



# **A GUIDE TO DOMESTIC IMPLEMENTATION**

## **of the Framework Convention on Tobacco Control (FCTC)**

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# A Guide to Domestic Implementation of the Framework Convention on Tobacco Control (FCTC)

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## Executive Summary

In 2003, member countries of the World Health Organization unanimously endorsed the Framework Convention on Tobacco Control (FCTC), the product of four years of inter-governmental negotiations. The FCTC is the first international legal instrument designed to promote national action and global cooperation to counter the worldwide spread of the tobacco epidemic. The treaty sets out, in legally binding form, internationally accepted public health standards. As stated in the treaty's Preamble, the objective of the FCTC is *"to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke."*<sup>1</sup> The Preamble also recognises: the need for countries to give priority to their right to protect public health, the unique nature of tobacco products, and the harm that companies that produce them cause.

The FCTC provides Parties with a considerable degree of leeway in implementing measures beyond those described in the treaty. As stated in Article 2:

*Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.*

In addition, Parties have a fundamental legal obligation to interpret and implement the Con-

vention in good faith. The obligation of good faith in the observance of international agreements is universally recognised and is included in Article 26 of the Vienna Convention on the Law of Treaties.

Therefore the FCTC sets a floor, not a ceiling, for national and international tobacco control efforts. Parties to the FCTC have the flexibility now and in the future to adopt stronger tobacco control measures than those called for in the FCTC. Best practices for tobacco control measures will naturally evolve over time as the tobacco control community's knowledge deepens and new evidence-based tobacco control measures are developed.

## RECOMMENDATIONS FOR IMPLEMENTING THE FCTC: KEY TOBACCO CONTROL MEASURES

- ✓ Ban tobacco advertising, promotion and sponsorship (including cross-border advertising, promotion and sponsorship originating from its territory) no later than five years after entry into force. (Article 13)
- ✓ Within three years of entry into force, require government-approved rotating health warnings on tobacco packaging that: cover at least 30 percent and preferably at least 50 percent of the principal display areas (e.g. front and back), may include pictures or pictograms, and must be in the principal language or languages of the Party. (Article 11)

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<sup>1</sup> Throughout this document words and phrases quoted from the FCTC are italicised or underlined for emphasis.

- ✓ Ban the use of misleading and deceptive terms (such as “light,” “mild,” “low tar”) no later than three years after entry into force. (Article 11)
- ✓ Protect people from secondhand smoke. In practice this will require banning smoking in all indoor workplaces and public places. (Article 8)
- ✓ Increase tobacco taxes and ban or restrict the sale of duty-free tobacco products. (Article 6)
- ✓ Require all tobacco packages and packets to bear a clear indication of origin and final destination market, in order to discourage smuggling. (Article 15)
- ✓ Include tobacco cessation services in national health programmes. (Article 14)
- ✓ Ban the distribution of free tobacco products. (Article 16.2)
- ✓ Develop, implement, periodically update and review comprehensive multi-sectoral national tobacco control strategies and plans. (Article 5.1)
- ✓ Protect public health policies from tobacco industry influence. (Article 5.3)
- ✓ Promote the participation of non-governmental organizations (NGOs) not affiliated with the tobacco industry in the development and implementation of national tobacco control programmes. (Article 12 (e))
- ✓ Actively assist in the mobilization of financial and technical resources for developing country Parties and for Parties with economies in transition. (Article 26)
- ✓ Proactively propose protocols, amendments, and annexes to the FCTC to ensure that obligations remain relevant in light of new evidence-based tobacco control measures and evolution of best practices.

## RECOMMENDATIONS FOR IMPLEMENTING THE FCTC: DEVELOPING THE NECESSARY NATIONAL STRUCTURES

- ✓ Establish and finance a national coordinating mechanism or focal point for tobacco control. (Article 5)

# I. Introduction<sup>2</sup>

The Framework Convention on Tobacco Control (FCTC), which was adopted in May 2003 and entered into force in February 2005, is an outstanding achievement in international health law. The FCTC is the first international legal instrument designed to promote national action and global cooperation to counter the worldwide spread of the tobacco epidemic.

The FCTC sets out, in legally binding form, internationally accepted public health standards. This guide is an attempt to provide an

overview of the key substantive commitments in the FCTC.<sup>3</sup> Section II provides a brief overview of the treaty and describes how the Convention endeavours to forge international cooperation to address the tobacco epidemic through a legal framework. Section III sets forth a short description of general rules of treaty interpretation and some general observations about the interpretation of the FCTC. Finally, Section IV provides an analysis of the key tobacco control commitments contained in the FCTC.<sup>4</sup>

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<sup>2</sup>The Convention entered into force Feb. 27, 2005 for the first 40 ratifying countries (those that ratified before the end of November 2004), and 90 days after ratification for all other Parties.

