

Global Tobacco Treaty & Governance

A Role for International Organizations

The international public health community has agreed to pay special attention to the tactics of the tobacco industry to undermine tobacco control measures and promote a unique and inherently lethal product. Presently, there are 180 states are parties to the Framework Convention on Tobacco Control (FCTC), the first global tobacco health treaty created under the auspices of the World Health Organization (WHO). In 2008, all FCTC parties adopted the Guidelines for the Implementation of Article 5.3 of the FCTC, which recommends, among others, standards on dealing with the tobacco industry and its front groups and prohibits governments from granting incentives, privileges or benefits to the tobacco industry and from accepting political, social, financial, educational, community or other contributions from the tobacco industry or from those working to further its interests.

In 2014, the global health community agreed to a coordinated approach in intensifying tobacco control efforts and protecting governments from the vested and commercial interests of the tobacco industry. FCTC parties further decided to promote the implementation of Article 5.3 of the FCTC and its Guidelines in various international organizations (IOs).

The role of IOs, including non-government organizations (NGOs), needs to be examined in the context of a multi-sectoral approach. The actions of these organizations influence state behavior, help transform the processes of international law, mobilize states, and leverage public opinion. Needless to state, IOs play a critical role in increasing awareness of the tobacco industry's practice of using front groups to further its interests.

IOs need to recognize the dangers of treating the tobacco industry like any corporate citizen. Moreover, IOs that work on developmental issues must be prepared to support the implementation of the FCTC. Treaty obligations and guidelines offer governments with evidence-based standards of treatment for the tobacco industry based on documented nefarious practices of violating anti-corruption, agriculture, environmental, and labor laws. Treaty guidelines also recommend more stringent transparency standards that governments must require from the tobacco industry. For instance, states parties must adopt measures requiring information and penalizing the tobacco industry for any false and misleading submissions. Further, governments are obligated under treaty law to ban or restrict the tobacco industry's corporate social responsibility activities, which, as evidenced from internal documents of the tobacco industry, were found to be mere strategies to promote its products, expand markets, increase profits, and influence policies relating to tobacco control.

What makes tobacco unique?

Tobacco is unique in that it is the only consumer product that kills half of its consumers when used according to manufacturers' instructions. Far more people are killed by tobacco than by weapons,ⁱ natural disasters,ⁱⁱ and road accidents combined. Tobacco-related deaths have risen to an alarmingly high rate of 6 million per year (15,000 a day), a rate that may kill one billion people in the 21st century, if current trends persist.ⁱⁱⁱ Tobacco also results in over 600,000 non-smokers dying each year from involuntary exposure to secondhand smoke, 28% (169,000) of which are children.^{iv}

The tobacco epidemic is recognized as globalized, especially considering that presently, 180 parties have ratified the FCTC, which entered into force in 2005.

The FCTC is the only treaty in the world to govern a consumer product. It is an evidence-based treaty which has become a tool for international cooperation and multilateral regulation as the tobacco epidemic transcends national borders.^v With a progressive 50% reduction in uptake and consumption rates, by the year 2050, 200 million lives are projected to be saved, and hundreds of millions more thereafter.^{vi}

What sets the tobacco industry apart?

The tobacco industry is the only industry that treaty law requires to be strictly monitored.^{vii} As part of their treaty obligations, FCTC parties are required to protect their respective tobacco control measures from the commercial and vested interests of the tobacco industry.

The Preamble of the FCTC recognizes that States Parties *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.^{viii}

In 2011, the Political Declaration on the Prevention and Control of Non-communicable Diseases (NCD), issued by the United Nations General Assembly, recognized the fundamental conflict of interest between the tobacco industry and public health, and pledged to give high priority to the full implementation of the FCTC.^{ix} In May 2013, the Global Action Plan on Prevention and Control of NCDs 2013-2020, adopted by all WHO Member States (even those that are not party to the FCTC), reiterated the need to protect tobacco control policies from the vested interests of the tobacco industry.^x

Tobacco manufacturers have been involved in many controversies ranging from suppressing evidence about tobacco's health effects to engaging in an extensive illicit trade while supporting crime, terrorism and armed conflict with its profits. Currently, the European Union (EU) is investigating Japan Tobacco for allegedly violating Syria's sanctions and supporting the government's attacks on dissidents there via illicit sale of cigarettes.^{xi}

Further reports describe many instances where global tobacco companies were charged with or found to be undermining tobacco control measures:

