

Framework Convention on Tobacco Control

ASH briefing for the first negotiations, October 2000

This paper examines issues facing negotiators in advance of the forthcoming negotiating meeting of the Framework Convention on Tobacco Control, 16-21 October 2000 and recommends a progressive approach.

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Summary: impact = commitments x participation

The best outcome for health will be a convention that finds an optimum balance between the strength of commitments and the number of parties prepared to ratify. A super-strong convention that remains unratified is no use to anyone. In this paper, the FCTC is comprised of 'the Convention' and one or more protocols. In discussing the FCTC, views have sometimes been polarised as 'strong versus weak', or 'specific versus general', or 'convention versus protocols' or 'legal enforcement versus voluntary'. In each case, there is an *optimum* that will secure the maximum product of meaningful commitments and high participation.

The Convention should be configured as follows:

1. The essential housekeeping and institutional machinery of the FCTC. This is mostly uncontroversial at this stage.
2. An objective to prevent any increase in tobacco consumption in the next 2-3 decades. This is a challenging objective meaning 500 million less smokers in the 2020s, but it deflects concerns about grower nations and tobacco industry jobs by suggesting the size of the tobacco market will not decrease.
3. A series of general commitments, which could resemble already-agreed [WHA resolutions](#) and not be especially prescriptive, but would encourage action taking account of national circumstances, and require documentation, reporting etc. These 'plan and report' general commitments might include:
 - Youth protection
 - ETS exposure - culturally specific and no transboundary dimension
 - Research - resources dependent
 - Reducing tobacco dependence - different countries warrant different approaches
 - Education, training, co-operation
 - Taxation and subsidies - though it could be possible to define useful principles for tobacco taxation.
4. A series of specific commitments, which would deliver important substantive measures, which would tend to be transboundary or of necessity negotiated internationally. The intention is not to include all possible specific commitments in the Convention, just a few 'headlines' that would underpin development of protocols. Such commitments should include:
 - A ban on duty free sales and imports of tobacco.
 - Warning labels to be placed on all packs sold worldwide *in the national language* of the country in which it is to be sold. This is a risk-communication and anti-smuggling measure.
 - A unique machine-readable marking indicating the origin and date of manufacture of the cigarette.
 - A ban TV advertising of tobacco
 - A ban on tobacco sponsorship - or a ban on sponsorship of televised events - by 2006. The aim of this should be to tackle tobacco sponsorship of Formula One.
 - A ban on misleading 'low-tar' branding and the printing of misleading tar yields on packs.
 - A comprehensive disclosure regime - ingredients and smoke composition.
 - A funding mechanism for north-south assistance.

The protocols should be used for the following:

1. Issues which are technically complex and may need to be negotiated on a different timetable to the Convention and/or which involve different institutions - notably smuggling and product regulation.

2. Issues that may not be included in a Convention due to clashes with national constitutional law in some jurisdictions. The function of the protocol could be to provide model legislation. This would most obviously apply to banning tobacco advertising.

Documents and nomenclature

In this document 'the Convention' refers to the framework convention not including its protocols and FCTC is used to refer to the totality of the Convention and protocols.

The key texts are as follows:

- [WHA resolution 52/18](#) from the 1999 World Health Assembly authorising development of the FCTC and establishing a timetable culminating in 2003.
- [WHA resolution 53/16](#) from the 2000 World Health Assembly, which endorses continued negotiation but places priority on development of the Framework Convention in advance of the Protocols.
- [A/FCTC/INB1/2](#)
- [A/FCTC/WG2/4](#) *Possible subjects of initial protocols*, presented at the 2nd Working Group in March 2000.
- [A/FCTC/INB1/4](#) and [A/FCTC/INB1/4 Add.1](#) New paper on *working methods for the FCTC negotiations* is expected in September. This will set out a format for the negotiations.

What issues should be covered by the FCTC?

