

SMOKING **OUT** LIES

Documents Research on **Tobacco** Industry Interference in Kenya

TIDRA:

TOBACCO INDUSTRY DOCUMENTS RESEARCH IN AFRICA

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TABLE OF CONTENTS

ACRONYMS AND ABBREVIATIONS	iii
FOREWORD	iv
ACKNOWLEDGEMENTS	v
EXECUTIVE SUMMARY	vi
CHAPTER 1: INTRODUCTION	1
1.1 Tobacco use Prevalence	1
1.2 History of Tobacco Industry Establishment in Kenya	2
1.3 Tobacco Industry Interference	5
1.4 Justification	6
1.5 Research Goals and Objectives	6
CHAPTER 2: METHODS	7
2.1 Data Collection	7
2.2 Data Analysis	7
CHAPTER 3: FINDINGS	8
3.1 Influencing Policy development and legislative processes	8
3.2 Litigation	14
3.3 Use of Front Groups	16
3.4 Illicit Trade	20
3.5 Marketing and Corporate Social Responsibility (CSR)	23
3.6 Use of phony statistics and researches	24
CHAPTER 4: DISCUSSION AND CONCLUSION	26
4.1 Discussion	26
4.2 Conclusion	28
4.3 Recommendations	29
4.4 Limitation of the study	29
Annexes	30
References	31

ACRONYMS AND ABBREVIATIONS

APECA Association of Physicians in East and Central Africa

BAT British American Tobacco

BATK British American Tobacco Kenya

COP Conference of Parties

CSR Corporate Social Responsibility

CSO Civil Society Organization

CTCA Center for Tobacco Control in Africa

FCTC WHO Framework Convention on Tobacco Control

GATS Global Adults Tobacco Survey

IILA International Institute for Legislative Affairs

ITGA International Tobacco Growers' Association

KAM Kenya Association of Manufacturers

KEBS Kenya Bureau of Standards

KETOFA Kenya Tobacco Farmers' Association

KEPSA Kenya Private Sector Alliance

KII Key Informant Interview

KRA Kenya Revenue Authority

MoH Ministry of Health

TIDRA Tobacco Industry Documents Research in Africa

MTK Mastermind Tobacco Kenya

PMI Phillip Morris International

TAPS Tobacco Advertising, Promotion, and Sponsorship

TCA Tobacco Control Act

TI Tobacco Industry

WHO World Health Organization

FOREWORD

Over the last decade, the continent of Africa has identified and documented its development priorities through several continental and global landmark agreements, including the African Union Agenda 2063, the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda. Both the 2030 Agenda for Sustainable Development and the African Union Agenda 2063 recognize that the continent's development agenda is founded on investing and improving health and healthcare systems across the region. It is also universally agreed that Effective public health systems are essential for providing care for the sick, and for instituting measures that promote wellness and prevent disease.

According to the World-Health Organisation (WHO), Non-Communicable Diseases (NCDs) will cause 60% of global burden of disease and 73% of deaths by 2020. 82% of these deaths are predicted to occur in Africa and Latin America. In Kenya, NCDs have become a major scourge in socio-economic development contributing to around 50% of inpatient admission and a further 40% of hospital mortality. The NCDs morbidity and mortality numbers are driven by four main risk factors namely tobacco use, harmful use of alcohol, unhealthy diets and physical inactivity. Of all the four risk factors to NCDs, tobacco products have the most peculiar political-economy history and remains to be the only legal product that when used as directed is lethal. The dominant

There has been numerous reports of supernormal profits on tobacco products and parallel efforts against tobacco control in Kenya, ranging from stalled policy formulation on tobacco control, bribery of policy makers, manipulation of tobacco taxation systems, legal suits and intimidation of implementers and advocates for tobacco control and many others, with all fingers pointed at one protagonist: The Tobacco Industry. Until now, no report had comprehensively and evidentially documented the tobacco industry interference in Kenya as early as the date the country was born. This report carefully documents the reach and instances of Tobacco Industry interference in development and implementation of tobacco control policies in Kenya using their own internal correspondences, publications and position statements in a unique and methodological fashion.

I urge policymakers, advocates, journalists, health-care professionals, public servants and the citizens in general to carefully review the contents of this report and use it as a tool to advocate for an end to this pandemic. Our corporate action can help reduce the harms of innumerable diseases, rising mortality and the chains of cyclical poverty levels among our countrymen. But we must act now.

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EXECUTIVE SUMMARY

Globally, one person dies every six seconds because of tobacco use. If Left unchecked, tobacco is predicted to kill more than 8 million people globally each year by 2030. Conversely, the 6-leading tobacco companies (Phillip Morris International, British American Tobacco, China National Corporation, Imperial, Altria/Philip Morris USA and Japan Tobacco International) are experiencing tremendous growth, commanding a combined gross profit of Ksh. 4.41 Trillion (USD 44.1 B), a return greater than the GDP of Norway. Driven by their main objective of profit maximization, the Tobacco Industry (TI), has sought to manipulate governments to safeguard and expand their markets.

The overall goal of this study was to provide insight into TI activities in Kenya to inform the implementation of tobacco control policies. This was to be achieved by the specific objectives of the study which were to; (1) document the history of tobacco industry interference in Kenya, (2) create awareness on tobacco industry tactics to policy makers, decision makers and the public and (3) to stimulate action planning and monitoring to reduce tobacco industry interference in public health policy making and implementation in Kenya.

The Truth Tobacco Industry Documents Archive (<http://legacy.library.ucsf.edu>), a database compiled by the University of California in San Francisco since 2002, served as the primary source of information for the study and supplemented with information through the Uniform Resource Locator (URL) media articles, journal articles, websites and Key Informant Interviews with relevant government officials and Civil Society actors. Remarks from the KIIs and findings from the library were triangulated with information collected from other sources.

This study established that the TI in Kenya, for over half a century, repeatedly interfered with the development and implementation of tobacco control policies using 6 broad tactics including: use of front groups, use of tobacco advertisements, promotion and sponsorship, influencing policy development and legislative processes, Illicit and deceptive trade practices, Intimidation and litigation, and provision of phony statistics and research evidence.

The report finally makes recommendations that will be important in aiding government ministries, agencies and Civil Society Organizations to close ranks and not only closely monitor the trends and actions of the TI, but also pre-empt any interference attempts on tobacco control policies by actively countering their interference tactics.

CHAPTER 1: INTRODUCTION

1.1 Tobacco use Prevalence

Tobacco use is the leading preventable cause of death, disease and disability resulting in 7 million deaths yearly in the world with approximately 890,000 of these deaths occurring as result of exposure to second hand tobacco smoke(2). In Kenya, 2.5 million adults (11.6% of the population) currently use tobacco products (19.1% of men and 4.5% of women(3),while 9.9% of Kenyan youth aged between 13-15 years, (12.8% boys and 6.7% girls) currently used tobacco products(4)

The WHO Framework Convention on Tobacco Control (FCTC) is an evidence-based treaty that reaffirms the right of all people to the highest standard of health, and is the first treaty negotiated under the auspices of the WHO(5).It provides for demand reduction strategies including price and tax measures(article 6),protection from exposure tobacco smoke (article 8), regulation of product contents and product disclosures (Articles 9&10), packaging and labeling of tobacco products (Article 11), education, communication training and public awareness (article 12) tobacco advertising promotion and sponsorship (Article 13) and support for tobacco cessation (Article 14). It also provides for supply reduction strategies including control of illicit trade in tobacco products (Article 15) sales to and by minors(article 16)and provision of support for economically viable alternative activities (article 17)(6)

Kenya signed and ratified the WHO FCTC in 2004 and domesticated it through the Tobacco Control Act (TCA), 2007. The preamble of the TCA describes its purpose as (1) to control the production, manufacture, sale, labelling, advertising, promotion and sponsorship of tobacco products, (2) to provide for the Tobacco Control Board, (3) to regulate smoking in specified areas and for connected purposes(7)

1.2 History of Tobacco Industry Establishment in Kenya

The WHO FCTC defines 'tobacco industry' as 'tobacco manufacturers, wholesale distributors and importers of tobacco products.(6). The tobacco market in Kenya is dominated by two main actors, British American Tobacco- Kenya (BATK) which controls about 78% of the market share and Mastermind Tobacco Kenya (MTK) controlling about 20% with the remaining comprising of imports by multi- nationals including Phillip Morris International (PMI), Japan Tobacco and RJ Reynolds International(8)

The initial entry of British American Tobacco (BAT) into Kenya goes back to the turn of the 20th century. It was then a marketing firm importing and selling tobacco, largely to British colonial consumers. In 1907, BAT created a marketing organization, with the name 'British American Tobacco' headquartered at Mombasa. BAT remained a distributor of imported cigarettes for the next 20 years. However, the emergence of a strong East African market saw the firm make its first plant investment when it opened a factory in Jinja, Uganda in 1928 meant to supply the EA Region, including Kenya. The factory was upgraded in 1948, becoming a modern tobacco company in the East African region(9).