<sup>3</sup>This guide focuses on the commitments contained in Articles 1-19 of the FCTC.

<sup>4</sup>This guide does not suggest legislative language for the tobacco control measures called for in the FCTC. Those can be found in the International Union for Health Promotion and Education's "Model Legislation for Tobacco Control," which is available at: <http://fctc.org/modelguide/>

## II. How the FCTC Responds to the Global Tobacco Epidemic

**A. The FCTC recognises the global problem of tobacco.** The identification of tobacco as a global problem necessitating intergovernmental cooperation and multilateral legal action is a critical aspect of the FCTC. The treaty represents the first time the world community has come together to recognise the global scourge of tobacco and forge a collective approach to curbing the epidemic.

**B. The FCTC sets forth that its ultimate objective is “to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke....”.** The FCTC objective is broadly drafted and thereby incorporates wide-ranging aspects of tobacco control within the legitimate scope of the Convention and its future protocols. Interpreting and implementing the broad duty to *protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco* involves far-reaching considerations that will have to be weighed by each country in accordance with the explicit commitments set forth in the treaty. This wide scope of the FCTC objective is consistent with international practice. Contemporary treaties normally state their objective(s) in the broadest possible terms in order not to impose any limitations on the future development of the legal regime.

**C. In order to achieve the objective set forth in the FCTC, the Convention identi-**

**fies and calls for national action and international cooperation across a wide range of tobacco control issues.** The FCTC highlights a wide range of domestic policies and measures that should be used by Parties to curb tobacco consumption and exposure to second-hand smoke. The FCTC also encourages countries to work together to develop comprehensive and collaborative approaches to tobacco control.

**D. The FCTC establishes an ongoing framework and a process for strengthening global tobacco control efforts.** The state delegates who negotiated the FCTC saw it as a launching pad for more detailed obligations in future protocols. Consequently, the Convention provides that Parties—those countries that have ratified, approved, accepted or acceded to the FCTC—will meet at regular intervals at the Conference of the Parties, known as the COP. At these sessions, Parties will promote implementation of the FCTC and continue talks on how best to tackle tobacco through detailed protocols designed to implement the broad goals of the FCTC. Decisions taken by the COP at its sessions may, over time, make up a detailed set of rules for practical and effective implementation of the FCTC. By setting up this process by which governments will meet regularly to discuss tobacco, and by encouraging information exchange, the FCTC launches an international legal dimension to global tobacco control efforts. In short, the FCTC is not just an end result, it is also the basis for future action.

### III. Understanding the FCTC

Countries are at different points in the tobacco epidemic, and have widely varying capacities to respond to it. The Convention strikes a balance between binding international standards and the need for flexibility in implementation, leaving considerable discretion to national governments as to the specific means chosen to attain Convention goals and objectives.

#### THE OBLIGATION TO IMPLEMENT THE FCTC IN GOOD FAITH

Although Parties do have some flexibility in how they implement the FCTC, they also have a fundamental legal obligation to interpret and implement the Convention in good faith. The Vienna Convention on the Law of Treaties—the so-called “Treaty on Treaties”—provides general rules on treaty implementation and interpretation.<sup>5</sup> Article 26 of the Vienna Convention states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” The Vienna Convention further states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” The obligation of good faith in the observance of international agreements is universally recognised and a fundamental tenet of international law.

#### THE FCTC SETS A FLOOR, NOT A CEILING

It is important to stress that Article 2 of the FCTC explicitly encourages Parties to implement tobacco control measures beyond those required by the treaty:

*In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.*

#### “EFFECTIVE” MEANS EVIDENCE-BASED

Throughout the text of the Convention, the FCTC calls upon states to adopt *effective legislative, executive, administrative and/or other measures* to implement specific provisions. The reference to different types of measures expands flexibility and is made necessary by the fact that parties to a single instrument with a unified sense of goals still have different political and legal systems. Different types of measures may be more or less suitable and effective depending upon the country's situation. Such flexibility provisions are incorporated in the Convention to promote effective national action and should be read in *accor-*

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<sup>5</sup> Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(1) (hereinafter, the “Vienna Convention”). The Convention's authoritative character as law, even for States that have not ratified the instrument, is based upon the fact that it is now accepted as declaratory of the customary international law of treaties. For example, although

the United States is not a party to the Vienna Convention, it considers that the substantive provisions of the Convention state the international law of the subject. (Restatement (Third), *Foreign Relations Law of the United States*, Part III, Introductory Note.)