It is useful to classify the scope of agreements that can be made under the FCTC, into the following categories:

1. Problems that *cannot* be tackled at a national or local level because they have an inherent transboundary dimension, such as smuggling or televised motor racing.
2. Problems that would be *more effectively or cost-effectively* tackled through an international agreement rather than piecemeal national or regional initiatives – for example product regulation measures, ingredients and additives disclosure, smoke constituent measurements, and duty free.
3. Responses that need international co-operation for reasons of skills transfer, capacity building, funds transfer etc. This would include co-ordinated R&D, collection of statistical data, agricultural diversification, and information exchange.
4. Tackling international barriers to local or national action (Eg. World Trade Organisation, trademark protection law etc.) or tobacco control measures that require international co-ordination to comply with trade or other agreements. For example, agreements on warnings or other packaging regulation.
5. Issues that Parties would tend to regard as their own prerogative – even if there are transboundary consequences. This most obviously includes taxation and pricing policy. More generally, many Parties will wish to avoid the FCTC having *pre-emptive* effects – inhibiting more progressive national legislation.
6. Issues in tobacco control that have no obvious transboundary dimension: passive smoking, youth access measures; some advertising, health education, prevention and treatment programmes. Even with these measures, there is scope for dissemination of best practice, technical advice, or development funding.

This gives an initial basis for prioritising action – those measures that can only be achieved or best achieved under the FCTC should take priority. That does not mean ignoring the others, but it may mean downgrading the strength of agreement or specifying general commitments only.

Negotiating the treaty

We recognise that this is a process of optimisation of conflicting choices. Usually resolution of the conflict at one or other polar extreme will not represent the optimum outcome for health. For example, those that advocate the strongest possible framework convention with all substantive measures included in the Convention rather than the protocols may be unhappy to find that no country would sign or ratify such an agreement. Here are examples of conflicting choices, with tentatively suggested optimum approaches.

Conflicting aims	Polar extreme	Opposite polar extreme	Optimum?
Strength of obligations vs. participation	Very strong specific obligations with low ratification.	Very weak general obligations with complete ratification.	Favour greater participation (aim for 80% ratification). But it cannot just be like a collection of WHA resolutions . Use protocols for the measures likely to exclude participation in the Convention, but keep some strong <u>headline</u> specific measures in the Convention.
Content in the Convention vs. protocols and ratification	Framework convention has all substance, but a single composite hurdle may be too great to allow ratification or watered down to a 'lowest common denominator' .	Protocols have all substance. Framework convention is window dressing, and protocols are never ratified.	General measures with some high-profile specifics ('headlines') in the Convention. Protocols to articulate technical detail, complex issues and highly contentious points. Headlines important to give the Convention legitimacy and good return for negotiating expense.
Specific and binding vs general and aspirational framing of obligations	Very hard-edged measures but with weak substance and easy to comply - hard hurdles will be set at low height.	Aspirations may lead to nothing happening.	Recognise that an international treaty is essentially a voluntary agreement between nations. Identify where 'strong' language is needed for the measure to work and concentrate on securing this language.
Wide vs. narrow scope of issues covered	Every issue included, but too general to cause meaningful change. Too little negotiating time to do justice to the essential measures. Appearance of action on many fronts lets Parties off the hook on difficult issues.	Negotiations limited to strictly transboundary issues, but confidence building opportunities and scope for greater participation lost. May end in stalemate.	Have a broad scope, but give different emphasis to measures depending on the extent to which they can <u>only</u> be addressed or <u>better</u> addressed through the FCTC. For other measures, establish general principle that endorses action and requires reporting.
Strong vs. weak enforcement	Tough legal sanctions, but agreements framed (=watered down) so that parties can easily comply.	No enforcement, no-one takes the obligations seriously.	As above. Recourse to external sanctions as a last resort. Formulate dispute resolution procedure within the Convention.

The aim therefore has to be to identify the most progressive package of measures that can achieve wide assent by identifying the points where these trade offs will best work for health.

What types of agreement can be made?

The negotiators can match different issues to differing types of obligation. Different *types* of commitment could be as follows:

- Meet outcome targets (eg. reduce tobacco use prevalence by one third by 2020)
- Take specific actions (eg. introduce tax stamps with agreed specifications)

- Take less specified actions (eg. introduce security markings)
- Aim towards certain goals (eg. - take measures to reduce teenage smoking.)
- Have a process (eg. - develop a national plan and revise periodically)
- Consider options (eg. - assess the most cost effective options for smoking cessation.
- Report on actions taken and outcomes (eg. report on national plan)
- Collect data to an agreed format
- Engage in research - jointly or individually

The list is graded with the most specific at the top and the most general obligations at the bottom. By adopting this approach, it is possible to include all the issues and concerns of the Parties, but to grade them according to their importance and form obligations in the main tobacco control areas with appropriate precision and strength.

