

Title: Tracking the Relevance of the WHO Framework Convention on Tobacco Control in Legislation and Litigation through the online resource *Tobacco Control Laws*

Authors:

Corresponding Author:

Monique E. Muggli, MPH, JD, Campaign for Tobacco-Free Kids, International Legal Consortium; 1400 I (Eye) Street NW, Suite 1200 Washington, DC 20005 Phone: 202-481-9389 Ext. 3089 Fax: 202-296-5427 Email : mmuggli@tobaccofreekids.org

Co-Authors:

Annie Zheng, BSc, JD Candidate, University of Melbourne, Australia, Victoria, Carlton

Jonathan Liberman BA, LLB (Hons), MPub & IntLaw, McCabe Centre for Law and Cancer (Australia, Victoria, Carlton), Cancer Council Victoria (Australia, Victoria, Carlton) and Union for International Cancer Control (Switzerland, Geneva)

Nicholas Coxon, BA, LLB (Hons), McCabe Centre for Law and Cancer (Australia, Victoria, Carlton), Cancer Council Victoria (Australia, Victoria, Carlton) and Union for International Cancer Control (Switzerland, Geneva)

Liz Candler, JD, Campaign for Tobacco-Free Kids, International Legal Consortium (Washington, DC)

Kaitlin Donley, JD, Campaign for Tobacco-Free Kids, International Legal Consortium (Washington, DC)

Patricia Lambert, BA (Hons), LLB, Campaign for Tobacco-Free Kids, International Legal Consortium (Washington, DC)

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“What this paper adds”

- The paper documents that at least 51 jurisdictions have incorporated the WHO FCTC into legislative objectives, definitions and/or substantive provisions.
- The paper documents that courts in at least 27 jurisdictions have referred to the WHO FCTC in litigation, and discusses a number of notable examples.

- The paper outlines the Tobacco Control Laws-Legislation and Tobacco Control Laws-Litigation on-line databases, which allow searching of tobacco control laws and litigation from around the world.

Abstract

The WHO Framework Convention on Tobacco Control (FCTC) is increasingly referenced and incorporated into the objectives, definitions, and provisions of domestic legislation worldwide. It is also relied upon by courts in interpreting and upholding strong tobacco control measures challenged by the tobacco industry. In this Special Communication, we describe these trends and explore the important new online resource – *Tobacco Control Laws* (www.tobaccocontrolaws.org) – that has been used to track them.

Background

The WHO Framework Convention on Tobacco Control (FCTC) entered into force as international law on February 27, 2005. As of August 30, 2012 there were 176 Parties to the FCTC.¹ The treaty's 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*'. Parties undertake, as a matter of international law, to implement a range of domestic measures to achieve this objective, to report to other Parties on their implementation, and to cooperate in the sharing of information, the transfer of skills and capacity, and the deployment of financial and other resources.

The FCTC functions in two major ways. First, it establishes norms and creates a framework to support both domestic action and international cooperation. Norms are established by the terms of the treaty itself, by the implementation guidelines adopted by the treaty's governing body, the Conference of the Parties (COP), and by other COP decisions and resolutions. These norms carry both legal and political weight, but their precise effects differ according to individual countries' legal systems and processes. For example, in some countries, ratification of treaties automatically transforms their obligations into domestic law. In others, domestic legislatures must enact legislation to implement international obligations undertaken by the executive branch of government. Second, treaties and their subsidiary instruments, such as the implementation guidelines in the case of the FCTC, are used by courts and tribunals in the development of constitutional powers and principles, the interpretation of statutes, the evolution of the common law and the settlement of disputes under international law. The FCTC therefore has a powerful role to play in the interpretation and application of domestic tobacco control legislation, international trade and investment treaties,^{2 3 4} and international human rights law.⁵

Importance and Occurrence of FCTC References in Tobacco Control Legislation

Legislative objectives state the aims and purposes of a law. In doing so, they assist in (1) explaining and/or justifying the provisions of the law; (2) articulating the rights, values and interests that the law is designed to protect or promote; and (3) resolving ambiguities in the law. Subject to drafting customs in a particular jurisdiction, ideal tobacco control legislation would include legislative objectives that explicitly refer to a State's obligation to implement the FCTC, as well as incorporate the elements of FCTC-based definitions and substantive measures to assist in comprehensive interpretation and implementation of the law. An examination of 161 countries' (and the European

Union) tobacco control legislation (with reasonably reliable English translations) available at *Tobacco Control Laws-Legislation* as of September 1, 2012 indicates that 50 of the 161 countries and the European Union have incorporated the FCTC in legislative objectives, definitions and/or substantive provisions of their tobacco control legislation or policy.

