Briefing paper

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Cannabis regulation: Lessons from the illicit tobacco trade

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Background

Since 2013, a number of countries and local jurisdictions around the world have legalised and regulated their cannabis supply chains for non-medical use. Lawmakers, regulators, researchers, and advocates continue to design, enact, implement and revise regulatory frameworks for medical and recreational cannabis. And yet lessons from regulating other psychoactive substances, including tobacco products, are not always fully considered.

The experience of the illicit tobacco trade is particularly relevant for cannabis regulation. There are of course significant differences between the two substances. Cigarettes kill over 7 million people worldwide annually,[2] and between one half[3] and two thirds[4] of their users. Non-combustible cannabis products, in contrast, present very low levels of harm, and some medical benefits.[5] Cannabis and tobacco distribution also differ in nature. The global tobacco market is heavily concentrated. China, Brazil, and India accounted for 63% of all tobacco leaf cultivation in 2019 as part of a global cigarette market dominated by a small number of companies.[6] China National Tobacco Corporation (CNTC) accounted for 43.9% of global cigarette retail volume in 2019 – the large majority of it is destined for domestic consumption, though the company has been developing a global expansion strategy.[7] Beyond CNTC, Philip Morris International (PMI) (13.4% of global retail volume in 2019), British American Tobacco (BAT) (12.7%), Japan Tobacco International (JTI) (9.1%) and Imperial Brands (4.2%) accounted for 70% of the rest of the world's market share in 2019.[8] In contrast, cannabis can be grown indoors and therefore almost anywhere across the world. The illicit cannabis market has been characterised by a high number of small-scale growers, including for personal consumption and local distribution. Moreover, cigarettes are light, compact, distributed in small packs, and easy to smuggle – in part because they can be disguised as legal products through false invoicing and/or when hidden within a shipment containing other commodities. One 20-foot shipping container alone can hold almost five million cigarettes.

Yet tobacco and cannabis are both plants with psychoactive substances, with some similar characteristics including with regard to production (cultivation and processing) and consumption (tobacco and cannabis products can be smoked, consumed with a vaporiser, or used orally), and to some extent converging industries (see Box 1).

In any jurisdiction that regulates a psychoactive drug like tobacco or cannabis, a portion of it will remain on the illicit market. In Canada for instance, approximately half of the total cannabis market was illicit in the third quarter of 2020, almost two years after cannabis legalisation was introduced, according to expenditure data (see Figure 1). Across the 10 Canadian provinces, legal recreational cannabis shares varied from 13% to 70% in September 2019.[9] An estimated 10-12% of cigarettes consumed worldwide are illicit – this includes both illicit production and distribution.[10]

Given those similarities and while the legal cannabis industry is still nascent, now is the time to explore lessons from tobacco control in order to

Box 1 Convergence between the tobacco and cannabis industries

Why would tobacco companies get involved in the cannabis industry?

Internal tobacco industry documents from the 1970s shed light on early consideration from at least three major tobacco companies (PMI, BAT, and RJ Reynolds (RJR)) to manufacture cigarettes containing cannabis, as Barry et al (2014) outlined.[11] In 1970, Philip Morris president George Weissman wrote to Philip Morris USA president Ross Millhiser: 'While I am opposed to its [cannabis] use, I recognize that it may be legalized in the near future and put on some sort of restricted sale, if only to eliminate the criminal element. Thus, with these great auspices, we should be in a position to examine: 1. A potential competition, 2. A possible product, 3. At this time, cooperate with the government'.[12] The same year, Sir Charles Ellis, who served as principal adviser to both the BAT board of directors and the International Narcotics Control Board, wrote in an internal BAT memo: 'The proposed research can be started off very simply, it is just to do for "cannabis-loaded" cigarettes what has already been done for normal cigarettes… The starting point must be to learn how to produce in quantity cigarettes loaded uniformly with a known amount of either ground cannabis or dried and cut cannabis rag'.[13]

For decades, this convergence was not formalised. As recently as 2014, a BAT statement noted: 'The 1970s were a long time ago (…) Today, we have no interest whatsoever in participating in the marijuana market'.[14] However, in recent years, the tobacco industry has shown a renewed interested in the cannabis industry – see examples below. This might be explained by a number of factors, including: the emergence of legal cannabis regulation in various jurisdictions, including in the United States and Canada, which led to new legislation and complex compliance requirements which the tobacco industry is well placed to navigate, and a nascent legal cannabis industry which tobacco companies could now invest. More liberal cannabis policies have also been associated with reduced stigma around cannabis use.[15] Other factors may include the products' similarities, the possible combined use of tobacco and cannabis in roll-your-own cigarettes and e-cigarettes, and tobacco companies' interest in alternatives to combustible cigarettes.[16]

Examples of recent forays by major tobacco companies into the cannabis industry:

Philip Morris International:

2016: Made a US$20 million investment in Syqe Medical, an Israeli manufacturer of medical cannabis vaporisers.[17]

Imperial Brands:

2017: Invested in UK-based medical cannabis research company Oxford Cannabinoid Technologies.[18]

2019: Bought 19.9% of Auxly Cannabis (for C$123.3 million or US$93.6 million at the time[19]), a Canadian company which 'spans the cannabis supply chain, including upstream cultivation, midstream extraction and processing, and downstream distribution and sales'.[20]

Altria:

2018: Paid US$1.8 billion for a 45% stake in Cronos Group (a Canadian company – one of the 'Big Four' in the cannabis industry along with Canopy Growth, Aurora Cannabis, and Tilray).[21] Altria, which the same year also paid US$12.8bn for a 35% in US-vaping company Juul, was particularly interested in Cronos' research and development centre in Israel, focused on vaping devices, providing both financial resources and Altria employees to support the research.[22]

2020: Filed two patent applications for vaporiser devices specifically designed for cannabis – the company also owns two other similar vaporiser patents acquired through a previous sale.[23]

British American Tobacco:

2020: The company announced they were researching CBD and THC flavourings for their e-cigarettes.[24]

2021: BAT started test-marketing a range of CBD products in Manchester, UK as part of company efforts to 'go beyond nicotine'.[25]

