



WHO FRAMEWORK CONVENTION  
ON TOBACCO CONTROL

**Conference of the Parties to the  
WHO Framework Convention  
on Tobacco Control**

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# **Trade and investment issues relevant to implementation of the WHO FCTC**

## **Report by the Convention Secretariat**

### **INTRODUCTION**

1. This report has been prepared in accordance with decision FCTC/COP5(15), on cooperation between the Convention Secretariat, WHO, the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD), which was adopted by the Conference of the Parties (COP) at its fifth session (Seoul, Republic of Korea, 12–17 November 2012). Pursuant to that decision, this report contains observations regarding evolving tobacco control-related trade and investment issues of relevance to the implementation of the Convention, and presents the outcomes of activities undertaken by the Convention Secretariat in cooperation with partners in this area since the fifth session of the Conference of the Parties.

2. At its fourth session (Punta del Este, Uruguay, 15–20 November 2010) the COP adopted decision FCTC/COP4(18), on cooperation between the Convention Secretariat and the WTO, which was aimed at supporting Parties in implementing the Convention by, inter alia, facilitating information sharing on trade-related issues, including between Parties to the WHO FCTC, and furthering cooperation between the Convention Secretariat and the WTO. At its fifth session, the COP took note of the report on this matter presented as requested in that decision (document FCTC/COP/5/18) and further requested that the activities undertaken by the Convention Secretariat in relation to information sharing, monitoring of relevant developments and provision of technical support in cooperation with other international organizations continue.

3. In related developments, the COP adopted the Punta del Este and Seoul Declarations at its fourth and fifth sessions, respectively. Through these decisions the Parties declared their commitment to prioritize the implementation of health measures designed to control tobacco consumption in their respective jurisdictions, and their determination not to allow tobacco industry interference to slow or prevent the development and implementation of tobacco control measures in the interests of public health and in accordance with the Convention.

## **RELEVANT DEVELOPMENTS SINCE THE FIFTH SESSION OF THE COP**

4. Increasing attention has been paid, since the fifth session of the COP, to the relationship between the WHO FCTC and international trade and investment agreements and the implications of this relationship for the effective implementation of the Convention. This occurs against a background of continuing legal challenges to implementation of tobacco control measures in WTO dispute settlement proceedings and under international investment agreements.

5. In addition, many governments are facing legal challenges by the tobacco industry in domestic courts in relation to tobacco control measures, and some of these challenges incorporate claims relating to international trade law. In recent years, legal challenges to tobacco control measures have been initiated in all WHO regions, in relation to a range of tobacco control measures. Interference by the tobacco industry remained one of the most frequently identified barriers to effective implementation of the Convention reported by Parties in their 2014 implementation reports.

6. Domestic disputes are initiated in relation to measures implemented under various articles of the WHO FCTC. In their 2014 implementation reports, Parties reported domestic legal challenges relevant to Articles 9, 10, 11 and 13. Challenges often relate to measures that have already been successfully implemented by other Parties without challenge. A number of Parties also reported that the tobacco industry threatened legal challenges or queried the lawfulness of draft tobacco control laws.

7. Importantly, a number of Parties have successfully defended legal challenges to their tobacco control measures, and the sharing of their experiences can assist other Parties facing similar challenges. The WHO FCTC has been an important factor in the outcomes of some of these decisions.

8. The use of international forums to pursue legal challenges to tobacco control measures has also prompted ongoing discussion about how tobacco control should be addressed in the negotiation of new free trade and investment agreements. In response to these challenges, and the tobacco industry's observed practices of lobbying to influence negotiation of new agreements, some Parties to the WHO FCTC have proposed specific measures to prevent such agreements being used to challenge tobacco control measures, including explicitly excluding tobacco and tobacco products from future coverage of trade and investment treaties.

9. One Party requested that the provisional agenda for the fifth session of the COP encourage substantive discussions on dealing with tobacco and tobacco products during negotiations on free trade and investment agreements. The COP's consideration and guidance in relation to this item will aid future work.

## **KEY ACTIVITIES SINCE THE FIFTH SESSION OF THE COP**

10. The Convention Secretariat has undertaken a range of activities to promote sharing of information among Parties to the WHO FCTC, including between Parties' health and trade officials. Parties to the WHO FCTC have continued to highlight in various forums and through their implementation reports the challenges they face in relation to trade and investment matters, including legal challenges.

### **Cooperation with international organizations**

11. The decision taken by the COP at its fifth session requested the Convention Secretariat to continue to cooperate with the WHO Secretariat, the WTO Secretariat and the UNCTAD Secretariat in information sharing and provision of technical support to Parties.