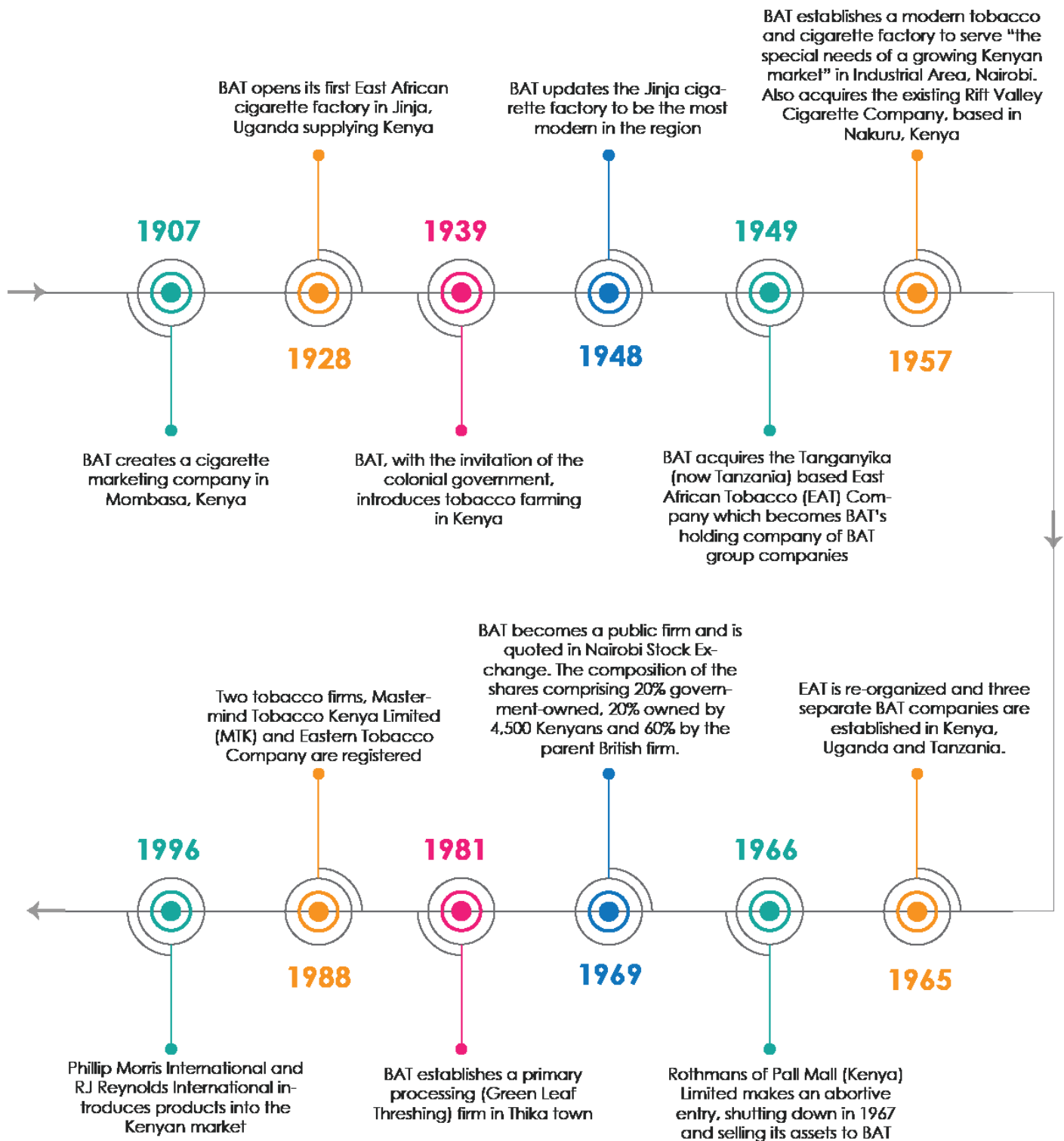
In the early 1950s, as demand in Kenya grew, BAT decided to build another factory in Nairobi. This plant was opened in 1956, and full-scale production began the year after. The Rift Valley Cigarette Company, which operated a factory in Nakuru, 180 km from the Kenyan capital Nairobi, was acquired by BAT in 1956. In July 1966, Rothmans entered the Kenyan market, but sold out to BATK the following year(10).

Backed by a well-oiled machinery and high-powered political connections within and outside the country, BATK enjoyed a market monopoly for over 80 years up to 1988 when Mastermind Tobacco Kenya (MTK) and Eastern Tobacco were registered. Of particular concern was MTK's threat because

it was a local company, its founder was an ex BATK Director Mr. Wilfred Murungi who received strong support from powerful politicians(11). MTK broke BATK's dominance mainly by serving the lower income clientele with brands such as Supermatch, countering BATK's high-priced brands such as Dunhill and Embassy.(8).

Below is a timeline depicting the history of the Tobacco Industry in Kenya.

Figure 1: Tobacco Industry Establishment in Kenya: 89-Year Timeline (1907 to 1996)



1.3 Tobacco Industry Interference

The WHO FCTC defines Tobacco Industry (TI) as large trans-national companies, state-owned entities and domestic growers, manufacturers, importers, wholesalers, and retailers of tobacco. It also includes a wide range of supporting consultancies specializing in such areas as marketing, legal services and lobbying. (12)

The WHO recognizes that tobacco companies use different strategies to influence the course of regulatory and policy processes and outcomes. The Preamble of the FCTC recognizes the need to be alert to industry efforts to undermine and subvert tobacco control activities in countries and Article 5.3 encourages parties to protect their public health policies relating to tobacco control from commercial and other vested interests of the tobacco industry in accordance with national law(12).

This is supported by decades of evidence showing that the tobacco industry actively and consistently acts to delay, dilute and defeat domestic tobacco control measures around the world(13). In 1994, the Attorneys General of four States in America filed lawsuits against seven major tobacco companies for reimbursement of health care expenditures arising from tobacco-related illnesses. As part of the settlement, the tobacco companies globally were required to make public, millions of internal corporate documents produced during this litigation; which are now held at the Truth Tobacco Industry Documents library (<http://legacy.library.ucsf.edu>) created in 2002 by the University of California, San Francisco (UCSF) and Center for Knowledge Management of the United States. The database consists of over 80 million documents(14) including; marketing strategies, letters, faxes, memos, research reports and many other documents that provided us with a firsthand look on tobacco industry interference in order to monopolize markets and remain profitable. This library formed the basis for this research.

1.4 Justification

Documents from the Truth Library have been used variously to document and expose TI activity around the world. However, use of the Truth Library to document TI interference in Africa, including Kenya, is limited. This research is therefore, intended to expose TI activities in Kenya, by raising awareness among policy makers, practitioners and the public, with an ultimate goal of protecting public health policies relating to tobacco control from the commercial and other vested interests of the industry and hence contribute to the development and implementation of strong tobacco control measures in Kenya.

1.5 Research Goals and Objectives

The goal of this project is to provide insight into TI activities in Kenya to inform the implementation of strong tobacco control policies. This goal will be accomplished through the following objectives:

- i. Document the history of tobacco industry interference in Kenya
- ii. Create awareness on tobacco industry tactics to policy makers, decision makers and the public
- iii. Stimulate action planning and monitoring to reduce tobacco industry interference in public health policy making and implementation in Kenya.