2021: BAT announced it would buy a nearly 20% stake in Organigram, a Canadian cannabis producer for US$ 175.8 million.[26] A company statement noted that 'BAT will gain access to R&D technologies, product innovation and cannabis expertise, complementing BAT's extensive plant-based expertise and development capabilities'.[27]

Box 2 Terminology and definition

The term 'illicit tobacco trade' refers to the illicit trade in tobacco products, most notably cigarettes. The World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) defines 'illicit trade' as 'any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase including any practice or conduct intended to facilitate such activity'. It is worth noting that the term 'illicit' may have a moral connotation as well. In this report, we use the term 'illicit trade' to reflect the wide range of activities encompassed in the FCTC definition above, because it is used widely by scholars, NGOS, IGOs, and governments alike, and given it is arguably more nuanced and binary than 'legal/illegal'.[28]

inform cannabis regime design decisions. By tackling these questions early, governments are more likely to be able to prevent the emergence of an industry capable of preventing, deflecting and undermining policies centred on public health, social justice, inclusive and equitable trade, and human rights.[29] The tobacco experience is arguably not a reason to refrain from regulating cannabis at all. Rather it serves as a cautionary tale of the difficulties to restrain private actors once they have become too powerful. The history of the illicit tobacco trade, and the role of the tobacco industry in both driving it and shaping responses to it, is particularly relevant in that regard. It will be the focus of this report.

Overview of the illicit tobacco trade

The illicit tobacco trade is largely dominated by transnational tobacco company (TTC) brands, manufactured legally then diverted to the illicit market somewhere along the supply chain. This can be done via large shipments, in a way that requires direct involvement or complicity from major manufacturers and distributors (large-scale smuggling), or in smaller amounts ('ant smuggling').[30] Cigarettes manufactured by smaller tobacco companies, including aspiring and emerging TTCs, have also been smuggled in ways mimicking the strategies and tactics of TTCs.[31] In addition to the smuggling of major brands, the illicit tobacco trade includes 'illicit whites' – also called 'cheap whites', defined by the European Commission as 'brands manufactured legitimately in one market, either taxed for local consumption or untaxed for export, and sold knowingly to traders who transport them to another country where the products are sold illegally without domestic duty paid'.[32] Trademark owners of 'illicit whites' – which include TTCs – are registered in a range of countries including China, the United Arab Emirates (UAE), and the UK.[33] Cigarettes are also illegally manufactured in legal and illegal factories.[34] Counterfeiting, i.e. producing cigarettes bearing a trademark without the approval of the trademark's owner, accounts for a small fraction of the illicit tobacco trade, approximately 2% of illicit cigarettes seized worldwide in 2015.[35]

Factors

A number of factors may explain the illicit tobacco trade. Differences in prices between different jurisdictions can provide an initial incentive for smuggling, given the potential profits to be made.[36] A significant portion of cigarette prices indeed include taxation, given that increasing taxes has proven to be one of the most effective ways to decrease cigarette consumption. (The WHO recommends cigarettes to be taxed at 75% of retail price;[37] a price increase of 10% has shown to be responsible for a 2.5-5% decrease in smoking prevalence,[38] or as Jha & Peto (2014) estimated, 'tripling real cigarette prices would approximately halve cigarette consumption worldwide'[39]). This has led the tobacco industry to criticise tax increases, through direct lobbying, commentaries in media outlets, and relying on front groups, astroturfs and other third parties to push for lower cigarette taxes[40] – in addition to other industry strategies to avoid the impact of tax increases on profits.[41] However, as independent research and reports by the WHO and the World Bank have pointed out, countries with high taxation levels in fact face lower levels of illicit tobacco trade.[42] This is partly explained by the fact that these countries have better institutional resources to deal with the issue.[43]

Other factors that have proved to be significant include geography (e.g., border regions with

Figure 1. Detailed household final consumption expenditure on non-medical cannabis products, quarterly, Canada (in million C$[44])

Estimates (million CAD)	Q3 2018	Q4 2018	Q1 2019	Q2 2019	Q3 2019	Q4 2019	Q1 2020	Q2 2020	Q3 2020
Cannabis product for non-medical use (licensed)	---	170	301	372	422	475	558	648	824
Cannabis product for non-medical use (unlicensed)	1,306	1,187	1,021	962	916	871	824	785	754
Total non-medical use	1,306	1,357	1,322	1,334	1,338	1,346	1,382	1,433	1,578
% of unlicensed (black market)	100%	87%	77%	72%	68%	65%	60%	55%	48%

Source: Based on data from Statistics Canada[45]

extensive illicit trade across borders), the presence of established illicit networks, corruption, local laws and enforcement levels, and last but not least industry involvement[46] – as we will explore in greater detail in the next section.

Impacts

A relatively small proportion of a regulated drug market being illicit may not initially seem like a significant problem. However, the illicit tobacco trade has a number of negative consequences. Illicit cigarettes tend to be cheaper and more readily available via informal sales networks amongst vulnerable populations, e.g., younger people, thereby leading to more smoking and related morbidity and mortality.[47] This is yet another pressure on already burdened public health systems. It also means lower tax revenue for government and therefore weaker institutional capacity to address tobacco-related challenges. The illicit tobacco trade can also present an opportunity for the tobacco industry to pressure governments to decrease taxes and abandon other tobacco control measures, including plain packaging – despite independent evidence indicating that these are effective in reducing smoking and related harms.[48] Paradoxically, while TTCs have historically been involved in the illicit tobacco trade, they are now multiplying efforts to rebrand themselves as partners to authorities as a way to increase their influence over other tobacco control policies. This is despite the WHO's repeated warning of the 'fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests' and the Framework Convention on Tobacco Control (FCTC) Article 5.3 'to protect these policies from commercial and other vested interests of the tobacco industry'.[49] In a way, TTCs have used the illicit tobacco trade as way to solidify their power and influence.

The tobacco industry and the illicit tobacco trade

In the late 1990s and early 2000s, millions of internal TTC documents were publicly released as a result of legal settlements. A number of US states had sued TTCs to recover health care expenditure.[50] One of the most stunning revelations from these documents was that TTCs had relied on the illicit tobacco trade as part of their business strategies since at least the 1960s.[51]

Why would tobacco companies get involved in the illicit tobacco trade?