12. The Convention Secretariat, as part of the WHO delegation, continues to observe and to provide information, as appropriate, in relation to relevant agenda items of regular meetings held by WTO bodies, primarily the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Committee on Technical Barriers to Trade (TBT). The WHO Secretariat also provided information in relation to WHO's technical cooperation activities in the area of public health, intellectual property and trade. The WTO has attended relevant meetings convened by the Convention Secretariat and WHO.

13. The Convention Secretariat collaborates with other international partners, particularly UNCTAD. The Convention Secretariat and UNCTAD have agreed in principle on a framework of cooperation, including matters related to the mandate of UNCTAD on trade and development issues, which outlines areas and mechanisms of assistance to promote this work, as requested by the COP. In particular, the Convention Secretariat and UNCTAD cooperated on the preparation of technical papers relating to trade and investment challenges to support Parties' implementation of the WHO FCTC. UNCTAD has also assisted the Convention Secretariat in the provision of technical support to Parties, through participation in meetings convened by the Secretariat, and upon request.

14. The Convention Secretariat has continued to update partners, including the WTO, UNCTAD and the WHO Secretariat on relevant trade and investment issues and legal challenges related to implementation of the Convention through the United Nations Interagency Task Force on the Prevention and Control of Noncommunicable Diseases, which incorporates the work of the former United Nations Ad Hoc Interagency Task Force on Tobacco Control.

### **Facilitating information sharing between health and trade representatives of Parties**

15. In March 2014, the Convention Secretariat convened a workshop on trade and investment issues relevant to implementation of the WHO FCTC for health and trade representatives of Permanent Missions in Geneva. The workshop was convened in recognition of the continuing accumulation of national experiences in this area since the first such workshop was organized by the Convention Secretariat for Permanent Missions and interested representatives from capitals in March 2012. Representatives of WHO, WTO, UNCTAD, and the World Intellectual Property Organization also participated in the workshop to provide information to Parties within their respective mandates.

16. In light of the developments since the 2012 workshop, the 2014 workshop placed greater emphasis on sharing of experiences among Parties, and identification of support that could be provided to Parties. Key observations arising out of the workshop were that:

- (a) Parties continue to face trade and investment-related challenges in implementation of the WHO FCTC;
- (b) in addition to international trade- and investment-related challenges, many governments are facing legal challenges by the tobacco industry in domestic courts in relation to WHO FCTC implementation. These challenges address a wide range of issues under domestic law. Some also incorporate claims related to international trade law, highlighting the relationship between international and domestic disputes;
- (c) there can be a lack of capacity regarding trade and investment law within Parties' health ministries, and a limited pool of legal experts to call upon. Parties would benefit from a network of individuals with relevant expertise, to whom they could be referred for technical support on request.

- (d) the tobacco industry routinely seeks to intimidate countries developing tobacco control laws with the threat of legal action.<sup>1</sup> Such threats can dissuade governments from acting. This is a particular risk in countries with limited resources and capacity to assess and respond to threats or defend challenges;
- (e) the tobacco industry also has an incentive to prolong litigation as long as possible, to drain government resources, to further delay implementation of the measure being challenged, and to dissuade other governments from acting by creating a perception that the lawfulness of tobacco control measures is unclear;
- (f) there is much that Parties can learn from one another's experiences in defending domestic challenges, even though local laws and legal systems are different; there is a need for greater communication, cooperation and understanding not only between Parties, but also between different government ministries and departments within Parties; and
- (g) Parties highlighted the value of a readily available catalogue of current and pending challenges, including domestic legal challenges, to WHO FCTC implementation;<sup>2</sup> Parties would benefit from additional, easy-to-use materials that outline and explain key legal issues, particularly relating to the relationship between international trade and investment law and WHO FCTC implementation.

17. In addition, some other issues were raised during the workshop, such as the possibility of using the dispute settlement mechanism referred to in Article 27 of the WHO FCTC to create a forum for discussion between two or more Parties to the Convention in the event of a dispute concerning the interpretation or application of the Convention.

### **Other activities**

18. Trade and investment issues have been highlighted as part of the international cooperation agenda in the regional workshops on implementation of the WHO FCTC conducted by the Convention Secretariat in cooperation with WHO regional offices and with the participation of relevant international organizations, particularly UNCTAD. Since 2012 a series of workshops on trade and tobacco has also been convened by the WHO Secretariat, including its regional offices, in collaboration with the Convention Secretariat. In these workshops, the Convention Secretariat underlined the importance of the WHO FCTC as a legally binding international framework, including the content and role of the guidelines for implementation of various provisions of the Convention adopted by the COP, with regard to the development of Parties' legislation and regulations.

