

Parallel Report on Implementation of the Framework Convention in Brazil – 2010

Since 2006, following ratification of the Framework Convention for Tobacco Control (FCTC) by Brazil, through Decree 5.658/2006, the Alliance for Tobacco Control (ACT - *Aliança de Controle do Tabagismo*)¹, has been monitoring the implementation of the FCTC and its protocols in the country.

In 2010, the Parliamentary Front for the Control of Tobacco (FPCT – *Frente Parlamentar para o Controle do Tabaco*) was launched in the Chamber of Deputies, and it is to be hoped that it contributes to the implementation of the measures of the FCTC. It is a major initiative, considering that there is great pressure from representatives of the tobacco industry and its allies on legislators. In light of the changes in the legislative situation as a result of the last elections, it is important for the FPCT to be resumed and to have its activities and goals defined in 2011.

The 4th Conference of the Parties of the FCTC (COP4), held in Uruguay, in November of 2010, approved the guidelines of Articles 9 and 10, dealing with additives that increase the power of attraction of tobacco products. All the guidelines for Articles 12 and 14, on education, communication, training and communication [*sic*] were approved; as well as measures for the reduction of demand relating to dependency and quitting tobacco. In addition, the continuation of the study group on the illicit market for tobacco products (Article 15) was decided upon, as well as the creation of a new group on Article 19, which addresses the civil liability of the tobacco industry.

The most significant advance for 2010 occurred after COP4 and needs to be consolidated and implemented in 2011, with the proposal for the Resolutions for the Collegiate Directorate (RDC's - *Resoluções da Diretoria Colegiada*), which addresses the issue of additives and packaging, warning images and exposure at points of sale, respectively. Both were presented for public consultation² on December 28, 2010, and the period expires on March 31, 2011. ACT supports the initiative for Anvisa regulation on both issues and is participating in the process of discussion of its details. **We hope, despite the strong resistance orchestrated by allies of the tobacco industry in the National Congress, that the constitutional and ethical duty to prioritize health prevails and is put into practice in 2011.**

Recommendations made on other matters in issues of the report on monitoring of the implementation of the FCTC in Brazil for 2006, 2008 and 2009³ are still relevant and taken up again here, making allowance for the respective nuances.

1. GENERAL OBLIGATIONS – ARTICLE 5

The National Commission for Implementation of the Framework Convention for Tobacco Control (CONICQ – *Comissão Nacional para Implementação da Convenção Quadro para o Controle do Tabaco*)⁴

¹ The Alliance for the Control of Tobacco is a non-governmental organization geared towards the promotion of actions to diminish the health, social, environmental and economic impact generated by tobacco's production and consumption, as well as exposure to tobacco smoke. Its mission is to monitor and support the implementation of the FCTC in Brazil.

² Public consultations no. 112 and no. 117.

³ To review previous reports, go to <http://www.actbr.org.br/biblioteca/fatos-destaque.asp>

⁴ CONICQ, created through the Decree of August 1, 2003, is made up of the Ministries of Health; Foreign Relations; Treasury; Agriculture, Fisheries and Supplies; Justice; Education; Labor and Employment; Agricultural Development; Development, Industry and Foreign Commerce; Communications; Environment; Science and Technology; Planning, Budget and Management; the Office of Government Administration (*Casa Civil*); Special Bureau of Policies for Women (*Secretaria Especial de Políticas para as Mulheres*)/Office of the Presidency of the Republic and the National Agency for

is lacking the participation of civil society, recommended by the FCTC, and financial autonomy for the implementation of the National Program for Tobacco Control (*National Program for Tobacco Control*).

Recommendations

- ⊗ To guarantee a governance mechanism for CONICQ that performs a role of national coordination and establishes goals and timetables for implementation of the measures set forth in the treaty.
- ⊗ To develop mechanisms for the measurement of progress and monitoring of implementation at state and municipal levels and to ensure that members of CONICQ submit progress reports on implementation.
- ⊗ To insert a package of measures for implementation of the FCTC in Brazil in the multi-year governing plan.
- ⊗ To ensure the participation of organized civil society, without links to the tobacco industry, in CONICQ, and to establish agreements with such organizations to ensure the sustainability of the National Program for Tobacco Control.
- ⊗ To conduct a broad survey of the economic and social costs related to the production and consumption of tobacco in the country, including the loss of productivity, premature retirements and health expenditures.
- ⊗ To guarantee financial resources for the National Program for Tobacco Control at federal, state and municipal levels, for the implementation of the FCTC and to cover expenditures on health associated with the consumption of tobacco, and to see to it that these resources are drawn from what is levied in taxes and duties on the tobacco industry.
- ⊗ Investigate the juridical, legal and legislative possibilities to release the funds deposited in the lawsuit by Souza Cruz and Philip Morris in the name of the National Agency for Health Oversight (Anvisa), to foster and contribute to the financing of measures for tobacco control.⁵