WHO's proposals - the objective

The ideal would possibly be to have an objective *to prevent any increase in tobacco consumption worldwide over the period 2000-2020[2030]*. This deals at a stroke with the objections of the grower states and the jobs arguments, as the market volume would remain unchanged. It also deflects the empty 'abolitionist' charge. In fact such an objective represents a substantial reduction in prevalence and a very demanding target against a baseline expectation of growth in tobacco users from (approximately) 1.1 to 1.6 billion. It would mean 500 million less smokers from prevention and cessation policies.

WHO gives four options for the objective: I-IV.

- Options I and III call for a reduction in prevalence. Given the world population continues to grow, a reduction in prevalence may equate to increase in consumption or absolute numbers smoking. The objective is ambiguous because what matters is the size of the reduction in prevalence.
- Option II calls for a reduction in tobacco use, but does not state whether this is prevalence or consumption, or whether this is a reduction compared to current levels or compared to the (rising) baseline trend. The size of the reduction is unclear.
- Option IV talks of 'putting an end to tobacco use in any form'. This will attract unnecessary criticism, can only be achieved with prohibition, and would not change what concrete measures are actually taken.

Option two is the best. But it could be modified as follows:

Option 2: establish and agree on international responses to prevent an increase in annual tobacco consumption over the period [2000]-[2030] in order to reduce the expected public health, social and economic consequences of tobacco consumption and to provide the mechanism for implementing such responses through the engagement of the Parties, and in doing so to reduce the expected number of smokers by 500 million and to avoid 250 million unnecessary tobacco-related premature deaths.

Approach to obligations - general and specific

The main idea should be to have an obligation to create a national plan as in II.A.1 and to report on it. This should contain both 'general obligations' and 'specific obligations'. General obligations would be those measures for which international agreement is not essential but domestic action is desirable. These could be expressed in fairly open terms to allow national discretion while encouraging action.

Specific obligations should be reserved for those areas where international co-operation is necessary or desirable for reasons of cost-effectiveness. These measures should be detailed precisely and spread between the Convention and protocols.

The subsections below suggest which measures would be suited to general and which to specific obligations.

General obligations

- Taxation (for political reasons this will only be expressed in general terms)
- Youth protection
- Some aspects of advertising - to overcome constitutional objections
- ETS exposure - culturally specific and no transboundary dimension
- R&D - resources dependent
- Treatment - different countries warrant different approaches
- Education, training
- Co-operation

It might be helpful to define general obligations with reference to key [WHA resolutions](#) (the advantage is these are already agreed). For example WHA39.14 para 4.1 (1986) urges Member States to "*ensure that non-smokers receive effective protection, to which they are entitled, from involuntary exposure to tobacco smoke, in enclosed public places, restaurants, transport, and places of work and entertainment*". WHA 31.56 1.2 (1978) urges member states "*to adopt comprehensive measures to control tobacco smoking, inter alia by providing for increased taxation on the sale of cigarettes and restricting as far as possible all forms of publicity for promotion of smoking.*"

Specific obligations

These are measures that have to be carefully specified and will form the most concrete measures in the FCTC - probably split between the Convention and Protocols.

- Some transboundary aspects of advertising - televised tobacco sponsored events, internet etc
- Disclosures
- Product regulation
- Packaging and warnings
- Duty free
- Smuggling
- Financial transfers and capacity building
- Surveillance

Specific obligations should not all be confined to protocols. The aim should be to place a number of key specific obligations in the Convention itself while achieving the aim of near full participation. The specific 'headline' obligations that should be included in the Convention will be those that are most readily negotiated and that have a good rationale for inclusion as specific commitments in an international treaty.

The sections below discuss obligations and roughly follow the WHO outline in its draft elements document [A/FCTC/WG2/3 Provisional texts of proposed draft elements for a WHO framework convention on tobacco control](#), presented at the 2nd Working Group in March 2000.

