



BRIEFING PAPER:
IMPLEMENTING ARTICLE 5.3 –
PROTECTION OF TOBACCO CONTROL MEASURES
FROM INTERFERENCE BY THE TOBACCO INDUSTRY

Second Session of the Conference of the Parties to the WHO FCTC
Bangkok, Thailand
30 June - 6 July 2007

Recommendation

At its second session, the Conference of the Parties to the WHO Framework Convention on Tobacco Control should be alert to the potential for interference by the tobacco industry with the tobacco control measures discussed under each of the items on its agenda, so that the COP as a whole and Parties individually are prepared to protect their work and their policies on these matters from commercial and other vested interests of the tobacco industry in accordance with Article 5.3.

Executive Summary

Parties to the WHO Framework Convention on Tobacco Control (FCTC) recognise ‘the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts’ (Preamble), and agree that in setting and implementing their public health policies with respect to tobacco control they shall ‘act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law’ (Article 5.3).

The strategies used by the tobacco industry to undermine tobacco control activities across the globe are highly developed and extremely well resourced, and often present great difficulties to governments in protecting their public health measures from industry interference. The industry is practiced in anticipating and responding to tobacco control measures and uses sophisticated techniques to discredit and delay these measures and to obstruct their implementation. As such, Parties to the FCTC need to take great care in protecting their tobacco control policies from industry influence.

In addition to the elaboration of guidelines for implementation of Article 5.3 specifically, Parties will be greatly assisted in protecting their tobacco control measures from industry interference by the adoption by the COP of strong, best practice guidelines on other provisions for which the COP is required or has undertaken to propose guidelines, namely, Articles 8 to 14. Strong guidelines, developed through transparent processes with the participation of a wide range of Parties, experts, and representatives of civil society, will assist Parties in designing and implementing best practice tobacco control measures. Guidelines will be invaluable to Parties in drafting strong legislative provisions, eliminating or minimising ‘loopholes’ which would otherwise be exploited by the industry, and anticipating, guarding against, and responding to industry efforts to obstruct, delay, diminish and circumvent their tobacco control measures.

The need to protect tobacco control measures from industry interference extends across the full range of provisions that Parties are required to implement under the FCTC, and the Conference of the Parties (COP) at its second session should be alert to the potential for industry interference with the measures discussed under each of its various agenda items – including protection from exposure to tobacco smoke; regulation of the contents of tobacco products; illicit trade in tobacco products; tobacco advertising, promotion and sponsorship; alternatives to tobacco cultivation; packaging and labelling of tobacco products; and education, communication, training

and public awareness with respect to tobacco and tobacco control – so that Parties are prepared to protect their work and their policies in these areas from commercial and other vested interests of the tobacco industry.

Background

In the Preamble to the WHO Framework Convention on Tobacco Control (FCTC), Parties recognise ‘the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts’. Parties also agree that in setting and implementing their public health policies with respect to tobacco control they shall ‘act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law’ (Article 5.3).

These important provisions recognising the potential for interference by the tobacco industry in action to develop and implement tobacco control measures under the FCTC are grounded in extensive evidence of a long history of attempts by the industry to undermine and subvert efforts to protect people from the devastating effects of tobacco consumption and exposure to tobacco smoke. As noted with great concern by Member States of the WHO in WHA Resolution 54.18,¹ in response to the findings of the Committee of Experts on Tobacco Industry Documents,² ‘the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic’.

WHA Resolution 54.18 urged WHO Member States to be aware of affiliations between the tobacco industry and members of their delegations; urged the WHO and Member States to be alert to any efforts by the tobacco industry to continue its practice of subversion, and to assure the integrity of health policy development in any WHO meetings and in national governments; and called on the WHO to continue to inform Member States of activities of the tobacco industry that have a negative impact on tobacco control efforts. These concerns were incorporated into the FCTC, particularly in Article 5.3 and preambular paragraph 18, as described above, Articles 12(c) and 12(e) (which require Parties to promote, respectively, public access to a wide range of information on the tobacco industry, and awareness and participation of agencies and organizations not affiliated with the tobacco industry in developing and implementing tobacco control programmes and strategies), and Article 20.4(c) (which requires cooperation between Parties and international organizations to progressively establish and maintain a global system to regularly collect and disseminate information on ... the activities of the tobacco industry which have an impact on the FCTC or on national tobacco control activities).