TTCs have benefited from the illicit tobacco trade in a number of ways. Tobacco manufacturers are paid when their products are sent to wholesale distributors, regardless of whether products are then channelled through the legal supply chain or diverted to the illicit market. A February 2000 internal BAT briefing on how to deal with smuggling allegations noted that 'where necessary, British American Tobacco acts, within the law, on the basis that its brands will be found available alongside those of its competitors in the smuggled as well as the legitimate market', and that the company 'had no control over what became of its cigarettes after it sold them'.[52]

In fact, illicit cigarettes tend to be cheaper (given that no taxes or lower taxes from another jurisdiction were paid on them), and lower prices usually lead to more sales and profit. The circulation of these smuggled cigarettes also helps create smoking habits and brand loyalty amongst younger populations, an additional long-term advantage for the industry.

TTCs have also used the illicit tobacco trade, which they have themselves been involved in, as an opportunity to lobby governments against tax increases and other tobacco control measures. In Canada, between the late 1980s and the mid-1990s, several tobacco companies legally shipped their cigarettes to the United States for them to be smuggled back to Canada via Indigenous reserves, evading Canadian excise taxes.[53] In parallel, these companies pointed to this increase in the illicit tobacco trade to lobby the federal government to reduce cigarette taxes. The successful lobbying efforts led to tens of thousands of additional smoking-related deaths in Canada.[54,55] More recently, tobacco companies have fought against the introduction of plain packaging (also called standardised packaging), including in Australia, Canada, the UK, and Uruguay, arguing that this will lead to dramatic increases in illicit trade. This claim has been repeatedly debunked.[56]

Internal tobacco industry documents revealed that cigarette smuggling was in fact part of tobacco companies' market entry strategy from at least the 1960s onwards. At the time, US tobacco companies began to anticipate a domestic decline in smoking given the emergence of scientific evidence on the health harms caused by cigarettes – including the 1964 US General Surgeon report linking smoking to lung cancer.[57] Though the decline in demand did not materialise for decades, these companies started to aggressively target overseas markets around that time.[58] Many of them were protected by import restrictions, high tariffs, and other barriers that made any legal entry particularly challenging. Tobacco company executives therefore decided to smuggle their cigarettes to those protected markets to create demand for these products, while pressuring local governments to open up their countries to foreign imports and investment. The strategy was particularly effective in Latin America, where Paraguay served as a transit hub, through which cigarettes were legally exported for them to be then smuggled to the attractive yet closed markets of Argentina and Brazil.[59] Local companies were then progressively bought off, eventually leading to a near duopoly across South America, where TTC BAT and PMI account for 89.7% of the continent's cigarette market share – with only three countries (Bolivia, Paraguay, and Uruguay) where a local company dominates the market.[60]

Growing market share has been another objective of TTC involvement in the illicit tobacco trade. Numerous internal BAT documents, for instance, point in that direction, including communication from company directors advising BAT directors prior to a UK parliamentary hearing in 2005: 'DNP [duty not paid] (…) does connote smuggled goods (…) The evidence is it [BAT] used DNP channels to grow its market share [in Latin America]'.[61]

One other justification tobacco company executives have expressed is that tobacco companies merely do what everyone else around them does. A 1992 internal BAT document on northeast Argentina notes 'DNP cigarettes are a fact of life and almost institutionalized'.[62]

Generally, the illicit tobacco trade presents tobacco companies with low risks and high rewards. Price differentials between jurisdictions mean great potential for substantial profits, while only a handful of often low- to mid-level tobacco company executives have been incarcerated for smuggling activities.[63]

How have tobacco companies smuggled their products?

Historically, tobacco companies relied on a number of tactics to smuggle their cigarettes. Internal documents released in the late 1990s and early 2000s – and related lawsuits and investigations (see Box 3) – demonstrate that these notably included:

- **Oversupplying markets*:*** TTCs have legally shipped vast amounts of cigarettes to countries – at times referred to as transit hubs – with very small domestic markets and limited legal exports. Those cigarettes were then smuggled to other destinations. Paraguay (a scheme led by BAT and PMI from the 1960s to the 1980s), Andorra (Gallaher, mid-1990s),[64] Belgium (US tobacco companies, late 1990s)[65] are amongst the most well-known examples.
- **Overproduction*:*** Similarly, in certain countries, tobacco companies have manufactured more

Box 3 Examples of late 1990s/ early 2000s lawsuits and formal inquiries focusing on transnational tobacco companies' role in smuggling

- A UK Parliamentary inquiry into BAT's alleged smuggling activities[66] following extensive reports by the International Consortium of Investigative Journalists,[67] which later led to a formal investigation by the UK Department of Trade and Industry.[68]
- The Government of Canada suing RJ Reynolds, related entities, and the Canadian Tobacco Manufacturers Council in US federal court for smuggling cigarettes across the US-Canada border.[69]
- A lawsuit filed by 22 Colombian governors and the city of Bogota against Philip Morris, and later British American Tobacco for cigarette smuggling, money laundering, wire fraud, and mail fraud – later consolidated when the then European Community joined the lawsuit, claiming the companies conspired to smuggle cigarettes to Europe and laundered the proceeds of drug trafficking.[70]
- A civil RICO suit filed by the Government of Ecuador in Miami-Dade Circuit Court against Philip Morris, BAT and RJR.[71]
- The European Community and 26 member states filing a RICO civil suit in the United States against RJR, JTI, and PMI, claiming the companies participated in a global money laundering scheme in cooperation with organised crime groups.[72]

These lawsuits and inquiries notably led to settlements, guilty verdicts, and agreements between TTCs and national and international authorities to address the illicit tobacco trade.[73]

cigarettes than the domestic consumption and legal exports could account for, with products being then diverted to the illicit trade. Extensive evidence indicates that Tabacalera del Este, most commonly known as Tabesa, one of the largest companies in Paraguay and led by former President Horacio Cartes (2013-2018), has relied on such a scheme.[71] In 2015 for instance, Tabesa produced an estimated 25-36 billion cigarettes, while Paraguay's domestic consumption and legal exports respectively amounted to 4 billion and 2.1 billion cigarettes.[72]