The Impact and Use of the FCTC in Domestic Litigation

The FCTC has played an important role in domestic courts to aid in the interpretation of domestic law and in supporting the constitutionality of tobacco control measures as evidence of matters in legal disputes. *Tobacco Control Laws- Litigation* indicates that, as of September 2012, courts from at least 26 countries and one economic community court have referenced the FCTC in some manner. Some notable examples of the use of the FCTC by domestic courts include the following:

Canada (2007): The Supreme Court upheld the validity of a law requiring, among other things, graphic health warning labels to occupy 50% of cigarette pack surfaces.⁶

Tobacco manufacturers had argued that such a restriction unjustifiably infringed the freedom of expression protected under the Canadian Charter of Rights and Freedoms. However, the Court rejected the claim, finding the ban to be a reasonable limit on free expression. Noting that the FCTC was one of the most 'widely embraced' multilateral treaties in the world,⁷ the Court concluded that the reasonableness of the requirement was supported by article 11(1) of the FCTC and the fact that many other countries (including Australia, Belgium, Brazil, Finland, Singapore, and Switzerland; and with the exception of Switzerland, all are Parties to the FCTC) at the time required similar-sized warnings.

Colombia (2010): The Constitutional Court made extensive reference to the FCTC in determining the meaning of 'promotion' used in a national law prohibiting tobacco advertising and promotion.⁸ The Court held that the law must be suitable, reasonable and proportionate, so that the 'essential core' of constitutional freedoms of enterprise and private initiative would remain operational.⁹ The Court stressed that the FCTC, which was transformed into Colombian law by Law 1109 of 2006, 'did not conflict with the *Political Charter* but rather constitutes the development of principles and values contained therein'.¹⁰ Since the law did not define 'promotion', the Court applied the definition under article 1(c) of the FCTC.¹¹ The law was suitable because its purpose in reducing youth smoking conformed with the purpose of the FCTC. The 'plausible or reasonable' link between the 'means and purposes' of the law was affirmed by article 13 of the FCTC, which clearly stated the need for a comprehensive ban on tobacco advertising, promotion and sponsorship in order to meet the treaty's objective.¹² Further, the State possesses the power to enact measures discouraging consumption of particular goods or services, particularly where it is 'encouraged by the international community'.¹³ The Court also considered the article 13 implementation guidelines as 'useful for the interpretation of the norms of the Convention' and used the implementation guidelines to clarify the meaning and scope of promotion in 'any form' pursuant to the definition of 'tobacco advertising and promotion' in the FCTC.¹⁴

Guatemala (2010): The Constitutional Court upheld a law prohibiting smoking in 'any enclosed public space',¹⁵ which had been challenged by the Guatemalan Chamber of Commerce as unreasonably restricting the exercise of constitutional freedoms of industry and commerce on the basis that it would render the manufacture, production, distribution or marketing of tobacco-based products 'worthless'. The Court examined the FCTC's objective, and in particular, the obligation to protect individuals from tobacco

smoke exposure. It concluded that the government was entitled to implement the FCTC into national law to comply with the Guatemalan Constitution's right to health mandate.¹⁶ Further, the purpose of the law was not to regulate the manufacture, production or distribution of tobacco products, but to discourage tobacco consumption in order to realize the fundamental right to health.

