



## **Impact of implementation of the WHO FCTC on the tobacco industry's behaviour**

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### **Abstract**

The tobacco industry developed a comprehensive public relations and strategic plan in preparation to oppose, delay or weaken the text of the FCTC. A part of this strategy was to, directly and through front groups, attempt to influence Member States' delegations and shifting the debate from health to allegedly economic losses associated with tobacco control.

Once the FCTC entered into force, the tobacco industry intensified efforts to counter progress in implementing the FCTC. For example, the industry increased the use of litigation as a tactic to oppose tobacco control.

The industry continued to make use of front groups and partnerships, including with Intergovernmental Organizations, but the type of front groups and partnerships adjusted to progress being made in implementing the FCTC, for example, increase utilization of customs and tax-related groups.

The tobacco industry continues to postulate that it is a stakeholder in tobacco control and as such it should participate in policy development. Therefore, the industry is making efforts to reframe Article 5.3 in order to have access to decision making processes. Gaps in the implementation of Article 5.3 continue to provide the tobacco industry with access to policy makers, and with avenues of influence, increasingly focused on the Protocol. Only implementation, across government sectors, of the recommendations from Article 5.3 Guidelines will effectively protect the FCTC from the commercial and other vested interests of the tobacco industry.

# The impact of implementation of the WHO FCTC on the tobacco industry's behaviour

## Introduction

The tobacco industry<sup>a</sup> has a decades-long history of interfering with policy and legislative measures that promote tobacco control. Essentially, the tobacco industry will oppose any measures that attempt to regulate the product itself, its marketing, pricing or social acceptability. Efforts to enter new markets, particularly in low and middle income countries (LMIC) have been previously described and include the tobacco industry efforts to develop products and advertisement campaign targeting, women, social and ethnic minorities, and young people.<sup>1</sup> The tobacco industry strategies to interfere with tobacco control and gain new profit markets have been described for over 3 decades.

Globalization, as described by Yach & Bettcher,<sup>2</sup> increased the multinational tobacco companies' reach, while at the same time offering an understanding that the tobacco industry strategies were in fact, the product of a well-coordinated global effort to derail tobacco control advances, particularly in low and middle income countries. This understanding of this internationally coordinated strategy was consolidated when millions of internal tobacco industry documents became public,<sup>b</sup> subsequent to legal cases in the United States. One of the earliest international publications containing an analysis of these internal documents is the Report of the Committee of Experts on Tobacco Industry Documents *"Tobacco industry strategies to undermine tobacco control activities at the World Health Organization"*<sup>3</sup> published by WHO in July 2000. The *Report* identified several strategies utilized by the tobacco industry to subvert the global tobacco control agenda. Among the strategies identified, the report mentioned the use of lobbyists, front groups, third-parties, consultants and paid scientists to influence the WHO and other international agencies decision making process. A common thread is that the tobacco industry stayed, mostly, as a "behind the scene" or "silent partner", conveying the impression that those individuals or groups who were defending the industry views were "independent". Since the entry into force of the WHO FCTC, and the subsequent discussion about Article 5.3 and issues related to tobacco industry interference, there appears to be more of a spotlight on the tobacco industry activities, as discussed below.

While the Report *focused* on the WHO and international groups, research at the time<sup>c</sup> (i.e. in the early stages of the Convention, circa 1999-2004) confirmed that

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<sup>a</sup> The term tobacco industry means "tobacco manufacturers, wholesale distributors and importers of tobacco products" as per the WHO FCTC definition, as well as trade groups and front groups that represent the interests of the tobacco industry.

<sup>b</sup> These documents and additional description can be found at the Truth Tobacco Industry Documents library at <https://industrydocuments.library.ucsf.edu/tobacco/>

<sup>c</sup> Since the tobacco industry documents were made available there has been hundreds of academic papers published shedding light on the tobacco industry's strategies to interfere with tobacco control

similar strategies to obstruct tobacco control were being used at the country and regional levels.<sup>4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25</sup>

The goals of this report are to:

(1) Describe the responses of the tobacco industry to the WHO FCTC, both overall and to the Parties. This includes industry tactics to encourage and promote the consumption of all tobacco products;

(2) Describe changes in the tobacco industry behavior, if any, as a consequence of WHO FCTC;

(3) Identify responses from the tobacco industry to the WHO FCTC Article 5.3 and how these responses have influenced Parties in the context on the implementation of this Article in the Parties' jurisdictions.