Conflicts with trade agreements

There are likely to be cases where tobacco-control policies conflict with policies that have the aim of fostering international trade. This is because the purpose of tobacco policies is to protect and, as a consequence reduce sales. It will not always be possible to guarantee that measures taken for reasons of health protection will not be regarded as in breach of the general provisions of trade agreements such

as GATT, WTO, TRIPS, TBT and so on. There should be nothing in the Convention that subordinates the FCTC to these trade agreements as a matter of principle. Measures to protect public health may conceivably conflict with trade liberalisation, but the public health objectives are legitimate and may take precedence over increased trade, given that lives are at stake. Where there are actual or alleged conflicts, we believe the approach should be as follows:

1. Argue that the health measure does not constitute a barrier to trade and try to avoid negotiating agreements that are deliberately discriminatory.
2. Where there is a discriminatory impact on trade, then argue that the health measure qualifies for an exemption in the relevant trade agreement (for example Article XX of GATT, which has an exemption for health).
3. If and only when 1) and 2) above fail, then argue that the trade agreement should be adjusted to exclude tobacco.

Measures proposed by WHO and suggested approach

Taxation

WHO proposes a minimum tax level set at two thirds of the pack price. Whilst this is desirable, it fails a political feasibility test. It is unlikely that time spent debating measures on taxation will be worthwhile as most states will not wish to have taxation levels specified in an international treaty.

- A general obligation to increase the real price of tobacco products through the tax system may be possible - though even this could be seen as a breach of fiscal sovereignty.

Youth access measures

Youth access measures as suggested by WHO (prohibit sales to youth by requiring proof of age and banning vending machines) have no transboundary dimension and, in any case, there is little evidence that they are effective in preventing youth tobacco consumption. Youth measures should be regarded with great caution as they can easily backfire. Concentrating on 'youth' adds to the definition of smoking as 'adult' and it is precisely this that appeals to teenagers. It is no coincidence that youth smoking is just about the only tobacco control policy favoured by tobacco companies. It is, in fact, just good marketing!

- We suggest an extremely general commitment in this area.
- See ASH report [*Danger! PR in the playground*](#) for a powerful critique of the youth anti-smoking initiatives promoted by the tobacco industry.

ETS exposure

Though measures to reduce smoking in public places and at work are very important in tobacco control, there is no transboundary dimension. Bans on smoking in particular settings will be very hard to negotiate, given the great diversity in practice at present.

- A general commitment to take measures to reduce ETS exposure to people at work and in public places, and to encourage reduced exposure in the home, especially to children.

Regulation of contents and disclosure

This is a major issue with a reasonable case for international action. Despite WHO's own initiatives in this area (the Oslo conference and its new steering committee), it is inappropriately included in a list of 'general measures'. This area should be the subject of a protocol covering the following:

- Disclosure
- Testing - standardising testing procedures and methods for characterising harm
- Toxic exposure and emissions regulation

- Additives regulation - with a comprehensive test of all permitted additives.
- Novel nicotine products
- Claims for reduced-risk tobacco products
- Low tar cigarettes claims

However, there is scope to introduce some product regulation provisions into the Convention in advance of the development of a protocol.

- A disclosure regime for ingredients and smoke constituents - on similar lines to that agreed in British Columbia. This would increase the information base on which further development of regulation in a protocol might be based.
- A ban on branding - such as 'light', 'mild', 'ultra' etc - that implies that any smoked tobacco product is less harmful than any other.

Banning duty free tobacco

This is a very important measure both as part of a strategy to use price to keep tobacco prices high, and as an anti-smuggling measure (duty free sales create several types of opportunities for smuggling).

This has been introduced successfully within the European Union and is therefore a tested measure.

- A ban on duty free tobacco sales should be advanced as a 'headline' specific commitment within the Convention. It should apply to duty-free sales AND to duty-free imports. This helps to prevent abuse by non-parties or offshore duty free specialists.

Subsidies and agriculture

It should be stressed here that the *only* acceptable use for subsidies in the tobacco sector is conversion or diversification. Farmers in Africa, Latin America etc, should see the removal of subsidies to tobacco farmers in Europe and USA as positive. However, subsidies are often locked in deeply rigid structures or political bargains, and may be impossible for some parties to dismantle - they could therefore become a barrier to ratification.