CHAPTER 2: METHODS

2.1 Data Collection

A comprehensive search of the truth library documents was done where documents relating to industry interference in Kenya were mapped using key terms; including "BAT", "Kenya" "Advertising", "Research", "Marketing" "CSR" and "Tobacco control law". The names of key individuals and organizations, and adjacent page (Bates) numbers (identifying number or alpha- numeric code assigned to a document in the library) were then used to conduct follow-up searches. We obtained a total of 3028 hits and found 476 documents, based on their relevance and consonance to the topic of investigation. These documents were then used to construct a historical and thematic narrative. On the other hand, primary data (Key informant interviews) was collected from August 2016 to December 2016.

Data obtained from the truth library search was triangulated with additional sources, including purposively sampled Key Informant Interviews (KII) with relevant government ministries and agencies, civil society, and other actors; desk review of published literature and searches of news media (print and web) was conducted.

2.2 Data Analysis

To gain understanding of specific tactics used by the tobacco industry, we used grounded theory to identify six themes from the 476 relevant documents. The documents collected were rigorously reviewed to identify TI interference tactics and behavior. The review was guided by identifying repeated topics, common concepts, language, and approaches used by the industry. This facilitated the grouping of 6 key tactics As more data were collected, the research team continuously reviewed it to further categorize and code it into the commonly emerging tactics. The 6 themes identified were: 1) Influencing policy development and legislative processes; 2) Litigation; 3) Use of front groups; 4) Illicit trade; 5) Marketing and CSR and 6) Phony statistics and researches. After identification of the themes, snowball sampling was used to do follow-up searches on the specific themes, subjects or individuals mentioned in an advanced search.

The audio recorded key informant interviews were transcribed verbatim, read, coded and triangulated into the 6 themes. Similarly, the desk review findings were used to augment the TDL and Key Informant findings

CHAPTER 3: FINDINGS

Tobacco Industry Interference Tactics in Kenya

The TI in Kenya has employed various tactics in their unending quest to interfere with the development and implementation of tobacco control measures(15). Based on findings, the report highlights six key tactics as follows:

3.1 Influencing Policy development and legislative processes

Policy development and implementation in Kenya is primarily conducted and overseen by the executive arm of Government while the Legislature is mandated with the development and/or amendment of legislations(16).

Tobacco Control Legislation

There is numerous evidence revealing that the TI has operated for decades in Kenya with the intention to influence in their favor policies and legislation relating to tobacco. Key informant 1, Ministry of Health, distilled the 4 strategies that the industry has used in this regard;

BOX 1: 'Through my own analysis, I have identified that they use like 4D's, one is, 'delay' as much as possible any legislation that might come and they 'dilute' it as much as possible so that it is not effective, if they do not succeed they still have another D 'derange it' making it look irrelevant. Here they provide arguments that tobacco is not bad since they provide employment to laborers, they pay tax to the government. The last D is to 'destroy'. Here they fight the legislations in court'

KI1, Ministry of Health

In 1993, BATK monopoly was under threat from a new entrant MTK. Feeling unhappy that some farmers had accepted sponsorship from their competitor and were openly selling their crop to them, BATK lobbied the

government to enact legislation to designate exclusive growing areas or zones to prevent poaching of its “farmers”. The law compelled the farmers to sell tobacco to BATK and not to its competitor, even though BAT was paying farmers less than any other African leaf-growing company(17). Upon enactment of this law, during a visit to London by the Kenyan president, BATK’s Director of African Operations Mr. Norman Davies sent a fax to the BAT group Chief Executive Officer Mr. F Broughton requesting that he congratulates the president for the move: The excerpt in Box 2 is a communication between the two BATK Officials:

BOX 2: “The Kenyan Government has passed a “tobacco law” which looks as though it will be very successful (if properly implemented) in stopping poaching and illegal out of season growing. The law was actually drafted by us but the Government is to be congratulated on its wise actions.” (18)

Company fax message

Years later, this legislation was repealed, with the enactment of the Tobacco Control Act (TCA) 2007.

In 1998, Kenya’s Ministry of Health in collaboration with other stakeholders like Kenya Medical Association (KMA) and the Kenya Cardiac Society (KCS) drafted a tobacco control Bill and presented it to the National Assembly. In response, BATK drafted and through a private member presented an alternate Bill intended to delay the process of enactment of the TC Bill. This tactic was able to delay the processing on the TC Bill through parliamentary bureaucracy for 9 years (1998-2007). BATK must have considered this to be a successful strategy, as its cooperate and social accountability Manager, Mr. Shabanji Opukah in 1998 shared his lessons with his colleague Vijaya Prasanna Malalasekera, the Director of Corporate and Legal Affairs of the Ceylon Tobacco Company, a subsidiarity of BAT in Sri Lanka, for an opportunity to have it replicated in Sri Lanka who were going through a similar legislative process. The excerpt of their conversation is indicated in Box 3 below:

Box 3: ‘...In Kenya we are taking forward an alternative to the proposed legislation. Can this happen in this case and do we have it ready. What is the full and due process of passing this legislation. Do we have the opportunity through this process to delay it, kill it on the floor or indeed stop it? (19)

Company memo

Following these struggles, in 2004 MoH through the Tobacco Free Initiative Committee (TFIC) that had been established to provide a coordinated approach to TC in Kenya introduced a new Bill in Parliament. BATK and MTK put their differences aside and through a PR company, Gina Din Corporate Communications, BATK and MTK subsequently organized a weekend-long retreat in the exclusive Chale Island, located at the coast of Kenya, for 40 Members of Parliament (MPs) to lobby against the Bill(17). This trip resulted in proposed amendments to the Bill, including its renaming from 'Tobacco Control Bill' to 'Tobacco Products Regulation Bill' and representation of the industry in the tobacco control committee proposed in the Bill, which would have weakened its scope and objectives(20). Following a media exposé, their plans were thwarted and their proposals did not see light of day and a comprehensive Tobacco Control Act was enacted in 2007, nine years after it was first introduced in the Kenya National Assembly.

Key informant 1, Ministry of Health, a long-standing tobacco control advocate who witnessed this process explained as shown in Box 4:

Box 4: "...If you look at those drafts they are many and definitely more than six drafts of the tobacco control Bill, we did not need those many Bills, it is because of the counter lobby of the tobacco industry that never wanted us to get a law. They did not want any of these countries to do tobacco control in any manner. They knew also that the formula is to get a legislation home and their best bet was to block the legislation. With the influences that they have had over the years all over the world they had influence over the processes of legislation through dealing with individual legislators, deals with the members of parliament, swing and sway in other corridors of power and see the influence they would bring. Every one of those years, Bills were drafted, debated, amended to whatever the extent it could be but that was not the delaying factors..."

KI1, Ministry of Health

Similar attempts have been made towards delaying and defeating the enactment of the Tobacco Control Regulations, which were gazetted on 5 December 2014 and set for commencement on 6 June 2015. Key Informant 1, Ministry of Health, recalls in Box 5:

Box 5: "...As we were already putting in to place our regulations word came out that the industry was actually putting aside a KSh. 100 million to take our MPs to shop in London or somewhere. It leaked too fast and it did not go far"

KI1, Ministry of Health

A chronology of events detailing instances of industry interference in the development of the Regulations is contained in the annex 1 of this report.