*dance with the underlying obligation of good faith* to promote the broad goals of the Convention. Flexibility does *not* mean that States are free to choose whatever measure they choose to implement an obligation, simply because it is expedient. The FCTC consistently stipulates that the measures chosen must be *effective*. In other words, there should be science or expert opinion supporting the choice of implementation measures, and Parties should take corrective action if a particular measure proves ineffective.

#### **“IN ACCORDANCE WITH NATIONAL LAW”**

Additionally, the phrase *“in accordance with national law”* appears in various places throughout the text of the FCTC and its interpretation has important implications for understanding the scope of national obliga-

tions under the agreement. A limited interpretation of the phrase *“in accordance with national law”* would merely obligate states to implement a commitment consistent with existing national law and would not require states to adopt new legislation. **However, such an interpretation is not consistent with good faith** since, taken to its logical conclusion, such a construction would not require states to undertake any new actions and would essentially undercut the objective of the FCTC to advance national and international tobacco control. A more appropriate interpretation of this phrase is that countries **are** expected to enact or amend national legislation, where necessary, but to do so in accordance with normal legislative or administrative procedures without overturning longstanding constitutional or quasi-constitutional arrangements.

## IV. Elements of the Framework Convention on Tobacco Control

The FCTC sets a basic framework for national and intergovernmental efforts to battle the tobacco epidemic. Each of the core substantive elements of the FCTC is briefly explained below.

### GENERAL OBLIGATIONS (ARTICLE 5)

Article 5 establishes the basic obligations of States under the Convention to advance tobacco control efforts through national action and international cooperation. By becoming Parties to the Convention, States accept the responsibility to actively implement the objective of the Convention (*“to protect present and future generations from the devastating consequences of tobacco consumption and exposure to environmental tobacco smoke”*). The express commitment in Article 5.1 to give effect to the obligations contained in the Convention reflects the principle that the implementation of tobacco control measures requires concrete action by each Party.

All Parties to the Convention are subject to a commitment to develop, advance, and implement comprehensive national tobacco control strategies, plans and programs in accordance with the FCTC and Protocols to which they are Parties (Article 5.2). The Convention requires States to *adopt and implement effective measures* to curtail tobacco consumption and exposure to secondhand smoke. To this end, Parties have an express obligation to establish or finance a national coordinating mechanism or domestic focal point for tobacco control.

The FCTC also requires that Parties undertake measures to protect tobacco control policies

from the interests of the tobacco industry, including the adoption of new legislation when necessary (Article 5.3).

The FCTC recognises that policymakers can learn from one another and encourages governments to work together and with relevant international organizations to advance tobacco control. The Parties have an affirmative obligation to advance national and international tobacco control efforts by cooperating with other Parties in strengthening tobacco control efforts and developing measures for the implementation of the FCTC and Protocols to which they are a Party (Article 5.4). Similarly, Parties are legally bound to cooperate with competent intergovernmental organizations and other bodies to achieve the objectives of the Convention (Article 5.5).

### PRICE AND TAX INCREASES<sup>6</sup> (ARTICLE 6)

It is no accident that price and tax measures are the first item listed in the FCTC. Tax and price measures are widely recognised as one of the most effective means of reducing tobacco consumption, particularly among the young. Article 6 commits Parties to treat tobacco taxation as a health measure, rather than solely a fiscal measure, and encourages Parties to adopt tax and price policies that will discourage tobacco consumption. The sale of tax- and duty-free tobacco products to travellers effectively imposes low-cost tobacco products on other countries; hence, Parties are strongly encouraged to prohibit or restrict such sales.

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<sup>6</sup> For more information on the economics of tobacco control, see: <http://www1.worldbank.org/tobacco/>

## PROTECTION FROM EXPOSURE TO TOBACCO SMOKE<sup>7</sup> (ARTICLE 8)

Article 8 confirms that *scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability* in both smokers and non-smokers. This is important because tobacco companies and their allies continue to claim the opposite, and sometimes suggest that the science from one part of the world cannot be applied to other regions. The broad commitment under Article 8 to protect smokers and non-smokers from tobacco smoke reflects the fact that an increasing number of jurisdictions worldwide have recognised the effectiveness of such protective measures and are increasingly adopting bans on smoking in all workplaces and other public places, including bars and restaurants.

