



WORLD HEALTH ORGANIZATION

**INTERGOVERNMENTAL NEGOTIATING BODY
ON THE WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL
Sixth session
Provisional agenda item 3**

**A/FCTC/INB6/3 Rev.1
5 February 2003**

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 delegates will recall, at the eighth plenary meeting of the fifth session, it was agreed 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/PL/SR/8.

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 words “and the environment” have been 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.

In international law, there is no in-built hierarchy between different types of treaties. This means that in principle, the framework convention on tobacco control, once entered into force will have the same standing as any other international treaty. The relationship between successive treaties dealing with the same subject matter is addressed by customary international law and is in part codified in Article 30 of the Vienna Convention on the Law of Treaties. In the event of a conflict between two treaties which do not contain provisions as to their respective priority, there are two fundamental rules:

- (1) the more recent treaty will be applied in precedence over the older one; and
- (2) the more specific treaty will be applied in precedence over the more general one.

These rules will be applied to the relationship between two treaties if the following conditions are fulfilled:

- The two treaties must address the same subject matter. This may be the case only for a limited number of provisions of each treaty. In that case, the rules will apply only to the provisions in question.
- There must be a conflict between the provisions of the two treaties. Whether or not this is the case must be determined in accordance with the rules and principles governing the interpretation of treaty rules.
- All States concerned by potentially conflicting provisions of two treaties must be parties to both treaties. If this is not the case, the treaty to which all concerned States are parties will apply to them, even if that treaty is older, or more general.

Determination of that relationship in each case requires in-depth study of the factual and legal situation, and can be a very complex matter.

In cases where there is potential conflict between two treaties, to which the vast majority of States are parties, States will normally have an interest in implementing both treaties rather than in emphasizing potential conflicts and in establishing a fixed rule of priority. It can therefore be seen as counterproductive to give precedence to one treaty over the other.

With this in mind, and in view of the common interest in the mutual supportiveness of two treaties to which most States are parties, several recent treaty negotiating processes have opted not to include wording which indicates precedence in the body of the treaty.

- **Article 4, paragraph 1.** I decided to replace the word “nonsmokers” with “all persons”. This change was made throughout the text, with the aim of protecting smokers and non-smokers. 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. The sentence “special approaches and measures should be developed to protect vulnerable groups” in the previous text has been deleted. All references to “vulnerable groups” have been removed throughout the text because of concerns that inclusion would create differentiated responsibilities.

Since the negotiations began, there has been a concern that long lists of groups limit the applicability and scope of the framework convention. The change also reflects a desire not to limit protection to certain groups, but to extend it to everyone.

- **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.
- **Article 5, paragraph 2.** The choice of the wording “in accordance with its capabilities” rather than “to the extent possible” is intended to respond to the concern expressed by some delegations that the latter could provide an easy escape route to countries not willing to make the necessary efforts to comply with their obligations. Such countries could argue that they must only comply “to the extent possible”, meaning as it suits them. The phrase “in accordance with their capabilities”, used also in other treaties, is intended to express the concept that countries that do not have the necessary infrastructure, financial means, know-how etc. must comply to the extent that their means permit. This concept is often linked to the notion that financial and technical assistance should be provided to developing and transition countries to help them to comply with their obligations.

Example: Convention on Biological Diversity, Article 6 introductory paragraph: “*Each Contracting Party shall, in accordance with its particular conditions and capabilities: ...*” (there follows a list of obligations):

- **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 used 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 United Nations 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 into language more consistent with an obligation. The word “coordinated” was deleted in the previous text because of concern about possible coordination towards a lower standard.

- **Article 6, paragraph 2(b).** Here the reference to “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. This affords a clear direction based on public health objectives.
- **Article 8.** The words “passive smoking” have been eliminated from the title and the text of this Article and elsewhere in the text and replaced with the words “exposure to tobacco smoke”. This change addresses concerns about exposure to tobacco smoke for smokers as well as for non-smokers. There is no consensus within the scientific community on the use of terminology such as “environmental tobacco smoke”, “passive smoking” and “second-hand smoke”. As none of these is adequately descriptive, I opted for the more technical phrase “exposure to tobacco smoke”, which has a broader meaning (including exposure of smokers to the smoke of others, increasing the negative effects) and is more suitable for use in a treaty. Member States may wish to consider drafting a definition of “exposure to tobacco smoke” for Article 1 on Use of Terms.

The aim of this Article is to protect all persons, smokers and non-smokers alike, from exposure to tobacco smoke. The word “promote” was chosen because it is more appropriate for the prevailing institutional contexts in federal States.

- **Article 9.** As explained elsewhere in this letter, this choice of language reflects concerns over the creation of *de novo* obligations by the Conference of the Parties. The new formulation addresses international aspects in the first sentence and domestic aspects in the second.
- **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 of the Intergovernmental Negotiating Body: it reaffirms the principle of restriction and encourages countries to proceed towards a total ban and to translate their commitment into an international obligation by means of a binding written declaration to be circulated to all Parties to the Convention. It also encourages and empowers those who wish to eliminate cross-border advertising to do so in accordance with their national legislation.

The proposed formula allows countries to adhere to the treaty and to adapt their legislation gradually, something that in many countries takes considerable time and effort (legislative procedures, political considerations, changes in attitude to be promoted and encouraged).

- **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.

“Taking into account national circumstances and priorities” is a phrase commonly used in treaties with the aim of ensuring that countries’ obligations do not exceed their resources. This phrase is preferable to the more ambiguous phrase “to the extent possible”. Such language addresses the concerns of many countries about the resources required to implement this treaty.

- **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 addressed in detail in other negotiations. It would not be appropriate for this convention to include this complex area which is dealt with by other international agreements.
- **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 “Questions related 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.

It is unusual for any convention to contain an enabling provision on this subject; therefore the inclusion of such a provision would be a major achievement for public health. Member States could consider including the term “liability” in Article 1 “Use of Terms”.

- **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 shall 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.

The language in paragraph 4(b) constitutes a so-called “enabling provision”, giving the Conference of the Parties the task of considering the matter further. By specifying that the Conference of the Parties must do this at its first meeting, it establishes a time limit, thus ensuring that this issue will be addressed in a timely manner. This is quite a common approach in treaty negotiations if more time is required owing to the complexity of the matter.

Example: Montreal Protocol on Substances that Deplete the Ozone Layer

1987: Adoption of the Protocol without a provision on financial mechanisms

1989: Entry into force

1990: Amendment of the Protocol by the Conference of the Parties – new Article 10 providing the basis for the establishment of the Multilateral Fund.

Additionally, in response to a suggestion in the fifth session of the Intergovernmental Negotiating Body that information should be provided on the capacity of the Tobacco Free

Initiative or other existing funding mechanisms to undertake the work involved (see document A/FCTC/INB5/PL/SR/8), a background paper on financial resources was drafted. This information document (A/FCTC/INB6/INF.DOC./1), has been issued in advance of the sixth session of the Negotiating Body.

- **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 reference to "accession" after "formal confirmation". The concept that international organizations can accede to treaties is normal treaty practice and is 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 the 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 Intergovernmental 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 2003 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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