulation<sup>19</sup> to fund these efforts.

Governments and civil society must also look to implement other elements of Article 5.3 (including limiting interactions with industry and ensuring their transparency, rejecting partnerships with industry, avoiding conflicts of interest for officials, denormalising activities industry describes as "socially responsible"). Most ministries of health are now cognisant of tobacco industry misconduct and the requirements of 5.3 and can therefore play a key role in informing other government departments. While departments seeking to control illicit tobacco may need to meet with and obtain data from the tobacco industry, they should ensure such interactions meet the standards of transparency required of Article 5.3 and learn to treat industry data with scepticism. Similarly civil society and ministries of health must urge governments to reverse any agreements tobacco companies have hitherto secured with governments. Prospectively, progress on Article 5.3 is likely to be enabled by first implementing the most feasible measures. For example, many countries have codes of conduct for civil service to which guidance for interaction with the tobacco industry could be

added and provisions consistent with 5.3 can be added to tobacco control legislation as it is being developed. More broadly, improving standards of governance and transparency in policing making and public life and ensuring greater public health involvement in trade and investment agreement negotiations would help.

Beyond this, a number of specific technical interventions should help address industry interference in LMICs and beyond. Technical support and capacity building is needed to enable parties to deal with legal challenges to tobacco control via both domestic courts and international dispute settlement mechanisms and is being addressed via the relevant knowledge hubs.<sup>204</sup> Investigative research and capacity building in illicit tobacco is needed to further understand and address this complex issue. Updated research that directly addresses industry economic arguments, including those on tobacco farming, is also needed alongside efforts to accelerate the development of FCTC Article 17 and 18 guidelines on support for economically viable alternative alternatives to tobacco. Moving forward, LMICs must guard against industry efforts to alter the regulatory architecture, for example through the application of Better Regulation principles and business impact assessments, which have been shown to embed and enable corporate influence.<sup>12,13,188</sup>

## **CONCLUSION**

Tobacco industry interference with governments' efforts to implement tobacco control policies remains one of the greatest challenges to preventing the harm caused by this industry. Tobacco companies continue to promote their lethal product and circumvent or prevent development and implementation of effective tobacco control policies. While select countries in all income groups, including those where the industry is a significant economic player,<sup>193</sup> show that actively addressing tobacco industry misconduct is achievable and enables effective tobacco control, elsewhere, despite a legal obligation to implement the FCTC, progress is lamentably slow and an epidemic that could be prevented continues to escalate. While debate centres on whether progress can be most rapidly achieved through implementation of FCTC provisions or moving to more radical 'endgame' solutions, actively addressing tobacco industry interference is a pre-requisite to both. Changing attitudes to the tobacco industry through actively monitoring and exposing its conduct is an essential first step.

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