Tobacco tax and price measures

The tobacco tax system in Kenya has changed over the years, varying between a complex ad valorem structure prior to 1993, a tiered specific regime between 1993 and 2007 and various models of tiered excise system between 2007 and 2010(21)

These changes are summarized in the figure below:

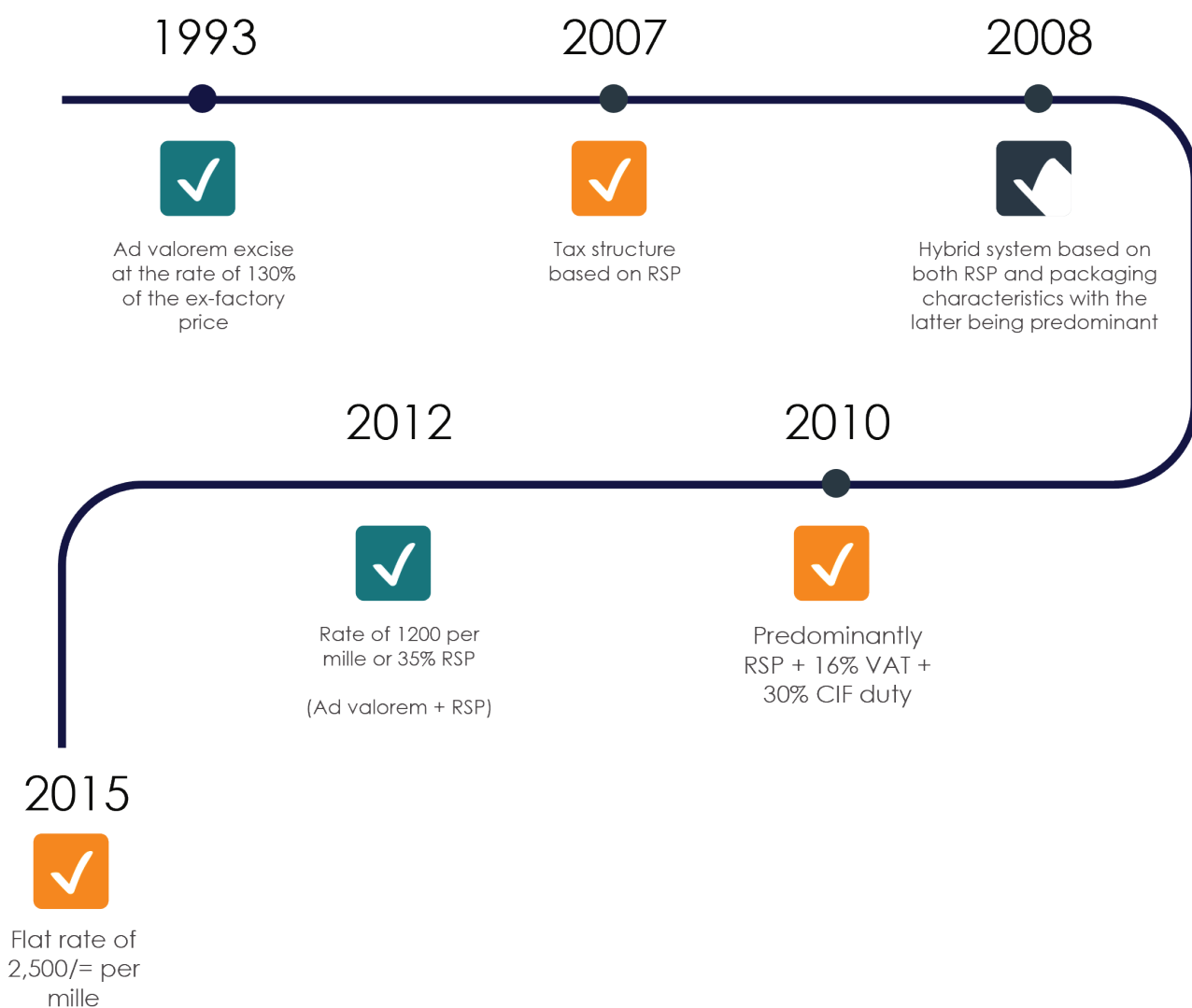


Figure 2: A timeline of taxation systems applied on tobacco products in Kenya

BATK's involvement in tobacco tax policies in Kenya are captured in BATK's documents which show early attempts to endear itself to political powers of the time with the objective of benefiting from tax waivers. In 1992, BATK set up housing development named 'Imara Daima'- Swahili for 'strong forever', which happened to be its company slogan at the time. BAT's internal documents capture the importance that it attached to the project when its African Regional Director Mr. Norman Davis wrote a letter to his seniors at BATCo headquarters in London, UK. Excerpts indicated in Box 6.

Box 6: "The project occurs at a time when it is particularly important for BAT Kenya to be seen to be good citizens. Negotiations with Government on changing the excise structure commenced and BAT Kenya are trying to get leaf growing areas to be gazetted for their exclusive development. Failure to undertake the project would have an un favorable effect on Government and staff relations" (22)

Company Letter

During this period, the country experienced the lowest percent contribution of tobacco to the total excise tax to the government as illustrated in the table below:

Table 1: Excise Revenue by Commodities (% of total excise revenue)

Fiscal Year	Alcoholic Beverages	Cigarettes and Tobacco	Petroleum Products	Other Products
1980/81	29.43	46.06	n/a	24.51
1981/82	27.03	49.86	n/a	23.12
1982/83	20.28	51.65	n/a	28.07
1983/84	22.44	54.92	n/a	22.64
1984/85	21.64	57.88	n/a	20.48
1985/86	22.81	60.48	n/a	16.71
1986/87	22.45	60.89	n/a	16.66
1987/88	20.42	64.85	n/a	14.73
1988/89	18.29	64.81	n/a	16.90
1989/90	15.65	71.42	n/a	12.93
1990/91	32.09	53.69	n/a	14.23
1991/92	53.46	32.28	n/a	14.26
1992/93	53.80	34.63	n/a	11.57
1993/94	53.51	37.16	n/a	7.33

Source: Ministry of Finance Kenya

A letter written to BATK's Corporate Affairs Department in November 1995 by African Regional Director, Norman Davis, confirms the success of the strategy with the conclusion quoted in Box 7.

Box 7: "On lobbying for the lowering of ceiling on all duties levied on cigarettes, so far some action in this direction has yielded fruit including excise duty reduction from 18% to 15%, increase on Duty on imported cigarettes from 25%- 40% and an increase on excise only for plain cigarettes, leaving the major brands untouched" (22)

Company letter

From around 2010, the tobacco tax system began to progressively improve to include a simplified structure, indexation to account for inflation and a general increase on excise tax rates from Kshs. 1200 (USD 12) per 1000 cigarettes (or 35% of retail selling price) in 2012 to Ksh. 2500 (USD 25) per 1000 cigarettes in 2015. These changes have not pleased the industry, and key informant 8, policy expert, explains why in Box 8.

"in 2012 we saw the collapse of the tax structures, so that was a major step because the four tax structures that we had, the mistake that we had is that the cigarette manufacturers would actually classify their cigarette in terms of ensuring that their premium brands fall in areas that they do not pay much. The other problem we had been having with the four structures was that you could actually switch as a consumer and therefore the ultimate objective of reducing consumption could not be realized because the industry could manipulate the tax structure and also the consumers could switch which is not consistent with requirement on the guidelines of implementing article 6."

KI8, Policy Expert

MTK; which has always presented itself as the 'local' company, producing for the poorer segment of the population; was hardest hit in the short term by the changes in the excise tax structure and rates because the changes in effect caused a price increase of between 1% for premium brands such as Dunhill and Embassy; 37% for mid-price brands such as Sportsman, Sweet menthol and Safari and 81% for economy brands such as Rooster, Supermatch and Rocket (ITC tax report). In reaction to these changes, MTK put up a media advert challenging the Act and directly attacking Tobacco Control Advocates from, IILA accusing them of being sensational, siding with their competitor and misleading the public. Consequently, after close to a year and a

half of the implementation of the Act and much lobbying from MTK, the cabinet secretary to treasury, Mr. Henry Rotich, in his budget speech for the year 2017/2018, made a pronouncement on the tobacco taxes as indicated in Box 9.

Box 9: Due to "...industry concerns on current taxation of cigarette... which had been inequitable and had adversely affected demand for locally produced low value cigarettes", I am proposing "...a two tier tax structure of Ksh 2,500 (USD 25) per mille for cigarette with filters and Ksh 1,800 (USD 18) per mille for plain cigarettes" in order to "...cushion the local cigarette manufacturers from the adverse financial effects due to loss in Market"

Budget statement 2017

3.2 Litigation

Litigation is a strategy that the TI has used repeatedly in Kenya. Key Informant 5, Ministry of Health, explains how this has been done:

Box 10: "These players work together, in that the BAT and the Mastermind actually make it look like they are competing but when it comes to the legislative battle with us, the government and the ministry of health, then what happens is that one would go to court and the other would play as the 'good boy' and in playing the good boy which looks like they are actually collaborating...The other one would go and try to block it in the court by suing and if one wins the industry benefits as a whole..."

