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Administering the Mark of Cain: Secrecy and Exclusion in the FCTC Implementation Process

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ARTICLE

ADMINISTERING THE MARK OF CAIN:
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IMPLEMENTATION PROCESS

*Gregory F. Jacob**

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I. INTRODUCTION

The process for negotiating and implementing the Framework Convention on Tobacco Control (“FCTC”), the world’s first public health treaty and the first adopted under the auspices of the World Health Organization (“WHO”), has been characterized by novel features of secrecy and exclusion that cannot be reconciled with accepted norms of international lawmaking. The FCTC’s stated objective is to progressively reduce tobacco consumption “by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional, and international levels.”¹ That goal has significant economic implications that impact groups ranging from tobacco farmers to wholesalers to importers - yet blanket bans on public and media access have wholly excluded impacted groups from having any voice in, or even the ability to monitor, ongoing deliberations. In a clear and unabashed exercise of viewpoint discrimination, only favored NGOs that uniformly espouse swift and universal eradication of all tobacco products without regard to economic consequences have been exempted and allowed to participate in implementation proceedings. Even more extraordinarily, the FCTC’s “Conference of the Parties” (“COP”)—the international lawmaking body charged with elaborating and implementing the FCTC²—has advocated increasingly strident measures designed to render tobacco interests, and all who associate with them, international pariahs who are not merely excluded from deliberations but also *incapable of speaking*: to international negotiators, to domestic lawmakers, or even to the consumers of their products.

You might be thinking that if all this has really been happening, surely you would have heard of it before. But the truth is that the aforementioned public and media bans have proven very effective at discouraging mainstream media coverage of FCTC proceedings. What news organization has the cash to spare to send a reporter overseas to cover an event into which the reporter will not be admitted, to write a story that is virtually guaranteed to be limited by a near-total lack of access, concerning a treaty that few among the reading public even know about? In addition, no one (myself

1. WHO Framework Convention on Tobacco Control art. 3, May 21, 2003-June 29, 2004, 2302 U.N.T.S. 166 [hereinafter FCTC], http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf [https://perma.cc/8F7B-BYAP] (last visited Mar. 4, 2018).

2. *Id.* art. 23.

included) particularly relishes the thought of speaking out in what might be perceived to be a defense of highly disfavored tobacco interests.

It is high time, however, that serious scholarship set anti-tobacco prejudices aside and begin doing what scholarship at its best always does: shed light on an FCTC implementation process that has increasingly drifted in recent years from established norms of international lawmaking, and critically examine whether the most notable departures are justified. The time could not be riper for a fulsome examination, as the United Nations' Special Rapporteur on the Right to Food recently recommended that the FCTC be used as a model for the negotiation of other multilateral health instruments,³ and in November 2016 the head of the WHO FCTC Secretariat opened the seventh Conference of the Parties ("COP7") with a declaration that the sugar and alcohol industries should consider themselves next in line for a similar international convention.⁴ Before the process is in fact replicated, a serious and scholarly examination is warranted.

Scholarship concerning FCTC implementation is also timely because certain delegations at COP7 began, for the first time, to make serious objections to procedural and legal irregularities in the manner in which implementation deliberations were being conducted.⁵ Many objecting delegations at COP7 lacked the support of on-the-ground legal teams because their countries could not afford them, forcing them either to act without the benefit of legal counsel, or to rely on partisan NGOs—or the equally partisan WHO Secretariat—for legal guidance.⁶ These delegations deserve access to constructive scholarly

3. Hilal Elver (Special Rapporteur on the Right to Food), *Interim Rep. on the Right to Food*, at 24, U.N. Doc. A/71/282 (Aug. 3, 2016).

4. Dr. Vera de Costa e Silva, Head of the Convention Secretariat on Tobacco Control, Address at the Seventh Session of the Conference of Parties to the WHO Framework Convention on Tobacco Control FCTC/COP/7/DIV/3 (Nov. 9, 2018) [hereinafter FCTC/COP/7/DIV/3], http://www.who.int/fctc/cop/cop7/FCTC_COP_7_DIV3_EN.pdf?ua=1 [<https://perma.cc/79UE-9LJA>] (archived Mar. 4, 2018).

5. *A New Kind of COP with New Challenges*, Framework Convention Alliance Bull. No. 134 (Nov. 12, 2016) [hereinafter Framework Convention Alliance Bull], <http://www.fctc.org/publications/meeting-resources/cop7-bulletins/1496-a-new-kind-of-cop-with-new-challenges> [<https://perma.cc/32GF-EHXU>] (archived Mar. 4, 2018) (criticizing delegations for "raising procedural or legalistic arguments" and for "proposing provocative new language when Parties were close to agreement on a controversial item").

6. From the inception of FCTC negotiations, many countries with limited financial resources have been able to send only one or two delegates to negotiating sessions, and have

criticism providing a less insular view, and that can place the various novel features of recent FCTC implementation deliberations within the broader context of standard approaches to multilateral treaty making.

I am uniquely positioned—and perhaps uniquely responsible—to shed some of the requisite scholarly light. From 2001 to 2003, I served on the US delegation that helped negotiate the FCTC. Shortly after the negotiations concluded, I published an article arguing that the FCTC as finally adopted was substantively beneficial, yet was the product of a “deeply flawed [negotiation] process” that was both “broken” and “inefficient.”⁷ I urged then that the broken negotiating structure should not be replicated or used as a model for future negotiations, predicting that doing so would result in further warping of established norms of international lawmaking, and would in the long run generate poor and perhaps even extreme policy results.⁸ Having issued this warning, I left the stage of international lawmaking for more than a decade and did not look back. Just ahead of COP7 in 2016, however, I was contacted by the Reason Foundation, which inquired whether I would be willing to revisit my previous scholarship and analyze whether in light of subsequent developments my 2004 predictions have essentially come true. This Article is the product of that prompting, as well as a deep dive into the last twelve years of FCTC implementation deliberations, to the extent information on those deliberations could be obtained in the face of the increasingly cloistered and one-sided negotiation process.

To be clear, I am not an epidemiologist, and this Article will not opine on public health outcomes (although my admittedly amateur view is that the experienced and dedicated public health officials who dominate FCTC negotiations have adopted and promoted many worthy ideas concerning tobacco control policy over the course of the last decade.) I am, however, a student of and former participant in the making of international law and it is from that perspective that this article argues that the FCTC implementation process must be reformed to incorporate basic norms of transparency and deliberative process.

had to make do without legal counsel. See Gregory F. Jacob, *Without Reservation*, 5 CHI. J. INT'L L. 287, 290, 296 (2004).

7. *Id.* at 288-89.

8. *Id.*

II. BACKGROUND CONCERNING IMPLEMENTATION OF THE FCTC

As previously noted, the FCTC is the first international health treaty negotiated under the auspices of the WHO, a venerable international body established in 1948 that is dedicated to promoting global public health.⁹ The FCTC purports “to promote measures of tobacco control based on current and relevant scientific, technical and economic considerations.”¹⁰ To that end, the FCTC’s self-declared objective is to “provid[e] a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.”¹¹ The treaty thus expressly contemplates ongoing international and domestic law processes to tailor and refine the principles set forth in the framework convention for implementation and adoption at the national level.

