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ON TOBACCO CONTROL
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Framework convention on tobacco control

Letter from Ambassador Luiz Felipe de Seixas Corrêa, Chair, Intergovernmental Negotiating Body

The period between now and the Fifty-sixth World Health Assembly represents a very significant time in the history of public health: Member States of the World Health Organization are expected to be approving a draft text of the framework convention on tobacco control that will be submitted for adoption to the Health Assembly in May 2003. The framework convention represents a key aspect of a global strategy to stem the unacceptable burden of death and disease directly attributable to tobacco use. The importance of the decisions to be taken at the sixth session of the Intergovernmental Negotiating Body on the framework convention cannot be overstated.

I was encouraged by the concerted negotiations that took place during the fifth session of the Negotiating Body (15 to 25 October 2002), leading to identification of appropriate consensus language in some areas, most notably in the clause on illicit trade. In other areas of particular importance differences were considerably narrowed. Based on the frank and open discussions during the fifth session, delegations now benefit from a better understanding of each other's concerns, aspirations and commitments.

As Members will recall, at the eighth plenary meeting of the fifth session, it was decided that the Chair should produce a revised version of the new Chair's text for the sixth and final session of the negotiations on the framework convention.¹ This decision was based on discussions during the session, proposals, and consultations with individual delegations or groups of delegations. It was agreed that the revised text, like the original, would not contain square brackets or options and would attempt to take account of all views expressed.

In keeping with this decision, I am presenting you with a revised version of the text.²

In drafting, I focused mainly on the following background material and information:

- informal proposals submitted by various Member States to the Secretariat;

¹ Document A/FCTC/INB5/2.

² Document A/FCTC/INB6/2.

- provisional summary records of the fifth session of the Negotiating Body and notes of informal meetings prepared by the Secretariat during the fifth session;
- informal papers presented by the facilitators of informal groups convened during the fifth session on the areas of advertising, promotion and sponsorship; financial resources; illicit trade in tobacco products; liability and compensation; packaging and labelling; and trade and health;
- an informal paper drafted by the Chair during the fifth session for areas of the text not covered by the six informal groups referred to above;
- a paper on the use of terms provided by the facilitator of the informal group on that subject;
- the report drafted by the facilitator for a contact group on legal, institutional and procedural issues;
- oral inputs at various consultations conducted by the Chair during and after the fifth session.

When reviewing the various proposals put forth by Member States, I was impressed by the number of constructive and useful suggestions. I have tried to reflect as many such substantive suggestions as possible.

My impression is that two distinct approaches to the framework convention have persisted throughout negotiations:

- the first one is based on the expectation that the convention should provide a replacement for incipient or nonexistent legislation at national level; this view leads to a preference for a very specific convention with the principal goal of addressing national, subregional or regional needs;
- the second approach favours a global framework for addressing, through the adoption of more general provisions, the transnational problems related to tobacco control and encourages broad participation by Member States in order to stimulate international cooperation in the area of tobacco control.

In drafting the revised Chair's text, I have attempted to integrate these two complementary visions of the framework convention. In so doing, I have drafted a text setting forth strong principles and a framework under which countries would be required to adopt comprehensive and effective tobacco control laws and measures at national level. At the same time I have highlighted obligations of a transnational nature; these provide a foundation for international cooperation on a wide number of issues, ranging from advertising, promotion and sponsorship to illicit trade in tobacco products. In drafting the revised text I have retained the progressive options recommended by the facilitators of the informal groups convened during the fifth session, for example on descriptors of "light" and "mild", on warning labels, and on advertising, promotion and sponsorship. I am confident that such obligations will provide an effective foundation to support comprehensive measures at national level.

The text is not a soft or hard text, a weak or strong text; it is, in my judgement, an effective text. It is a text based upon sound public health principles and solid commitments regarding the intertwined dimensions of national legislation and international cooperation. The major new features of the text are summarized below.