Implementing Article 5.3

The strategies used by the tobacco industry to undermine tobacco control activities across the globe are highly developed and extremely well resourced, and often present

¹ *Transparency in Tobacco Control Process*, WHA Res 54.18, WHA, 54th session, 9th plenary meeting, Document A54/VR/9 (22 May 2001).

² WHO Committee of Experts on Tobacco Industry Documents, *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization* (Geneva, 2000).

great difficulties to governments in protecting their public health measures from industry interference. The tobacco industry is practiced in anticipating and responding to tobacco control measures and uses sophisticated techniques to discredit and delay these measures and to obstruct their implementation. As such, Parties to the FCTC need to take great care in protecting their tobacco control policies from industry influence, and will benefit from guidance to assist them in doing so. At its first session, the Conference of the Parties to the FCTC (COP) recognised in its Decision FCTC/COP1(15) ‘the need to address issues related to Article 5.3’ through the elaboration of guidelines for its implementation.

The need to protect tobacco control measures from industry interference, as required by Article 5.3, extends across the full range of provisions that Parties are required to implement under the FCTC. At its second session, the COP should be alert to the potential for industry interference with the measures discussed under each of its various agenda items, so that the COP as a whole and its Parties individually are prepared to protect their work and their policies in these areas from commercial and other vested interests of the tobacco industry. These areas include: protection from exposure to tobacco smoke; regulation of the contents of tobacco products; illicit trade in tobacco products; tobacco advertising, promotion and sponsorship; alternatives to tobacco cultivation; packaging and labelling of tobacco products; and education, communication, training and public awareness with respect to tobacco and tobacco control.

The need for strong, best practice guidelines on implementation

In addition to the elaboration of guidelines for implementation of Article 5.3 specifically, Parties will be greatly assisted in protecting their tobacco control measures from industry interference by the adoption by the COP of strong, best practice guidelines on other provisions for which the COP is required or has undertaken to propose guidelines. These include Articles 8 to 13 (as required by Articles 7 and 9), and Article 14 (as recognised in Decision FCTC/COP1(15)).

Guidelines are made to assist Parties in implementing treaty obligations on complex issues: they are ‘designed to provide a reference frame and detailed guidance to countries in adopting national measures on the issues in question’.³ Strong guidelines, developed through transparent processes, with the participation of experts and nongovernmental organizations not affiliated with the tobacco industry, will assist Parties in designing and implementing best practice tobacco control measures. Guidelines will be invaluable to Parties in drafting strong legislative provisions, eliminating or minimising ‘loopholes’ which would otherwise be exploited by the industry, and anticipating, guarding against, and responding to industry efforts to obstruct, delay, diminish and circumvent their tobacco control measures.

³ *Additional Matters Identified in the Convention for Consideration by the Conference of the Parties: Elaboration of Guidelines for Implementation of Article 7 and Article 9, and Elaboration of Protocols* (Note by the Secretariat, Conference of the Parties to the WHO Framework Convention on Tobacco Control, First Session, Provisional Agenda Items 5.2 and 5.3) A/FCTC/COP/1/INF.DOC./3 (5 January 2006) 2.

Specific industry interference issues relating to items on the agenda of the COP

At its second session, the COP as a whole and the Parties individually should be alert to the potential for industry interference with the measures discussed under each of the various items listed on the provisional agenda of the COP. The following is a brief list of some matters that the Parties to the FCTC should anticipate, be prepared for, and be committed to effectively responding to when they arise.

Agenda Item 5.3.1: Elaboration of guidelines for implementation of Article 8 (Protection from exposure to tobacco smoke)

Parties need to be prepared for efforts by the tobacco industry to achieve the ‘watering down’ of the proposed guidelines for the implementation of Article 8. Once guidelines are adopted, Parties need to be prepared for efforts by the tobacco industry to interfere with their domestic efforts to implement best practice smokefree laws and policies, as reflected in the guidelines. In particular, the tobacco industry is likely to:

- argue that voluntary agreements or other informal arrangements should be used in the implementation of Article 8, a position that neither accords with Parties’ legal obligations under the treaty nor can be sustained on the evidence;
- argue that comprehensive smokefree legislation will generate negative economic effects, an untenable position given that evidence surrounding the implementation of smokefree laws indicates that these laws are economically beneficial, as well as popular, effective, and practicable;⁴
- promote so-called ‘accommodation’ policies as a means of dealing with exposure to tobacco smoke, premised on the notion that such exposure is a ‘comfort’ issue for non-smokers, rather than an extremely harmful interference in the right of all people to life, health, and a healthy environment;
- argue that comprehensive smokefree legislation will lead to more smoking in the home, whereas the evidence shows the opposite to be true;
- work to obstruct measures adopted for the effective implementation of Article 8 on the ground, for example by threatening unfounded legal challenges to regulation; and
- provide funding to restaurants, clubs, bars and similar venues to campaign against the introduction of comprehensive smokefree legislation, and to fund the refurbishment of venues to exploit any allowances or exceptions in legislation and, in so doing, defeat the objectives of the legislation.

Agenda Item 5.3.2: Elaboration of guidelines for implementation of Article 9 (Regulation of the contents of tobacco products)

The COP will consider the progress report prepared by the working group on Articles 9 and 10, dealing with what the COP at its first session designated as the ‘first phase’ of Article 9, namely product testing and measuring. Parties should be wary of the involvement of the tobacco industry in the development of standards for the testing and measuring of the contents and emissions of tobacco products. Lessons should be

⁴ For further information, see the Framework Convention Alliance and Global Smokefree Partnership joint briefing paper ‘Proposed Guidelines for the Implementation of Article 8 of the WHO Framework Convention on Tobacco Control’, available online at www.fctc.org and www.globalsmokefreepartnership.org.

drawn from the detrimental effects of the tobacco industry's use of tar, nicotine and carbon monoxide emission yields based on testing methods developed by the International Organization for Standardization (ISO). It is now widely accepted that ISO testing methods do not accurately reflect smokers' exposure to carcinogens and other toxins, and that the display of numerical ratings based on these methods on cigarette packages and in advertising is misleading.⁵ As a consequence of the use of these ratings, many smokers falsely believe that certain products are less harmful than others.

As noted in the report of the working group on Article 9 (Document A/FCTC/COP/2/8, paragraph 66), the 'International Organization for Standardization development process in the tobacco product area has not always been in support of public health objectives' – indeed, the relevant ISO committee and its processes have been dominated by the tobacco industry.⁶ The involvement of ISO in developing standards to be used in the implementation of Articles 9 and 10 should thus not be considered by Parties unless and until the composition of the relevant committee is such that it can serve public health interests rather than the interests of the tobacco industry.

Agenda Item 5.4.1: Elaboration of a protocol on illicit trade in tobacco products

The need to protect efforts to eliminate the illicit trade in tobacco products from industry influence is acute, particularly as the problem has been significantly contributed to by the tobacco industry through its involvement in smuggling activities over many years. To cite but a few examples of tobacco industry involvement in smuggling: senior tobacco industry executives have been convicted of smuggling related offences in Hong Kong and Canada; a wholly-owned subsidiary of RJ Reynolds Tobacco Company pleaded guilty to charges related to its involvement in smuggling cigarettes from the United States into Canada; and the involvement of British American Tobacco (BAT) in smuggling activities has been disclosed by public statements of the company's senior executives and by a range of internal documents released through litigation in the US.⁷

The dangers of industry involvement in measures to eliminate illicit trade cannot be overemphasised. The objectives of the industry are fundamentally inconsistent with those of Parties to the FCTC: while Parties seek to address the contribution of illicit trade to the global death and disease burden caused by tobacco consumption, and the billions of dollars in taxation revenue of which it deprives them each year, the tobacco industry is concerned to protect the market for its products and to maximise its profits. Parties should expect the tobacco industry to seek to shift the focus of a protocol on illicit trade towards addressing counterfeit tobacco products, the trade in which affects their profits, and away from smuggling, in which they have a financial interest.

⁵ See WHO Scientific Advisory Committee on Tobacco Product Regulation, "SACTob Conclusions on Health Claims Derived from ISO/FTC Method to Measure Cigarette Yield" (2002) 4, available online at <http://www.who.int/tobacco/global_interaction/tobreg/en/iso_ftc_en.pdf>.