### *Methodology*

A search on published reports by tobacco control advocates, health groups – including WHO – and the tobacco industry, peer-reviewed publications analyzing the tobacco industry's behavior, the online WHO FCTC Parties' report, and news media.

Only publicly available sources were used, the search was conducted in February – April 2016 and included documents and sources dated January 2005 through March 2016 period. Occasionally, a document dated prior to 2005 is used to illustrate the tobacco industry's response to the development and negotiations surrounding the Convention.

### **The tobacco industry's response to the WHO FCTC**

The tobacco industry has responded to the FCTC since its early discussions, mostly proposing alternative, voluntary policies, and influencing a few selected member States to intervene. Their efforts have been well described.<sup>26-27-28-29</sup> Internal tobacco industry documents demonstrate<sup>30</sup> that at least since 1997, Philip Morris, for example, was working with the public Relations firm Mongoven, Biscoe & Duchin to develop a plan to block or counter the Framework Convention.<sup>d</sup> Research also

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and public health. An updated listing of these papers can be found at University of California, San Francisco Tobacco Control Archives <https://www.library.ucsf.edu/tobacco/docsbiblio>

<sup>d</sup> As quoted by Carter (2002) from the 1997 document titled "MDB analysis of WHO convention (FCTC) process (Bates No.: 2074292078/2082) prepared for Philip Morris, "The first alternative to an onerous convention is to delay its crafting and adoption... Any pressures to delay the finalisation of the convention would require the combined efforts of several individual or coalitions of countries and various NGOs... the key intervention points to delay or strongly influence movements in negotiations are the biennial meetings of the WHA where all the individual nation-states participate. . . The first target WHA would be 1999... Aside from delaying the adoption of a convention the company is best served by participating in the development of the agreement. It would be in the

shown that from 1999 to 2001, British American Tobacco, Japan Tobacco International and Philip Morris International joined forces to develop a voluntary regulatory plan that would be proposed in lieu of the Convention.<sup>31</sup> Grüning and colleagues<sup>32</sup> described how the tobacco industry identified Germany, for example, as a target for its lobbying efforts to oppose a strong Convention.

A document from the year 2000 found in Philip Morris' archives, an example, among many, contains notes from a meeting where the company's plans to react to the FCTC are outlined, including how to coordinate efforts with other multinationals. The document state that the ideal Convention, from a tobacco company perspective would be "a preference for no [FCTC] at all"<sup>33</sup> but since that did not seem feasible, the strategy was to engage with government and "be part of the solution."<sup>31</sup>

Once the FCTC was adopted by the World Health Assembly in May 2003, and entered into force in 2005, the tobacco industry responded with efforts to avoid legislation, weakening legislation that was approved, and/or interfering with implementation of tobacco control measures, as described below.

These strategies were deployed globally, but LMICs were particularly vulnerable, particularly in the early stages of INB negotiations and before entry into force of the Convention. For example, the tobacco industry continues to make ample use of front groups allegedly representing tobacco growers, such as the International Tobacco Growers Association (ITGA) to put forward arguments against ratification or implementation of the FCTC by Member States.<sup>34-35-36-37-38</sup>

The tobacco industry continues to promote itself as a "partner" or a stakeholder in implementation of the FCTC, as previously mentioned.<sup>e</sup> As Parties ratified and implemented the Convention, the industry attempted to provide input into Parties' tobacco control measures under the argument that it supported "reasonable" regulations. Of note that these regulations and other measures supported by the tobacco industry were not aligned with either the intent of the FCTC or its guidelines.<sup>39</sup> Examples of earlier attempts by the tobacco industry to interfere with the FCTC, include when the tobacco industry entered into an agreement with the government in Mexico that lead to the adoption of weaker health warnings and for several years precluded the country from implementing warnings aligned t=with Article 11 of the FCTC.<sup>40</sup> In Kenya, the tobacco industry lobby managed to stall for several years, and weaken its provisions, a tobacco control legislation that was introduced around the time the negotiations for the FCTC started, in 1999. Furthermore, it challenged in the courts tobacco control measures implemented by

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company's interest to have the treaty focus entirely on protecting children and leaving adult choice protected . . . Any effort to influence the convention finally adopted will require a highly sophisticated and well-coordinated central strategy..."