The FCTC entered into force on February 27, 2005,¹² and as of the date of this Article’s publication has 180 parties. (The United States signed the treaty in 2004, but is not a party because it has not yet ratified it).¹³ Article 23 of the FCTC established the COP to continue work on the international aspects of FCTC implementation, directing that it “shall keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation and may adopt protocols, annexes and amendments to the Convention.”¹⁴ The COP is also empowered to establish (and has established) subsidiary bodies to help carry out the COP’s work and achieve the Convention’s objectives.¹⁵ There have been seven COPs since the FCTC went into effect; the first was held in Geneva in 2006 to establish rules of procedure to govern future COPs, and subsequent COPs were held in Bangkok (2007), Durban

9. FCTC, *supra* note 1, Foreword, at v.

10. FCTC, *supra* note 1, Preamble, at 3.

11. FCTC, *supra* note 1, art. 3, at 5.

12. FCTC, *supra* note 1.

13. *WHO Framework Convention on Tobacco Control, Status of Treaties*, U.N. Treaty Collection, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IX/IX-4.en.pdf> [<https://perma.cc/DNJ3-WZS6>] (last visited Mar. 4, 2018).

14. FCTC, *supra* note 1, art. 23.5, at 21.

15. FCTC, *supra* note 1, art. 23.5(f), at 22.

(2008), Punta del Este (2010), Seoul (2012), Moscow (2014), and Delhi (2016).¹⁶

The FCTC recognizes, however, that the on-the-ground work of tobacco control must primarily be done at the national level, through “nationally developed strategies,” “national coordinating mechanism[s],” and “legislative, executive, administrative and/or other measures” that are exclusively creatures of domestic law.¹⁷ Indeed, as I argued in my previous article on the subject, the FCTC is peculiar among multilateral treaties in that it “has remarkably little to do with international relations, and primarily covers matters pertaining purely to domestic law. Virtually every provision of the treaty could be enacted into law by willing countries, even in the treaty’s absence.”¹⁸ The individual work of the sovereign parties to the Convention at the national level is thus necessarily the primary driver of treaty implementation.

III. DIPLOMACY AS A TWO-LEVEL GAME, AND FCTC NEGOTIATION DYNAMICS

The fact that the FCTC is an international instrument that addresses almost exclusively domestic law subjects has resulted in markedly unusual negotiation dynamics. In his seminal article concerning the application of game theory to diplomatic affairs, *Diplomacy and domestic politics: the logic of two-level games*,¹⁹ Robert Putnam convincingly argued that “[d]omestic politics and international relations are often somehow entangled,” with negotiators making strategic moves at one level (say, in international treaty negotiations) primarily for the purpose of improving their strategic position at the other level (say, in domestic law making).²⁰

16. *Sessions of the Conference of the Parties to the WHO FCTC*, WHO Framework Convention on Tobacco Control, <http://www.who.int/fctc/cop/sessions/en/> [<https://perma.cc/73WA-FDLD>] (Mar. 4, 2018).

17. See, e.g., FCTC *supra* note 1, art. 4.1, at 5 (“effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level”); art. 4.2 (“at the national, regional and international levels”); art. 4.4, at 6 (“at the national, regional and international levels”); art. 4.5, at 6 (“as determined by each party within its jurisdiction”); art. 4.6, at 6 (“in the context of nationally developed strategies”); art. 5.2, at 7 (“a national coordinating mechanism”).

18. See Jacob, *supra* note 6, at 288.

19. See generally Robert Putnam, *Diplomacy and domestic politics: the logic of two-level games*, 42 INT’L ORG. 427 (1988).

20. *Id.* at 427.

From the outset, that dynamic has been fully on display in FCTC negotiations.

Because the FCTC is the world's first public health treaty and as originally conceived was supposed to primarily entail the development of model public health measures relating to tobacco consumption, most countries sent their public health ministers as their national representatives to negotiate the treaty.²¹ This basic representational structure has continued throughout the COP implementation process. Consequently, virtually every aspect of FCTC implementation is dominated by public health officials who when they arrive at the COPs, get to step out of the pitched battles of domestic politics they are used to fighting at home—in which they are constantly required to contend with opposing forces representing interests such as jobs, trade, intellectual property, and economic growth—and step instead into a gathering of almost entirely like-minded individuals who bear similar scars from frustrating domestic political experiences back home.²²

As it turns out—and as Putnam might have predicted—this collection of public health ministers has shown a marked proclivity to use the treaty-making and implementation process to achieve domestic policy goals that they have previously proved unable to convince their home governments to adopt through domestic lawmaking processes.²³ Some delegations have even expressly stated this intention, arguing that various treaty provisions should be tightened or strengthened so that their home governments could not interpret their way out of them.²⁴ These delegations, in other words, are (at least occasionally) using the COP implementation process to impose international law obligations on the nations they represent that their home governments would on balance prefer not to have.²⁵ Small

21. See Jacob, *supra* note 6, at 290.

22. *Id.* at 297-99.

23. See *id.* at 297-98.

24. Jacob, *supra*, note 6, at 298 (“It quickly became clear that many of the delegates had experienced frustration in the past in trying to persuade their home governments to adopt strong anti-tobacco measures. These delegates saw the FCTC as an opportunity to do an end-run around their governments by inserting strong anti-tobacco measures into the Convention and then relying on international political pressure to force their governments to join it. Some of the delegates openly admitted their ulterior agendas, making plaintive appeals from the floor of the negotiations that strong language be inserted in the treaty so that they could force the hand of their government back home.”).

25. See *id.*

wonder that such delegations regularly advocate for strict limits on public access to, and media coverage of, their activities.

Two additional groups that also exert significant influence over the course of FCTC implementation—the FCTC Secretariat, and a coalition of more than 500 anti-tobacco NGOs that calls itself the “Framework Convention Alliance”—have also demonstrated a proclivity to use the FCTC implementation process for the purpose of securing domestic law victories that had long proved elusive. Although these groups have very little formal power in COP deliberations, as they are not parties to the Convention and thus lack the power to vote, their soft power is considerable. The Secretariat sets the default COP agenda, and both the Secretariat and the NGOs frequently draft the base working documents that subsequently frame the deliberations of the COP and its subsidiary working group bodies.²⁶ Indeed, the power of the Secretariat and the NGOs during implementation deliberations has been further magnified by the absence of trained diplomats and lawyers from most delegations.²⁷ Smaller delegations, already ripe for NGO capture because of basic alignment of viewpoint, often rely almost exclusively on the Secretariat and the NGOs for legal advice concerning treaty implementation, even though both play a highly partisan role in the implementation process and have a poor track record of providing neutral and disinterested advice.²⁸

Like the COP delegations, the Secretariat and the NGOs are dominated by public health advocates.²⁹ These advocates have extensive scientific knowledge concerning the medical and sociological consequences of tobacco use and the relative

26. See *About the WHO FCTC Secretariat*, WHO Framework Convention on Tobacco Control, <http://www.who.int/fctc/secretariat/about/en/> [https://perma.cc/9DDA-XHF8] (last visited Mar. 4, 2018); see also *What Is The Framework Convention Alliance?*, Framework Convention Alliance, <http://www.fctc.org/about-fca> [https://perma.cc/X8T8-QU4N] (last visited Mar. 4, 2018).

27. See Jacob, *supra* note 6, at 290, 296.

28. See *id.* at 297 (“I greatly sympathized with the cause espoused by the NGOs in Geneva. Setting my own policy preferences aside, however, it is clear to me that it is not in the interests of the United States to participate in negotiations where NGOs exert tremendous influence over large numbers of delegates not because they are right on matters of substance, but rather because they are providing the only pro bono legal services available to delegates with no legal experience of their own. In filling this role, the NGOs certainly did not act as disinterested legal advisors, and along the way more than one delegation was hoodwinked into believing the NGOs’ all-too-frequently distorted versions of the truth.”); *id.* at 295-96 (providing specific examples).

