

THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

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Background Information

Tobacco use is one of the main causes of global morbidity and mortality, responsible for up to 7 million deaths annually as of 2017 (WHO Tobacco Fact Sheet, 2017). Economic losses linked to tobacco use are quantified at approximately \$1.4 trillion annually, making it a developmental problem and a major cause of poverty and social inequity besides a health tragedy (US National Cancer Institute, WHO, The Economics of Tobacco and Tobacco Control, 2016). The health effects of tobacco, and the role of the tobacco industry in concealing them as well as the addictive nature of nicotine, have become progressively clear since the 1950s. National control measures enacted largely in developed countries since the 1960s fostered progressively a general reduction in smoking rates and concurrently of tobacco-related diseases. At the same time, however, the tobacco industry consolidated into a few giant multinational corporations and, largely thanks to the explosion of direct foreign investment and the liberalization of international trade law in the 1990s, managed to expand its production and dramatically increase consumption in developing countries and economies in transition in Eastern Europe. It, thus, became increasingly clear that tobacco control could only be effective if strong national measures were backed up and complemented by an international framework addressing transnational issues as well as counterbalancing the restrictive effects of international economic law on the authority of states to protect public health through regulatory measures.

Tobacco had been on WHO's agenda since 1970, largely focusing on studying its health effects and supporting Member States (particularly developing countries) in their national tobacco control programs. However, the idea of an international law approach emerged progressively only in the 1990s thanks to the undeniable effects of globalization and economic liberalization, as well as the power and sophistication of the multinational tobacco industry, on the spread of tobacco use. The decision to focus on a framework convention, modelled upon the precedents of environmental conventions, was taken by the World Health Assembly (WHA) in 1996 (resolution WHA49.17) based on a feasibility study prepared by legal experts. The rationale for a normative model (a main convention of a general nature supplemented by detailed protocols) used in a very different field was a conceptual compromise between a legally binding instrument on the one hand, and on the other hand the predictable difficulty of convincing States with strong economic interests in tobacco to immediately accept strict obligations. It should also be noted that, even though WHO's Constitution endows the WHA with treaty-making powers (WHO Constitution, articles 19-20), this power had not been exercised until then. There was consequently a total lack of experience about the implication of negotiating and managing an international convention both in the WHO secretariat and in national delegations, largely composed of ministry of health officials.

A significant development that validated the approach undertaken by WHO was a major evidence-based World Bank report that confirmed the social and economic costs of tobacco use and identified a number of cost-effective measures that would both reduce consumption and enhance government revenues (World Bank, Curbing the Epidemic: Governments and the Economics of Tobacco Control, 1999). Finally, another important factor to understand the decision to work towards a convention was the decisive leadership by the then Director-General Gro Harlem Brundtland, who selected tobacco control as one of her flagship initiatives.

Negotiating History

The WHA launched the negotiation of the WHO Framework Convention on Tobacco Control (FCTC) in 1999 and 2000 (resolutions WHA52.18 and WHA53.16). Given the ambivalence of a number of countries to commit themselves to negotiating an unprecedented instrument just based on studies produced by the WHO secretariat, the WHA preceded negotiations with an unusual “pre-negotiation” phase by establishing a Working Group tasked with the identification of the main legal issues and substantive elements of a future convention without engaging in negotiations. This intermediate step enabled delegations to familiarize themselves with the treaty-making process. It also created misplaced expectations, due again to a lack of experience, that a number of protocols could be negotiated alongside the main convention (doc. A/53/12). The WHA, however, established an Intergovernmental Negotiating Body (INB) to conduct negotiations and instructed it to focus on the convention.

The INB held six sessions between October 2000 and February 2003, while a number of regional consultations and technical conferences were held between sessions to address unresolved issues and develop regional positions. About 170 Member States as well as the European Union participated in one or more sessions, thus showing the political importance of that undertaking. The first four sessions raised troubling questions on the prospects for a successful outcome of the negotiations, since they only produced a rolling text with virtually no agreed provisions. The reasons for this are diverse, but the main factors are, firstly, the uncompromising positions often held by ministry of health officials, unfamiliar with treaty negotiations and reluctant to dilute what they saw as crucial features of an international tobacco control framework; this reluctance was used by other delegations to introduce weak counterproposals and largely stalemate progress. Secondly, the development of strong regional positions (in particular within the African group and the European Union) created an additional element of rigidity in achieving trade-offs.