<sup>e</sup> A scan of the multinational tobacco companies' websites demonstrate that these companies continue t claim to support "reasonable" regulation, and to seek "dialogue" while continuing to oppose Parties' efforts to implement the FCTC.

the Ministry of Health at the time.<sup>41</sup> Recently released documents indicates that the tobacco industry attempted to use bribery and intimidation to influence the outcomes of the FCTC discussions.<sup>42</sup>

The WHO has, for discussion purposes, categorized the tobacco industry interference into 6 broad categories,<sup>43</sup> and provided a series of examples representing industry interference globally, regionally and nationally:

- 1) Maneuvering to hijack the political and legislative process
- 2) Exaggerating the economic importance of the industry
- 3) Manipulating public opinion to gain the appearance of respectability
- 4) Fabricating support through front groups
- 5) Discrediting proven science
- 6) Intimidating governments with litigation or the threat of litigation

### ***The tobacco industry response to the WHO FCTC Article 5.3***

In addition to the tobacco industry overall response to the FCTC, there are several examples of the industry responding to Parties' efforts to implement specific articles as well the Illicit Trade Protocol. Similarly, there is growing evidence of the industry's response to Article 5.3.

Shortly after the approval of the Guidelines for implementation of Article 5.3 (at COP 3, in 2008), Paul Adams, then British American Tobacco's Chief Executive, stated "... [W]e fully agree that the manufacture, distribution and sale of tobacco products should be regulated. But these 'guidelines' [Article 5.3 Guidelines] raise serious questions about real best practice in policy making. They are a potential recipe to vilify and marginalise legitimate, tax-paying, regulated businesses, employing thousands of people, and risk forcing tobacco products 'underground' where the illicit, non-taxpaying, unregulated trade is already flourishing ... despite the clamour for 'denormalisation,' exclusion and extremism being promoted by many anti-tobacco activists, many governments seek balanced regulation that is transparent, accountable, proportionate and properly targeted."<sup>44</sup>

However, despite the tobacco industry interference, Article 5.3 has been playing an increasingly significant role in protecting the Convention, and public health against the tobacco industry. While it may not have stopped the industry interference completely, it has raised awareness and created mechanisms of industry monitoring that facilitates shining a light on industry's behavior. It is increasingly difficult for the tobacco industry to stay "behind the scenes" or to hide behind front groups. However, the tobacco industry use of front groups and third parties (i.e organizations defending the industry interests) are becoming more widely known. It is possible that this increased awareness about the tobacco industry tactics has led to intense efforts by the industry to stay "underground". For example, while the industry has always used international groups to influence policy through participation in international fora, some new groups that have tobacco industry

membership and offer it a voice have surfaced, for example the International Tax and Investment Center (ITIC),<sup>45-46-47</sup> which was the subject of a *note verbale* from the Secretariat to the Parties,<sup>48</sup> the International Trademark Association (INTA),<sup>49</sup> in addition to continuing to work with international groups that have been long time aligned with its interests, for example the international and bilateral Chambers of Commerce,<sup>50-51</sup> to oppose implementation of the Convention. This increased awareness led to a wider social discussion of indirect interference and calls for broader implementation of Article 5.3.

The tobacco industry also appears to have enhanced their involvement with a few Intergovernmental groups, focusing mainly on interfering with the implementation of the Protocol on Illicit Trade of Tobacco Products. These efforts have been described elsewhere in detail, but in summary, it includes the industry involvement with the World Customs Organization, Interpol, the United Nations Office on Drugs and Crime.<sup>52</sup> The tobacco industry has had partnerships and other joint projects with the ILO for several years. However, since the creation, by the tobacco industry, of the Eliminating Child Labor in Tobacco Growing Foundation (ECLT),<sup>53</sup> there appears to be an increased investment in this partnership, which aligns well with the tobacco industry strategy, from the early days of the FCTC, of using tobacco growers and tobacco growing countries to oppose the FCTC. However, beyond access to international discussions through ILO and ECLT, ILO has engaged in other partnerships allegedly related to child labour on tobacco, such as project ARISE in Zambia<sup>54</sup> and recently, ITGA used ILO as a model of inclusion of all stakeholders in a criticism of the FCTC excluding the tobacco industry from decision making processes. On April 2016, Mr. Van der Merwe, current president of the International Tobacco Growers' Association (ITGA), stated, in an opinion piece on a South Africa online paper, that the "ITGA has a good dialogue with the United Nations International Labour Organisation" but WHO and the FCTC lacked transparency, and that a "dialogue with farmers" was overdue.<sup>55</sup>