- **Article 2, paragraph 1.** The clause “and the environment” was removed because the primary objective of the framework convention is to protect health. The environment is dealt with in other instruments. I have thus chosen to retain references to environment only in specific health-related contexts.
- **Article 2, paragraph 3; Article 4, paragraph 5.** These paragraphs on the relationship between the framework convention and other international agreements that appeared in the original new Chair’s text have been deleted. Although these paragraphs highlight an important issue, there is no need to include them as specific provisions in the framework convention since these matters are adequately addressed by the Vienna Convention on the Law of Treaties. Additionally, the preamble reiterates the paramount importance of health. Precedents for not including such language include the Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Cartagena Protocol on Biosafety.
- **Article 4, paragraph 1.** I decided to replace the phrase “nonsmokers” with “all persons”. This change was made throughout the text, with the aim of protecting smokers and nonsmokers. This phrase was chosen over the alternative “entire population” because of the difficulty in using that reference for measures to be taken at national, regional and international levels.
- **Article 4, paragraph 2.** The term “legitimate expectation” has been deleted in favour of the clearer term “need”. Juridically speaking, “legitimate expectation” is an extremely difficult term to define. Additionally, the reference to “vulnerable groups” has been removed here and throughout the text because of concerns that inclusion would create differentiated responsibilities.
- **Article 5, paragraph 3.** The new language relating to the influence of industry on policy under General obligations has been chosen to emphasize the importance of avoiding the involvement of commercial interests in the formulation of public health policy.
- **Article 5, paragraph 5.** I have decided here and throughout the text to use the term “competent” rather than “relevant” when referring to relations with other bodies and organizations. In international law, “competent” is the term of the art to convey the idea that a body or organization has a specific subject within its mandate. Precedents exist in the Cartagena Protocol on Biosafety, the Framework Convention on Climate Change, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.
- **Article 6.** The new formulation addressing price and tax policies affirms the sovereign rights of the Parties and meets concerns that the Conference of the Parties may create *de novo* obligations. By changing “can be” to “are”, I converted preambular language to language more consistent with an obligation. The word “coordination” was deleted because of concern about possible coordination towards a lower standard.
- **Article 6, paragraph 2(b).** Here the word “recommendations” has been deleted; elsewhere in the text the term “standards” has been replaced by “guidelines”. Both these changes aim to avoid the Conference of the Parties creating *de novo* obligations for the Parties.

- **Article 6, paragraph 2(c).** In view of polarized discussions on the subject, I felt it more appropriate to retain the original language.
- **Article 8.** The phrase “passive smoking” has been eliminated from the title and the text of this Article and elsewhere in the text and replaced with the term “exposure to tobacco smoke”. This change addresses concerns about exposure to tobacco smoke by smokers as well as by nonsmokers. Additionally, in Article 8, a reference to appropriate governmental levels has been included (as elsewhere in the text) in order to address concerns of federal States.
- **Article 10.** Requirements relating to disclosure of information have been expanded: the first sentence addresses disclosure to appropriate governmental authorities, the second relates to disclosure to the public. Since most countries do not actually have disclosure regulations, I preferred to separate the obligation into two stages. Further, the words “to governmental authorities” were added because few countries currently require that companies disclose information to government; this is the first stage of the process described above.
- **Article 11, paragraph 1.** Language relating to the size of health warnings has been added. The text is based on the facilitator’s language and attempts to reflect the status of discussions, by conveying optimal warning size while establishing appropriate minimum standards.
- **Article 13.** The new language proposed for Article 13 reflects the status of the discussions at the fifth session: it reaffirms that everyone is committed to the principle of restriction, and allows those who wish to eliminate cross-border advertising to do so in accordance with their own internal legislation. Furthermore, it encourages countries to proceed towards a total ban and to translate their commitment into an international obligation.
- **Article 14.** This Article now includes a reference to affordable pharmaceutical products for diagnosing and treating tobacco dependence; most such products are unaffordable in developing countries.
- **Article 15, paragraph 2.** The one paragraph which was not agreed to in the informal meeting on illicit trade during the fifth session has been eliminated; it related to Article 2, paragraph 3 and Article 4, paragraph 5 which have now been deleted from the text (see rationale above).
- **Article 16.** Throughout Article 16, the word “minor” has replaced “minors as determined by domestic law” (a definition of “minor” for the purposes of the Convention has been added to Article 1: Use of terms). In view of the considerable support for inclusion of a provision on sales by minors in Article 16, I opted to do so. A new paragraph 8 aims to curb sales by minors. Paragraphs 5 and 6 of Article 16 emphasize the Convention’s commitment to the principle that vending machines should be inaccessible to minors and should not promote tobacco products, allowing those who wish to prohibit vending machines to translate their commitment into an international obligation. Such an approach has the advantage of recognizing that this problem impacts different countries in different ways and that practices existing in one do not necessarily affect others.
- **Article 17.** Reference to subsidies has been removed from the title and text of this Article. Subsidies are an extremely technical matter and it is outside of the purview of the framework convention to address this issue in detail.