KI5, Ministry of Health

In May 2006, the Minister of Health introduced the Public Health (Tobacco Products control) Rules aimed at ensuring smoke free places in the country through Legal Notice No. 44 of 2006. BATK and MTK challenged the Government in a court of law, claiming they were not consulted in the development of the rules. (Miscellaneous Civil Application No. 278 of 2006). This led to their suspension by the High Court on 31st May(23). This decision was however rendered void with the enactment of a comprehensive nation legal framework through the Tobacco Control Act in 2007.

With the enactment of the Act, MTK challenged the constitutionality of the law through a high court petition (NO. 416 of 2008), arguing that it contravenes fundamental human rights and freedoms by criminalizing an otherwise lawful activity. Some of the specific areas of challenge included tax and price measures, alternative livelihoods, some labeling provisions, display of signs in retail outlets, prohibition of use of vending machines, prohibition of sale in single sticks and advertising promotion and sponsorships provisions(15). Following long delays occasioned by MTK's lack of cooperation, the matter was dismissed by the High Court of Kenya on 4th December 2012.

However, the TI through BATK and later joined by MTK presented a petition at the High court of Kenya in April 2015 challenging the implementation of the Tobacco Control Regulations, 2014 which had just been gazetted. They argued that the Regulations were "unconstitutional, oppressive, irrational and unreasonable". The High Court ordered a temporary injunction on the implementation of the regulations in July 2015(24). The matter concluded In March 2016, when the High Court dismissed the petition by BAT and set an implementation date of September 2016. BAT however launched an appeal immediately after the judgement was passed, which was defeated again in February 2017, when the Court of Appeal upheld the decision of the High Court. The matter is currently awaiting hearing at the Supreme Court of Kenya. Details of specific incidences of industry interference during the development of the Regulations; including the court process are contained in annex 1 of this report.

The main impact of Industry litigation has been delay in implementation of key tobacco control strategies as contained in the TCA, 2007 and the Tobacco Control Regulations, 2014, slowing down and in some instances halting tobacco control work in the country, as explained by key informant 4, Civil Society:

Box 11: "Right now, we are battling a court process because the industry has taken the government to court claiming that the regulations are unconstitutional. This has led to a delay of almost two years now where a major part of the Act cannot be implemented because it requires the regulations and yet the regulations are stuck in court..."

KI4, Civil Society

3.3 Use of Front Groups

The Tobacco Industry in Kenya has used front groups to influence thinking and action on various tobacco related issues; including arguments around health impact of tobacco use; impact of tobacco regulation on business, trade and investment and farmer welfare. The discussions that follow show how the TI has worked with front groups to advance its interests and interfere into TC policy implementation.

Kenya Association of Physicians (KAP)

BAT documents show that in the early 1990's and 2000's the company was particularly close to the Kenya Association of Physicians (KAP) and its first chair and also chair of the Association of Physicians in East and Central Africa (APECA), one Dr. JA Aluoch. Dr. Aluoch was to serve as a consultant for BATK and several times in the company of other head hunted individuals from the academia, civil society groups, government agencies, NGOs and BAT staff visited BAT group's research and development centre in Southampton, England where they were trained on 'smoking issues', 'countering anti-tobacco organizations' and avoiding "unwanted excise taxes"

BAT's association with Dr. Aluoch allowed them access to research conducted by himself and colleagues as well as sponsorship and participation in scientific conferences organized by the two associations. Writing to his seniors in London about his engagement with the doctor, the BATK Managing Director, then, Mr. Luseno in 1984 had this to say:

Box 12: "...In the hope that we would be able to see some of their Conference Papers, we agreed to sponsor the compilation and printing of the programme and resultant papers of the conference of the Association of Physicians of East and Central Africa which was held in Kenya early this year. As we did not hear anything at the conclusion of that conference, I enquired of our friend Dr. J.A. Aluoch... if the conference had in fact addressed itself to Smoking and Health Issues.

The results of that inquiry were the attached paper on "Bronchogenic Carcinoma in Kenyatta National Hospital" and a Questionnaire on a proposed epidemiological study of Lung Cancer in Kenya. The document makes extremely interesting reading and has references to the current Director of Medical Services In Kenya with whom we negotiated our Health Warning Clause...Please note that the Bronchogenic Carcinoma study was reported to have been inconclusive and there are now plans to repeat it. Also worthy to note is the invitation to this Company to "co-operate" with the Unit in this prospective study"(25)

Company letter

In late 1999, KAP organized a seminar on 'Smoking and Health' in Nairobi in which BAT was invited to participate. In June, 2000, following another visit to the UK, the doctor writes of his discussions with BAT's scientific personnel, including one Dr. Adrian Payne, BAT's international Scientific Affairs Manager, and says:

Box 13: "...there is clearly the need for health professionals to collaborate with the tobacco companies to carry out research oriented surveys in the whole area of tobacco use in developing countries"(26)

Company letter

In September the same year, KAP organized its fifth annual scientific conference at the Grand Regency Hotel Nairobi, with funding from BAT, at which Dr. Adrian Payne, a keynote speaker, presented on 'The impact of changes in cigarette design on lung cancer risk'. Later on 10th October 2000, Dr. Adrian Payne wrote a thank you note to Dr. Aluoch in which he says:

Box 14: "Thank you and KAP for inviting me to present a paper at the recent scientific conference...and should it be feasible, look forward to the possibility of attending next year's conference"(27)

Company letter

ITGA and KETOFA

International Tobacco Growers' Association (ITGA) was formed in Brazil in 1984 by resolution of the six founding member organizations, representing tobacco growers in Argentina, Brazil, Canada, Malawi, United States and Zimbabwe to represent and to provide a strong collective voice for members on an international and national scale in order to ensure the long-term security of tobacco markets(28).

From the late 1990's, ITGA received support from individual tobacco companies- for instance USD 50,000 per quarter from BAT alone(29), as well as through a conglomerate of the then major tobacco companies- initially named ICOSI (International Council on Smoking Issues) and later renamed 'INFOTAB'(30). ITGA grew to become the mouth piece of the TI within the Food and Agricultural Organization (FAO), WHO and other UN bodies. While membership was drawn from tobacco growers in the different member countries, their agenda was mainly driven by TI as seen in communication from the INFOTAB Secretary General to his Board where he warns that

Box 15: "we must ensure that the growers stick to politics and do not seek to use the global organization to gang up against the manufacturers" ... "The ITGA could 'front' for our Third World lobby activities at the World Health Organisation, and gain support from nations hostile to multinational corporations. The ITGA (pushed by us) could activate regional agriculture lobbies which are at present very weak and resistant to industry pressure' (1)

Company note

Kenyan Tobacco farmers joined the association in 1999 through a growers union called 'Nyanza Eastern Western Tobacco Farmers' Association' which was later rebranded to 'Kenya Tobacco Farmers Association' (KETOFA) to have a national outlook. As an active member of the ITGA, KETOFA was tasked with conducting activities such as "mobilizing farmers to protest when tobacco control measures are being considered, submitting comments on proposed tobacco control legislation and regulations, forming coalitions and promoting unsubstantiated research about the economic impact of tobacco regulation(15). In 2012, when the WHO proposed a global 70 percent tobacco tax, as well as earmarking of the revenue to finance tobacco control activities through introduction of Article 17 & 18 of the FCTC, KETOFA joined with ITGA in the launch of a global campaign, with an online petition and through growers' associations in opposition of the measures. The petition called on government leaders in Kenya to,

Box 16: "...reject these irrational and destructive proposals in favour of a more realistic approach that will help tobacco farmers adapt if and when the demand for tobacco evolves."(31).

Online petition

The intentions of KETOFA are explained by Key Informant 4, Civil Society, who observed that

Box 17: "...the tobacco industry uses Kenya Tobacco Farmers Association ,which a lot of times purports to speak for the tobacco farmers but from the message they are carrying you can hear that it is the message of the tobacco industry"

KI4, Civil Society

Kenya Association of Manufacturers (KAM)

The Kenya Association of Manufacturers (KAM) is the 'representative organization for manufacturing value-adding industries in Kenya and provides an essential link for co-operation, dialogue and understanding with the Government by representing the views and concerns of its members to the relevant authorities'(www.kam.co.ke). BATK and MTK are both members of KAM. The TI has repeatedly used KAM to voice their opposition to tobacco taxation and other tobacco control measures through direct and indirect lobbying.