The tobacco industry maintains, directly or through front groups, that it needs to be "at the table" and contribute to the ongoing development of tobacco control under the FCTC, as statements in various industry-owned websites exemplify. While not necessarily a direct reaction to Article 5.3, the tobacco industry's persistence in being a "stakeholder" might indicate that it will interfere with implementation of Article 5.3 if given the opportunity. The industry frequently criticizes its exclusion from the FCTC deliberations as lacking transparency and input from stakeholders, namely both the tobacco industry and its front groups, such as ITGA, as described above.<sup>56</sup> In Kenya, the tobacco industry took the government to court over what it claimed was a lack of industry involvement in the development of that country's tobacco control policy.<sup>57</sup>

There is also increasing public knowledge about government representatives accepting hospitality from the tobacco industry and others, especially in the diplomatic corps, promoting the tobacco industry's interests in detriment to host country's sovereignty. After an incident with UK diplomats speaking on behalf of

tobacco industry against implementation of FCTC measures, for example in Panama,<sup>58</sup> the UK strengthened its implementation of article 5.3 through a directive to all Foreign Service members, reminding them that they were not to promote the tobacco interests.<sup>59-60</sup> However, even after this measure there were reports of a UK diplomat participating in a meeting with British American Tobacco and Pakistan's government officials where BAT was expressing opposition to warning label policies proposed in that country.<sup>61</sup> This is an example of the need to be alert about tobacco industry interference in the international, regional and national spheres.

The tobacco industry uses a variety of avenues to complain about Article 5.3, claiming that it is exclusionary, thus limiting its input into policy making.

Ironically, the tobacco industry has, more than once, claimed that it should be considered a stakeholder and it should provide input on tobacco control measures using Article 5.3 as an argument, claiming that Article 5.3 guidelines do not ban all interactions with the tobacco industry. Philip Morris International's "Just the Facts" website has a page titled "FCTC Article 5.3: Misinterpreted To The Extreme" where it re-interprets Article 5.3 guidelines, claiming that it is a myth that Parties are to "exclude tobacco companies from tobacco policy discussions..."<sup>62</sup>

Thus, the industry, as it has done in the past on other issues, seeks to misrepresent the intent and the letter of Article 5.3 and its guidelines in order to gain access to the decision-making process.

And last, but not least, the tobacco industry continues to invest in its "corporate social responsibility" or "sustainability" programs, globally, with what appears to be an increased emphasis on issues related to illicit trade and, lately, emphasizing how the industry's ECLT Foundation will participate in reaching the Sustainable Development goals.<sup>63</sup>

### **The tobacco industry behavior as a consequence of WHO FCTC**

In addition to the responses described above, there are indications that the tobacco industry has developed and/or adapted some strategies to oppose tobacco control as a consequence of the increasing adoption and implementation of the FCTC. While the type of strategies used by the tobacco industry as a consequence of the FCTC are not new in themselves,<sup>64</sup> and essentially follow the categories described by WHO. These strategies and tactics have been amply documented in the past 11 years, however, there are indications that some tactics are being used more aggressively, possibly in response to the FCTC. A few examples of those tactics that appear to be intensified since 2005 are provided below, but these examples are not intended as a comprehensive list of all activities of the tobacco industry, globally, since 2005.

It is also likely that the FCTC has generated an increased awareness about the tobacco industry interference with the policy process and about the tobacco industry as a vector of disease. This framing, and the subsequent advocacy it

generated, has mobilized public opinion and the tobacco industry strategies to intimidate governments are more openly discussed in the last decade than in decades before the FCTC.

Three areas of interference exemplify the tobacco industry's response to the FCTC: efforts in promoting harm reduction, litigation, and increase use of international trade agreements as an argument to oppose tobacco control policy.

### *Investing in "reduced harm" tobacco products*

A possible area of enhanced tobacco industry activity in response to the Convention is its renewed efforts, and investments, in so called "reduced harm" tobacco products. While the search for a "reduced harm" product is not recent,<sup>65-66</sup> in the past ten years there has been a series of industry statements and related to new product development<sup>f</sup> that indicate that the industry, pursuing its strategy of fostering an image of a stakeholder in tobacco control, is investing in the creation of allegedly less harmful product, which would maintain industry profits, maintain the markets open and available to the industry, and avoid more strict tobacco control measures and the pursuit of an endgame. As Peeters & Gilmore's research on the tobacco industry's use of "harm reduction" described, engaging in harm reduction "offered the tobacco industry two main benefits: an opportunity to (re-) establish dialogue with and access to policy makers, scientists and public health groups and to secure reputational benefits via an emerging corporate social responsibility agenda."<sup>67</sup> British American Tobacco, for example, has created a separate website, <http://www.bat-science.com>, dedicated to share the companies' research and development of new products, including Electronic Nicotine Delivery Systems (ENDS). Philip Morris website claims to have over 300 scientists and engineers working to develop "reduced-risk products".<sup>68</sup> All major multinational cigarette companies are developing "harm reduction" strategies, including the manufacturing (or licensing), marketing and sales of electronic cigarettes (or ENDS).<sup>69-70</sup> Researchers demonstrate that the strategies utilized by the ENDS industry to interfere with public policy mirror the well documented strategies of the tobacco industry, including lobbying, use of front groups and third-parties, misuse of science and public relations campaigns.<sup>71</sup>