- **Smuggling through transit hubs***:* By shipping to countries and jurisdictions with low regulation and enforcement, including Free Trade Zones like the Colón Free Zone in Panama, Aruba, or Jebel Ali Free Zone (Jafza) in the UAE, tobacco companies have managed to divert cigarettes from their legal supply chains to the illicit market.[76] Reforming Free Trade Zones to discourage smuggling is extremely difficult given the de-regulated nature of these zones.
- **Round tripping***:* This is the phenomenon whereby a cigarette shipment is legally manufactured and exported excise-free from country X to country Y for it to be then smuggled back to country X, thereby evading taxes.[77] The aforementioned example of Andorra fits this, with Gallaher cigarettes being legally shipped from the UK to Andorra before being smuggled back to the UK.[78]
- **Relying on distributors***:* In order to keep some distance with illicit activities, tobacco manufacturers have historically relied on wholesale distributors and other intermediaries to carry out the smuggling for them. By doing so, they have been able to keep smugglers 'at arm's length', as described in a 1988 internal BAT document on Sorepex, a major distributor of BAT cigarettes in Africa.[79] Tobacco manufacturers have then countered smuggling allegations by claims that they sold their cigarettes to legitimate distributors and that what happened afterwards was not their responsibility. Tabesa CEO José Ortiz for instance noted in a 2009 interview with Paraguayan newspaper ABC Color: 'We have the function of supplying the market (…) We have no way of knowing where our cigarettes are smoked, nor is it our problem'.[80]

Box 4 Key provisions of the WHO Framework Convention on Tobacco Control[81]

Demand reduction (articles 6-14):

- Price and tax measures
- Non-price measures, including:
  - Protection from exposure to tobacco smoke
  - Regulation of the contents of tobacco products
  - Regulation of tobacco product disclosures
  - Packaging and labelling of tobacco products
  - Education, communication, training and public awareness
  - Tobacco advertising, promotion and sponsorship
  - Demand reduction measures concerning tobacco dependence and cessation.

Supply reduction (articles 15-17):

- Illicit trade in tobacco products
- Sales to and by minors
- Provision of support for economically viable alternative activities.

Policy responses

Following the release of internal tobacco industry documents shedding light on the manipulative tactics deployed for decades – including its involvement in the illicit trade – a number of policy responses were introduced at the national and international levels, chiefly: the WHO's FCTC and later on its Protocol to Eliminate Illicit Trade in Tobacco Products (Protocol), and a series of Memoranda of Understanding and other agreements between tobacco companies and national governments as well as the European Union (EU).

The WHO Framework Convention on Tobacco Control

Throughout the 1990s, TTCs faced a number of lawsuits not only for their involvement in smuggling, but primarily for the harms caused by their products and the lies and other deceitful tactics they had used to continue to grow profits and expand their business globally.[82] Meanwhile, tobacco killed 3.5 million people worldwide in 1998, and was expected to cause at least 10 million deaths a year by 2030, with 70% of them in lower- and middle-income countries, if significant steps were not taken.[83] Dr. Ruth Roemer, University of California, Los Angeles School of Public Health professor and University of Maryland law professor Dr. Allyn Taylor were involved in the inception of the idea of an international treaty on tobacco. In 1995, based on Taylor's concept 'that the WHO should utilize its constitutional authority to develop international conventions to advance global health', Roemer and Taylor wrote a document on its feasibility, which recommended the framework convention approach. This ultimately led to the development, creation, and adoption of the WHO FCTC.[84] The FCTC was eventually adopted by the World Health Assembly on 21 May 2003 and entered into force on 27 February 2005 (see key provisions in Box 4).[85]

Overall, academic studies on the impacts of the FCTC have emphasised that though key measures put forward by the FCTC (e.g., increases in taxes, protection from tobacco smoke, health warnings, cessation aid, and bans on tobacco advertising, promotion, and sponsorship) have led to a decrease in smoking prevalence, progress has been 'too small, too slow, and uneven'.[86]Smoking rates across 126 countries examined in one study only went down from 24.7% in 2005 to 22.2% in 2015.[87]

Beyond demand-reduction and supply-control measures per se, the Impact Assessment Expert Group found that over its first decade, the FCTC had notably contributed to 'significant and rapid progress in the implementation' of comprehensive smoke-free laws for indoor workplaces, restaurants and bars (Article 8),[85] thereby reducing second-hand smoke-related harms, and of bans on sales of tobacco products to and by minors (Article 16). 'Significant gaps remain', however, in the implementation and evaluation of measures to regulate the contents and emissions of tobacco products (Article 9), to promote economically viable alternatives to tobacco farming (Article 17), and to address the health and environmental impacts related to the cultivation and manufacture of tobacco (Article 18).[89]

Box 5 Article 5.3 of the WHO Framework Convention on Tobacco Control

Text:

'In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law'.[90]

WHO recommendations for implementation:

1. Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties' tobacco control policies.
2. Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.
3. Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.
4. Avoid conflicts of interest for government officials and employees.
5. Require that information provided by the tobacco industry be transparent and accurate.
6. De-normalise and, to the extent possible, regulate activities described as 'socially responsible' by the tobacco industry, including but not limited to activities described as 'corporate social responsibility'.
7. Do not give preferential treatment to the tobacco industry.
8. Treat State-owned tobacco industry in the same way as any other tobacco industry.[91]

The FCTC's challenges largely stem from weak compliance mechanisms, inadequate resources and an insufficient focus on implementing effective pro-health tobacco control measures at the national level, with tobacco industry interference playing a major blocking role.[92,93] By 2011, six years after the adoption of the FCTC, only US$68 million of the US$31.4 billion spent in development assistance for global health was focused on tobacco control, even though tobacco remained the second leading cause of death worldwide.[94]