Israel (2006): The Court of Civil Appeals took into account the purpose of a law restricting smoking in public places, noting that it reflected 'Israel's commitment to the World Health Organization *Framework Convention on Tobacco Control*'.¹⁷ In a case concerning the appropriate level of compensation for breach of the law, the judge held that article 8(1) of the FCTC ["Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability"] provided clear evidence that tobacco smoke exposure caused death, disease and disability, thus requiring Israel, a Party to the FCTC, to adopt legislative and administrative measures to protect individuals from such exposure in indoor public places.¹⁸

Norway (2012): The Oslo District Court held that a Norwegian law prohibiting the display of tobacco products and smoking accessories at point of sale did not violate the *Agreement on the European Economic Area ('EEA Agreement')*.¹⁹ Philip Morris Norway had argued that the display ban constituted an unlawful quantitative restriction under article 11 of the *EEA Agreement*, by restricting the marketing of imported tobacco products from other EEA States. It also argued that the ban was not proportionate to the legislative objective of reducing tobacco consumption because it was not suitable or necessary for the protection of public health. The Court rejected both arguments. The Court cited the FCTC's recognition of FCTC Parties' serious concern 'about the increase in the worldwide consumption of cigarettes and other tobacco products' and their

recognition that 'a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products'. The Court cited the 'finding' in the FCTC article 13 implementation guidelines that 'display of tobacco products at points of sale in itself constitutes advertising and promotion' and their recommendation that such display should be banned. It found that a 'limited display ban' would not remove the 'advertising and normalising effect of a visible tobacco display' and that the display ban was 'necessary and that there are no other alternative, less interventionist measures that could yield a corresponding result'.

Peru (2011): The Constitutional Court upheld a law banning smoking in 'enclosed public spaces' and 'establishments dedicated to education'.²⁰ Tobacco retailers and smokers argued that the law infringed on constitutional freedoms of autonomy, and a right to free enterprise and economy. They argued that the FCTC merely outlined proposals of action for states to implement tobacco control measures at their discretion. However, the Court held that Peru's ratification of the FCTC imposed positive obligations on the government to 'reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.'²¹ The FCTC held 'constitutional rank' in Peru pursuant to the *Political Constitution of Peru*.²² Therefore, the obligations were 'an indispensable minimum' for the State.²³ The Court concluded that the law was proportionate because the 'degree of damage' caused by the restriction on constitutional rights would be less than the benefit of achieving the 'constitutionally obligatory' end of protecting public health.²⁴

South Africa (2012): The Supreme Court of Appeal upheld a law banning the advertisement and promotion of tobacco products on the basis that any limitation on the freedom of commercial speech was reasonably justified.²⁵ The Court rejected British American Tobacco's argument that the Minister was not obliged to have regard to the FCTC.²⁶ It referred to the FCTC when addressing the purpose, effect and importance of

the law, emphasizing that South African courts are constitutionally obliged to 'have regard to international law when interpreting the Bill of Rights'.²⁷ The public health considerations addressed by the law, pursuant to the FCTC, made for a 'compelling case for justification' of a ban. Notably, the Court made clear that South Africa has 'accepted the link between advertising and consumption as incontrovertible' by ratifying the FCTC, and that its 'clear obligations' under article 13 of the FCTC are reflected in 'the practice in many other open and democratic societies'.²⁸

The FCTC and Trade and Investment Law

The FCTC is increasingly playing a critical role in international trade and investment law. McGrady explains that international health norms, such as the FCTC and its implementation guidelines, may influence the application of World Trade Organization (WTO) law in three main ways: (1) as evidence of facts; (2) to aid interpretation; or (3) as representing 'international standards' (for the purposes of the WTO Agreement on Technical Barriers to Trade (TBT Agreement)).²⁹ In the recent WTO case of *US – Clove Cigarettes*, which concerned a challenge brought by Indonesia against the United States' product regulation measures prohibiting the production and sale of cigarettes containing certain characterizing flavours, which captured clove cigarettes, but not other cigarettes, including those containing menthol, the WTO Panel referred to the partial implementation guidelines on articles 9 and 10 of the FCTC. The guidelines reinforced the Panel's understanding that regulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users. The Panel noted that the guidelines 'draw on the best available scientific evidence and the experience of Parties', and show a growing consensus within the international community to strengthen tobacco control policies through regulation of the content of tobacco products, including additives that

increase the attractiveness and palatability of cigarettes. The Panel observed that the guidelines support the view that youth are attracted to cigarettes with flavours that increase palatability and concluded that the objective of the United States' measure was to reduce youth smoking. While the Panel's decision was appealed, this issue was not raised in the appeal. Significantly, the Panel adopted this approach even though neither Indonesia nor the United States is a Party to the FCTC.³⁰

Both Australia and Uruguay have referred to articles 11 and 13 of the FCTC in their responses to claims brought against their packaging measures under bilateral investment treaties by Philip Morris Asia and Philip Morris International respectively.³¹ If these challenges result in arbitral decisions, it remains to be seen how the FCTC and its implementation guidelines will be taken into account.