In September 2012, in the run up to the 5th Conference of Parties (COP) to the FCTC, KAM and BAT collaboratively organized a forum that brought together

different stakeholders from both the public sector and tobacco industry to discuss the 'direct impact of implementation of the World Health Organization's (WHO) framework convention on tobacco control (FCTC) in the region'. In a media conference after the meeting, KAM's Chief Executive Officer, Ms. Betty Maina remarked;

Box 18: "Some of the FCTC proposals include discriminatory measures targeting price and taxation of tobacco products, measures aiming at the elimination of tobacco leaf production through introduction of alternative crops and product ingredients regulation..." (31)

Newspaper quote

One of the KI narrated his experience with KAM as follows

Box 19: "when we had engagement with WHO during tax policy formulation in Kenya, we saw them (tobacco industry) doing presentations not directly but as the Kenya association of manufacturers and you could see that they were the ones that drafted the statements for the press releases and they do this indirectly using the Kenya association of manufacturers. I remember when we were preparing for the conference of parties where the guideline on article 6, were to be discussed and one of them was to simplify the tax structure ensuring that the tax rates are done to ensure that 70% of the retail selling price is the tax component. They actually fought and even wrote to the ministry of foreign affairs actually challenging the Kenyan delegations requiring the ministry of foreign affairs to write to the Kenya delegates who were doing a splendid job in putting the public health before the interest of the tobacco industry..."

KI8, Policy Expert

KAM has also been in the forefront in fighting against proposed Tobacco Control Regulations, 2014. Minutes from a Kenya Bureau of Standards (KEBS) led World Trade Organisation Technical Barriers to Trade (WTO TBT) committee meeting held on 20th January 2015 show that KAM (with involvement of BATK who were present in the meeting) made a presentation against the Regulations and suggested that they were 'in breach of international trade protocol(32).

3.4 Illicit Trade

Illicit trade is a major argument of the TI against effective tobacco tax and price policies in Kenya- as expressed on their website (www.batkenya.com)- 'Smuggling is caused by tax differentials, weak border controls, and import restrictions and bans – often to protect state monopolies – on goods which are in high consumer demand'. In its publication titled 'The Burden of Cigarette tax' circulated in 1998, in a bid to counter 'excessive taxation policies' around the world, BAT puts the blame of smuggling solely on governments' use of excise taxes. The conclusion on smuggling reads:

"Smuggling is demand driven by a demand from the consumer for an alternative product. Price is the main, but not only, reason why the consumer seeks alternatives and this is largely tax induced. Offending taxes would principally be excise but could also be VAT or tariff barrier, Non-tariff barriers, such as distribution restrictions. They also have the effect of forcing the consumer to satisfy his/her demand acquiring a smuggled product"

Company report

The TI attempts to demonstrate its 'anti- illicit trade' stance, with the aim of distancing themselves from any incidences of illicit trade of tobacco products, evidence has shown that the two major companies in Kenya- BATK and MTK have been involved in smuggling of their own products as demonstrated below.

In March, 2009 BATK launched a 'drive for the eradication of illegal trade and smuggling of manufactured industrial products in Kenya'. At a media briefing during the launch, senior investigations Manager at BATK, Mr. Colin Denyer reported (33):

Box 20: "We have come together with the investigators, the judiciary and the police, to seek ways of collaborating on how to end these illegal acts. The criminals are very innovative and are able to exploit opportunities. This is the largest ongoing theft of government revenue. It is a massive theft of government money that should be used to support social and economic programmes ...the scale of criminality is massive,"(29)

Newspaper Quote

However, from its own internal documents, evidence shows that BAT has used various strategies such as 'Transit trade' to defeat tax payment and 'to achieve excise structures, which provide competitive advantage to British American Tobacco's brands,'(34)'. A BAT document debating 'Q&As' on smuggling or 'transit trade' defines transit trade as:

Box 21: Q: What is Transit Trade?

A: Transit trade is the movement of goods from one country to another without payment of taxes and tariffs. It is more commonly known as smuggling.’(35)

Company note

Further, An article in a United Kingdom’s newspaper, the Guardian in February 2000, reported that Kenneth Clarke, Chairman and Director of BAT (1998 – 2007) publicly admitted that BAT has in the past taken advantage of weak laws and poor enforcement to supply cigarettes knowing they were likely to end up on the black market.

‘Where any government is unwilling to act or their efforts are unsuccessful, we act, completely within the law, on the basis that our brands will be available alongside those of our competitors in the smuggled as well as the legitimate market,’ (13)

Newspaper article

In July 2010, the Kenya Revenue Authority (KRA) seized a 40- feet container with smuggled cigarettes worth KSh. 41 million at a container freight station in Mombasa, Kenya(36). The consignment had been disguised as cotton buds worth only Sh2 million, but ‘Only 104 cartons contained cotton buds, while the bulk of the cargo - 720 cartons - were Sportsman brand cigarettes with fake KRA excise tax stamps, fake Kenya Bureau of Standards mark of quality and the Ministry of Health warnings similar to those appearing on genuine packs(37). Again in September 2012, KRA impounded and destroyed another consignment of ‘Sportsman’ cigarette worth Sh43 million in Mombasa for which BATK blamed taxation, when it’s Head of Communications, responded that:(38):

Box 23: “This latest incident comes on the back of a hike in the sale and distribution of smuggled counterfeit cigarettes due to stringent regulatory measures such as taxation and aggravated by the country’s porous borders. We estimate that BAT Kenya loses between Sh300 million and Sh350 million annually through smuggled counterfeit cigarettes traded in Kenya. Taxation policy needs to be balanced such that it does not incentivize illicit trade. When designing their tobacco tax policies, governments should take into account all potential unintended consequences of such policies such as the possible increases in illicit trade of tobacco products” (34)

Newspaper article

Similarly, MTK has also been involved in tobacco illicit. In July 2010, KRA officials at the Kenya-Uganda Border point, impounded a Ugandan lorry (truck) loaded with counterfeit supermatch cigarettes from Uganda meant for dumping in the Kenyan market. Two weeks later, a total of 284 cartons of counterfeit supermatch cigarettes smuggled from Uganda valued at Sh10 million were impounded at border towns of Malaba and Eldoret(37).

KRA officials inspect some of the cigarettes impounded during raid at a godown in Eldoret, July 2010



Source: Daily Nation Newspaper, 10th July 2010

TI industry tricks regarding illicit trade in Kenya are further highlighted in the excerpt by a key informant in Box 24 as follows:

Box 24: "It is documented that the tobacco industry themselves smuggles 40% of the tobacco they produce and they make it look like it is the other competitor is the one who smuggles and is producing the contraband tobacco. KRA have actually tracked them to a point where you find something entering the market from the factory, loaded for export, goes to the boarder and is brought back to the country."

KI1, Ministry of Health

3.5 Marketing and Corporate Social Responsibility (CSR)

The FCTC and Kenya TCA of 2007, prohibit all forms of Tobacco Advertising Promotion and Sponsorship (TAPS). Evidence shows that this is a strategy that the industry has used for decades to not only market their products, but also to influence public and policy maker perception of the companies and their business and hence shifting debate in their favour(39).

BAT 's move to support elimination of child labour in tobacco growing was driven by the need to position the company as socially responsible company. This has primarily been done through the Eliminating Child Labour in Tobacco Growing Foundation (ECLT)(40), and in partnership with the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), with BAT pushing its agenda through the ITGA for the reasons outlined below by BATK CSR Manager, Shabanji Opukah at an ITGA meeting in 1999 held in Nairobi Kenya(41):

Box 25: "...i am trying to ensure that we maximize the use of the ITGA in the management of various issues and leverage their global outreach and influence in the tobacco farming sector. This is how we get value for our cash and time contribution. I would in particular very much like them to delve more into the child labour and WHO issues and I am happy that thus far we are leading the debate here and they are co-operating. Otherwise what is the point of having the membership and paying the money." (37)

Company note

Additionally, When BATK was planning for the 1st International Conference on child labour in tobacco growing that was held in Nairobi Kenya in October 2000, Their CSR Manager Mr. Opukah reported to his colleagues on the purpose of the conference; as expressed in the experts in Box 26(42):

Box 26: "...partnership with the IUF and ITGA gives us a good opportunity to move to the moral high ground on this particular issue and we would like to make use of it in line with the BAT CORA (Consumer and Regulatory Affairs) strategy for recognition as a responsible tobacco company. That strategy identifies corporate conduct and accountability as one of the six reputation management initiatives" (38)

Company note

In November 2017, International Labour Organization's (ILO) governing body will vote on whether to adopt policies compliant with Article 5.3 of the FCTC and cut ties with the Tobacco industry. Also, The United Nations is currently under pressure to drop the TI from its Global Compact (UNGC)-a voluntary initiative of the United Nations to encourage corporations to adopt sustainable and socially responsible policies is currently under pressure to drop the TI.