The FCTC establishes a specific two-pronged commitment that legally binds Parties to protect people from secondhand smoke. First, Article 8 mandates that within areas of existing national jurisdiction, Parties must adopt and implement *effective* measures to protect against exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places. Second, where national governments do not have jurisdiction (for example, in sectors under state/provincial control), Parties have a duty to *actively promote* the adoption and implementation of such effective measures.

The tobacco industry has aggressively promoted ventilation and/or separate non-smoking areas as an alternative to smoke-free environ-

ments around the world. However, according to the World Health Organization, second-hand smoke is a carcinogen for which there is no “safe” level of exposure. There is unequivocal evidence establishing that ventilation technology is incapable of removing all of the harmful elements from tobacco smoke.

Consequently, good faith implementation of the commitments under Article 8 requires Parties to implement smoke-free policies in public places, workplaces, and public transport in areas under national jurisdiction and to actively promote smoking bans at other jurisdictional levels. Good faith interpretation and application of Article 8 also requires Parties to adopt the widest possible definition of public places, workplaces and public transport and to extend the ban to other public places in order to protect smokers and non-smokers. Public health authorities recommend that **ALL** indoor workplaces (including bars and restaurants) and public places should be smoke-free, without exception. Anything less will not provide the required protection for all citizens—including bar and restaurant workers—from exposure to the deadly toxins in secondhand smoke.

## REGULATION OF THE CONTENT OF TOBACCO PRODUCTS<sup>8</sup> (ARTICLE 9)

Manufactured tobacco products and their smoke contain thousands of chemical compounds, including more than 60 known or suspected carcinogens. In most of the world, cigarettes are largely exempt from safety standards, testing, and regulation, even though

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<sup>7</sup> More information can be found at: <http://fctc.org/factsheets/3.pdf>

<sup>8</sup> More information can be found at: <http://fctc.org/factsheets/4.pdf>

many of the dangerous chemicals found in cigarettes and cigarette smoke are banned or strictly regulated in other products. Scientific studies have found wide variations in levels of (carcinogenic) tobacco-specific nitrosamines in unburnt tobacco, even among cigarettes of the same brand. There has also been considerable academic debate about various commonly used cigarette additives that may increase addictiveness or suppress coughing. This has led to increased calls for regulation.

Some jurisdictions impose ad hoc rules (e.g., the so-called “tar” and “nicotine” ceilings in the European Union, based on the controversial ISO method for measuring cigarette emissions) but experts hotly debate the appropriateness of these rules and their public health benefit. Because of the complexity of tobacco smoke chemistry and the interaction between the product and human behaviour, tobacco product regulation requires considerable scientific resources that may be beyond many countries’ means. International cooperation is therefore key to meaningful product regulation.

The FCTC COP is charged under Article 9 with developing guidelines for testing and measuring the contents and emissions of tobacco products, and for the regulation of these contents and emissions. This is a complex area and it is strongly recommended that the ongoing work by the WHO Study Group on Tobacco Product Regulation (formerly known as SAC-TOB), the work of other independent public health practitioners, and the work of experts in toxicology and other relevant specialities be fed into this process.<sup>9</sup>

Article 9 of the FCTC highlights the importance of product regulation mechanisms while recognising the challenge that Parties currently face in developing and implementing standards in this realm. The Article legally binds each party to:

*adopt and implement effective legislative, executive and administrative or other measures for the testing and measuring as well as the regulation of the contents and emissions of tobacco products where approved by competent national authorities.*

The phrase *where approved by competent national authorities* appears to create some ambiguity about the scope of the obligation. Read in light of the objective of the Convention and the current regulatory context, a good faith interpretation of the Article 9 commitment requires national regulatory authorities to adopt and implement *effective* legislative, executive and administrative or other measures for such testing, measuring and regulation when evidence-based best practices in this realm are established.