Article 5.3 of the FCTC, along with its Guidelines for implementation, focuses on guarding against tobacco industry interference in policy making (Box 5).[95,96] This is a cornerstone of the FCTC, given the industry's history in misleading consumers about the harms their products pose, and their sophisticated strategies to shape policies in a way that would benefit their commercial interests at the expense of public health. However, Fooks et al (2017) point out: 'Across all Parties, 16% of guideline recommendations reviewed have been implemented. Eighty-three percent of Parties that have taken some action under Article 5.3 have introduced less than a third of the guidelines'.[97] Similarly, Hawkins & Holden (2018) found that 'Article 5.3 compliance within EU institutions is partial and incomplete', pointing to 'widespread lack of knowledge about the existence of the FCTC and Article 5.3 amongst key policy actors across the institutions', and 'considerable resistance in [the European Parliament and the European Commission] to further substantive action to implement Article 5.3', noting that tobacco industry officials effectively bypassed health officials to lobby other EU representatives across related issues.[98] Other studies have shown that non-health ministries in many countries (including in India,[99] and Mexico[100] and South Korea[101]) have also been particularly vulnerable to tobacco industry interference, including through corporate social responsibility initiatives and front groups.[102] The 'PMI Files', published by Reuters in 2017, revealed the company's strategy to subvert and undermine the implementation of the FCTC by targeting officials in trade, finance, agriculture and other non-health ministries less familiar with the tobacco industry's strategies and tactics.[103]

It is also worth noting that the FCTC focused on domestic tobacco control measures – including requiring countries to implement bans on smoking in public places and restrictions on tobacco advertising and labelling, and encouraging (i.e. not mandating) parties to increase taxes on tobacco products. As Bollyky and Fidler (2015) point out, 'It contains no obligations concerning licit international trade and investment, cross-border advertising, assistance for developing countries, or strong dispute settlement'.[104]

Ultimately, the FCTC helped create a set of largely effective rules for domestic tobacco control, including tax increases, public smoking bans, and advertising restrictions, though given the nature of international treaties, the actual treaty text was watered down during negotiations. The first 15 years of the FCTC also demonstrate the importance of civil society groups, including Bloomberg Philanthropies and the Bill & Melinda Gates Foundation, in supporting those efforts, particularly in low- and middle-income countries where most tobacco-related deaths are feared to occur.[105]

The Protocol to Eliminate Illicit Trade in Tobacco Products

Article 15 of the FCTC focused on the illicit trade in tobacco products, notably including measures on marking products to help authorities determine their origin and point of diversion to the illicit market, data monitoring and collection, enacting and strengthening legislation, considering a tracking and tracing regime, and putting in place further measures to control or regulate production and distribution, including through licensing.[106]

Building on Article 15, and two years after the adoption of the FCTC, in 2015 the second FCTC Conference of the Parties established an Intergovernmental Negotiating Body to draft and negotiate an FCTC protocol specifically dedicated to the illicit tobacco trade. Following years of drafting and negotiations, the Protocol was adopted in November 2012 and entered into force in September 2018 – with 62 parties to date (as of 15 March 2021), a process which contrasted with that of the FCTC, adopted and ratified far more swiftly and widely.

The stated objective of the Protocol is the 'elimination of all forms of illicit trade in tobacco products'.[107] General obligations (Article 4 of the Protocol) notably include taking measures to increase the effectiveness of competent authorities and services, improve technical assistance, financial support, capacity building and international cooperation, and most importantly control and regulate the supply chain of tobacco products, including through licensing, due diligence, and a global tracking and tracing regime (to be established by September 2023 – Article 8).

The Protocol clearly warns against tobacco industry interference in efforts by national and international authorities to combat the illicit tobacco trade. Its preamble, citing FCTC Article 5.3, emphasises 'the need to be alert to any efforts by the tobacco industry to undermine or subvert strategies to combat illicit trade in tobacco products and the need to be informed of activities of the tobacco industry that have a negative impact on strategies to combat illicit trade in tobacco products'.[108] Article 4 of the Protocol stipulates: 'In implementing their obligations under this Protocol, Parties shall ensure the maximum possible transparency with respect to any interactions they may have with the tobacco industry'.[109] Article 8 on tracking and tracing specifically points out that obligations 'shall not be performed by or delegated to the tobacco industry' and that interactions with the tobacco industry and affiliates shall be kept 'to the extent strictly necessary in the implementation of this Article'.[110]

The Protocol only entered into force in September 2018, and a relatively small number of countries have so far ratified it. Though it might be too early to draw definitive conclusions, implementation to date has been problematic. Even before the adoption of the Protocol, Liberman et al (2011) cautioned that government cooperation with the tobacco industry in combating the illicit trade 'poses risks for tobacco control, particularly if relationships and norms of cooperation spill over into other areas of FCTC implementation', highlighting that the industry saw it 'as an opportunity to portray itself as "legitimate" and "responsible", a friend of governments, and a way to integrate itself into FCTC processes'.[111] The authors correctly predicted, 'it is likely that the tobacco industry stands ready to provide funding to governments to "work together" on protocol implementation'.[112]

Although the FCTC and Protocol were in part initially intended to hold the industry to account – including for its role in smuggling, the tobacco industry has deployed a sophisticated strategy to become part and parcel of the international policy response to the illicit tobacco trade, amidst growing evidence of its continued involvement therein.

Corporate capture: Tobacco industry's growing influence on governments' anti-illicit trade response

Since the early 2000s, TTCs have striven to rebrand themselves from 'pariah' to 'victim and solution' of the illicit tobacco trade.[113] Following the aforementioned lawsuits, the four major TTCs signed legal agreements with the EU between 2004 and 2010, along with financial payments totalling US$1.9 billion over 20 years and supplementary seizure payments of 100% of the evaded taxes in the events of seizures of their cigarettes.[114] Joossens et al (2016) noted that these agreements, though intended to hold the industry to account for their role in the illicit tobacco trade, have instead established 'extensive systems of cooperation', 'have served largely to secure the TTCs' interests and are threatening progress in tobacco control'.[115] The agreements are thus arguably in breach of the spirit of FCTC Article 5.3, have enhanced TTCs' credibility worldwide as a partner to the EU, and have not been effective at reducing the size of illicit tobacco markets: Between 2004 and 2012, TTC seizure payments amounted to an estimated 0.08% of the revenue losses to the illicit tobacco trade.[116]

Similarly, TTCs signed Memoranda of Understanding (MOU) with governments to tackle the illicit tobacco trade – at least 124 such MOU between 1998 and 2014.[114] In contrast to the legally-binding EU agreements, these are voluntary, non-enforceable, and largely opaque partnerships. Yet just like the EU agreements, they have been largely ineffective at mitigating the illicit tobacco trade[118] and served as an opportunity for TTCs to shape law enforcement strategies against the illicit activities in which they continue to be complicit.