Tobacco Control Laws (www.tobaccocontrollaws.org)

Given that 176 countries are now Parties to the FCTC and that the FCTC is increasingly being cited in domestic legislation and national and international litigation, as outlined above, a verifiable and easily accessible system for tracking legal developments related to the FCTC becomes of critical importance. Importantly, to assist in advocacy of strong and effective tobacco control legislation, the more the FCTC is cited in legal cases, the more governments will be encouraged to refer to the FCTC and its implementation guidelines in their new or revised legislation. Ultimately, this serves to implement the objective of the FCTC of protecting people from the devastating consequences of tobacco use and exposure to tobacco smoke.

To fulfil this need, the International Legal Consortium (ILC) at the Campaign for Tobacco-Free Kids launched the online resource *Tobacco Control Laws* (www.tobaccocontrollaws.org) in March 2011.³² *Tobacco Control Laws* is an interactive

website designed for tobacco control advocates, researchers, legal professionals, and other members of the public to access information about tobacco control legislation and litigation worldwide. Key features of the website include fully searchable legislation and litigation databases, country-specific fact sheets, online forums for English, French and Spanish speaking lawyers to facilitate discussion and information sharing among tobacco control attorneys in a confidential online environment, and various additional legal resources.

Tobacco Control Laws – Legislation is a searchable online collection of national tobacco control laws from around the world. The project also features in-depth legislative reviews and policy fact sheets assessing how tobacco control measures from a growing list of countries compare to the essential elements of successful tobacco control legislation set forth in the FCTC and its implementation guidelines, focusing on three policy areas: (1) smoke free places (article 8); (2) tobacco advertising, promotion and sponsorship (article 13); and (3) packaging and labeling (article 11). These reviews are conducted by lawyers at the ILC in collaboration with in-country lawyers, wherever possible.

Tobacco Control Laws – Litigation is a searchable online collection of litigation that captures a growing number of court decisions involving health policies related to tobacco and tobacco products from countries around the world. With initial assistance in populating the database by the O'Neill Institute for National and Global Health Law,³³ the database contains both the texts and summaries of court decisions as well as legal concepts at issue in litigation. Users access the information by performing word searches or by browsing countries or litigation subject areas.

As of September 2012, the searchable databases contained over 1100 tobacco control laws from 178 countries, in-depth legislation analyses from 47 countries and nearly 360 judicial decisions from 47 countries.

Conclusions

The legal significance of the FCTC and its implementation guidelines has been demonstrated in legislation and litigation in many domestic jurisdictions and in international fora. This trend will continue in the years ahead as FCTC Parties continue to implement their obligations, and as more jurisprudence is developed by domestic and international courts and tribunals. In order to fully appreciate the FCTC's legal significance, and for jurisdictions to learn from and benefit from one another's experiences, it is essential that these be tracked and be easily accessible. Easily accessible on-line databases, including *Tobacco Control Laws*, will be important resources for tracking the development of jurisprudence arising from the implementation of the FCTC.

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¹² *Cáceres Corrales v Colombia* (2010) at page 56. Unofficial English translation available at Tobacco Control Laws- Litigation, <http://www.tobaccocontrollaws.org/litigation/decisions/co-20101020-caceres-corrales-v.-colombia>. Accessed October 2012.

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³² The International Legal Consortium (ILC) is part of the Campaign for Tobacco-Free Kids (CTFK). CTFK is one of five coordinating partners for the Bloomberg Initiative to Reduce Tobacco Use launched in 2006 by New York City Mayor and philanthropist Michael Bloomberg. Information about the Bloomberg Initiative to Reduce Tobacco Use is available at: <http://www.mikebloomberg.com/index.cfm?objectid=B30497B1-C29C-7CA2-F9F7AABDE96F87E7>. Accessed October 2012.

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