The negotiations were eventually salvaged by the production of a proposed chairman’s text at the fifth session, which became the sole basis for further discussions (A/FCTC/INB5/2, 25 June 2002). The last two sessions saw a number of painful compromises for public health officials largely to meet the concerns of a number of key states, such as the abandonment of a total ban on tobacco advertising and promotion. The FCTC was eventually adopted by consensus on 21 May 2003 (resolution WHA56.1). The WHA at the same time established an open-ended intergovernmental working group as a preparatory committee for the first session of the Conference of the Parties; the Group held two sessions and made recommendations on issues such as draft rules of procedure, financial rules, designation of a secretariat for the FCTC and a draft budget (doc. A/FCTC/IGWG/2/7, report of the second session of the Intergovernmental Working Group, 5 October 2005).

Summary of Key Provisions

The final text of the FCTC vindicated those who advocated for a strong and comprehensive treaty. Even though it has been labelled as a framework Convention, the FCTC is in fact a mixed instrument, with some provisions of a general nature requiring elaboration in further instruments (e.g. article 9 on regulation of the contents of tobacco products), but for the most part containing substantive provisions that can support immediate national implementation while leaving enough room to adapt to different national regulatory environments.

The essence of the text is encapsulated in the preamble and the objective (article 3), in particular the priority of the “right to protect public health”, the need for wide international cooperation to fight a global problem, and the aim of the FCTC “to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”. The Convention is divided into eleven parts, as follows (with highlights on the most important provisions):

Part I (Introduction) includes article 2 on the relationship of the FCTC with other legal instruments. Many countries advocated unsuccessfully for a clear statement in that article of the primacy of health protection over economic interests; consensus was instead found on treating the FCTC as a foundation and encouraging parties to implement stronger measures in accordance with international law.

Part II (Objective, guiding principles and general obligations) contains three articles setting the context for the implementation and interpretation of the FCTC. Of particular importance is the emphasis in article 4 on the need for “comprehensive multisectoral measures”, highlighting the fact that tobacco control requires actions going well beyond the remit of public health authorities. Article 5.3 requires parties to protect tobacco control policies from the interests of the tobacco industry. This apparently self-explanatory statement encapsulates one of the unique features of the FCTC; besides intending to regulate the marketing and consumption of tobacco products to achieve reduction of smoking rates, the Convention constitutes a strong political statement delegitimizing a whole industry and excluding it from any direct input into the governance of the Convention and potentially of global tobacco control.

Part III (Measures relating to the reduction of demand for tobacco) constitutes the main substantive part of the Convention and reflects an early agreement among negotiators to focus on demand reduction in order to address the concerns of tobacco producing developing countries. This part contains nine articles; besides a largely hortatory provision on taxation (article 6), most articles in this part aim at decreasing the appeal of tobacco products and increasing consumer awareness by regulating packaging and labelling and prohibiting misleading descriptors, such as “mild” and “light” (article 11), prohibiting or restricting advertising, promotion and sponsorship (article 13), prohibiting smoking in public places to protect from second-hand smoke (article 8), educating the public (article 12) and promoting cessation and treatment of tobacco dependence (article 14). Parties must also adopt measures on product contents (article 9) and disclosure (article 10).

Part IV (Measures relating to the reduction of the supply of tobacco) contains three articles dealing respectively with illicit trade (article 15), sales by and to minors including practices designed to appeal to minors, such as selling sweets and toys in the form of tobacco products (article 16), and supporting economically viable alternatives for tobacco growers and workers (article 17). The latter issue proved controversial during the negotiations, with tobacco-producing developing countries demanding guarantees of financial support as a condition for participation in the Convention and developed countries unwilling to commit themselves to what could amount to agricultural subsidies.

It is striking that most of the measures in Parts III and IV are essentially domestic and ostensibly not justifying an international treaty. The main reasons for this are, firstly, to set internationally agreed benchmarks for such measures that would protect them from industry pressure and, secondly, to empower ministries of health within their respective governments who could use the international obligations of their respective countries as a tool to receive more political support and financial resources.

Part V (Protection of the environment) and VI (Questions related to liability) contain one article each, dealing with protection of the environment (article 18) and liability (article 19). The latter, rather ambiguous provision finds its roots in successful national litigation against tobacco manufacturers, largely in the United States, that enabled both public institutions as well as individual smokers to make tobacco companies liable for health damages; it initially aimed at replicating that approach at the international level but, given the evident legal difficulties at designing a viable international liability model, limits itself to demanding that parties cooperate in sharing best practices and afford each other legal assistance “to deal with criminal and civil liability, including compensation where appropriate”.