⁶ For further information, see the Framework Convention Alliance briefing paper 'Guidelines on Article 9 (Regulation of the Contents of Tobacco Products) and Article 10 (Regulation of Tobacco Product Disclosures)', available online at www.fctc.org.

⁷ For further information, see the Framework Convention Alliance paper 'Response to the British American Tobacco Position Paper on a Protocol on Illicit Trade in Tobacco Products to the WHO Framework Convention on Tobacco Control', available online at www.fctc.org.

Agenda Items 5.4.2 and 6.1.3: Elaboration of a protocol on cross-border tobacco advertising, promotion and sponsorship, and elaboration of guidelines for implementation of Article 13 (Tobacco advertising, promotion and sponsorship)

Advertising, promotion and sponsorship activities are fundamental to the tobacco industry's capacity to continue to cultivate public perceptions of smoking as a desirable activity and of tobacco companies as good corporate citizens. These activities are undertaken by the industry to stimulate demand for tobacco products, particularly among young people, undermining communication to the public regarding the enormous health risks associated with tobacco consumption and exposure to tobacco smoke, and to seek to influence government policy-making processes. As such, the tobacco industry may be expected to employ its resources to resist the implementation of bans on its ability to undertake advertising, promotion, and sponsorship activities.⁸

Parties should expect the tobacco industry to:

- seek to portray advertising, promotion and sponsorship of tobacco products as a 'consumer choice' issue, arguing – contrary to the experience of countries which have implemented bans on advertising, promotion and sponsorship, and to the recognition by all Parties of the relationship between these activities and consumption of tobacco products – that these activities do not influence demand for tobacco products, impacting only on consumers' brand preferences;
- seek to exaggerate any economic impacts of bans or restrictions on tobacco advertising and promotion on companies engaged in these activities, such as advertising agencies, publishers, and broadcasters, and to enlist such organizations to lobby against such measures on its behalf;
- seek to argue, contrary to fact, that tobacco advertising, promotion and sponsorship simply provide 'information' to consumers, rather than promote tobacco products, the tobacco industry and tobacco use;
- seek to portray tobacco advertising, promotion and sponsorship as a 'free speech' issue, and threaten to bring unfounded legal or constitutional challenges to the imposition of comprehensive bans on tobacco advertising, promotion and sponsorship;
- seek to argue that voluntary agreements or other informal arrangements, which are known to be ineffective, should be implemented, rather than strong, effective legislation;
- seek to argue that partial restrictions on tobacco advertising, promotion and sponsorship, which are known to be ineffective, should be implemented, rather than comprehensive bans; and
- employ sophisticated strategies to circumvent the operation of laws banning advertising, promotion and sponsorship activities.

⁸ For further information, see the Framework Convention Alliance briefing paper 'Guidelines on Article 13 (Tobacco Advertising, Promotion and Sponsorship) and a Protocol on Cross-Border Tobacco Advertising, Promotion and Sponsorship', available online at www.fctc.org.

Agenda Item 5.5: Establishment of a study group on alternative crops

It is crucial that Parties are alert to industry strategies to interfere in measures taken under the FCTC to promote economically viable alternatives to tobacco cultivation. These measures anticipate an eventual decrease in demand for tobacco products, an outcome against which the tobacco industry is vigorously working. The tobacco industry employs strategies – including lobbying, funding questionable research activities, and directly threatening and misinforming small-scale tobacco farmers – to confuse and weaken public debate about alternatives to tobacco cultivation and government policies to encourage crop diversification, particularly in developing countries in which tobacco is cultivated by economically vulnerable populations.⁹

Tobacco industry representatives have been actively pushing for greater involvement in discussions on crop alternatives to tobacco. Some industry groups – such as the International Tobacco Growers’ Association (ITGA) – have attempted to present themselves as representatives of small tobacco farmers in a bid to add legitimacy to their requests to be included in these discussions. Parties must ensure that the work of the Study Group on Alternative Crops is not influenced by commercial and other vested interests of the tobacco industry, and must protect their measures to promote economically viable alternatives to tobacco cultivation from industry influence.