As part of these agreements, more informal arrangements, and implementation of the Protocol, TTCs have become an increasingly central part of the policy response against the illicit tobacco trade, providing equipment, training, financial support, information and intelligence, and other types of assistance to governments – including to revenue, customs and law enforcement agencies – to tackle the illicit tobacco trade.[119]

TTCs have also put in place a sophisticated strategy to undermine the creation and implementation of a global track-and-trace regime – arguably the most central measure put forward by the Protocol. PMI initially developed Codentify, a product serialisation and pack market system allegedly able to 'track & trace products at all packaging levels from manufacturing throughout the supply chain'.[120] The technology, later shared with the other three major TTCs and now named Inexto, has drawn widespread criticism. Despite claims of independence from the tobacco industry, it continues to be controlled by the industry – it is notably designed in a way to keep control amongst manufacturers (not independent regulators); key Inexto officials previously worked for PMI and other TTCs; and leaked documents showed continued cooperation between Inexto and TTCs long after the companies claimed they stopped working together.[121] Codentify/Inexto has also been criticised for its ineffectiveness, inefficiency (requiring a lot more resources from law enforcement than other track-and-trace solutions), and opacity.[122]

By funding and commissioning research on the illicit tobacco trade, TTCs have also been able to shape the public and policy discourse on the matter. Gallagher et al (2019) found that studies funded by the tobacco industry routinely exaggerate the scale of illicit tobacco markets.[123] The authors notably highlight 'inappropriate usage of methods of data collection and data analysis, misleading presentation of results and a lack of transparency throughout, with information necessary for replication often being excluded'.[124] Through its PMI IMPACT programme launched in 2016, PMI has also been funding research on the illicit trade and related crimes.[125] PMI committed to provide $US100 million through its first three rounds of grants 'to support public, private, and non-governmental organizations to develop and implement projects'.[126] The two rounds of grantees awarded so far include funded projects on the links between the illicit tobacco trade, terrorism and organised crime, money laundering, wildlife trafficking, illicit trade in other commodities including alcohol and fuel, migration, human rights and corruption.[127] Though PMI IMPACT does not seem to be involved in the projects' research or writing process, none of 61 projects funded to date focus on the role the tobacco industry has been playing in the illicit tobacco trade, nor, of course, does it fund organisations with a history of holding TTCs to account. This type of funding helps PMI pursue its reputational interests by selecting projects that, together, may give the misleading impression that the illicit tobacco trade is a problem which is largely characterised by organised crime groups and terrorist organisations, while simultaneously helping the company improve its corporate image.[128]

As part of their engagement strategy on the illicit tobacco trade, TTCs have also managed to influence media reporting on the issue. Smith et al (2017) found that 'organizations with ties to the tobacco industry are often quoted in media reports about the illicit trade and, through the media, promote policy responses that favour the industry'.[129] In these stories, the illicit tobacco trade is notably 'portrayed as a safety and security issue, linked to the activities of organized crime, and even terrorism', and that it is 'caused by excessively high tobacco taxation, pushing consumers to seek cheaper alternatives, and strict regulations of tobacco products, which punish legitimate businesses', though independent research suggests otherwise.[130] Altria, PMI, Reynolds America, and the PMI-funded Foundation for a Smoke Free World have also donated to the Influence Foundation,[131] which runs Filter Mag, a magazine whose stated 'mission is to advocate through journalism for rational and compassionate approaches to drug use, drug policy and human rights'.[132] A number of Filter Mag articles argue that greater regulation on tobacco products will lead to more smuggling.[133]

TTCs have relied on free-market and libertarian think tanks to argue against effective tobacco control measures, e.g., tax increases and plain packaging, pushed for new products promoted by the industry, and disseminated industry-funded academic research, notably claiming that further regulation will automatically lead to more illicit trade.[134]

Partnerships with a number of international governmental organisations (including Interpol[135] and the Organisation for Economic Co-operation and Development (OECD)[136]) and discreet lobbying through front groups, astroturfs and other third parties[137] have been other key tactics tobacco companies have used to influence perceptions on the illicit tobacco trade, and cement the industry's role as part and parcel of the policy response.

Continued tobacco industry involvement in the illicit trade

Amidst this corporate capture of the discourse and policies on the illicit tobacco trade, cigarettes manufactured legally by TTCs continue to account for the large majority of the illicit trade, with various seizure data at the European and international levels estimating it at 60-70%.[138,139] While there have been multiple reports of illicit cigarette production and trade carried out by organised crime groups, smaller gangs, and even some involvement of terrorist groups, TTCs continue to hold much greater manufacturing capacity, and at the very least have been unwilling or unable to effectively control their supply chains.[140] A recent investigation by the Dutch tax authorities led to the uncovering of one of the largest illicit cigarette factories in the country's history: 3.6 million cigarettes were seized along with 32,000 kilos of tobacco, packaging material, cigarette paper, and cigarette filters.[141] An estimated 38.5 million cigarettes can be produced with that amount of tobacco, according to Corradini's (2010)'s methodology.[142,143] These numbers may seem staggering, but a single PMI machine can produce up to 1.2 million cigarettes *per hour*,[144] while 5.7 trillion cigarettes were sold worldwide in 2016.[145]

A series of serious allegations have been made in recent years on continued TTC involvement in the illicit tobacco trade. These include:

Japan Tobacco International

- In 2011, an Organised Crime and Corruption Reporting Project (OCCRP) investigation, based on company emails and other internal documents, detailed claims of JTI's complicity in cigarette smuggling across several regions, including 'through Russia, Moldova, the Balkans, Afghanistan and the Middle East' – when internal investigators presented information internally, a senior JTI executive blocked the investigation.[146]Internal BAT documents claim that JTI facilitated illicit trade into the Democratic Republic of Congo.[147]