- **Article 18.** Much of the language of the text was deleted in response to general discussion, including the concern that because this was a new article there was insufficient time to carry out adequate negotiations and consultations on complex environmental issues. Additionally, the original introductory paragraph had raised concerns that it was inappropriate for the framework convention to pass judgement on compliance with other treaties.
- **Article 19.** Although addressing questions of liability at the international level is complex, most delegations agree that it is necessary to include this issue in the framework convention in order to emphasize both the integral role of liability in an overall tobacco-control regime and the importance of having a structure at country level to address the issue internally and to cooperate on exchange of information. The rationale for including this Article is thus to indicate the importance of liability and compensation for tobacco control. The title has been changed to “Liability”. The reference to compensation has been deleted on the understanding that liability is a broad concept which encompasses the idea of compensation. The Basel Convention’s Article 12 on “Consultations on Liability” provides a precedent for such a title. Additionally, the term “pertinent jurisprudence” in paragraph 2(b) has been chosen to meet the concerns of delegations who felt that the collection and transmission of all court decisions at all levels would create an undue administrative burden and that the transmission of all court decisions to other countries was not customary practice.
- **Article 21, paragraph 1(e).** This subparagraph has been deleted in order to avoid implying *ex ante* the creation of additional obligations via the Conference of the Parties.
- **Article 23.** In paragraph 3, I opted to state that the Conference of the Parties should adopt rules of procedure by consensus, as this was favoured by most delegations. Precedents for this choice include Article 23, paragraph 3 of the Convention on Biological Diversity, Article 7, paragraph 2 of the United Nations Framework Convention on Climate Change, Article 18, paragraph 4 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and Article 19, paragraph 4 of the Stockholm Convention on Persistent Organic Pollutants. An additional paragraph 4 has been added; this provision is at the level of detail typically included in the financial rules of a convention, to be adopted by decision of the Conference of the Parties. A budget must be adopted on a regular basis, i.e. for each budgetary period, by the Conference of the Parties; adoption of the budget should be a standing item on the agenda of the Conference of the Parties. Additionally, paragraph 4(i) from the new Chair’s text has been changed in order to define better the authority of the Conference of the Parties (paragraph 5(h) of the revised text).
- **Article 26.** Changes to paragraph 4 reflect the fact that many countries are concerned about governance and creation of new bureaucracies. Although the convention will act as a vehicle for generating both new resources and goodwill among donors, the volume of resources to be made available is not yet known. The process is only beginning; it is therefore appropriate for the Conference of the Parties to consider the matter. The language represents an effort to propose a constructive solution in an area in which opposing views still exist.
- **Article 27, paragraph 2.** Arbitration rules should be adopted by consensus. Such an important issue should require a high level of agreement.
- **Article 28, paragraph 3.** The requirement for adoption of amendments to the framework convention is now three-quarters of Parties present and voting. The idea is that a higher

measure of agreement will strengthen the convention. Article 15, paragraph 3 of the Framework Convention on Climate Change provides a precedent for this language.

- **Article 29.** Paragraphs 3 and 4 from the new Chair's text have been deleted in order to make the amendment process for annexes consistent with the amendment process for the convention;
- **Article 35, paragraph 3.** I included the term "accession" after "formal confirmation". The concept that international organizations can accede to treaties is normal treaty practice and reflected in Article 15 of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.

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In addition to these more substantive amendments, I have made some minor revisions that do not substantively change original obligations of the new Chair's text. Although we have not formally reviewed the proposed preambular language from the new Chair's text, I decided to propose some changes in order to make the language more consistent with the emerging text of the convention. I have also made some revisions to Article 1 (Use of Terms) based on the outputs from the informal group on that subject.

As we look forward to the sixth session of the Negotiating Body (17 to 28 February 2003) – the final round of negotiations on the framework convention – we have cause to be optimistic. We have made excellent progress thus far, and I am confident that we will be able to move the process ahead to prepare the convention for adoption by the Health Assembly. The time has come jointly to apply the imagination and skills of all concerned to the task of producing a formulation that is generally acceptable. In order to accomplish this task, we must move beyond country, subregional, and regional perspectives and work for the collective interest, bringing whatever is necessary and desirable in terms of public health into the realm of the possible. I am firmly convinced that the search for consensus is not futile, and will not reduce the effectiveness of the convention. Consensus is the accepted practice in multilateral treaty negotiations, and I am certain that we will be able to achieve an effective global consensus on the text by the end of the sixth session. In order to achieve a consensus text all delegations must be willing to find creative solutions that will provide a solid foundation for countries to progress on tobacco control. I do not agree with the view that searching for consensus involves reducing the effectiveness of the framework convention. Treaties, and especially framework conventions, cannot replace national legislation; nor can they incorporate all local and regional views. What they can and are meant to do is to provide a foundation for inspiring international cooperation and national action.

As I emphasized during the fifth session, it is important to keep in mind that adoption of the framework convention will not be the end of a process. It should be viewed rather as the first formal institutional step on the long road to consolidating a multilateral regime on tobacco control. This is the basic idea behind the framework-convention approach that has been successful in the environmental field, where it has evolved significantly over the past two decades. The adoption of the text in May should be seen as a starting point rather than the end of a process. With this in mind we held a productive discussion on the possible negotiation of one or more initial protocols to the framework convention following its adoption. A significant number of Member States favoured keeping the process alive between adoption of the framework convention and its entry into force. We resolved to

continue this discussion at the end of the sixth session, and I am confident that we will make the right decision.

We should nurture the process carefully in order to achieve its successful conclusion in May 2003, working as much as possible on the basis of consensus, so that the final outcome will be a convention that is both meaningful in setting international public-health standards and ratifiable by the majority of States.

I wish to thank Dr Brundtland and her staff for their commitment and for their valuable suggestions and contributions to the drafting of this text.

I look forward to your active and constructive participation during the sixth session, and expect that we will be able to agree on a final text, to be forwarded to the Fifty-sixth World Health Assembly for formal adoption in May 2003. For my part, I remain committed to the integrity of this process, and I rely upon your collective wisdom and cooperation in order to take it to a successful completion.



Luiz Felipe de Seixas Corrêa

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