29. See *id.* at 295; see also *About the WHO FCTC Secretariat*, *supra* note 26.

effectiveness of various cessation strategies, but they have little or no training in or knowledge of regulatory law, trade policy, intellectual property, job creation, or other economic impacts of tobacco control measures. Those, of course, are precisely the competing interests that domestic governments typically must grapple with, analyze, and balance in developing workable tobacco policy. From the perspective of the Secretariat and the NGOs, the COP thus represents a unique opportunity to sidestep the turbulent cut and thrust of domestic lawmaking, and to instead make their case to an international supra-legislature composed primarily of public health ministers that fundamentally agree with them on all core issues.

IV. FROM OPEN MEETINGS TO MEETINGS OPEN TO THE FAVORED FEW

In light of this tripartite, homogenous, coalition of the willing—health minister delegates, partisan Secretariat, and aligned NGOs—the one thing that might threaten to disrupt a steadfast march toward adoption of their preferred policy agenda would be a reintroduction of the voices of those economically impacted interests that have historically provided a policy counterbalance in domestic politics. Like many embattled interest groups before them, the anti-tobacco coalition determined at the outset of the FCTC implementation process that one of the easiest ways to ensure achievement of their policy goals would be to simply ban all of the groups they perceive to be “the opposition”—ban them from participating, ban them from watching, ban their domestic governments from talking to them, ban the public (which just might after all have been infiltrated by the forces of the opposition!), and ban the media from covering the vast majority of FCTC proceedings.

Perhaps most troubling of all, Article 5.3 of the FCTC, which received scant attention during the drafting of the Convention, has been weaponized and transformed into something it was never intended to be: a mandate that anyone who dares *even to associate* with tobacco interests be treated as pariahs who must be completely excluded from participating in international and domestic lawmaking processes relating to tobacco control.³⁰ Even Interpol (yes, Interpol!) has been prohibited from providing input to the COP on combating illicit trade in tobacco products, for the sole reason that it has the

30. See *infra* Part V.

temerity to work with the tobacco industry to track tobacco shipments.³¹ And in the months before COP7, the Secretariat pushed to force State Parties to excise from their sovereignly selected delegations government officials with ties of any kind even to state-owned tobacco interests, expressly threatening to deny such delegates diplomatic credentials and the ability to access or participate in negotiating sessions.³²

While I am sympathetic to the core public health goals being pursued by the anti-tobacco coalition, this article sounds a clarion call of warning for those who care about the *process* by which international law is made. Dislike of the tobacco industry should not blind us to the deeply problematic means increasingly being employed by the dominant FCTC interest groups to warp international and domestic lawmaking processes in ways they believe will help them achieve their short-term policy goals.

A substantial and growing scholarship shows that open decision-making processes characterized by transparency tend to produce markedly better policy outcomes than processes that are hidden or shielded from public view.³³ Indeed, the WHO is well aware of transparency's power. One of the WHO's foundational governing principles holds that "[i]nformed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people."³⁴ The WHO purports to champion that principle by regularly advocating for transparency in the implementation of public health measures.³⁵ Even the FCTC

31. See *infra* notes 67-68 and accompanying text.

32. Framework Convention on Tobacco Control [FCTC], *Maximizing Transparency of Parties' Delegations, Intergovernmental Organizations, Nongovernmental Organizations and Civil Society Groups During Sessions of the COP and Meetings of its Subsidiary Bodies*, ¶¶ 7-14, FCTC/COP/7/30 (July 13, 2016) [hereinafter FCTC/COP/7/30].

33. See, e.g., Dov Seidman, *The Transformative Power of Transparency*, N.Y. TIMES (May 23, 2014) (noting that transparency improves healthcare outcomes); Jake Rosenfeld & Patrick Denice, *The Power of Transparency: Evidence from a British Workplace Survey*, 80 AMERICAN SOC. REV. 1045 (2015); Abhijit Banerjee, Rema Hanna, Jordan C. Kyle, Benjamin A. Olken & Sudarno Sumarto, *The Power of Transparency: Information, Identification Cards and Food Subsidy Programs in Indonesia* (Nat'l Bureau of Econ. Research, Working Paper No. 20923, 2015).

34. *Constitution of the World Health Organization: Principles*, WORLD HEALTH ORGANIZATION [WHO], <http://www.who.int/about/mission/en/> (last visited February 5, 2018).

35. See, e.g., *The world health report 2002 - Reducing Risks, Promoting Healthy Life*, WHO, <http://www.who.int/whr/2002/en/> [<https://perma.cc/CL9W-TM5L>] (last visited Mar. 4, 2018) ("Trust can only be generated by openness. . . . [and]the public should be trusted to respond rationally to openness."); *WHO calls for increased transparency in medical research*,

Secretariat recognizes that transparency is a virtue; it recently published a report calling for “maximizing transparency of Parties’ delegations, intergovernmental organizations, nongovernmental organizations and civil society groups during sessions of the COP and meetings of subsidiary bodies” so that industry attempts to subvert sound tobacco control policy can be identified and avoided.³⁶ The FCTC’s expert group has similarly called for “systematic and transparent” analysis of evidence and for “coordinated and transparent application” of treaty provisions.³⁷ A fair examination of the FCTC implementation process, however, reveals that the WHO and the COP have not remotely been practicing what they preach.

Rule 32 of the procedural rules adopted at COP1 state that “[s]essions of the Conference of the Parties shall be held in public, unless the Conference of the Parties decides that they shall be restricted.”³⁸ The same rules apply to meetings of subsidiary bodies of the COP.³⁹ In effect, these rules established a presumption that all meetings of the COP and its subsidiary bodies should be public meetings, unless circumstances justify the COP restricting them through a consensus vote instead.

Rule 2 provides added meaning to the terms “public” and “restricted.” Rule 2 defines public meetings as “sessions or meetings that are open to attendance by Parties, States and regional economic integration organizations that are not Parties, the Secretariat, intergovernmental and nongovernmental organizations accredited by the Conference of the Parties pursuant to Rule 31 and members of the public.”⁴⁰ Restricted meetings are defined as those “held for a specific

MEDIA CENTRE OF THE WORLD HEALTH ORGANIZATION [WHO] (Apr. 2015), <http://www.who.int/mediacentre/news/notes/2015/medical-research-transparency/en/> [<https://perma.cc/FE3X-55CM>] (last visited Mar. 4, 2018); *Transparency during public health emergencies: from rhetoric to reality*, 87 BULLETIN OF THE WORLD HEALTH ORGANIZATION [WHO] 614-18 (2009), <http://www.who.int/bulletin/volumes/87/8/08-056689/en/> [<https://perma.cc/MKM7-P87Z>] (last visited September 25, 2016).

36. See FCTC/COP/7/30, *supra* note 32.

37. Framework Convention on Tobacco Control [FCTF], *Impact assessment of the WHO FCTC: Report by the Expert Group*, FCTC/COP/7/6 (July 27, 2016) [hereinafter FCTC/COP/7/6], http://www.who.int/fctc/cop/cop7/FCTC_COP_7_6_EN.pdf [<https://perma.cc/8TZE-KWBT>] (archived Mar. 4, 2018).

38. *Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control*, R. 32, WORLD HEALTH ORGANIZATION [WHO] (2006), http://www.who.int/fctc/cop/cop_rop_text_english.pdf [<https://perma.cc/58UR-FFLT>] (last visited Mar. 4, 2018).

39. *Id.* R. 25(3).

40. *Id.* R. 2(10).

purpose and under exceptional circumstances that are open to attendance by Parties and essential Secretariat staff.”⁴¹ These definitions lend further weight to Rule 32’s strong presumption that the COPs should conduct most of their work through meetings that are open to the public, by limiting “restricted” meetings to those held “for a specific purpose” and where “exceptional circumstances” exist.