## REGULATION OF TOBACCO PRODUCT DISCLOSURES (ARTICLE 10)

Increasing public awareness of the dangers of tobacco has been shown to be an effective means of discouraging and reducing tobacco consumption. Numerous studies show that knowledgeable consumers smoke less. In order to expand governmental and public understanding about the toxic contents and emissions of tobacco products, Article 10

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<sup>9</sup>The preamble and guiding principle 4.7 recognise the necessity to involve NGOs and other members of civil society in achieving the objective of the Convention.

establishes a legally binding two-pronged duty with respect to tobacco product disclosures. The purpose of this article is to facilitate public access to emissions and ingredients data, which manufacturers generally try to claim should be kept as confidential trade secrets. But the high risk potential of tobacco products means that such detailed information must take precedence over trade secrecy. Specifically, Article 10:

- ✓ requires that each Party implement *effective* measures requiring manufacturers and importers to disclose to government authorities information about the contents and emissions of tobacco products in accordance with national law. Given the current lack of legislation in this realm in most countries, satisfying the legal obligation under Article 10 to ensure full-fledged industry disclosure will, in most cases, require that Parties adopt and implement new legislation.
- ✓ mandates that each Party shall adopt and implement *effective* measures to ensure public disclosure of information about the toxic constituents and emissions of tobacco products.

Until evidence-based guidelines for how contents and emissions information should be collected have been developed (see Article 9), the collection of such information should not be prioritised. Ultimately, in order to minimise the work involved for any individual country, a standardised system for collecting, reporting and analyzing the required information should

be established. This would also enable comparability between different tobacco companies and products.

## PACKAGING AND LABELLING OF TOBACCO PRODUCTS<sup>10</sup> (ARTICLE 11)

Prominent health warnings and messages on tobacco products are widely recognised as an important means of increasing awareness of risks associated with tobacco use and discouraging consumption. Studies from a number of countries have demonstrated the effectiveness of health messages in reducing tobacco consumption, provided that such messages are prominent and contain vivid information about the dangers of tobacco.

Article 11 sets forth concrete and binding national obligations mandating that Parties require health warnings and messages in the packaging and labelling of tobacco products. The text explicitly establishes a firm deadline: each Party is required—within three years after the treaty comes into force for that country—to adopt and implement *effective* tobacco packaging and labelling measures in accordance with its national legal system and the detailed commitments contained in the Article. Specifically, parties are obligated to:

- ✓ require government-approved rotating health warnings on tobacco packaging that cover at least 30 percent—and preferably 50 percent—of the principal display areas (e.g. both front and back) and may include pic-

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<sup>10</sup> More information can be found at: <http://fctc.org/factsheets/7.pdf>

tures or pictograms. In practice, countries should require warnings even larger than 50 percent. Australian warnings, for example, must cover at least 60 percent (on average) of the front and back. Good examples of countries using effective warning labels with pictures can be found in Canada, Brazil, and Thailand. For the content of messages, countries also have the option of requiring non-health messages (e.g. “Quit Smoking, Save Money”) as part of the rotated series of messages.

- ✓ ensure that tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive, or likely to create an erroneous impression about its characteristics, health effects, hazards, or emissions. The FCTC encourages the banning of terms such as “low-tar,” “light,” “ultra-mild,” or “mild,” as it is widely recognised that terms such as “low-tar,” “light,” and so-forth are inherently misleading. Brazil and the European Union have already instituted such bans.

Regarding Article 11.2, which deals with emissions information on the package, it is strongly recommended that countries avoid using discredited ISO numbers. For example, Brazil has removed its previous requirement for ISO numbers to appear on packages. Indeed, Parties should seriously consider **prohibiting** ISO or any other emissions numbers on the pack.<sup>11</sup> The preferred approach to using any type of numerical levels is to use qualitative descriptions of the hazardous effects of constituents

and emissions, as Australia has done.<sup>12</sup> Some countries may choose not to define any emissions/constituents and thus not require additional information regarding emissions/constituents elsewhere on the packaging.

All warnings and labels required by Article 11 must be set forth in the principal language or languages of the Party. In addition, for the purposes of Article 11, the term “*outside packaging and labelling*” applies to all outside packaging and labelling used in the retail sale of the product, including cigarette packages and cartons.

## EDUCATION, COMMUNICATION, TRAINING AND PUBLIC AWARENESS (ARTICLE 12)

Public education and awareness campaigns have been shown to be effective in informing the public about the dangers of tobacco use and in reducing consumption. Recognising the importance of public information efforts, the FCTC legally binds Parties to an express obligation to promote and strengthen public awareness on tobacco using all available communication tools. Importantly, the Convention introduces limited qualifications to this commitment by establishing a standard that recognises differences in national circumstances and capacities. Article 12 requires Parties to promote:

- ✓ broad access to comprehensive public awareness programmes on the health risks of tobacco; and

<sup>11</sup> In setting requirements for *relevant* toxic substances disclosures, national authorities can look to international practice and recognised scientific bodies for guidance on implementing this commitment in good faith. In particular, the WHO Scientific Advisory Committee on Tobacco Product Regulation has specifically recommended that “tar, nicotine and CO numerical ratings based upon current International Standards Organization/Federal Trade

Commission (ISO/FTC) methods and presented on cigarette packages and in advertising as single numerical values are misleading and should not be displayed.” At present there are no other suitable testing methods ready to replace the ISO method.