British American Tobacco

- In 2016, BAT was fined for oversupplying hand-rolled tobacco to Belgium, which was later smuggled back to the UK.[148, 149]
- Other internal documents leaked by a whistle-blower at BAT show that: the company illegally moved millions of dollars of cash from Uganda to the Democratic Republic of Congo to buy tobacco leaf then smuggled to Kenya and Uganda; BAT cigarettes were diverted to the illicit market across Africa, the Middle East and Europe.[150]
- An OCCRP investigation published in February 2021 found that the profits of billions of smuggled cigarettes, most of them produced by BAT in South Africa, 'fuel the bloody struggle between jihadists, armed militias, and corrupt military officers' in Northern Mali.[151]

Philip Morris International

- A lawsuit filed in November 2020 accuses PMI of smuggling cigarettes across Africa and the Middle East through a UAE-based distributor until at least 2010. In addition, it claims that PMI continues to overproduce cigarettes in Algeria and oversupply the local market for diversion to illicit markets in Europe, particularly France. The lawsuit also alleges that PMI stole the claimant's Empty Pack Survey methodology, designed to estimate the size of illicit tobacco markets, and manipulates it to 'deflect attention from PMI's misdeeds', 'target certain "illicit competitors"', and 'lobby against taxes'. Data indicating that in the third quarter of 2019 'over 20% of the total French market (legal or otherwise) was composed of untaxed PMI products' was notably excluded from a PMI-funded report by KPMG using Empty Pack Survey methodology.[152]
- In February 2021, OCCRP revealed that PMI continues to rely on one of the richest men in Burkina Faso, well known for his smuggling activities, to distribute cigarettes across West and North Africa.[153]

Trends in the emerging cannabis industry

Tobacco industry tactics regarding the illicit tobacco trade – including extensively cooperating with law enforcement, undermining track-and-trace systems, funding and commissioning research on the illicit trade, shaping media stories on the topic, engaging with national governments, international governmental organisations and other third parties, and lobbying for lower taxes and the targeting of competitors while continuing to be complicit in smuggling – could very well be replicated in the legal cannabis industry, unless stronger accountability mechanisms are put in place. The case of Canada, the first country to regulate the cannabis supply chain through a largely commercial model (in contrast with the stricter, nationalised model designed by Uruguay), offers some warning signs.

The legal cannabis industry is at a nascent stage, but two main developments are worth monitoring closely due to their resemblance to tobacco industry tactics. A 2020 report by Transform and México Unido Contra la Delicuencia pointed out, 'The dynamics of corporate capture and related distortions of the policymaking process (of the kind seen especially in the alcohol and tobacco industry) are a significant and pressing concern, and one that has not been diminished by significant investment from alcohol and tobacco corporations in the Canadian cannabis sector'[154] (see Box 1).

First, lobbying for lower taxes and against further regulation, and pushing for more law enforcement against smaller competitors. The Canadian industry is already highly concentrated around a small number of manufacturers, i.e., Canopy Growth, the Cronos Group, Aurora Cannabis, and Tilray – the so-called 'Big Four'. The four companies are all represented on the board of the Cannabis Council of Canada, which aims 'to act as the national voice for our members in their promotion of industry standards'.[155] The Cannabis Council of Canada has notably argued against the introduction of new regulations (including limits on THC levels and a ban on edibles in Quebec[151]) and, specifically on the illicit cannabis trade, in favour of lowering taxes and increasing enforcement ('we recommend that the government prioritize the closure and removal of both illegal brick and mortar stores, and actively seek out and shut down illegal online cannabis dispensaries', the council noted in a November 2019 letter to Prime Minister Justin Trudeau).[157] Meanwhile, Altria, a major tobacco company which acquired 45% of Cronos in 2018 (see Box 1), is actively lobbying the U.S. Congress for legislation friendly to the industry.[158]

Second, funding research. Though there is no record of cannabis companies funding research on the illicit cannabis trade to date, there have already been significant grants and donations awarded by various cannabis companies to other areas of academic research. These include:[159] Canopy Growth donating C$2.5 million (at the time US$1.9 million[160]) to the University of British Columbia and the British Columbia Centre on Substance Use for research on the use of cannabis to address the opioid overdose crisis and launching the Canopy Growth Cannabis Science Endowment Fund and the Canopy Growth Professor of Cannabis Science in 2018,[161] and an undisclosed amount to the Fondation de l'Hôpital du Sacré-Coeur de Montréal and the Canadian Sleep and Circadian Network in 2019;[162] Cronos funding the Technion Research and Development Foundation to study the use of cannabis in skin disorders in 2018;[163] and Tilray donating to the University of British Columbia for a clinical trial on cannabis and Post-Traumatic Stress Disorder in 2016.[164]

Similarly, serious concerns, notably raised by Jelsma, Kay & Bewley-Taylor (2019), exist regarding the 'threatened exclusion of small-scale and marginalised farmers from traditional cannabis producer countries in the Global South'.[165] Though they do not directly relate to the illicit trade, these developments are part of a broader story of exploitation. An agricultural history of cannabis in Africa shows that 'Global Northerners [continue] to extract more value from African resources than African farmers can extract'.[166] While tobacco leaf production has shifted from high-income countries to upper-middle income, lower-middle income and low-income countries since the early 2000s, tobacco farming has been largely marked by child labour, poverty, exploitation by global companies, and deforestation and other forms of environmental degradation, in contrast with tobacco industry public messaging on the matter.[167] This is perhaps unsurprising given the colonial and racist origins and current activities of TTCs.[168] Several Canadian cannabis companies have already invested in medical cannabis cultivation around the world, notably in Colombia and Jamaica, where the 'autonomous participation of small farmers in the market continues to be undermined by a range of complex factors'.[169]

Conclusion: Ten implications for legal cannabis regulation

TTCs have been complicit and directly involved in the illicit tobacco trade through various tactics explored in this briefing paper. In parallel, they have managed to shape policy responses to it through overt and covert engagement with the media, academia, law enforcement, international governmental organisations, international treaties, and front groups. As the legal cannabis industry continues to expand, and new jurisdictions review regulatory frameworks for cannabis supply chains, this briefing paper offered an overview of industry strategies and practices to watch out for on illicit trade issues. Ten overall lessons are worth stressing here:

1. Consider home-growing and other non-profit models[170]

These models would serve as useful alternatives to commercial frameworks, which in the case of tobacco have led to harmful effects and provided economic incentives for smuggling.