- Tobacco companies in the United States (US) were charged and found guilty of violating Racketeer Influenced and Corrupt Organizations laws, with the court explaining how the tobacco companies "sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted."^{xii}
- Tobacco companies were found to be complicit in cigarette smuggling and were required to pay settlement fees in the EU and Canada.^{xiii}
- Tobacco companies were held liable for its actions/products in jurisdictions with strong

legal systems (MSA in the US, Canadian class suit).^{xiv}

Despite its record of incorrigible behaviour,^{xv} the tobacco industry insists that it is just like any other corporate citizen selling a legal product, much like the food industry, and uses every opportunity to undermine the global recognition of its uniqueness. For instance, when graphic health warnings were introduced, tobacco companies would compare this with graphic warnings for sugary drinks and unhealthy food.^{xvi}

What sectors are affected by the tobacco industry's sphere of influence?

A UN Development Programme ("UNDP") report enumerated some of the sectors involved in FCTC implementation wherein the tobacco industry has extended its influence: trade, tax, education, justice and law enforcement, environment and agriculture.^{xvii}

- a. *Anti-Corruption/Transparency*: In 2012, British American Tobacco invoked a Transparency International report to publicize^{xviii} that an international organization recognized it as one of the most "transparent" in terms of corporate and anti-corruption reporting.^{xix} This is a far cry from the many instances where tobacco companies have been accused of corruption and of unduly influencing high officials (e.g., Philippines, Indonesia, EU).^{xx} Furthermore, instead of being transparent, the tobacco companies have been known to resist and undermine regulations, including the requirements to submit information of various forms.^{xxi} For instance, in its 2014 shareholders meeting, Phillip Morris (PM) voted against a proposal to declare its political contributions.^{xxii}
- b. *Agriculture*: Tobacco companies claim to promote the welfare of farmers, yet are involved in contributing to a cycle of debt for tobacco farmers, mainly by keeping the price of tobacco leaves low.^{xxiii}

- c. *Environment*: A majority of tobacco is wood-cured causing serious damage to the environment^{xxiv} Instead of creating awareness, tobacco companies widely promote and fund unsustainable tree-planting activities^{xxv} that are severely disproportionate to the amount of damage caused by wood curing.^{xxvi}
- d. *Labour*: Child labour in the production and farming of tobacco is a well-documented, continuing problem. A study shows that a majority of children working in US tobacco farms were found to have green leaf symptoms.^{xxvii} Yet, the tobacco industry uses its international programme on child labour to create an impression that it is addressing child labour issues.^{xxviii}

Can the tobacco industry be socially responsible?

Corporate Social Responsibility (CSR) is recognized as a key to political influence across policy domains^{xxix} and is being used as a strategy to access policy makers with an end to undermining tobacco control policies.^{xxx} The FCTC addressed this problem in various ways:

- Article 13 of the FCTC obliges parties to ban tobacco sponsorship, including CSR as part of a comprehensive advertising ban.
- Article 13 guidelines further describe so-called tobacco CSR as a form of advertising:
 - "Tobacco companies may also seek to engage in 'socially responsible' business practices (such as good employee–employer relations or environmental stewardship), which do not involve contributions to other parties. Promotion to the public of such otherwise commendable activities should be prohibited, as their aim, effect or likely effect is to promote a tobacco product or tobacco use either directly or indirectly."^{xxxi}
 - "Public dissemination of such information should be prohibited, except for the purposes of required corporate reporting (such as annual reports) or necessary business administration (e.g., for recruitment purposes and communications with suppliers)."^{xxxii}

What level of transparency do we need from the tobacco industry?

Transparency standards required from the tobacco industry include:

- Requiring tobacco companies to submit information to governments on tobacco production, manufacture, market share, marketing expenditures, revenues, and other activities, including lobbying, philanthropy, political contributions and all other activities not prohibited or not yet prohibited under tobacco advertising, promotion and sponsorship provisions of the FCTC.^{xxxiii}
- Ensuring the disclosure and registration of all the tobacco industry's entities, affiliated organizations, and individuals acting on its behalf, including lobbyists.^{xxxiv}
- Making information acquired from the tobacco industry publicly available.^{xxxv} The tobacco industry should not be expected to voluntarily submit information. Instead, governments are urged to adopt measures that require information and penalize the tobacco industry for false and misleading submissions.^{xxxvi}

What is the role of international non-government organizations in all of these?

With a multi-sectoral approach to tobacco control, collaboration with various IOs is necessary, including those involved in trade, tax, education, justice and law enforcement, labour, environment, and agriculture.