At COP5, however, the proceedings of virtually all subsidiary body meetings were conducted in a manner that did not conform to these authorized formats.⁴² Without amending the governing Rules of Procedure, the COP implemented a new and unauthorized meeting format that excluded the public and the media, but permitted favored observers and NGOs to attend and participate.⁴³ The justification given for this departure from the rules was that the tobacco industry might otherwise send observers to watch (yes, watch!) the proceedings.⁴⁴ Exclusion of the public and the media was thus the

41. *Id.* R. 2(11).

42. Framework Convention on Tobacco Control [FCTC], *Possible amendments to the Rules of Procedure of the Conference of the Parties*, at 3, FCTC/COP/6/28 (July 11, 2014), (proposing amendment to Rule 2 that “would recognize current practice for subsidiary bodies typically established as ‘working groups,’ where the public is not invited to attend.”); Framework Convention on Tobacco Control [FCTC], *Report to the fifth session of the Conference of the Parties of the Chairperson of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products*, ¶ 10, FCTC/COP/5/7 (May 11, 2012) (“On the first day, the INB decided to continue its practice of the two previous sessions to exclude the public from observing the proceedings of the INB.”).

43. *Id.* (stating that the newly defined “open” session format, which had already become the “current practice for subsidiary bodies,” would allow only the following entities to attend: “Parties, States and regional economic integration organizations that are not Parties, the Secretariat, intergovernmental organizations and nongovernmental organizations that have observer status pursuant to Rules 30 and 31”); Framework Convention on Tobacco Control [FCTC], *Report of the sixth session of the Conference of the Parties to the WHO FCTC* (2014), ¶ 165 (Oct. 2014) (“[m]embers of the media would be considered as members of the public”) http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_Report-en.pdf [<https://perma.cc/JM8R-S8FC>] (archived Mar. 4, 2018); *Id.* ¶ 166 (summarizing debates over whether the general public should be permitted to attend even COP plenary sessions, in the face of arguments that “the admission of persons with links to the tobacco industry could hamper, or in some cases even threaten, the work of the COP”).

44. Framework Convention on Tobacco Control [FCTC], *Conference of the Parties to the WHO FCTC, Sixth Session, Verbatim Records of Plenary Meetings*, at 18 (Oct. 2014) (remarks of delegate Heyward of Australia) (“You will recall that at COP5 and some sessions of the INB on the protocol of illicit trade and tobacco products, valuable working time was taken up with consideration of whether to exclude the public from meetings. The decisions to exclude the public were prompted by concern at large numbers of tobacco industry representatives among public attendees, but had the effect of also excluding academics, students, and other members of civil society.”); *id.* at 20 (remarks of delegate Ndyabangi of Uganda) (“We know from our history how members of delegations could not contribute

only way to ensure that the tobacco industry could reliably be kept out.⁴⁵

At COP6, an amendment to the rules was adopted to provide a legal basis for this alternate meeting format, called “open,” which describes “sessions or meetings that are open to attendance by Parties, States and regional economic integration organizations that are not Parties, the Secretariat, intergovernmental organizations and nongovernmental organizations that have observer status.”⁴⁶ Rule 32 was not amended, however, thus leaving intact the presumption in the original Rules of Procedure favoring open meetings absent “exceptional circumstances,” a “specific purpose,” and a consensus decision to keep the public and the media out. Nevertheless, the Convention Secretariat noted in a report issued ahead of COP7 that “the last two COP sessions decided to close meetings to the public,” and predicted a “high likelihood of another such decision by the Parties in the forthcoming COP sessions”⁴⁷ And that is precisely what happened, although no specific purpose or exceptional circumstances were cited in support of COP7’s decision.⁴⁸

Nor is that the end of measures taken to minimize public scrutiny of COP deliberations. COP5 ended the previous practice of including in the summary records of subsidiary body meetings “[e]ach speaker’s intervention,” which were recorded and provided for the purpose of “obtain[ing] an accurate and detailed summary of

because of big tobacco being among the public, and we should not underestimate the power of the tobacco industry, especially at a political level, that we may have some delegations who may not be able to express their opinions because of the tobacco control efforts back in their capitals. ... I think until we have amended the Rules of Procedure and we are very clear that the methods of screening are thorough, we should not allow members of the public to continue attending the present session, because we may as well have members of the tobacco industry within the public and they will hinder the discussions of the meetings of this COP.”); *id.* at 21 (statement of Mr. Solomon of the WHO Office of Legal Counsel) (“The fourth thing being discussed is a proposal to adopt a decision that was taken in COP5 and at the intergovernmental negotiating bodies for the Protocol, which would be to exclude members of the public on an ad hoc basis until a decision on this matter is reached.”).

45. *See id.*

46. Framework Convention on Tobacco Control [FCTC], *Amendments to the Rules of Procedure of the Conference of the Parties to the WHO FCTC*, FCTC/COP6(24) (Oct. 18, 2014), http://apps.who.int/iris/bitstream/10665/146108/1/FCTC_COP6%2824%29-en.pdf [<https://perma.cc/29XC-8EG5>] (archived Mar. 4, 2018).

47. FCTC/COP/7/30, *supra* note 32, ¶ 4.

48. Kevin Mooney, *Taxpayer-funded U.N. anti-tobacco convention closes out the press*, WASH. EXAMINER (Nov. 1, 2016), <http://www.washingtonexaminer.com/taxpayer-funded-un-anti-tobacco-convention-closes-out-the-press/article/2606161> [<https://perma.cc/CQE3-L984>] (archived Mar. 4, 2018).

the debate.”⁴⁹ That change was significant because the vast majority of the detail work of Convention implementation occurs at subsidiary body meetings, and the detailed records allowed those not personally present in the room to follow the course of the debate, and to know which countries were responsible for the various proposals and negotiating positions. The Convention Secretariat also proposed at COP5 to abandon the required production of verbatim records of COP sessions, labeling the proposal an “efficiency measure” even though it was forced to admit that the cost to produce the verbatim records was in fact quite small.⁵⁰ At COP7 the Convention Secretariat went further, proposing amendments to the rules that would eliminate *all* verbatim reporting of FCTC policymaking.⁵¹ The COP adopted the proposed amendment with respect to discussions and debates in subsidiary bodies, although it decided to keep verbatim reporting for the typically more anodyne plenary sessions.⁵²

V. PURIFYING THE PARTICIPANTS: ARTICLE 5.3 AND THE TEST FOR TAINT AS A REQUIREMENT FOR ADMISSION TO TOBACCO POLICY DELIBERATIONS AT THE INTERNATIONAL AND NATIONAL LEVEL

Since the FCTC went into force, the WHO FCTC Secretariat and aligned NGOs have waged an open campaign to adopt highly aggressive interpretations of the FCTC and its procedural rules intended to isolate disfavored tobacco interests and completely ban them from all forms of participation in public policy debates, at both the international and the domestic level. Dr. Vera da Costa e Silva,

49. Framework Convention on Tobacco Control [FCTC], *Proposed workplan and budget for the financial period 2014–2015*, FCTC/COP/5/23 (Sept. 4, 2012) [hereinafter FCTC/COP/5/23], http://apps.who.int/gb/fctc/PDF/cop5/FCTC_COP5_23-en.pdf [https://perma.cc/PKE3-3BF7] (archived Mar. 4, 2018); see also Framework Convention on Tobacco Control [FCTC], *Performance report for the 2010–2011 workplan and budget*, FCTC/COP/5/19 (June 30, 2012), http://apps.who.int/iris/bitstream/10665/75815/1/FCTC_COP5_19-en.pdf [https://perma.cc/DD3R-F3YR] (archived Mar. 4, 2018).