Part VII (Scientific and technical cooperation and communication of information) contains the main international obligations in the Convention, as opposed to the previous parts that mostly require action at national level. Articles 20 and 22 require respectively parties to engage in research and surveillance relevant to tobacco control, to cooperate in that endeavor and to facilitate the transfer of technology and expertise to strengthen national capacities to fulfill FCTC's obligations. One of the main underlying purposes of these articles is to build a global body of evidence as a basis for national and international regulatory measures as well as to counteract the disinformation propagated by the tobacco industry. Article 21 constitutes the main legal basis for monitoring the implementation of the FCTC, requiring parties to periodically report to the Conference of the Parties information about their respective policies and measures, hurdles encountered by them as well as information on surveillance and research.

Part VIII (Institutional arrangements and financial resources) is the foundation of the FCTC governance and its normative development, with article 23 establishing a Conference of the Parties (COP) as the governing body of the Convention, and article 24 establishing a supporting secretariat that was eventually housed in WHO as a dedicated unit. The COP is tasked with reviewing and promoting the implementation of the FCTC, steering its development through the adoption of protocols, guidelines, annexes and other decisions as well as ensuring cooperation and consistency with other international institutions and legal regimes.

Part IX (Settlement of disputes) contains a single article notable for its vagueness. Article 27 only requires parties to seek settling their disputes through peaceful means of their choice or to opt for compulsory arbitration upon ratification. So far, no party has chosen that option. The weakness of this provision may seem surprising, but is probably a deliberate choice in order to steer disputes toward other forums, such as WTO or investment arbitral panels, arguably more sympathetic for economic interests of investors and exporting States. It is not a coincidence that disputes arising from national control measures based on the FCTC were submitted to the WTO dispute settlement mechanisms or to arbitral panels established under bilateral investment treaties (Zhou and Libermann, pp. 375-386).

Parts X (Development of the convention) and XI (Final provisions), finally, contain procedural and final clauses including on amendments (article 28), withdrawal (article 31) as well as on the process to adopt protocols (article 33) and annexes (article 29). Notable in this regard is article 30, which prohibits reservations. This unconditional provision was the object of much controversy during the negotiations, in particular on how to accommodate the position of countries such as the United States of America arguing that it would be practically impossible to secure parliamentary approval without the possibility of filing reservations. The opposite position eventually prevailed as a consequence of the many compromises already introduced in the substantive part of the Convention.

Development of the Convention

The FCTC entered into force on 27 February 2005, having attained quite rapidly the required 40 ratifications. The Convention has been a success in terms of participation, with 181 parties as of January 2020, including most tobacco manufacturing and exporting countries. The COP held eight sessions between February 2006 and October 2018 and has been extremely active in promoting both the normative development of the FCTC framework, building political support for tobacco control as part of the broader non-communicable diseases (NCD) and development agendas as well as strengthening implementation through inter-institutional cooperation, monitoring national implementation and assessing the overall impact of the Convention.

Normative development of the Convention has taken place through the adoption by the COP of guidelines and protocols. With regard to the latter and despite early prediction of multiple protocols, the only such instrument adopted as of January 2020 has been the Protocol to Eliminate Illicit Trade in Tobacco Products, adopted by the fifth session of the

COP in 2012 (decision FCTC/COP/5(1), 12 November 2012) and entered into force on 25 September 2018; the protocol had 58 parties as of January 2020. Thus far, no other proposals for new protocols are under consideration.

The protocol is grounded on article 15 of the FCTC and aims at eliminating “all forms of illicit trade in tobacco products” that undermines tax and price measures and makes tobacco products more accessible and affordable. Even though a protocol on illicit trade was considered relatively easy to achieve and therefore a good proof of concept for the framework convention approach, its negotiation lasted almost four years and proved complex and controversial. One of the reasons for controversy was the difficulty of designing an international system for the control of the supply chain that would not imply cooperation with the tobacco industry. The protocol contains a number of broad areas: supply chain control, including notably the establishment of an international tracking and tracing system (articles 6 to 13), the establishment of offences and related enforcement measures (articles 14 to 19), and international cooperation including mutual legal assistance and extradition (articles 20 to 31).