- A general obligation within the Convention to aim towards the progressive reduction and elimination of subsidies to tobacco growers and to convert ongoing subsidies to transitional subsidies for diversification.
- Where subsidies are continuing to be offered to growers, there may be scope for influencing environmental impact, labour standards, ensuring these are not used for genetic engineering, etc. It may be possible to suggest that subsidies only be used for tobacco that is not exported.
- The FCTC process itself should not be a source of new subsidies to growers - even for restructuring and diversification. This is within the remit of the World Bank, which offers sectoral reform assistance. FCTC funds should be reserved exclusively for tobacco control measures.

Advertising

The FCTC should have a role in tackling tobacco advertising, which is one of the important 'vectors' of the tobacco epidemic. It is important that the FCTC deals first and foremost with the most serious transboundary advertising. This is currently globally televised sponsored sport, notably the Formula One Grand Prix. National legislation cannot easily deal with this, except to ban the screening of the event itself – which is probably unfeasible. The approach should be therefore to deal with the problem upstream – by removing the sponsorship. A reasonable goal would be to align with the EU Directive on tobacco advertising and phase out sponsorship worldwide by 2006.

For some parties a complete ban on tobacco advertising could be difficult for constitutional or political reasons - for this reason a careful judgement will be needed about the balance of the advertising

obligations in the Convention, and what would be reserved for a protocol. A possible compromise format could be:

- A general obligation in the Convention to control commercial communications whose aim or effect is to promote tobacco products or brands.
- A specific obligation to ban tobacco advertising on television - and/or,
- A specific obligation to ban tobacco sponsorship - possibly for all events, but maybe just for those that may be broadcast across boundaries.
- Provision of model legislation in the form of a protocol for those seeking a complete ban
- Technical advice from the scientific bodies

Further considerations

Any provision that does not tackle 'indirect advertising' is easily circumvented and worthless. It may be better to avoid the concept of *direct* and *indirect* advertising, and to tackle tobacco *brand* advertising.

Any approach that deals only with advertising to children is doomed and misses the point. All advertising reaches children, and it is impossible to specify what does and does not appeal. It is also an entirely legitimate to control tobacco advertising to assist *adults* that wish to stop smoking and to reduce the pressure to relapse from adult smoking cessation attempts.

There should be no funding for replacement sponsorship (this is a waste of money and inhibits a genuine market in replacement sponsorship).

Treatment of tobacco dependence

This is a vital component of the FCTC. It is the one that most directly bears on the health of the smokers and reinforces the 'health' credentials of the FCTC and the WHO's *locus*. However, it should not be seen merely as a conduit for nicotine patches or bupropion. Parties should take cost-effective measures to reduce tobacco dependence. In many countries there is a long way to go before pharmaceutical treatment is the most cost-effective marginal measure. For example, simple advice from doctors and basic public education campaigns may be more cost-effective where there is not a high level of existing awareness.

- Create a general obligation to take all reasonable, cost-effective and affordable measures to help existing tobacco users to quit.
- In our view, this can only be a general 'plan and report' obligation, with a number of (strictly optional) measures that could be taken. Detail might be developed in the technical bodies. *There is therefore no need for a protocol.*

This is again a 'plan and report' issue, with a greater emphasis on technical support and sharing research.

- It would be better if this were renamed "Tackling tobacco dependence" – because treatment has explicitly medical or even pharmaceutical connotations.
- It could be linked to a funding mechanism – and for this reason should be included as a general obligation in the Convention, rather than a separate protocol. A funding mechanism could be used for skills transfer, training and capacity building, to fund the development of the evidence base in developing country settings and, perhaps, to fund evidence-based programmes.

Measures to eliminate smuggling

This is a complicated issue and will need to be concentrated mostly in a separate protocol – not least because it will involve other participants such as the World Customs Organisation and different expertise from within the Parties. It is likely that measures to determine smuggling will take a long time to negotiate and will evolve over time. This makes it likely that a Protocol will be the appropriate vehicle for negotiating measures against tobacco smuggling.

There should however be some measures incorporated in the Convention.