50. FCTC/COP/5/23, *supra* note 49, ¶ 20. The Secretariat acknowledged that “the actual cost of the production of the verbatim records as currently produced may not be seen as significant . . . because it normally represents approximately US\$ 20,000–US\$ 25,000, excluding costs for printing and dispatch.” *Id.*

51. FCTC, *Possible amendments*, *supra* note 42.

52. Framework Convention on Tobacco Control [FCTC], *Report of the seventh session of the Conference of the Parties to the WHO FCTC*, at 121–22, FCTC/COP/7/DIV/3 (Nov. 2016), http://www.who.int/fctc/cop/cop7/FINAL_COP7_REPORT_EN.pdf?ua=1 [https://perma.cc/HB4D-UMAS] (archived Mar. 4, 2018).

Head of the Convention Secretariat, made this approach plain in her opening speech to COP7:

There is another observer here too, although its representatives may not always wear badges. The tobacco industry takes a very keen interest in COP meetings and makes every effort to insinuate itself into delegations and proceedings. If anyone doubts the importance of what we do here, always remember the industry's malevolent presence and the strong need for transparency.⁵³

(Transparency for tobacco interests, that is—not for the Secretariat, the NGOs, or the COP.) The Framework Convention Alliance echoed a similar sentiment in its closing words for COP7, lamenting “delegates who are faced with tobacco industry interference in their home countries”—“interference” being the term that the Alliance regularly use to describe any expression of opposing viewpoints.⁵⁴

In recent years, Article 5.3 of the FCTC has emerged as the primary international law weapon of those seeking to gag and exclude tobacco interests. As one NGO put it, “the FCTC includes a critical provision—Article 5.3—that recognizes the tobacco industry’s irreconcilable conflict of interest with public health. The article is the backbone of the treaty; the treaty cannot succeed if industry interference is not rooted out.”⁵⁵ Not expressly stated, but implicit in these strategies, is the knowledge that it is far easier to win a policy debate if there is no opposing interest—for example, no poor tobacco farmer whose livelihood is at risk of being lost if policy changes are implemented without due regard for transitional needs—to express economic, due process, free speech, liberty, or other similar concerns.

Article 5.3 is a markedly strange choice of vehicle for such a campaign of silence, as the unassuming provision received scant attention during the FCTC negotiations. As adopted, Article 5.3 provides that “[i]n 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

53. See FCTC/COP/7/DIV/3, *supra* note 4.

54. See Framework Convention Alliance Bull, *supra* note 5.

55. See, e.g., *Roadmap to Protecting Health from Big Tobacco*, CORP.ACCOUNTABILITY INT’L (Sept. 2017) [hereinafter CAI Roadmap], https://www.corporateaccountability.org/wp-content/uploads/2017/09/map_booklet_en_web.pdf [https://perma.cc/H9C2-ZB4H] (archived Mar. 4, 2018)

tobacco industry in accordance with national law.”⁵⁶ Although this language was amended a handful of times during the course of the treaty negotiations, Article 5.3 was never viewed by negotiators as establishing one of the treaty’s core substantive obligations, and no INB breakout sessions were dedicated to shaping its language.⁵⁷

In the consolidated Chair’s Text released ahead of INB5, Article 5.3’s precursor provided that “[i]n setting and implementing their public health policies, the Parties shall avoid harmful interference by the tobacco industry.”⁵⁸ That language was considered too strong by many delegations, particularly those with national constitutions that mandate transparent governance processes and vest all lawful stakeholders with civic participation rights. Article 5.3 was accordingly softened in its final version by removing the terms “avoid,” “harmful,” and “interference” from the Chair’s Text, and by adding the expressly stated limitation that protective measures adopted pursuant to Article 5.3 need only be implemented “in accordance with national law.”⁵⁹

No delegation participating in the INBs ever suggested that Article 5.3 should be read to mandate a general ban on all tobacco industry participation in (or even passive observation of!) international and domestic policymaking relating to tobacco control.⁶⁰ Such a provision could never have been adopted, and the final text says nothing of the sort.⁶¹ The final language of Article 5.3 is, however, not a model of clarity, and advocates (led by the Secretariat and the NGOs) have stepped into the interpretive void and twisted the nebulous provision’s meaning beyond recognition to serve their own ends.

Most prominent among the official FCTC documents that purport to interpret and implement Article 5.3 are the “Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on

56. FCTC, *supra* note 1, art. 5.3.

57. A review of the records of the FCTC’s INB breakout sessions reveals that none were dedicated to shaping Article 5.3. Assertions in the text about the views of the FCTC negotiators are supported by the absence of contrary statements in the negotiating records, as well as by the author’s own personal observations as one of the FCTC negotiators.

58. Framework Convention on Tobacco Control (FCTC), *Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control* (Oct. 22, 2002) [hereinafter Art. 5.3 Guidelines], http://www.who.int/fctc/guidelines/article_5_3.pdf [<https://perma.cc/J6AC-7W86>] (archived Mar. 4, 2018).

59. Compare FCTC, *supra* note 1, art 5.3, at 7, with Art. 5.3 Guidelines, *supra* note 58.

60. See *supra* note 57.

61. The text of Article 5.3 speaks for itself. Otherwise, see *supra* note 57.

Tobacco Control” (“Article 5.3 Guidelines”) which were drafted between COP2 and COP3,⁶² and were adopted by the COP in November 2008.⁶³ The Article 5.3 Guidelines call for, *inter alia*, “establish[ing] measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur,” “denormaliz[ing] and, to the extent possible, regulat[ing] activities described as ‘socially responsible’ by the tobacco industry, including but not limited to activities described as ‘corporate social responsibility,’” and “reject[ing] partnerships and non-binding or non-enforceable agreements with the tobacco industry.”⁶⁴ According to the Article 5.3 Guidelines, these and its multitude of other recommended measures “aim at protecting against interference not only by the tobacco industry but also, as appropriate, by organizations and individuals that work to further the interests of the tobacco industry.”⁶⁵

A. Application of Article 5.3 to Achieve Purity and Isolation at the International Level

The various measures recommended in the Article 5.3 Guidelines and similar FCTC implementation documents are neither mandatory nor binding. Their quasi-official status, however, has lent an air of credibility to hardline advocates who maintain that Article 5.3 prohibits Parties from allowing both their international delegations and their domestic governments to lend an ear to tobacco interests. For example, when COP6 began to consider how to provide economically viable alternatives to tobacco farmers who depend on growing and selling tobacco to survive, international farming associations were outright excluded from providing input of any kind, solely because they had an economic interest in tobacco farming.⁶⁶ Of

62. Framework Convention on Tobacco Control [FCTC], *Decisions*, A/FCTC/COP2/DIV/9 (Sept. 20, 2007), http://apps.who.int/gb/fctc/PDF/cop2/FCTC_COP2_DIV9-en.pdf [<https://perma.cc/ZU25-EA2W>] (archived Mar. 4, 2018).

63. *Id.*

64. Art. 5.3 Guidelines, *supra* note 58, ¶ 17.

65. *Id.* ¶ 11.