19. The Convention Secretariat regularly monitors country experiences of trade, investment and domestic legal challenges to tobacco control measures. Both the Convention Secretariat and the WHO Secretariat continue to provide legal and technical support directly to Parties on trade and investment issues, as well as in relation to other legal challenges, on request. In addition to supporting Parties in implementation of specific tobacco control measures, the Convention Secretariat supports Parties' activities through the provision of information about general developments in relation to trade, investment and tobacco control, upon request. The Convention Secretariat continues to highlight the linkages between health, trade and investment policies pertinent to the WHO FCTC in relevant international forums. Most recently, the Convention Secretariat spoke at the Seminar on Tobacco and Trade convened for health and trade officials by the European Commission held in March 2014 in Brussels.

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<sup>1</sup> During the March 2014 workshop, civil society reported that legal action regarding tobacco control measures has been threatened in around 15 countries across Africa. Some Parties also reported threats in their 2014 biennial implementation reports.

<sup>2</sup> Parties noted that existing public online resources such as the Campaign for Tobacco Free Kids' Tobacco Control Laws – Tobacco Litigation Database (<http://www.tobaccocontrollaws.org/litigation>) and various national databases already compile key tobacco control litigation decisions in concluded matters.

20. The purpose-built WHO FCTC information platform, which seeks to combine in one place information on implementation of the Convention, will also boost the Convention Secretariat's sharing and dissemination of information relevant to implementation of the WHO FCTC, and will further enable the promotion and sharing of resources. In anticipation of the launch of the platform, a dedicated page of the WHO FCTC website has been created for dissemination of information relating to trade and investment issues relevant to implementation of the Convention.<sup>1</sup>

21. The Convention Secretariat requested the McCabe Centre for Law and Cancer (based in Melbourne, Australia), a joint initiative of the Union for International Cancer Control and its member organization, Cancer Council Victoria, to serve as a knowledge hub in relation, in particular, to legal challenges to implementation of the WHO FCTC. The hub will assist the Secretariat to facilitate the exchange of information and cooperation between Parties and provide technical assistance. Through the McCabe Centre knowledge hub website, Parties and interested partners can find information regarding the WHO FCTC, State obligations under international trade and investment law, and the relationships between them, as well as ongoing trade, investment and domestic legal challenges to implementation of tobacco control measures. It is expected that by the end of 2014 this information will be embedded in the Secretariat's information platform, as will information provided by other knowledge hubs, to assist with information sharing. The knowledge hub also assists the Secretariat in establishing a network of experts to promote information exchange and assistance to Parties in this area.

22. In a related activity, in early 2014 the McCabe Centre, in collaboration with the Convention Secretariat and the WHO Regional Offices for Africa and the Western Pacific, and with funding support from the Australian Government, conducted an Intensive Legal Training Programme which, inter alia, focused on regulating risk factors for cancer and other noncommunicable diseases, particularly tobacco use, through the WHO FCTC, and covered topics such as international trade and investment law, international intellectual property law, litigation, advocacy and public health leadership, attracting representatives of more than 20 countries. The Secretariat supported participation of three experts nominated by Parties that undertook joint needs assessment missions as part of post-needs assessment assistance requested by those Parties.

### **Information deriving from Parties' reports**

23. Analysis of Parties' implementation reports in 2014 revealed that Parties have a variety of concerns about legal challenges, reporting on them as a form of tobacco industry interference, as a barrier to implementation of the Convention generally, and as a challenge to implementation of specific articles. In recognition of the importance of promoting and sharing Parties' experiences, these responses from Parties are reflected in the summary of the 2014 global progress report on implementation of the WHO FCTC (document FCTC/COP/6/5), and the full report, which contains a summary of trends and developments related to legal challenges to Parties' implementation of tobacco control measures.

### **CONCLUSION**

24. As legal challenges to implementation of the Convention remain a serious concern, there are a number of opportunities for the COP to continue and strengthen support for Parties in this area. To this end, the COP could investigate options for an intersessional mechanism to strengthen support for Parties facing legal threats and challenges, and to enhance multisectoral exchanges relating to health and trade, including in the context of negotiations for new trade and investment obligations. Continued cooperation between the Convention Secretariat and other relevant international organizations, and further sharing and dissemination of experiences and best practices will remain important.

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<sup>1</sup> See web page at: [http://www.who.int/fctc/trade\\_and\\_investment](http://www.who.int/fctc/trade_and_investment)

**ACTION BY THE CONFERENCE OF THE PARTIES**

25. The COP is invited to note this report and to provide further guidance.