



# WORLD HEALTH ORGANIZATION

**INTERGOVERNMENTAL NEGOTIATING BODY  
ON THE WHO FRAMEWORK CONVENTION  
ON TOBACCO CONTROL**

**A/FCTC/INB6/INF.DOC./2  
18 January 2003**

**Sixth session**

**Provisional agenda item 4**

---

## **Future protocols**

### **Note by the Secretariat**

#### **INTRODUCTION**

1. By resolution WHA52.18 (1999), the Health Assembly established the basis for negotiation of a WHO framework convention on tobacco control and “possible related protocols”. Indeed, the concept of a framework convention implies that the convention establishes the fundamental rules and principles, whereas additional protocols elaborate on specific issues. In this sense, the negotiation of a framework convention is not a complete process, but the beginning of one that will include the formulation of one or more protocols. A specific issue is often addressed in a protocol because of its complexity, which justifies that it should be dealt with separately by a negotiating group of specialists. Another reason may be that an issue is controversial and requires considerably more discussion than the rest of the text.

2. The combination of a framework convention and protocols is also more flexible: it constitutes a package that allows each State to adhere to the convention and to those protocols that address an area of concern to it. This approach may therefore enjoy greater political support than a convention that attempts to address every issue in detail, without resorting to protocols.

3. The subject of protocols has been discussed at all previous sessions of the Intergovernmental Negotiating Body. The following areas that could usefully be addressed by a protocol were identified: advertising, promotion and sponsorship; tobacco-product regulation; illicit trade; and liability. At the fifth session, the possibility of elaborating protocols on illicit trade and crossborder advertising was noted in particular.

4. Most delegations expressed preference for completing negotiations on the framework convention before engaging in negotiations on protocols. Two possibilities were identified for inception of negotiations:

- (1) immediately after adoption of the framework convention, i.e. during the period between adoption and entry into force of the convention; some delegations felt that this would maintain the momentum of the discussions;

(2) after entry into force of the framework convention by the Conference of the Parties; some delegations felt that this would ensure that only Parties to the convention would be involved in the protocol negotiations.<sup>1</sup>

5. In response to concerns raised during the discussions, the present document sets out precedents for these two options for the negotiation and adoption of protocols. A third option would be to negotiate and adopt a protocol at the same time and by the same body as the main treaty. Since negotiations have focused exclusively on the framework convention and are now nearing completion, this option cannot be considered realistic and has therefore been excluded. This was also the decision adopted by the Negotiating Body at its fifth session.

## NEGOTIATION AND ADOPTION OF PROTOCOLS

### **Negotiation in interim period between adoption and entry into force of a convention; subsequent adoption of protocol**

6. The negotiation of the protocol or protocols begins either shortly before or after adoption of the convention. The protocols are adopted after adoption of the convention, but possibly before its entry into force. The protocol negotiations thus take place at least in part during the interim period between adoption and entry into force of the convention. Accordingly, they are serviced by the interim secretariat that will have been designated for this period.

7. Usually, the protocol negotiations will be conducted either by the body that has negotiated the convention, and whose mandate is extended for this purpose by a diplomatic conference or the intergovernmental organ that adopts the convention, or by a new body established specially for this purpose by the diplomatic conference or the intergovernmental organ.

8. If the protocol negotiations are concluded after entry into force of the convention, the protocol will usually be adopted by the Conference of the Parties to the convention. If the negotiations are concluded before the entry into force of the convention, a special conference will be convened to adopt the protocol. The mandate for convening such a conference is generally established by the governing body of the organization that carries out the functions of the interim secretariat of the convention. The conference to adopt the protocol is convened and serviced by that organization. Alternatively, the protocol may be adopted by the governing body of the organization.

### **Precedents**

9. **Council of Europe Convention on Human Rights and Biomedicine (1996) and Additional Protocols.** The legal basis for negotiation of the Convention and the Protocols is established in Recommendation 1160 of the Parliamentary Assembly of the Council of Europe, adopted in 1991. The Assembly recommended that the Committee of Ministers “envisage a framework convention comprising a main text with general principles and additional protocols on specific aspects”. The mandate thus encompassed the convention and the protocols as parts of a whole, intended to complement each other. The Committee of Ministers in 1991 requested the Steering Committee on Bioethics to elaborate the convention, and protocols on specific issues. Under the guidance of the

---

<sup>1</sup> See the provisional summary record of the seventh plenary meeting (document A/FCTC/INB5/PL/SR/7).

Steering Committee, different working parties were set up to negotiate the convention and individual protocols.

10. The negotiations on the convention were initiated in 1991. It was adopted by the Committee of Ministers on 19 November 1996, opened for signature on 4 April 1997, and entered into force on 1 December 1999.

11. Two additional protocols have been adopted to date:

- **Additional Protocol on Transplantation of Organs and Tissues of Human Origin.** Negotiations began in 1991, concurrently with those of the convention. After an extended negotiation process, which included several postponements, the Protocol was adopted by the Committee of Ministers on 8 November 2001 and opened for signature on 12 December 2002. It is not yet in force. This protocol was thus negotiated at the same time as the convention but adopted only after the adoption and entry into force of the Convention.
- **Additional Protocol on the Prohibition of Cloning Human Beings.** The negotiation process began in May 1997. The Protocol was opened for signature on 12 January 1998 and entered into force on 1 March 2001. It was thus negotiated and adopted during the interim period between adoption and entry into force of the Convention. It entered into force after the entry into force of the Convention.

12. Three additional protocols are currently under negotiation by the relevant working parties (the year in which negotiations began appears in brackets): Additional Protocol on Biomedical Research (1992); Additional Protocol on the Protection of the Human Foetus (1995); Additional Protocol on Human Genetics (1998). Negotiations on the first two were initiated before the adoption of the Convention, i.e. they were in part negotiated concurrently with the convention, and will be adopted after its adoption and entry into force. Negotiations on the third were initiated after adoption but before entry into force of the Convention.