<sup>12</sup> It would be advisable where possible to test the efficacy of such information through consumer research.

- ✓ effective training and awareness programmes, including on the strategies of the tobacco industry to market a lethal product.

## TOBACCO ADVERTISING, PROMOTION AND SPONSORSHIP<sup>13</sup> (ARTICLE 13)

Tobacco addiction is a communicated disease—communicated through advertising, marketing and sponsorship. Each year the tobacco industry spends billions of dollars around the globe on advertising, promotion and sponsorship. There is overwhelming evidence that tobacco advertising leads to an increase in consumption, particularly among the young. At the same time, studies show that full advertising bans are effective in discouraging consumption, while partial bans (e.g. on radio and television advertising only) or restrictions (for example, on advertisements close to schools) are generally ineffective. The FCTC itself declares “Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.” (Article 13.1)

Article 13 legally binds Parties to comprehensively ban such advertising, promotion and sponsorship to the extent consistent with their national constitutions and constitutional principles. The legal commitment to comprehensively ban tobacco advertising, promotion and sponsorship is subject to a firm implementation timetable. Each Party that can institute a comprehensive ban is required to do so within a period of five years.

Notably, the concrete legal obligation to ban all advertising, promotion and sponsorship includes cross-border advertising originating from a Party’s territory. Recognising the technical and legal challenges this presents, the treaty provides flexibility in meeting this obligation, which is *subject to the legal environment and technical means available* to that Party. Specifically, Article 13 obligates Parties to:

- ✓ Undertake a comprehensive ban on tobacco advertising, promotion and sponsorship within five years after the Convention’s coming into force for that country.
- ✓ Prohibit all forms of tobacco advertising, promotion and sponsorship that promote a product by any means that are false, misleading, or deceptive, or that create an erroneous impression about its characteristics (Article 13.4(a)). Although this provision does not specifically mention “light and mild,” Article 11.1(a) specifically provides, in a similar provision, that such terms on tobacco product packaging and labelling *may* include terms such as “low tar,” “light,” “ultra-light,” or “mild.” A good faith and reasonable interpretation of the ordinary language of the Convention encourages Parties to prohibit such terms in advertising, promotion and sponsorship as well as in packaging and labelling.
- ✓ Prohibit—or, in the case of a Party that cannot prohibit due to its constitution or constitutional principles, restrict tobacco sponsorship of international events, activities, and/or participants therein.

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<sup>13</sup> More information can be found at: <http://fctc.org/factsheets/9.pdf>

- ✓ Require that health or other appropriate warnings or messages accompany all advertising and, as appropriate, promotion and sponsorship. This important provision (Article 13.4(b)), expands upon the obligation specified in Article 11 to use health warnings and messages by extending it to all tobacco advertising and, to the extent possible, promotion and sponsorship.
- ✓ Require the tobacco industry to disclose expenditures on tobacco advertising, promotion and sponsorship to relevant governmental authorities.

For the small number of Parties that have legitimate constitutional impediments to a comprehensive ban, Article 13.3 establishes different commitments. First, such Parties must apply *restrictions* on all advertising, promotion and sponsorship. In light of the underlying objective of the FCTC and the significance of tobacco advertising, promotion and sponsorship in spreading the epidemic, this duty to restrict should be read in good faith to require countries to ban such advertising, promotion and sponsorship to the greatest extent possible—as far as constitutionally permissible.

## DEMAND REDUCTION MEASURES CONCERNING TOBACCO DEPENDENCE AND CESSATION<sup>14</sup> (ARTICLE 14)

Helping adults to quit smoking is universally recognised as a cost-effective method of preventing disease. However, depending on a country's economic resources, healthcare system, and level of tobacco use, the appropriate means of providing meaningful cessation assistance vary widely. Accordingly, Article 14.1 requires each Party first to develop cessation and treatment guidelines that are tailored to its circumstances, but that are also evidence-based. Second, these guidelines should then serve as the basis for *effective* measures.

In practice, good faith implementation of Article 14 obligations will likely range from relatively complex plans to provide universal, free access to pharmacological and behavioural treatments, all the way down to relatively low-cost interventions such as integrating training about tobacco dependence into medical school curricula and encouraging doctors to ask all patients whether they smoke and counsel them to quit. At either extreme, however, Parties are expected to have *comprehensive* and *integrated* cessation and treatment guidelines—that is, more than simply one-off interventions or pilot projects.