These "reduced harm" strategies need to be seen with some caution given the tobacco industry long history of manipulating cigarette design and ingredients to increase its appeal and palatability,<sup>72-73-74-75-76-77-78</sup> including low nicotine products,<sup>79</sup> as well as its opposition to policy measures banning of ingredients added to tobacco products as part of implementation of Articles 9 & 10.<sup>80-81-82</sup> For example, Brazil's regulatory measures banning additives have been in legal dispute since it was approved in 2012.<sup>83</sup>

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<sup>f</sup> The major multinational tobacco companies' website include several examples of these statements and their position related to harm reduction. See <http://www.bat.com>, <http://www.pmi.com>, <http://www.jti.com>, <http://www.imperial-tobacco.com>



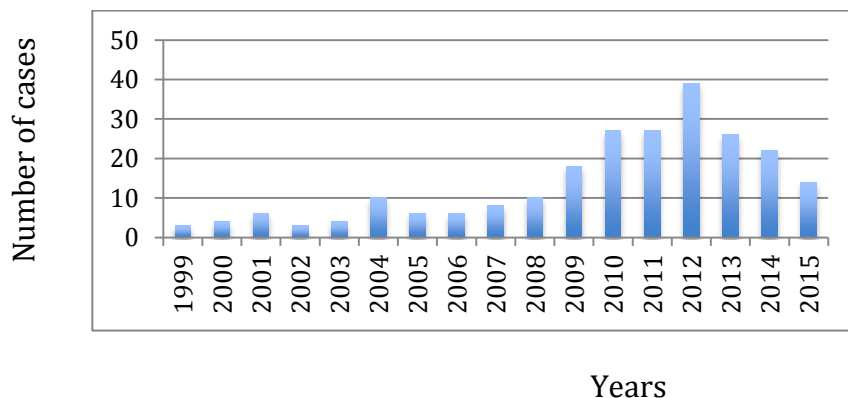
A ramification of this “reduced harm” tobacco products strategy is also the tobacco industry increasing involvement in the pharmaceutical industry, including the licensing of an electronic cigarette produced by British American Tobacco as a cessation device in the United Kingdom.<sup>84-85-86</sup> While it is clear that under Article 5.3 governments need to create a firewall with the industry, and not engage in partnerships, it is less clear how Article 5.3 would be applied in regards to these new products, particularly those that might be marketed as a cessation device, therefore part of implementation of Article 14. Thus, on one hand Parties are to avoid unnecessary engagement with the industry, and on the other, they might be engaging with the industry on cessation-related policies.

Products developed under the tobacco industry’s “reduced harm” strategies might not be explicitly addressed by the Convention, thus creating an opportunity to shield the industry from some regulatory measures and potentially stalling or reversing the progress made, to date,<sup>87</sup> in denormalization of the tobacco industry, including, for example, whether these novel tobacco industry products should be used in smokefree public places (Article 8), whether tobacco marketing restrictions are applicable (Article 13) and whether they should have any warning labels (Article 11).<sup>88-89</sup>

#### *Increased use of litigation to oppose implementation of the FCTC*

On the issue of litigation, it is clear that the tobacco industry is using this strategy to block FCTC progress. A database of litigation<sup>90</sup> related to tobacco control includes 264 cases that were “direct challenges to government policies related to tobacco control/public health.” Such cases are globally distributed and affect high, middle and low income Parties. The graph below exemplifies the increase in litigation against tobacco control measures since the entry into force of the Convention. It is important to note that this is just a subset of the over 700 cases documented, including litigation against implementation of Articles 13, 11 and 8 of the Convention.