13. This precedent shows that it is possible to opt for different timing for different protocols under the same convention, depending on the moment during negotiation of the convention or after its adoption, at which it is felt appropriate to elaborate a protocol on a particular subject.

14. **Vienna Convention on Protection of the Ozone Layer (1985) and Montreal Protocol on Substances that Deplete the Ozone Layer (1987).** The Vienna Convention was adopted on 22 March 1985 and entered into force on 22 September 1988. The Montreal Protocol was adopted on 16 September 1987 and entered into force on 1 January 1989. The Protocol was thus adopted before the entry into force of the Convention, i.e. during the interim period. Most of its negotiation also took place during the interim period.

15. Decision 12/14 of the UNEP Governing Council (1984) provided the legal basis for negotiations on the convention and on a protocol concerning chlorofluorocarbons that could be initiated before adoption of the convention. Accordingly, the negotiations on the protocol were launched by the working group that negotiated the convention. In its Resolution 2, the Diplomatic Conference that adopted the Vienna Convention requested the Executive Director of UNEP to convene a working group to continue work on the protocol. It also authorized the Executive Director to convene a Diplomatic Conference to adopt the Protocol. The protocol negotiations were serviced by the interim secretariat of the Convention. After its establishment by the first Conference of the Parties of the Convention in 1989, the permanent Secretariat also serviced the Montreal Protocol.

## Negotiation subsequent to entry into force of a convention

16. Protocol negotiations are not initiated until the main convention has entered into force. The mandate for the negotiation of one or more protocols is laid down by the Conference of the Parties to the convention, which also establishes a working group to negotiate the protocols. The protocols are subsequently adopted by the Conference of the Parties, in which non-Parties to the convention are represented as observers. At the inception of the protocol negotiations, the permanent institutional and financial infrastructure of the convention will usually be in place. The permanent secretariat will thus service the protocol negotiations.

### Precedents

17. **United Nations Framework Convention on Climate Change (1992) and Kyoto Protocol (1997).** The Convention was adopted in New York on 9 May 1992 and entered into force on 21 March 1994. The First Conference of the Parties, which met in March/April 1995, adopted the so-called Berlin Mandate, which provided the legal basis for the adoption of “a protocol or other legal instrument” to strengthen the commitments of Parties to the Convention. For this purpose, the Conference of the Parties established the open-ended Ad Hoc Group on the Berlin Mandate, which negotiated the protocol in eight sessions between 1995 and 1997. It was adopted on 11 December 1997 by the Third Conference of the Parties, held in Kyoto, Japan.

18. The permanent secretariat for the Convention was designated by the First Conference of the Parties, to become operational on 1 January 1996. The interim arrangement continued until 1995. The Ad Hoc Group on the Berlin Mandate was thus initially serviced by the interim secretariat and subsequently by the permanent secretariat.

19. **United Nations Convention on Biological Diversity (1992) and Cartagena Protocol on Biosafety (2000).** The Convention was adopted in Rio de Janeiro, Brazil, on 5 June 1992 and entered into force on 29 December 1993. The Second Ordinary Meeting of the Conference of the Parties (Jakarta, November 1995) decided to negotiate a protocol on biosafety and established an Open-ended Ad Hoc Working Group under the Conference of the Parties for this purpose. The Cartagena Protocol on Biosafety was adopted by the First Extraordinary Meeting of the Conference of the Parties on 29 January 2000. The permanent institutional arrangements of the Convention had been in place for a number of years by that time. Accordingly, the protocol negotiations were serviced by the permanent secretariat.

## CONCLUSION

20. As the above overview shows, there are precedents for the options outlined in the introduction; either could be chosen by the Negotiating Body.

21. The first option offers a wide range of possibilities for the timing of the inception of negotiation and adoption of protocols. It is suited to a situation in which there is a basic will to elaborate protocols, but negotiation may be opportune at different times for different subjects. This option ensures that the momentum of the negotiations on the framework convention is maintained, while leaving flexibility as to the timing of those on protocols. If this option were chosen, the Health Assembly, when adopting the framework convention, would need either to extend the mandate of the Negotiating Body to cover one or more protocols, or to establish a new open-ended working group for this purpose. The Health Assembly would also need to identify a body or conference that would adopt the protocol; it may of

course carry out this function itself. To bring into account the provisions of the draft text of the convention and in accordance with general practice, it is envisaged that the Health Assembly will in any event designate an interim secretariat. Under this option for negotiating protocols, one of the duties of the interim secretariat would be to service the negotiations of one or more protocols.

22. The second option is normally chosen in the event that the will to elaborate a protocol emerges only after the entry into force of a treaty. However, there is likely to be a time lag between the negotiations on the convention and those on the protocols, which might lead to a loss of political momentum in the process of developing the international legal regime. The working groups to negotiate protocols would be established within the framework of the convention and thus open to Parties only. Strictly speaking, only Parties may thus participate in the negotiations. However, non-Parties may generally participate as observers, and in practice there is often little difference between the two categories of States as to their participation in discussions. After the working group completes its work, the protocol would be adopted by the Conference of the Parties to the framework convention, in which non-Parties also participate as observers.

23. At present, the number of possible protocols to the framework convention cannot be predicted. Some issues that could be addressed in a protocol have already been identified, others might yet emerge. As the precedents show, any combination of the two options within the same framework convention is feasible. It would be possible, for instance, to start protocol negotiations during the interim period in those areas where the need for a protocol is already clearly established. On other issues, where the need for a protocol may become evident only at a later stage, it may be appropriate to start negotiations after entry into force of the framework convention.

= = =