- A general obligation to tackle smuggling and report on progress
- A specific obligation in the Convention to ensure that each pack or carton is uniquely marked, and records kept so that its origin can be determined.
- A possible specific obligation to identify the tax paid status of the product with a tax marking or stamp.
- Most of the substantive measures on smuggling would need to be included in a protocol, which may take some time to develop and require partner working with the WCO.
- It could also include a liability regime - see below: *Liability as part of a smuggling protocol*.

Packaging and labelling

Packaging and warnings are important and some minimum standards should be incorporated in the FCTC - all consumers should have some warning of the consequences of smoking – this is the starting point for raising awareness – *and should always be in the national language of the market in which it is sold*. Options would include specifying a default warning text, with the scope for Parties to modify this if they choose. Perhaps size equal to the EU directive (35%?) with black and white lettering. This is an area where trade agreements could be in conflict with the FCTC - though this is the practice required in the EU.

- A headline specific obligation in the Convention to require a health warning in the *main language of the country in which it is to be sold*. (This will also help combat smuggling because each batch will have to be manufactured for its end market). This is included as part of WHO's recommendations in E.2.
- There should be restrictions on branding 'light, mild' terms as outlined in E.1.b. of the WHO paper.

Further considerations

- There should be no restriction on packet size in the FCTC – eg banning of packs containing fewer than 20 cigarettes (though there are desirable reasons for this kind of restriction, it will be difficult to introduce in practice.)
- The idea of pictograms is attractive, but it is probably too optimistic to expect harmonisation at the level so far only reached by one country - Canada (E.2 in WHO paper).

Surveillance

This should require only a general obligation to participate in surveillance - closer to WHO's option 2, rather than the over-prescriptive option 1. The definition of the data to be collected should be a task for the subsidiary mechanism for provision of scientific and technical advice.

Beware of creating excessive data collection and collation requirements - for example, tobacco-attributable mortality (included in the WHO paper) is a complex epidemiological task that many countries may not be able to undertake without assistance.

Research

The research agenda should not be defined prescriptively in the Convention, except in the most general terms. The definition of a research programme should be a task for the subsidiary mechanism for provision of scientific and technical advice

Education, training and public awareness

This should be a general obligation to allow Parties to develop communications within their means.

There should be no suggestion of media co-option.

Co-operation in the scientific, technical and legal fields

The only controversial aspect of this will be the extent, if any, of the involvement of the tobacco companies.

Involvement of the tobacco industry

We believe that tobacco companies should be excluded from involvement in the FCTC almost completely. This is because the objectives of tobacco companies, and the objectives of the FCTC will be diametrically opposed - in effect health and tobacco compete in a zero-sum game. There is one exception to this general rule, which is in the area of product regulation and modification.

Liability and compensation

As far as health claims are concerned, this is a matter for the courts in each jurisdiction and should not be included in the FCTC. We believe it will be impossible to create a liability regime for health claims and would be blocked by courts. If countries wish to recover health care costs, the option to tax tobacco products has much the same financial effect as litigation - costs are raised from current smokers as a co-ordinated price rise. For individual or class actions, the differing circumstances of the 'victims' and tobacco companies would make a one size fits all compensation regime impossible. Once again, if governments wished to compensate smokers they could raise a tax and distribute it that way - but we do not think this makes sense.

Liability as part of a smuggling protocol

Other options for a liability regime might relate to manufacturers' responsibility for smuggled cigarettes. This would be analogous to the liability regime built in to a protocol to the Basel Convention on the transboundary shipment of hazardous waste in which the waste producer is held responsible if wastes are illegally dumped. This would need to be incorporated in the smuggling protocol.

Information exchange

Not controversial, but scope and standards should be maintained by the technical body.

Financial resources

The funding mechanism must be much more tightly defined than the present texts suggest. They should clearly specify what can be funded and create an institutional basis for evaluation of proposals and disbursement.

- Create a specific obligation to contribute to a multilateral fund to an agreed formula.

- Create a multilateral fund with rules of procedure and criteria for funding
- Perhaps allow private sector entities, such as pharmaceutical companies to contribute blind.
- There should be *absolutely* no compensation for growers or tobacco companies.

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