While allowing a certain degree of national discretion to take into account domestic circumstances, these flexibility provisions do not undermine the core obligation to develop comprehensive and integrated guidelines

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<sup>14</sup> More information can be found at: <http://fctc.org/factsheets/5.pdf>



appropriate for national circumstances. Indeed, the FCTC mandates that such guidelines should be based upon scientific evidence and best practices. A good faith reading would compel Parties to utilise the wide range of scientific standards and best practices, including standards established by the national ministry of health or recognised regional or global standards, such as guidelines recommended by WHO.<sup>15</sup> As more low- and middle-income countries develop cessation guidelines, there will likely be increasing scope for efforts to obtain access to low-cost pharmaceuticals, as per Article 14.2(d).

## ILLICIT TRADE IN TOBACCO PRODUCTS<sup>16</sup> (ARTICLE 15)

Stopping illicit trade in tobacco products through strong national action and international cooperation was a primary concern expressed by State delegates during the FCTC negotiations. Illicit tobacco trade deprives governments worldwide of significant tax revenue. It also brings tobacco products into markets cheaply, enhancing affordability and increasing consumption, particularly by the young. Recognising the negative impact of illicit trade on public health and governmental treasuries, the treaty underscores that the elimination of all forms of illicit trade in tobacco products is an essential component of tobacco control (Article 15.1) and, in one of

the strongest articles of the FCTC, establishes concrete obligations to promote national action and international cooperation to address all forms of illicit trade.<sup>17</sup>

A large proportion of the illicit cigarette trade involves the “disappearance” of container loads of product that are in international transit and have yet to be taxed in any jurisdiction. Containers are exported legally, with papers specifying some other country as the destination, but are diverted into the black market of a third country and hence never legally re-imported. This trade could be considerably reduced if all tobacco products, from the time of manufacture, bore a counterfeit-proof marking that specifies time, factory, and country of manufacture as well as country/sub-national jurisdiction of final sale.

As a first step towards this type of control, Article 15.2 obliges countries where manufacturing occurs to ensure that tobacco packaging bears a clear mark of origin (e.g., “Made in [name of country],” or, preferably, “Made [at factory x, city y, country z]”). It also obliges importing countries to prohibit the sale of any product that does not have a clearly specified destination market (e.g., “Only for sale in country X”).

A key challenge for the COP will be to move beyond these strictly national requirements to an internationally standardised system allowing customs and other enforcement authori-

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<sup>15</sup> See World Health Organization, *WHO Evidence Based Recommendations on the Treatment of Tobacco Dependence* (2001); <http://www.who.dk/Document/E73285.pdf>

<sup>16</sup> More information can be found at: <http://fctc.org/factsheets/8.pdf>

<sup>17</sup> Article 1 defines “illicit trade” to mean any practice or conduct prohibited by law and which relates to the production, shipment, receipt, possession, distribution, sale

or purchase including *any practice or conduct intended to facilitate such activity*. This includes smuggling (illegal importing of tobacco without paying duties and taxes), counterfeiting (unauthorised knock-offs of branded products, usually sold through smuggling channels), and illicit manufacturing (e.g., unlicensed/ clandestine factories, whether or not their production then crosses national borders).

ties, when they examine the product, to quickly determine whether it is legal or illegal, and if the latter, to determine at what point in the manufacture/supply chain it left the legal trade. This could involve developing one or more FCTC protocols.

In the meantime, FCTC Parties have an obligation to collect information and monitor cross-border trade involving their countries. Parties cannot simply turn a blind eye to cigarette containers that transit through their countries, for example. Good faith implementation of Article 15 requires countries to help other Parties track down sources of illegal supply. No Party should tolerate its territory being used as a base for smuggling operations into another country. As per Article 15.4(b), this may mean adopting legislation to prohibit illicit trade into other countries. Under Article 15.5, Parties undertake to provide data on cross-border trade in periodic reports to the Conference of the Parties.

## **SALES TO MINORS (ARTICLE 16)**

Globally, most individuals start using tobacco products during youth or adolescence, when they may have limited capacity to understand the addictiveness and dangerousness of tobacco products. Preventing young people from starting to smoke is thus an important component of tobacco control efforts. Many countries worldwide prohibit sales to youth and place other restrictions on youth access to tobacco products. Article 16 obliges Parties to make sales to minors illegal, but leaves countries with considerable discretion to decide the

methods used to prevent sales to youth and the level of resources that should be devoted to such efforts.