TI's involvement in any CSR initiative has always been driven by the need for publicity and this was made clear when the African Medical and Research Foundation (AMREF) and Kenya's Ministry of Health approached BATK and other corporates to support their HIV/AIDS mitigation programmes. BATK's Mr. Opukah through a correspondence to his colleagues advised that they would only participate in so far as they were able to get media coverage and recognition. Upon realizing that there were other players on board competing for the recognition, BATK pulled out of the initiative.(43):

'As for the aids programme, it would appear it is too global and there are already too many sponsors on board. Impact and recognition would be rather difficult to come by.' (39)

Company note

One of the biggest contradiction in the TI's involvement in CSR in Kenya is MTK's sponsorship to the annual Mater- Heart run, a marathon organized by the Mater Hospital in Nairobi to raise funds for treatment of congenital hand acquired heart diseases in children from poor backgrounds. The WHO considers involvement of the TI in CSR and specifically in Public Health Programmes such as the Mater- Heart run to be a cynical and inherent contradiction, especially when no mention is made of the link between the TI product and the disease (44) This was highlighted by one of the Key informants as indicated in the excerpt in Box 28:

Box 28: "...at one particular time we used to have Matter Heart Run and one of the major sponsors was actually one of the leading tobacco company in the country. The question that you ask yourself is that how can a company whose product is leading to heart disease be in the forefront of pushing for an event that is expected to address the issues of heart disease in the country"

KI4, Civil Society

3.6 Use of phony statistics and researches

Use of false data is a common strategy of the tobacco industry; including information on the health harms of tobacco use, Economic arguments such as impact of tax and price policies and social effects of tobacco growing, manufacture and use, amongst others. Key informant 4 explains this in box 29 below:

Box 29: "...it is a common thing with the industry to make up statistics and data to either hide some reality that they do not want people to know or to exaggerate some things that are not necessarily true. An example is before we understood the impact of tobacco use, the industry would actually deny that it causes cancer but using information that had been collected from their own documentation we have found that even during that time that they were denying the connection between cancer and tobacco use, they already had that information that they were hiding that information from the public for a long period"

KI4, Civil Society

This assertion is supported by TI documents that show that the industry studies that revealed the health, economic and other impacts of tobacco growing, manufacture and use, while at the same time promoting those that support their goals. For instance, even with evidence already established by the 1940s that smoking promotes cardiovascular diseases(45), BAT accepted to support a 5-year research project titled "Epidemiological Study into the relationship between smoking and heart disease" by one Professor K. Ojiambo, a leading cardiologist and at the time, the head of cardiology department at the school of Medicine, University of Nairobi. BAT's motivation for the £50,000 per annum project is detailed on their own documents as indicated in Box 30:

Box 30 "...The BAT scientific view is that, bearing in mind the very low recorded mortality rates associated with smoking related diseases, (for example 30 lung cancer deaths and 9 deaths from ischaemic heart disease in 1977) it is unlikely that smoking will have much of a role in Kenyan mortality. The study may not have much scientific value.

However, bearing in mind the attacks on the industry's credibility in developing countries, the public affairs value of co-operation and development of links with the medical community could help the company considerably. BAT Kenya have said that if the research project were to go ahead, the company would need expert advice from GR & DC (BAT's research and development centre) with for example, the preparation of a questionnaire and the evaluation of data. The public affairs view is that whilst there are risks that the results of the study could be used against BAT Kenya, these risks are outweighed by the potential benefits.

The company would be in a position to help ensure the study were carried out using the best scientific methodology; they would develop their friendly association with one of Kenya's leading medical specialists ; they would gain access to medical thinking at the highest level ; they would be seen to be conducting their business in a highly responsible way ; the results of the study would be available to the company at an early stage and the results could help to counter some of the wilder allegations about tobacco-related disease epidemics in the developing countries"

Company letter

CHAPTER 4: DISCUSSION & CONCLUSION

4.1 Discussion

The findings of this study suggests that the TI has repeatedly been involved in interference in the development and implementation of tobacco control measures in Kenya. This has been achieved through a series of well-coordinated strategies and tactics conducted over decades and anchored on three bases: profit maximization, market dominance/ security and visibility.

There was no singularly exclusive or dominant tactic used by the tobacco industry in Kenya to exert undue influence on tobacco control policy development or its implementation in the country. Nonetheless, a combination of six broad tactics were repeatedly used by the Tobacco Industry, each comprised of well-oiled mini-tactics that were complimentary to the function of the main tactics. The broad tactics ranged from use of front groups such as farmers' associations (KETOFA) and private sector associations (KAM and KEPSA) mainly for lobbying, bribery or 'facilitation' of members of parliament to hinder or thwart tobacco control legislations, corrupting of government officials to influence development and/or implementation of the policies, flooding of the Kenyan market with contraband tobacco products to reinforce the dogma that increase of taxation and subsequent price increase would result in emergence of black market. The industry was also involved in production or sponsorship of alternative scientific research to generate debate and contestations on mainstream knowledge on sale, use and health harms of tobacco products and the strategic engagements in CSR activities to influence both the policymakers' and the general public's perception of the industry and its actions. When all these tactics are unsuccessful, the tobacco industry would apply their trump card: litigation and intimidation of government ministries and agencies. These findings correlates with what was reported by many other countries particularly in Low Middle Income Countries and the materials shared during the World No Tobacco Day in 2012(46). The findings further vindicates the reason the parties to WHO FCTC included Article 5.3, the only UN treaty that highlights an Industry as detrimental to progress of treaty implementation and successⁱⁱⁱ.

Notably, albeit all political transitions in Kenya and a major regime change in the process, the tobacco industry successfully managed to stop or derange the enactment of a national tobacco control legislation for over 10 years! The study reveals that the earliest recorded direct influence of the tobacco industry in the development of tobacco related legislation in Kenya, was in actual drafting of a legislation by BAT and presented as a Government Bill in Parliament in 1993, that required farmers to grow tobacco under contract to only one company and forbid farmers to grow tobacco 'out of season'; this was an apparent tactic to block the then growing influence of its chief competitor, MTK. This ploy is exposed from the industry documents with a fax from BAT's regional director Mr. Norman Harris who infamously writes: '...the law was actually drafted by us but the Government is to be congratulated on its wise actions.'(18). More intriguingly, when in 1995, a comprehensive tobacco control Bill was first introduced by the Ministry of Health, the tobacco industry employed all the six broad tactics discussed to delay, dilute and finally block the legislation before it was even debated on the floor of the national assembly! This is repeated with introduction of two different tobacco control Bills until a breakthrough is achieved in 2007 after spirited campaigns and lobbying by Civil Society in Kenya. When the legislation was passed, the focus of the tobacco industry were trained on its implementation: The new target was thwarting the passing of tobacco control regulations. The study reveals use of the same set of tactics which finally ends in litigation. This finding is consistent with Tobacco industry underhand tactics across the world: A 2015 publication (5th Edition) by American Cancer Society and World Lung cancer titled 'Tobacco Atlas' indicates that in March 2014, when the European Union (EU) adopted the EU Tobacco Products Directive to regulate the manufacture, presentation and sale of tobacco products in European countries, Philip Morris International (PMI) launched a multi-million Euro lobbying campaign to delay and finally rescind the Directive. A third of the Members of the European Parliament (233 MEPs) were lobbied(47).