2. Ensure that policies and enforcement practices centre on public health, social justice, human rights, and equitable and inclusive trade

Regulatory frameworks should notably empower communities affected by cannabis prohibition, and feature strong environmental standards, labour protection, and inclusive and democratic models.[171] Importantly, requirements on preventing the illicit trade that are too rigid or expensive may effectively limit or exclude participation from smaller manufacturers or farming cooperatives.

3. Fund independent academic research and analysis on the illicit cannabis trade in regulated economies

Though the illicit cannabis trade in a regulated economy may look different from the illicit tobacco trade, independent research on the topic will prove essential in informing future policies. Methodologies used to estimate the size of illicit cigarette markets[172] and monitor tobacco industry activity[173] could prove particularly useful in that regard.

4. Establish comprehensive and adequately funded monitoring mechanisms

Finding innovative ways to monitor the illicit cannabis trade beyond traditional law enforcement and interdiction is another important point of consideration for cannabis regulation. Independent data collection and analysis throughout supply chains, for instance, could help mitigate the illicit trade. Cannabis regulation should ensure that all cannabis produced by legal manufacturers is accounted for. As cannabis manufacturers and distributors begin their overseas expansion, it is crucial to ensure that distribution data is accurately and independently verified, and that amounts sold are commensurate to the size of local markets and legal exports. Releasing comprehensive, free, and easily accessible data covering the entirety of cannabis supply chains would be a necessary first step.

5. Conduct frequent policy evaluations

Frequently reviewing regulatory frameworks and revising them accordingly would help ensure that harms related to health, justice, and trade along cannabis supply chains are effectively minimised. Metrics could include morbidity, mortality, and mental health impacts of regulation (health), the participation of civil society groups and communities affected by cannabis prohibition in the design and implementation of regulation (justice), and income and working conditions of all workers including farmers (trade).[174] Objective data, lessons learnt, market evolutions, and feedback from affected communities and civil society should form the basis of those reviews.[175]

6. Ensure that fair trade principles are at the core of regulation, as international trade develops

As the international trade in legal cannabis products continues to grow, regulators should ensure that fair trade principles are at the forefront of regional and international frameworks, and that the illicit trade is not used as an industry tactic. This could include banning trade through Free Trade Zones and of duty-free cannabis products,[176] while carving out cannabis, alcohol, and tobacco products from investor-state dispute settlement mechanisms or repealing them altogether should also be considered.[177]

7. Develop international guidance on the legal cannabis trade

The WHO FCTC and the Protocol to Eliminate Illicit Trade in Tobacco Products offer important lessons for future international guidelines on the international legal cannabis trade. Limitations include extensive efforts by the tobacco industry to undermine and co-opt their development, negotiation, drafting, and implementation.[178] Even in the absence of an international treaty on legal cannabis, UN institutions (e.g., WHO, the United Nations Development Programme and the United Nations Office on Drugs and Crime) should play a greater role in providing guidelines on cannabis regulation, including on how to mitigate the illicit cannabis trade while guarding against cannabis industry interference in policy making.[179]

8. Prevent the emergence of a powerful cannabis industry

Links between transnational tobacco companies and the cannabis industry already exist. Regulators could notably prohibit such links and prevent the increasing concentration and potential monopolisation of the cannabis industry – encouraging instead small, responsible businesses, if a commercial model is selected. This could for instance be achieved by capping the market share of any cannabis company at 10 or 15%.

9. Monitor and take action against cannabis industry interference into policy making

TTCs have managed to interfere with policy making via academia, the media, law enforcement, international governmental organisations, and other third parties. Given vested commercial interests potentially at odds with the social good, avoiding a similar situation with cannabis from expanding further could take the form of:

- Academic journals preventing studies on cannabis funded by the cannabis industry
- Universities rejecting cannabis industry research funding
- Law enforcement and customs agencies refusing to partner with cannabis company representatives on how to tackle the illicit cannabis trade
- Preventing cannabis industry representatives from shaping national regulation beyond public consultations and ensuring transparency in all interactions between the cannabis industry and government officials
- Requiring government officials involved in cannabis regulation to divest from any related financial interests
- Scrutinising and shedding light on cannabis industry donations to media and think tank organisations
- Creating an independent office to oversee and alert of potential conflicts of interest and interference in policy making by the cannabis industry.

10. Put in place effective track-and-trace/seed-to-sale systems

Learning from the current challenges in the implementation of the FCTC Protocol on the illicit trade in that regard, putting in place effective, independent, comprehensive, and transparent track-and-trace/seed-to-sale regimes, including audits and inspections, fully independent of the cannabis industry, could prove significant. Legal supply chains for cannabis products around the world continue to expand;[180] product innovation and commercialisation (e.g., pre-rolled cannabis cigarettes[181]) is developing further; legal trade is growing; and the cannabis industry is becoming increasingly concentrated.[182] In that context, one can certainly envisage a situation in which inadequate, industry-controlled track-and-trace systems would fail to fully control supply chains across borders. More research is notably needed on seed-to-sales solutions currently available in the United States and Canada, and on how regulations could be improved to ensure that tracking and tracing systems are effective, comprehensive, government-controlled, independent from the cannabis industry, and primarily focus on preventing diversion to the illicit trade, instead of serving as a tool to optimise supply chain productivity and efficiency.[1183] Policy innovation is, however, required to ensure that these requirements do not represent additional barriers to entry for traditional growers, long marginalised and stigmatised by drug control, in favour of large, multinational corporations.

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About this Briefing Paper

This briefing paper draws lessons from the history of the illicit tobacco trade, and the role of the tobacco industry in both driving it and shaping responses to it, in an effort to inform cannabis regulation.

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About IDPC

The International Drug Policy Consortium (IDPC) is a global network of NGOs that come together to drug policies that advance social justice and human rights. IDPC's mission is to amplify and strengthen a diverse global movement to repair the harms caused by punitive drug policies, and to promote just responses.

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