66. Framework Convention on Tobacco Control [FCTC], *Decision*, at 1, FCTC/COP6(2) (Oct. 16, 2014) [hereinafter COP6(2)] (rejecting the application of the World Farmer’s Organization for observer status); Framework Convention on Tobacco Control [FCTC], *Applications for the status of observer to the Conference of the Parties*, at 3, FCTC/COP/6/3 (June 25, 2014) (describing the World Farmer Organization’s economic interests in the COP deliberations); *Verbatim Records of Plenary Meetings*, *supra* note 44, at

course they did! Much as labor unions have an economic interest in international labor policy—yet one could hardly imagine attempting to exclude unions (or business interests, for that matter) from participating in International Labour Organization (“ILO”) deliberations, solely because they have an economic interest in the matters under discussion. Economic interests should of course always be transparently disclosed so that conflicts of interest can be identified and considered when crafting policy, but it is senseless for policymakers to cut themselves off entirely from useful sources of data and information. And while advocates such as Dr. da Costa e Silva and the Convention Secretariat are of course free to label tobacco farmers a “malevolent” force if they wish,⁶⁷ even such disfavored groups have civil rights of participation and association that are guaranteed by (among other treaties and conventions), the

10 (remarks of delegate Mishra of India) (“I speak on behalf of the South-East Asia Region. As far as the farmers’ organization is concerned, we need to be a little guarded in the matter. In our view, the acceptance of the application from the organization at this stage, without adequate safeguards and mechanisms to ensure that there is no association with the tobacco industry, may be premature. We would like to clarify that the issues of engaging and helping farmers in the context of policy options and guidelines under Articles 17 and 18 are important, and need to be carefully considered. However, we need to block the entry of the tobacco industry in any manner whatsoever and therefore this decision to accept the application of the World Farmers Organization for conferring the status of observer may perhaps presently be premature.”); *id.* at 14 (remarks of delegate Kiptui of Kenya) (“The concerns that we have with this application as the African Region is that it is just a farmer organization, and as Uganda earlier mentioned, there is a risk of the tobacco industry entering through this organization, it is the opinion of the African Region that it is rejected until it proves that it has interest in tobacco control and not to intervene as a farmer organization, pushing the interest of tobacco farmers. Secondly, this organization has no information on tobacco control activities or even examples of diversification, and they have not proved to have any expertise in supporting diversification of tobacco farmers to healthier and more profitable crops or alternative livelihoods for tobacco farmers, and therefore we propose that it be rejected until a point where they have actually evidence and proof that they want to support tobacco control, and they can have demonstrable evidence of the work they have done, then it can be considered at that time.”); *id.* (adopting Kenya’s proposal to reject the World Farmers Organization’s application).

67. See Address by Dr. Vera da Costa e Silva, *supra* note 4. See also *Model policy for agencies of the United Nations system on preventing tobacco industry interference*, WORLD HEALTH ORGANIZATION [WHO] TASK FORCE, <http://www.who.int/ncds/un-task-force/events/model-policy-agencies-united-nations1.pdf> [https://perma.cc/H5XH-3RFK] (archived Mar. 4, 2018) (defining “tobacco industry” to include “tobacco growers, manufacturers, wholesale distributors and importers of tobacco products, including State-owned, as well as lobbyists and associations”); Framework Convention on Tobacco Control [FCTC], *Implementation of Article 5.3 of the WHO FCTC* (July 27, 2016), http://www.who.int/fctc/cop/cop7/FCTC_COP_7_7_EN.pdf?ua=1 [https://perma.cc/CR8L-V8DV] (archived Mar. 19, 2018).

Universal Declaration of Human Rights.⁶⁸ These fundamental international law guarantees have been given next to no weight in COP proceedings, however; when a group of tobacco farmers showed up outside of the COP7 meetings in Delhi to peaceably protest their continuing exclusion from deliberations, the Convention Secretariat called upon security to round them up and bus them miles away, to a location where COP delegates could neither hear nor see them.⁶⁹

For the most extreme anti-tobacco advocates, it has not been enough merely to silence impacted groups from having a voice in policy debates. These advocates have pushed for a substantially deeper level of isolation for tobacco interests, demanding (oftentimes successfully) that any government official or international organization that has contact of any kind with the tobacco industry must *itself* be shunned, isolated, and barred from participating in FCTC proceedings. The goal of these advocates, of course, is to substantially disincentivize both domestic governments and international organizations from holding meetings with or otherwise listening to tobacco-affiliated interests, without regard to the topic under discussion. Application of this policy has, for example, resulted in the highly respected international law enforcement organization Interpol being excluded from the FCTC's implementation discussions concerning the prevention of illicit trade in tobacco.⁷⁰ Despite the fact that Interpol is perhaps the most prominent international organization in the world seeking to put a stop to the deeply problematic illicit trade in tobacco products, it has twice been denied credentials to participate in FCTC discussions concerning illicit trade *solely* because it occasionally cooperates with certain tobacco companies to track

68. See G.A. Res. 217 (III) A, at 19, Universal Declaration of Human Rights (Dec. 10, 1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [<https://perma.cc/Z46W-QW3C>] (archived Mar. 4, 2018) (“Everyone has the right to freedom of opinion and expression”); art. 20 (“Everyone has the right to freedom of peaceful assembly and association”); art. 21 (“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”), art. 23 (“Everyone has the right to work”); art. 28 (“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”).

69. Lauren Southern, New attack on free speech in Delhi: Protesting tobacco farmers rounded up outside UN conference, then “dropped off in the middle of nowhere,” REBEL MEDIA (Nov. 8, 2016), https://www.therebel.media/delhi_protesting_tobacco_farmers_rounded_up_outside_un_conference [<https://perma.cc/C6FM-M4YV>] (archived Mar. 4, 2018).

70. FCTC, *Possible amendments*, *supra* note 42.

shipments.⁷¹ Whatever one may think of government cooperation with the tobacco industry as a general matter, combating illicit trade is clearly an area in which governments and the tobacco industry have a synergy of interests that makes cooperation sensible and perhaps even necessary. Tobacco product packaging and associated tracking mechanisms play a key role in preventing illicit trade,⁷² and there are aspects of law enforcement policies designed to combat illicit trade that necessarily require implementation by tobacco interests.

The sovereign rights of State Parties to the Convention have enjoyed no immunity from the campaign to prevent industry perspective from infiltrating FCTC proceedings. Many State Parties to the Convention have state-run tobacco monopolies that play an important part in those countries' national tobacco control efforts.⁷³ Not only are those monopolies directly impacted by the policies set forth in the Convention, but they also have a valuable perspective to offer on many of the Convention's key tobacco control initiatives, including illicit trade. The Convention Secretariat let it be known heading into COP7, however, that State Parties no longer (in its view) enjoy the sovereign right to send delegates of their choosing to negotiating sessions; the Secretariat recommended that any delegates with ties to state-run tobacco monopolies or even links to tobacco farmers be denied credentials and barred from participating in negotiations.⁷⁴ The Secretariat further recommended that all delegates and observers to COPs be required to fill out a "declaration of interest" form that the Secretariat could use to sniff out individuals that it deemed to be improperly affiliated with the tobacco industry and designate them for exclusion.⁷⁵ This extraordinary proposal actually sparked some resistance from several of the delegations at COP7, which pointed out in response to the Secretariat's proposal that

71. Framework Convention on Tobacco Control [FCTC], *INTERPOL's application for the status of observer to the Conference of the Parties*, FCTC/COP/6/4 (June 12, 2014), http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_4-en.pdf [<https://perma.cc/94JN-KPPP>] (archived Mar. 4, 2018).

72. See, e.g., FCTC, *supra* note 1, art. 15 (requiring all parties to the FCTC to adopt packaging and tracking measures to combat illicit trade in tobacco products).

73. For a WHO-published world map of state-run tobacco monopolies, which "represent a combined consumption of 2 billion cigarettes or 40 percent of the world's total cigarette consumption," see *Tobacco Companies*, WORLD HEALTH ORGANIZATION [WHO], <http://www.who.int/tobacco/en/atlas18.pdf> [<https://perma.cc/3D3X-PPHC>] (archived Mar. 4, 2018).

74. FCTC/COP/7/30, *supra* note 32, ¶¶ 7-14.

75. *Id.* ¶¶ 13-14.