Many countries may find that tax and price policies are highly effective at reducing youth smoking. Completely prohibiting vending machines is also likely to be a cost-effective measure in countries where they exist, since enforcement costs are very small and age-verification mechanisms promoted by the industry as an alternative to prohibition are likely to be ineffective. Another reason for prohibiting vending machines is that they likely violate Article 13's ban on tobacco advertising.

## **PROVISION OF SUPPORT FOR ECONOMICALLY VIABLE ALTERNATIVE ACTIVITIES (ARTICLE 17)**

Article 17 establishes a flexible commitment to advance, as each nation deems appropriate, alternative livelihoods for tobacco workers, growers and, if necessary, individual sellers. While requiring Parties to give good faith consideration to the needs of those employed in the tobacco sector, this Article gives each State the flexibility necessary to address the economic issues according to individual national circumstances. Notably, Article 17 calls upon States to cooperate with each other and intergovernmental organizations as deemed appropriate to promote alternative livelihoods. It should be pointed out, however, that even under the most optimistic scenarios, global tobacco consumption is set to increase over the next three decades. WHO forecasts that if current trends continue, the absolute

number of smokers will increase from the current 1.1 billion to 1.64 billion in 2025 (due in part to an increase in global population), even as overall prevalence falls in some countries. While future declines in consumption will clearly reduce the number of tobacco farming and manufacturing jobs, those jobs will be lost over many decades, not overnight. This provides governments with a unique opportunity to plan a long-term and orderly transition.

## LIABILITY (ARTICLE 19)

Most of the world's cigarettes are consumed by smokers who were either too young or too misinformed to appreciate the risks when they became addicted to tobacco. In many cases it can be argued that manufacturers violated legal obligations not to make false or misleading statements about their products, not to make their products more addictive or harmful than they already are, not to market to children, and other legal duties. Furthermore, in several countries manufacturers are accused (or have been convicted) of involvement in illicit trade.

However, there are practical obstacles to obtaining compensation from manufacturers when they have violated national or sub-national laws on honest business practices, informed consent, product liability or illicit trade. Manufacturers are often rich, multinational corporations that can simply outspend individual claimants and drag out court proceedings. Incriminating documents are often located in other countries. In many

cases, manufacturers' decisions were taken outside of the country where compensation is being pursued.

With Article 19, Parties undertake to examine these issues and, if appropriate, take action. For example, the Canadian province of British Columbia has passed legislation to facilitate lawsuits against tobacco manufacturers, both by the provincial government (to recover health-care costs) and by groups of smokers (for damages). The Supreme Court of Canada recently upheld the constitutionality of this legislation, and other provinces have passed or are considering similar laws.

As more jurisdictions adopt similar measures, and as more legal claims are brought with or without new legislation, it will become increasingly important for Parties to share information and facilitate access to each other's courts; hence the obligation to share information under Article 19.2. To return to the Canadian example, its market is dominated by a subsidiary of British American Tobacco (BAT), but much of the research that is likely relevant to lawsuits in Canada was conducted in Britain, Germany or other countries where BAT has research facilities. All countries have legal systems that, at least in principle, provide for payment of damages for injuries caused by a manufacturer's negligence or misrepresentation. Under Article 19, Parties should look at the obstacles to enforcing these existing rights and cooperate with other Parties to deal with them.

## V. Conclusion

The FCTC is an historic landmark in the global battle against the tobacco scourge. However, a tremendous amount of work remains to bring the tobacco epidemic under control. Parties must (1) comply in good faith with their tobacco control obligations under the FCTC and (2) come together to negotiate concrete protocols to implement the goals of the FCTC. The FCTC recognises that *scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability*. Therefore, Parties to the FCTC have a moral obligation, in addition to their legal obligation, to implement the FCTC in good faith by implementing evidence-based,

effective legislation based on current and future best practices.

Our knowledge of which tobacco-control interventions are most effective in different circumstances is constantly evolving, particularly as policy measures are increasingly implemented in low- and middle-income countries. The overarching commitment of the FCTC is to take whatever measures are necessary to reduce death and disease from tobacco as quickly as possible. While the checklists at the beginning of this document point to the most critical starting points, Parties are encouraged to see the text of the treaty as a springboard for interventions that reach farther.

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The Framework Convention Alliance is a coalition of over 200 organizations and networks from more than 100 countries working to support the FCTC.