In order to fulfil its mandate to make recommendations on cost-effective diversification initiatives and on mechanisms to assess the impact over time of the tobacco companies’ practices, the Study Group will need to undertake further research on a number of matters relating to the conduct of the tobacco industry and the detrimental effects of tobacco cultivation, including: the impacts of unconscionable tobacco industry practices on tobacco farmers and tobacco producing countries; the links between tobacco cultivation and poverty and between tobacco cultivation and malnutrition; and the negative effects of tobacco cultivation on the health of those engaged in it and on the environment. Comprehensive research and systematic data collection by the Study Group, in partnership with governments and competent intergovernmental and nongovernmental organizations, will counter the effects of industry misinformation campaigns and assist Parties in identifying and promoting appropriate alternatives to tobacco cultivation.

Agenda Item 6.1.1: Elaboration of guidelines for implementation of Article 11 (Packaging and labelling of tobacco products)

Tobacco packaging and labelling are constantly visible to smokers and those around them, making them highly significant in communicating messages about tobacco products, both to the industry in its efforts to promote consumption, and to governments in their efforts to reduce consumption and exposure to tobacco smoke. Because communications on packaging and labelling represent one of the most direct and effective means by which the tobacco industry can advertise and promote its products, particularly where other advertising, promotion and sponsorship activities are prohibited or restricted, the industry may be expected to resist strenuously the effective implementation of the measures required under Article 11.

⁹ For further information, see the Framework Convention Alliance briefing paper ‘Economically Viable Alternatives to Tobacco: the Study Group on Alternative Crops’, available online at www.fctc.org.

Parties should expect that the tobacco industry will:

- seek to exploit any legislative loopholes or ambiguities (such as failure to adequately specify the size or placement of warnings or warning text);
- seek to quickly adjust its packaging to diminish the effectiveness of packaging and labelling requirements (for example through the use of new colours and terms – such as ‘full flavour’, ‘classic’, ‘smooth’ and ‘fine’ – where descriptors such as ‘light’ and ‘mild’ are banned) where legislation does not anticipate and prohibit such responses;¹⁰
- make spurious claims about technical impediments to complying with package warning and labelling requirements; and
- threaten spurious legal challenges against proposed package warning and labelling requirements (claiming interference with tobacco companies’ freedom to communicate and intellectual property rights).

Agenda Item 6.1.2: Elaboration of guidelines for implementation of Article 12 (Education, communication, training and public awareness)

It is crucial to the effective implementation of the tobacco control measures required by the FCTC that the public be adequately educated and informed with respect to the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke. An informed public is among the most fundamental elements of effective tobacco control, significantly increasing acceptance of and responsiveness to tobacco control measures. Effective public education and awareness campaigns are also a critical tool in diminishing the effectiveness of tobacco industry misinformation campaigns and advertising, promotion and sponsorship activities. Public access to a wide range of information on the tobacco industry, which Parties must promote under Article 12(c), is invaluable. Evidence indicates that the use of such information in education and awareness campaigns results in significant changes in attitudes and beliefs regarding tobacco and reduced rates of consumption of tobacco products, especially among young people.¹¹ Promotion of awareness and participation of agencies and organizations not affiliated with the tobacco industry in developing and implementing tobacco control programmes and strategies, as required under Article 12(e), is also highly beneficial.

Parties should expect the tobacco industry to seek to be involved in the development and implementation of public education and awareness campaigns, to run its own campaigns, such as its so-called ‘youth prevention programs’ and to encourage governments to endorse these campaigns. It is important that such efforts be resisted, as the objective of the tobacco industry in seeking to be involved in such campaigns, and to enlist government support for such campaigns, is to portray itself as a responsible corporate citizen, as a means to prevent or weaken government action on tobacco control, rather than to reduce the devastating harm caused by tobacco. Campaigns into which the tobacco industry has input are likely to be either wholly ineffective or positively counterproductive to public health.

¹⁰ For further information, see the Framework Convention Alliance briefing paper ‘Guidelines on Article 11 (Packaging and Labelling of Tobacco Products)’, available online at www.fctc.org.

¹¹ See eg DF Sly, GR Heald, and S Ray, ‘The Florida “truth” anti-tobacco media evaluation: design, first year results, and implications for planning future state media evaluations’ (2001) 10 *Tobacco Control* 9-15.