Article 5.3 in fact does not say anything at all about exclusion, bans on participation, or limitations on the sovereign right to assemble representative delegations.⁷⁶ The measure was accordingly tabled for further discussion at COP8—at which time the Secretariat is expected to take a second shot at using its considerable influence to push the measure through.⁷⁷

The Article 5.3 Guidelines seek not only to isolate and exclude tobacco interests from having any voice in policymaking, but also to prohibit them from engaging in and publicizing activities that might cause the public to view them in a favorable light. The FCTC itself expressly imposes a comprehensive ban on all tobacco advertising for all State Parties that are constitutionally able to do so.⁷⁸ The Article 5.3 Guidelines, however, purport to go substantially further, requiring all State Parties to adopt measures to prevent the tobacco industry from engaging in socially responsible activities, including corporate social responsibility.⁷⁹ One report issued by the Convention Secretariat, for example, deplors Japan Tobacco International's work with the ILO to “develop and implement activities that progressively eliminate child labour and address conditions that drive tobacco farmers to engage children in hazardous work.”⁸⁰ The same report criticizes the UN Global Compact for accepting money from tobacco interests “to promote responsible corporate citizenship as one way to advance sustainable development,” and the UN High Commissioner for Refugees for recognizing British-American Tobacco's efforts to “generat[e] job opportunities for refugees.”⁸¹ Multiple parties to the Convention have been persuaded by this and other official documents to enact bans on tobacco companies making charitable contributions or engaging in corporate social responsibility.⁸²

The clear message: because it is essential that the public understand that the tobacco industry is unequivocally evil,

76. FCTC, *Report of the seventh session*, *supra* note 52, ¶¶ 164-65, 167.

77. *Id.*

78. FCTC, *supra* note 1, art. 13.

79. Art. 5.3 Guidelines, *supra* note 58, ¶ 26-27 and Recommendations 6.1-6.3, at 7-8.

80. Framework Convention on Tobacco Control [FCTC], *UN agencies and tobacco industry interference: Examples of good practice from UN agencies*, <http://apps.who.int/ctc/implementation/database/sites/implementation/files/documents/resources/UN%20agencies%20and%20tobacco%20industry%20interference.pdf> [https://perma.cc/J7RZ-MUZT] (archived Mar. 4, 2018).

81. *Id.*

82. CAI Roadmap, *supra* note 55, at 2.

unprecedented steps must be taken to ensure that the industry is prevented as a matter of law from using its financial resources to do good. Whatever the merits of that idea, it is a rather curious application of Article 5.3, which calls on parties only “to protect [tobacco control] policies from commercial and other vested interests of the tobacco industry in accordance with national law.”⁸³ Such a substantial interpretive leap, fraught with significant public policy consequences, would not under normal processes for the implementation of international law be accorded the imprimatur of any kind of official status without first being subjected to rigorous examination and debate. The Article 5.3 Guidelines, however, were adopted at COP3 with virtually no meaningful discussion, in large part because the “guidelines” were denominated non-binding, were not supposed to impose new legal obligations under international law, and were expressly noted to be “designed to *assist* Parties” in setting tobacco control policy.⁸⁴ As described above, however, in practice the Article 5.3 Guidelines have in fact been accorded a much more substantive effect, and held up by partisans of all stripes—including the sophisticated Secretariat—as embodying rock-ribbed obligations that are binding on the State Parties to the Convention. The uses to which the Article 5.3 Guidelines have subsequently been put counsel in favor of much greater scrutiny by COP delegations of all future efforts to elaborate through official channels the meaning of the FCTC—including in particular COP7’s directive that the Secretariat should prepare another working document for COP8 to further develop the Article 5.3 Guidelines.

B. Application of Article 5.3 to Achieve Purity and Isolation at the National Level

The Article 5.3 Guidelines were also intended to bar tobacco interests from gaining access to national governments for purposes of influencing domestic law policymaking. Although, as noted above, the guidelines on this subject purport to be “recommendations” with no binding effect, they in fact expressly urge all Parties “to use and enforce mechanisms *to ensure compliance with these guidelines, such*

83. FCTC, *supra* note 1, art. 5.3, at 7.

84. Framework Convention on Tobacco Control, *Decisions*, (Feb. 16, 2009), http://apps.who.int/gb/ftc/PDF/cop2/FCTC_COP2_DIV9-en.pdf [https://perma.cc/AJ23-LXXY] (archived Mar. 19, 2018).

as the possibility of bringing an action to court.”⁸⁵ One does not “ensure compliance” with a guideline, or bring an action in court over failure to implement a mere recommendation.

In fact, a campaign of litigation and intimidation has been waged by advocates since the Article 5.3 Guidelines were first published to leverage the self-declared “recommendations” into practical mandates. For example, in September of 2014, the Youth Smoking Prevention Foundation sued the government of the Netherlands for its alleged failure to uphold Article 5.3 of the FCTC.⁸⁶ The thrust of the complaint was that the Dutch government had allowed tobacco companies to have input into lawmaking, including through a non-public meeting that the minister of finance accepted with tobacco interests.⁸⁷ The court in the Netherlands ultimately agreed that such standard government practices as holding informal meetings with constituents did not violate any provision of the FCTC, including Article 5.3.⁸⁸ Advocates, however, were able to claim a substantive victory in the end, as the litigation generated immense public pressure and media attention concerning the purported international law “obligations” that had allegedly been violated, which influenced the Dutch government to adopt measures severely limiting communications between government officials and tobacco interests on a going-forward basis.⁸⁹

Other similar lawsuits have also been filed. All such court cases brought to date have (correctly, in my view) been dismissed as meritless.⁹⁰ The interest groups supporting them, however, continue

85. *Id.* ¶ 34 (emphasis added).

86. Dutch court loss produces a win, Framework Convention Alliance, <http://www.fctc.org/media-and-publications/media-releases-blog-list-view-of-all-313/industry-interference/1369-dutch-court-loss-produces-a-win> [<https://perma.cc/M5LU-2VBP>] (last visited Mar. 4, 2018).

87. See generally *Youth Smoking Prevention Foundation v. Netherlands*, Case C/09/475711 E.C.R. [2015], https://www.tobaccocontrolaws.org/files/live/litigation/2394/NL_Youth%20Smoking%20Prevention%20Found.pdf [<https://perma.cc/TZ49-VBW4>] (archived Mar. 4, 2018).

88. *Id.*

89. *Clarification of Interpretation of Article 5.3*, Tabaknee, http://www.tabaknee.nl/images/stories/docs/clarification_implementation_art5.3.pdf [<https://perma.cc/EH2M-YTZF>] (archived Mar. 4, 2018).

90. See, e.g., *Institute of Public Health v. Union of India*, (2015) ILR (Del.), https://www.tobaccocontrolaws.org/files/live/litigation/2390/IN_Institute%20of%20Public%20Health%20v.%20.pdf [<https://perma.cc/DC5T-86KS>] (archived Mar. 4, 2018) (“[A]ll that Article 5.3 thereof requires is the covenanting States to protect its policies from commercial and other vested interests of the tobacco industry in accordance with national law. The

to seek to leverage the Article 5.3 Guidelines, both inside and outside the courtroom, to persuade national governments to adopt measures starkly singling out tobacco-affiliated interests for a unique form of public policy isolation that deprives them both of any voice in policymaking and of any access to those in positions with lawmaking authority.⁹¹

After years of observable practice, it is now also clear that the radical campaign of secrecy and exclusion that the Convention Secretariat and like-minded NGOs have been pursuing is, at times, producing decidedly perverse policy outcomes. When efforts to end child labor and to provide employment to refugees are sacrificed at the altar of isolating and stigmatizing tobacco interests, when Interpol is banned from participating in discussions about ending illicit trade because of its perceived taint from innocuous collaboration with tobacco companies on tracking their products, and when a resolution urging that governmental regulations of e-cigarettes and vaping devices should be supported by evidence-based science is voted down out of concern that science would not support the desired regulatory outcomes,⁹² a re-examination of the implementation process that is currently being employed is clearly called for. Indeed, it is demanded.