One would first question the focus of tobacco industry in influencing tobacco tax and price policies in Kenya yet their product largely exhibits abnormal demand due to its addiction tendencies. Secondly, one would wonder why the tobacco industry has repeatedly had its way in development of tax and price policies in Kenya yet they are the subject of the regulations in the first place. Recent studies indicate that younger smokers generally earn lower wages and are less dependent on tobacco, both of which would tend to make them more price sensitive hence reducing consumption much

more than adults in response to the same price increases(48). The Global Youth Tobacco Survey further reveals that tobacco smoking initiation ages in Kenya is between the ages 13yrs–15yrs. This therefore means that if the sale, access, promotion and advertisement of tobacco products are heavily regulated, the toll on the profits of tobacco industry would be negligible in the short-run but significant in the long-run since the legislations will reduce initiation. This in turn explains their impassioned focus in influencing policymakers. Moreover, it is evident from the findings that the tobacco industry in Kenya is well connected politically and also wields colossal financial power which it uses to ensure status quo and suppression of any dissenting voices.

4.2 Conclusion

The harmful effects of tobacco products to its consumers are not a secret. On the other hand, it is established from this study that the TI both local and global, armed with their financial power and political connections, will go any distance to achieve their principal objective of profit maximization; whether detrimental to consumers' health or not, mainly through influencing tobacco tax and price measures. If left unchecked, therefore, TI will continue to squeeze out profits from an ailing and mostly poor citizenry.

Article 43 (1) of the Constitution of Kenya, 2010, obligates the government of Kenya to prioritize the focus on the health implications of tobacco products over their financial gains (16) Additionally, the WHO FCTC, to which Kenya is a party, requires the parties, among other obligations, to 'protect public health policies from commercial and other vested interests of the tobacco industry and adopt price and tax measures to reduce the demand for tobacco' (12)

Further, the TCA bans any forms of advertising, promotion, sponsorship and CSR activities by the tobacco industries. Kenya's Public Service Commission is mandated by the Kenya's constitution 2010, in development of civil service ethics and code of conduct. One of its manual, 'Discipline Manual for Public Service' regulates that any public officer transacting business on behalf of Government is required to do so with outmost integrity and transparency. (49)

The fact that TI interference is still prevalent in Kenya, in spite of the clear legal framework on tobacco control, points to lack of implementation of the laws and regulations largely caused by ignorance of their interference

tactics and varied operational policies of interacting with the TI by the three arms of government in Kenya (executive, legislature and the judiciary).

It is therefore imperative for concerned government ministries, agencies and Civil Society Organisations to close ranks and not only closely monitor the trends and actions of the TI but also pre-empt any interference attempts on tobacco control policies and actively counter their interference tactics.

4.3 Recommendations

Based on the findings, the study recommends the following

1. Government ministries and agencies should engage with the Tobacco strictly within the provisions of guidelines for the implementation of Article 5.3 of the FCTC and the Tobacco Control Regulations 2014.
2. The Ministry of Health, the Tobacco Control Board and other tobacco control actors in Kenya should conduct periodic awareness campaigns on the impact of tobacco industry in Kenya
3. The CTCA should continuously build capacity for African Government officials on how to deal with Tobacco Industry and provide a code of conduct to guide their behavior.
4. African Governments should ensure that Policymakers are aware and act in accordance to the Code of Conduct on the Tobacco Industry and their front groups in line with established policies and Laws.
5. Civil Society Organizations to continually monitor and counter the tobacco industry interference on tobacco taxation policy through formation of TIM Teams

4.4 Limitation of the study

The study was mainly based on industry documents deposited in the UCSF Truth Library. The library has since reduced the number of industry documents submitted over the last 10 years as the Tobacco Industry became smarter with their documentations, paper trail and correspondence. However this was partly addressed through triangulation where additional data was gathered through desk review of available documents and other material as well as key informant interviews (KII).

Annexes

Annex 1: Chronology of events and TI interference in the development of the Tobacco Control Regulations

Date	Event
4 November 2013	BAT directly contacted the Attorney General's Office acknowledging the "critical role" the company plays in the law-making process and requesting a meeting to discuss BAT's concerns related to the proposed regulations
27 October 2014	Once the regulations were finalized and ready to be sent to the National Assembly for approval, the TCB in the Ministry of Health wrote to the Chairperson of the Parliamentary Committee on the Delegated Legislation Hon. William Cheptumo requesting to meet with the committee to educate them on the finalized regulations. This was the third time the TCB wrote with this request. The previous two times, the Chairperson of the- Committee failed to respond. The months that were spent waiting for a reply caused a significant delay in getting parliamentary approval for the regulations.
1 December 2014	BAT sent a letter to the office of the Attorney General referencing unanswered letters sent on the 4th Dec 2014 and 4th June 2014 with respect to the tobacco control regulations. BAT claimed they were engaging the Ministry of Health and the TCB in the legislative process in an attempt to achieve "high quality evidence based, proportionate tobacco control measures" but claimed that the Ministry of Health have failed "to take into account [our] views"
5 December 2014	Tobacco Control Regulations 2014 are gazette
Week beginning 8 Dec 2014	Tobacco Control Regulations tabled in Parliament by Majority Leader Aden Duale
10 December 2014	EW. Murungi, Managing Director of Mastermind Tobacco Kenya (MTK), wrote to the Clerk of the National Assembly requesting a meeting with the Parliamentary Committees on Delegated Legislation, Finance and Health, to discuss their concerns with the regulations.
January 2015	The Ministry of Foreign Affairs and International Trade lobbied the Chief of Staff and Head of Public Service against the regulations, claiming that they were in violation of the General Agreements on Tariffs and Trade (GATT), Trade Related Aspects of Intellectual Property Rights (TRIPS) and Technical Barriers to Trade (TBT). The GATT and TRIPS are international agreements meant to protect intellectual property rights. The tobacco industry has frequently used the intellectual property argument to try to weaken legislation in other parts of the world, including Australia and the UK.
6 January 2015	A final draft of the regulations was sent by email to TBT Committee members for review prior to the regulations being published for public view. The TBT Committee, which is mandated to ensure regulations are in line with the World Trade Organisation's Technical Barriers to Trade, has been utilised by the industry as a key outlet for influencing policy in Kenya. After the email was circulated, a meeting was called to discuss the draft regulations. Recipients of the draft regulations included industry associates and the Kenya Association of Manufacturers (KAM), of which BAT is a member
3 February 2015	The Ministry of Health received a letter from the Executive Office of the President requesting that they set a time to meet and "come up with a common understanding" on the regulations. The letter also included a briefing forwarded from the Ministry of Foreign Affairs and International Trade with arguments against the regulations.
11 February 2015	Letters from KAM were sent to various government ministries including the National Treasury, Ministry of Health, Ministry of Industrialization and Enterprise Development and the Ministry of Foreign Affairs to lobby against the regulations
17 March 2015	The tobacco industry was reported in local media to have invited MP's to a "lavish retreat" at a Coast hotel where hotel expenses and "fat allowances" for participants were estimated to cost Sh100 million. The local press described the retreat as "a lobbying session by the tobacco firms to woo MPs not to pass the strict Tobacco Control Regulations"
9 April 2015	MTK submitted a position paper opposing the tobacco control regulations to the TCB citing arguments that regulations will increase illicit trade, hold heavy cost implications and will be arduous to implement
14 April 2015	BAT launched a legal challenge against the proposed tobacco control regulations on the basis that they were "oppressive, irrational and unreasonable"
11 June 2015	Kenya Tobacco Control Regulations suspended by Justice Mumbi Ngugi pending a full hearing of the case brought by BAT Kenya
2 July 2015	The case for BAT was read, for a second time, at the Kenyan High Court and implementation of the new tobacco control regulations were suspended by Justice Mumbi Ngugi.
March 2016	Lady Justice Mumbi Ngugi of the High Court of Kenya, dismisses BAT's petition against the constitutionality of the Tobacco Control Regulations. BAT immediately appeals the ruling to the Court of Appeal
17 February 2017	The Court of Appeal through a three judge Bench comprising of Lady Justice Hannah Okwengu, Justice Festus Azangalala and Lady Justice Fatuma Sichale dismissed BAT's Appeal against a judgement delivered by Judge Mumbi Ngugi of the High Court of Kenya.

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