The COP has also adopted eight guidelines on various articles dealing with tobacco demand reduction measures (e.g. article 6 on taxation, articles 9 and 10 on the regulation of tobacco products contents and disclosure; and article 13 on advertising, promotion and sponsorship), as well as importantly on article 5.3 concerning the protection of tobacco control policies from the influence of the tobacco industry. Guidelines are adopted by consensus by the COP after a thorough process including country representatives as well as technical experts and involving both the analysis of existing evidence as well as textual negotiation. Although they are not binding, they represent agreed detailed and evidence-based guidance on the interpretation and implementation of FCTC obligations. They also arguably fall within the scope of “subsequent agreements between the parties” as an interpretive tool under article 31.3(a) of the Vienna Convention on the Law of Treaties, and are thus particularly authoritative for guiding national implementation. Mention should also be made of the “declarations” adopted from the fourth until the eighth sessions of the COP, such as for example the “Punta del Este Declaration” concerning the protection of national tobacco control measures against challenges by the tobacco industry (FCTC/COP4(5), 18 November 2010). Declarations represent political statements rather than agreed interpretation of treaty obligations, but still they play an important role as an expression of individual and collective commitment to effectively implement the FCTC.

Influence of the FCTC on Subsequent Developments in International Law

The FCTC is an unprecedented and ground-breaking instrument. It is the first and, so far, only treaty regulating the commercialization and consumption of a lawful but inherently unhealthy consumer product with the aim of reducing its health impact. Together with alcohol consumption, unhealthy diets and lack of physical exercise, tobacco use is a main contributor to the pandemic of NCD, such as cancer and respiratory diseases responsible for up to 65 percent of global mortality, with most deaths occurring in developing countries. Tobacco control is therefore a health goal in its own right as well as part of the broader fight against NCD, which was the object of a high-level declaration by the United Nations General Assembly in 2011 (General Assembly resolution 66/2 of 19 September 2011). Both the declaration as well as Goal 3 of the 2015 Sustainable Development Goals mention specifically strengthening the implementation of the FCTC as one of the main contributing factors to sustainable development from a public health perspective. The FCTC is thus a component of the global legal and policy framework on sustainable development.

Since the package of regulatory measures contained in the FCTC is generally applicable to the other risk factors of NCD, the Convention is seen as an important test of whether health-promoting national measures that restrict economic interests and the expectations of investors and manufacturers (e.g. with regard to taxation, labelling of products and advertising) are consistent with international trade, intellectual property and investment rules, such as those contained in WTO agreements, free-trade agreements and investment

treaties. The FCTC in a way has highlighted that the protection of health under international law does not only depend on the presence of dedicated international instruments but also on the implementation of other bodies of law, such as notably economic law and human rights law.

From the latter perspective, the FCTC is playing a role in the development of the “right to health” (as enshrined globally in article 12 of the United Nations Covenant on Economic, Social and Cultural Rights) and in the interpretation of health-related provisions in other human rights treaties, such as the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women and the Inter-American Convention on Human Rights. Human rights bodies are using ratification and implementation of the FCTC as an indicator of compliance, as shown for example by General Comment 15 by the Committee on the Right of the Child (General Comment No.15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health) and by the inclusion of FCTC implementation in concluding observations on periodic reports by states parties.

From the perspective of reconciling tobacco control measures with investment and trade rights, the FCTC has played a crucial role in international and national litigation launched either by the tobacco industry under bilateral investment treaties or national law or by tobacco exporting countries under the WTO settlement disputes system. In virtually all of those cases, courts and investment panels have found that national measures based on the FCTC prevailed over competing economic rights on the consideration that the FCTC expressed global consensus on necessary, legitimate and proportional measures to pursue a social goal of the highest importance such as public health. Emblematic in this perspective are the ICSID investment arbitration initiated by Philip Morris against Uruguay (*Philip Morris SARL v Oriental Republic of Uruguay* (award), 8 July 2016) and the 2018 case against Australia’s law on the “plain packaging” of tobacco products (*Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, 28 August 2018).

Related Materials

A. Legal Instruments

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Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investment, Bern, 7 October 1988.

Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, United Nations, *Treaty Series*, vol. 1249, p. 13.

Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, p. 3.

WHO Framework Convention on Tobacco Control, Geneva, 21 May 2003, United Nations, *Treaty Series*, vol. 2302, p. 166.

Protocol to Eliminate Illicit Trade in Tobacco Products, Seoul, 12 November 2012, Decision FCTC/COP5 (1).

B. Jurisprudence

International Centre for Settlement of Investment Disputes, *Philip Morris Brands SARL v. Oriental Republic of Uruguay*, Award of 8 July 2016, Case No. ARB/10/7.

Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Reports of the Panels, WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R, 28 August 2018.

C. Documents

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Committee on the Right of the Child, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), CRC/C/GC/15, 17 April 2013.

D. Doctrine

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