Implicitly, International NGOs ("INGOs") working closely with IOs should be conscious of their roles in promoting treaty implementation and observing international law. Scholars recognize that both IGOs and INGOs can be norm entrepreneurs that socialize and teach new norms, and that these new norms may influence state behaviour.^{xxxvii} Hence, all IOs seeking to assist governments to comply with international law should not perpetrate actions

that go against the same,^{xxxviii} such as promoting tobacco industry interests.

Organizations, international or otherwise, that promote tobacco industry interests take the risk of being perceived as being a front group for the tobacco industry. This perception could create problems in collaborating with governments because article 5.3 Guidelines defines the tobacco industry as including front groups or "those that represent the interests of the tobacco industry." Said Guidelines recommends governments to not interact with such entities or individuals that represent tobacco industry interests, unless strictly necessary for its regulation.

The Guidelines for the implementation of article 13 states: "[p]arties should, in addition, raise awareness about the tobacco industry's practice of using individuals, front groups and affiliated organisations to act, openly or covertly, on their behalf or to take action to further the interests of the tobacco industry."^{xxxix}

The Red Cross Case Study

Even the Red Cross recognizes the contradiction between collaborating with the tobacco industry and upholding the Fundamental Principles of Humanity and Interdependence.

On May 31 2013 (World No Tobacco Day), the Governing Board of the International Federation of the Red Cross/Red Crescent adopted a resolution urging National Societies to refrain from accepting funds from the tobacco industry.

In June 2015, an Internal Guidance Brief, which provides for the non-engagement of the Red Cross and Red Crescent Societies with tobacco companies, was circulated to National Societies and was made available to Red Cross and Red Crescent staff and volunteers.

The Red Cross/Red Crescent Societies are important vectors of influence on governments and the civil society alike, particularly because of their close ties with their respective national governments and to their counterpart Societies around the world. To open up this vast influence and network to an industry that is the leading cause of premature death around the world is to compromise the Movement's Fundamental Principles and to risk the credibility on which its effectiveness rests.

ⁱ Geneva Declaration Secretariat, Global Burden of Armed Violence 2011: Lethal Encounters (2011) http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2_011-Ex-summary-ENG.pdf.

ⁱⁱ ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, STATISTICAL YEARBOOK FOR ASIA AND THE PACIFIC (2011), <http://www.unescap.org/stat/data/syb2011/II-Environment/II.16-Natural-disasters-mortality-affected-population.pdf>.

ⁱⁱⁱ WHO, Tobacco: Fact sheet N°339 (2015), <http://www.who.int/mediacentre/factsheets/fs339/en/>.

^{iv} OBERG ET AL., WORLDWIDE BURDEN OF DISEASE FROM EXPOSURE TO SECONDHAND SMOKE: A RETROSPECTIVE ANALYSIS OF DATA FROM 192 countries(2010), http://www.who.int/quantifying_ehimpacts/publications/smoking.pdf

^v WHO, WHO Framework Convention on Tobacco Control: why is it important? (2012), <http://www.who.int/features/qa/34/en/>.

^{vi} *Id.*

^{vii} WHO, Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, FCTC/COP3(7) ¶32 (2008) [hereinafter Guidelines].

^{viii} WHO, WHO Framework Convention on Tobacco Control (2005), http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf [hereinafter FCTC].

^{ix} United Nations General Assembly, Draft resolution, submitted by the President of the General Assembly, of the Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases (2011), http://www.un.org/ga/search/view_doc.asp?symbol=A/66/L.1

^x WHO, Global Action Plan for the Prevention and Control of NCDs 2013–2020,

at: http://apps.who.int/gb/ebwha/pdf_files/WHA66/A66_R10-en.pdf.

^{xi} Jay Solomon, *EU Probes Cigarette Deal That May Have Aided Syria*, WALL STREET JOURNAL, August 21, 2012, <http://online.wsj.com/article/SB10000872396390444233104577595221203321922.html>.

^{xii} US v. Philip Morris, 449 F.Supp.2d 1 (D.D.C. 2006), 28.

^{xiii} Joossens, L. and Raw, M., *Cigarette smuggling in Europe: who really benefits?* (1998), <http://tobaccocontrol.bmj.com/content/7/1/66.full>.

^{xiv} People ex rel Lockyer v. RJ Reynolds Tobacco Co., 116 Cal.App.4th 1253 (2005).

^{xv} Edward L Sweda Jr & Richard A Daynard, 'Tobacco Industry Tactics' (1996) *Br Med Bull* 52 (1): 183-192.doi: 10.1093/oxfordjournals.bmb.a011525.