**Figure 1:** Number of litigation cases against “government tobacco control measures” from 1999 to 2015.



### *International trade agreements as an argument oppose the FCTC*

The industry has claimed that tobacco control measures are in breach of international trade agreements before (at least since 1992<sup>91-92</sup>), as was the case in Thailand when free trade was used to delay implementation of ingredients disclosure, it remains a litigation strategy in which the tobacco industry's uses trade agreements, including bilateral or investors' agreements, as an argument to oppose implementation of the FCTC.<sup>93-94</sup> The internal tobacco industry documents dated from the time the FCTC was being discussed clearly outline the use of international trade as a potential mechanism for the tobacco industry to use against the FCTC,<sup>95-96</sup> the claims that the FCTC implementation could be in breach of trade agreements is an argument used more intensely in the past 5 years, with most notably the cases of Philip Morris International against Uruguay's cigarette pack regulations<sup>97</sup> and the case against Australia's plan pack regulations in the World Trade Organization.<sup>98</sup> Of note, on July 8 2016 the World Bank's International Centre for Settlement of Investment Disputes (ICSID) found in favor of Uruguay in that the country's tobacco control measures did not violate Philip Morris International trade rights.<sup>99</sup> Trade arguments have been extensively used in tobacco industry submissions, litigation, or threat of litigation opposing implementation of pictorial warning labels and plain pack regulations in several countries, from Australia,<sup>100</sup> to Namibia,<sup>101</sup> from and Jamaica to Ireland.<sup>102</sup> While many countries, such as UK,<sup>103</sup> Ireland<sup>104</sup> and France,<sup>105-106</sup> among others, have continued to pursue plain pack as a policy, Turkey recently announced that it would no longer consider it.<sup>107</sup>

The industry has responded strongly to the FCTC, but the FCTC has facilitated global mobilization and exchanges among Parties and civil society, which in turn have continued to bring to light the industry interference and its negative impact on tobacco control.

### **Conclusion**

There is evidence that the tobacco industry started to prepare a response to the Convention at approximately the same time that the discussion to develop the treaty started. The response of the tobacco industry to the Convention has not, in itself, changed from previous documented strategies used by the tobacco industry to oppose tobacco control, however, the intensity of some tactics, for example, litigation, has changed and it appears that some new alliances and front groups were added to previously reported ones.

There is also evidence that Article 5.3 is emerging as a significant and effective measure to halt the tobacco industry's efforts to interfere with tobacco control and public health, and that the tobacco industry is making efforts to misrepresent Article 5.3 as it continues to claim that it should be involved in the decision making related to implementing the Convention. In summary,

- The tobacco industry developed a comprehensive public relations and strategic plan in preparation to oppose, delay or weaken the text of the FCTC.
- During the negotiations of the FCTC, the tobacco industry, often as a joint initiative of many companies, directly and through front groups, made efforts to influence Member States' delegations.
- The tobacco industry strategies to interfere with public health have been well described. These strategies are deployed at a global, regional and national level, and often adjusted to the regulatory circumstances of each country.
- Once the FCTC entered into force, the tobacco industry intensified the use of some strategies in order to counter progress in implementing the FCTC. For example, the industry increased the use of litigation as a tactic to oppose tobacco control.
- The industry continued to make use of front groups and partnerships, including with Intergovernmental Organizations, but the type of front groups and partnerships adjusted to progress being made in implementing the FCTC, for example, increase utilization of customs and tax-related groups.
- The tobacco industry continues to postulate that it is a stakeholder in tobacco control and as such should participate in policy development. Therefore, the industry is making efforts to reframe Article 5.3 in order to have access to decision making processes.
- Gaps in the implementation of Article 5.3 continue to provide the tobacco industry with access to policy makers, and with avenues of influence, increasingly focused on the Protocol.

The tobacco industry interference continues to be documented, that its strategies, to higher or lower extent, are still reported, the need for increased awareness and preparedness for countering industry interference remains. There is global progress in industry monitoring and sharing information about tobacco industry activities, a progress that will be accelerated with the launch of the tobacco industry observatories. Information about the tobacco industry interference could inform Parties' efforts to use litigation in order to hold the tobacco industry accountable for delaying the progress in implementation of the WHO FCTC. The cross-cutting nature of Article 5.3 helps Parties' preparedness to counter the tobacco industry interference in the implementation of all aspects of the Convention.

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(They are provided as supporting examples and is not to be considered as a comprehensive list of papers, reports and media accounts on the issue of the tobacco industry response to the FCTC and its efforts to interfere with tobacco control.)

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