VI. ESTABLISHED NORMS OF TRANSPARENCY IN INTERNATIONAL NEGOTIATIONS

To summarize the above, through the last several COPs, FCTC policymaking has become increasingly non-transparent. The public has been shut out. The media has been shut out. Organizations and

Guidelines issued thereunder (though in spite of our asking, we were not shown the power to make the guidelines or anything to indicate that India has accepted the said guidelines) too only require interaction with the tobacco industry on matters related to tobacco control or public health to be accountable and transparent and do not prohibit the governments of the covenanting States from participating in conferences even if sponsored/co-hosted by the tobacco industry.”).

91. See, e.g., *NGOs Issue Global Call On Namibia To Stand Strong Against Tobacco Industry Bullying*, Framework Convention Alliance, <http://www.fctc.org/media-and-publications/media-releases-blog-list-view-of-all-313/industry-interference/628-ngos-issue-global-call-on-namibia-to-stand-strong-against-tobacco-industry-bullying#sthash.BUDP5nDC.dpuf> [https://perma.cc/82HW-YVXX] (last visited Mar. 4, 2018) (“Under . . . the global tobacco treaty . . . and its Article 5.3 Guidelines[,] governments should refuse to . . . treat tobacco corporations as ‘stakeholders’ in public health policy . . . [or] accept their so-called corporate social responsibility schemes”).

92. FCTC, *Report of the seventh session*, *supra* note 52.

individuals even remotely associated with tobacco interests have been banned. And records of FCTC implementation deliberations have been increasingly stripped bare, to the point that future COPs can be expected to produce only summary reports for all subsidiary body working groups, which will report on ultimate conclusions and outcomes, but will not provide any means for the public, the media, or affected groups to discern which organizations or delegations were the primary drivers of the policies that were ultimately adopted, what the supporting reasons were, who expressed dissenting views, or why those views were overcome.⁹³

The increasing move towards non-transparency and exclusion at the FCTC COPs is a stark departure from the norm for international negotiations, and is entirely irreconcilable with the transparency principles that the WHO and the Convention Secretariat themselves espouse as an essential means of identifying and combating tobacco industry machinations. The highly regarded International Law Association has promulgated best practices for international negotiations (called the Recommended Rules and Practices, or “RRPs”) that are drawn from the experience of respected academics and judges from a wide variety of states.⁹⁴ The RRP provides that “[n]ormative decisions of an [international organization, or “IO”] should as a general rule be adopted by a public vote.”⁹⁵ They further call for IOs to transparently state the reasons supporting all decisions made: “Organs of an IO are under an obligation to state reasons for their decisions,” and “[n]on-plenary organs should reflect in their reports information of a non-confidential nature forming the basis of their decisions.”⁹⁶ According to the RRP, openness, transparency, and objectivity are essential elements of a well-tuned international negotiation process: “Non-plenary organs acting on behalf of the whole membership under the governing provisions of an [international organization] have a special obligation to act as transparently as possible, and should reduce as far as possible the number of non-public meetings.”⁹⁷ “An [international organization]

93. *See supra* note 52 and accompanying text.

94. INT’L L. ASS’N BERLIN CONF., *Accountability of International Organizations*, 1 INT’L ORG. L. REV. (2004).

95. *Id.*

96. *Id.*

97. *Id.*

should conduct its institutional and operational activities in a manner which is objective and impartial and can be seen to be so.”

The General Assembly of the United Nations, perhaps the most widely known and respected international governing body in the world, has demonstrated through decades of practice how well these principles can operate. Article 60 of the UN General Assembly Rules of Procedure is similar to the FCTC’s Article 32, and provides that “the meetings of the General Assembly and its Main Committees shall be held in public unless the organ concerned decides that exceptional circumstances require that the meeting be held in private. Meetings of other committees and subcommittees shall also be held in public unless the organ concerned decides otherwise.”⁹⁸ While meetings of the General Assembly are, on rare occasion, closed to public observation for security reasons, the UN has demonstrated its commitment to transparency in recent years by using modern technology to stream nearly all General Assembly meetings on the Internet.⁹⁹

Nor is the UN the only relevant example; openness and transparency have also proven effective for implementing multilateral framework conventions. COP21 of the Climate Change Framework, for example, has been lauded as an immense success, in no small part because it employed a process that valued inclusion, debate and diversity of opinion. Proceedings were entirely open to journalists and accredited intergovernmental bodies,¹⁰⁰ and the COP allowed thousands of organizations to be accredited, including industry groups representing a wide variety of viewpoints.¹⁰¹ In addition, a large space called the Climate Generations Area was set up at COP21 so that civil society could openly share opinions, debate, and even (gasp!) attempt to influence the Parties who were actively involved in the

98. *Rules of Procedure*, U.N. GENERAL ASSEMBLY, <http://www.un.org/en/ga/about/ropga/mtgs.shtml> [https://perma.cc/LJ98-4TTV] (last visited Mar. 4, 2018).

99. *Meetings*, U.N. GENERAL ASSEMBLY, <http://www.un.org/en/ga/meetings/> [https://perma.cc/K5CQ-NSL3] (last visited Mar. 4, 2018).

100. *FAQS*, Paris COP 21-CMP11, <http://www.un.org/sustainabledevelopment/wp-content/uploads/2015/10/COP21-FAQs.pdf> [https://perma.cc/L3TJ-YSU7] (archived Mar. 20, 2018).

101. *The Role of the Business Sector in Climate Negotiations: Interview with Nils Moussu*, EUROPEAN COMMISSION, <https://ec.europa.eu/research/social-sciences/index.cfm?pg=newspage&item=151126> [https://perma.cc/VEB9-GBJ8] (last visited Mar. 4, 2018).

negotiations.¹⁰² This investment in transparency and inclusion paid dividends, allowing a level of agreement on sound policy to be achieved at COP21 that had previously eluded the Climate Change Framework. The FCTC and its implementing bodies would do well to pay attention to the measurable level of real world success achieved by this markedly different procedural approach.

VII. CONCLUSION

The FCTC is intended to pursue unquestionably noble public health goals. Its implementation process, however, is deeply broken, departs markedly from established norms of international law, and needs to be fixed. The parties to the Convention should use the opportunity presented by COP8 to correct their procedural course at both the international and national levels.

At the international level, transparency and openness should be restored to the work of the COP, with full confidence that sound policies with a solid evidentiary basis will prevail in an open exchange of ideas. And at the level of domestic law implementation, the guidelines interpreting Article 5.3 should be revisited and revised to ensure faithfulness to the provision's text and the intent of the State Parties that negotiated it. Indeed, such a review is contemplated by the guidelines themselves, which state that they "should be reviewed and revised periodically to ensure that they continue to provide effective guide..."¹⁰³

What might revised Article 5.3 guidelines look like? A detailed exegesis is beyond the scope of this article, but certain core principles emerge from a review of relevant international instruments and practice. The implementation of domestic tobacco control policy should, of course, be protected from illicit practices such as bribery and corruption. Transparency measures that allow economic conflicts of interest to be recognized and taken into account by policymakers also have an established pedigree and have proven highly effective. What should be avoided, however, is a continuation of the campaign of secrecy and exclusion that has characterized the last eight years of Article 5.3 implementation. The continued use of such a broken and

102. *Climate Generations Areas' Official Opening*, Paris COP21-CMP11, <http://archive.epi.yale.edu/the-metric/scenes-paris-beyond-climate-negotiations> [<https://perma.cc/TYC6-JEYF>] (archived Mar. 20, 2018).

103. Art. 5.3 Guidelines, *supra* note 58, ¶ 37.

exclusionary policymaking process will serve only to destabilize established norms for the creation of international law, and if history is any guide in the long run will in the long run undermine the efficacy of public health outcomes.