^{xvi} Marion Nestle, If tobacco gets plain packets will junk food be next?(2015),

<http://www.newscientist.com/article/mg22530120.200-if-tobacco-gets-plain-packets-will-junk-food-be-next.html#.VWXYxk15SfQ>.

^{xvii} UNDP, Development Planning and Tobacco Control: Integrating the WHO Framework Convention on Tobacco Control into UN and National Development Planning Instruments (2014), <http://www.undp.org/content/dam/undp/library/HIV-AIDS/HIV%20MDGs%20and%20Development%20Planning/Development%20Planning%20and%20Tobacco%20Control%202014%2002%2028%20PDF%20FINAL.pdf>.

^{xviii} British American Tobacco, Awards and recognition (2013), http://www.pipistrelle-test.com/group/sites/uk_3mfnf.nsf/vwPagesWebLive/DO6ZKKSX?opendocument&SKN=2.

^{xix} Transparency International, Transparency in Corporate Reporting: Assessing the World's Largest Companies (2012), http://www.transparency.org/files/content/publication/Annual_Report_2012.pdf.

^{xx} K. Alechnowicz & Simon Chapman, The Philippine Tobacco Industry: The Strongest Tobacco lobby in Asia (2004),

http://tobaccocontrol.bmj.com/content/13/suppl_2/ii71.full?; Transparency International, Lobbying in Europe: Hidden Influence, Privileged Access (2015), <http://www.demorgen.be/bijlagen/3204.pdf>.

^{xxi} Fifty-Fourth World Health Assembly *citing* Report of the Committee of Experts on Tobacco Industry Documents, Tobacco Company Strategies to Undermine Tobacco Control Activities (2000), http://www.who.int/tobacco/en/who_inquiry.pdf.

^{xxii} EDGAR Online, Excerpt from a DEF 14A SEC Filing, filed by PHILIP MORRIS INTERNATIONAL INC. on 3/27/2014, <http://sec.edgar-online.com/philip-morris-international-inc/def-14a-proxy-statement-definitive/2014/03/27/section23.aspx>.

^{xxiii} WHO, Policy Options and Recommendations on Economically Sustainable Alternatives to Tobacco Growing (2014) FCTC/COP/6/12.

^{xxiv} Panos Media Briefing, The Environmental Costs of Tobacco Production, http://www.who.int/tobacco/framework/public_hearings/panos_institute.pdf.

^{xxv} *Id.*

^{xxvi} *Id.*

^{xxvii} Human Rights Watch, Tobacco's Hidden Children: Hazardous Child Labor in United States Tobacco Farming (2014), http://www.hrw.org/sites/default/files/reports/us0514_UploadNewNew.pdf.

^{xxviii} Rene Espino, et al., Tobacco Farming in the ASEAN Region (2013), http://seatca.org/dmdocuments/Media_Farming%20Regional%20Paper_final.pdf.

^{xxix} Gary J. Fooks, et al., Corporate Social Responsibility and Access to Policy Élites: An Analysis of Tobacco Industry Documents (2011), 10.1371/journal.pmed.1001076.

^{xxx} ECOSOC, Ad Hoc Inter-Agency Task Force on Tobacco Control: Report of the Secretary-General E/2013/61 (May 6, 2013); WHO, Tobacco Industry Interference with Tobacco Control (2008), http://whqlibdoc.who.int/publications/2008/9789241597340_eng.pdf *citing* World Health Organization Committee of Experts on Tobacco Industry Documents, Tobacco industry strategies to undermine tobacco control activities at the World Health Organization (2000),

http://www.who.int/tobacco/en/who_inquiry.pdf; Larry Breed, Strategies of the Tobacco Industry, <http://archive.tobacco.org/resources/history/strategieslb.html>.

^{xxxi} Guidelines, *supra* note vii, ¶27.

^{xxxii} *Id.*

^{xxxiii} FCTC, *supra* note viii, at Art 5.2.

^{xxxiv} *Id.*, at Art 5.3.

^{xxxv} *Id.*, at Art 5.5.

^{xxxvi} *Id.*, at Art 5.4.

^{xxxvii} Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100(2) AMJ INT'L L 348, 361 (2006).

^{xxxviii} International Law Commission, Draft articles on Responsibility of International Organizations for Internationally Wrongful Acts, with commentaries (2011), A/66/10, 5.

^{xxxix} WHO, 'Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control' (2008), ¶1.2.