2. GENERAL OBLIGATIONS – INTERFERENCE OF THE TOBACCO INDUSTRY – ARTICLE 5.3

One of the greatest obstacles to the implementation of demonstrably effective measures of tobacco control is the inappropriate interference of the tobacco industry in matters concerning public health. In order to deal with this, the text of the treaty itself contains an Article specifically addressing this issue. At the second Conference of the Parties (COP2) the decision was adopted to create guidelines for implementation of Article 5.3, which has an impact on all the others, and these were unanimously ratified at COP3.⁶

Recommendation

- ⊗ To disseminate and apply the guidelines of Article 5.3 in national public health policies.
- ⊗ Not to permit the interference of the tobacco industry in CONICQ, including by the staff of the Ministries of which it is comprised.
- ⊗ To draft a code of ethics to discipline relations between public officials, as well as members of the Judicial Branch, and the tobacco industry.

Health Oversight (ANVISA – *Agência Nacional de Vigilância Sanitária*). The decree that created it is available at http://www.inca.gov.br/tabagismo/cquadro3/decreto_1ago2003.pdf

⁵ By law, tobacco companies are required to pay ANVISA an annual fee for registration, revalidation or renewal of products derived from tobacco. However, it should be made clear that this payment is being made into an escrow fund, since the two companies are contesting it.

⁶ To review the guidelines for Article 5.3, go to:

http://www.inca.gov.br/tabagismo/cquadro3/guidelines_para_implementacao_do_artigo53_da_FCTC_v2.pdf

- ⊗ To prevent the involvement of the tobacco industry in the definition of tax policy. The industry can be informed, but it should not be consulted, nor should its approval be expected.
- ⊗ Transparency in relations of the industry with other governmental departments and regulatory agencies.

3. MEASURES RELATING TO PRICES AND TAXES TO REDUCE THE DEMAND FOR TOBACCO – ARTICLE 6

The increase of prices and taxes is, according to the World Health Organization, the most effective and cost-effective measure for reducing the consumption of tobacco derivatives. However, what was observed in Brazil in 2010 was the maintenance of tax policies with still reduced prices. Brazilian cigarettes are among the cheapest in South America, and countries such as Argentina, Chile and Uruguay charge prices that are higher than Brazil's. There is space for an increase of prices, since an increase of the income of the population is observed as well as the lack of a readjustment of the Manufactured Goods Tax (IPI - *Imposto sobre Produtos Industrializados*) in accordance with inflation. This means that the discrepancy between tax policy and tobacco control has not yet been overcome in our country.

After the last adjustment of the IPI in 2009, the average price for a basket of cigarettes provided by the IBGE showed a tendency to rise, however, since this adjustment did not keep pace with the inflation of the period, it was observed that in mid-2010 the price declined by 5.23% in real terms (discounting inflation), when comparing May of 2010 with the same month of the previous year. Federal collection of the Cigarette IPI, in nominal terms (without discounting inflation), between June of 2009 and May of 2010, increased by 19.2% in relation to the period between June of 2008 and May of 2009.

The purchasing power of the population maintained its trajectory of growth, and the number of packs of cigarettes that can be purchased on the minimum wage continued to be quite high. After the increase of 2009, the quantity of packs that could be bought with the minimum wage came to 128 packs. This number went up to 141 packs in January of 2010 with an increase in the amount of the minimum wage from R\$465 to R\$510, but it fell once again starting in June, with the adjustment implemented by the industry, since there was no adjustment of the rate of the IPI for cigarettes.

In 2010 we did not observe that the policy for prices and taxes progressed in a manner conducive to tobacco control.

Recommendations

- ⊗ Raise the percentage of the Cigarette IPI in the final price of all products to levels close to 35% and annually adjust the fixed rates, with the aim of maintaining this IPI/price ratio, while preventing tax collections and prices from falling in real terms.
- ⊗ Formally include the Ministry of Health in discussions on the IPI for Cigarettes, so that tax policy will take health goals into consideration, as established by Article 6 of the FCTC.
- ⊗ To create a system of taxation that is effective in keeping high real prices and tax collection in such a way as to implement, partially or fully, the FCTC in Brazil. To this end, the system for the Cigarette IPI should include the following elements:
 - ✓ To alter the legal foundation of the Cigarette IPI to eliminate uncertainties and interpretations that allow for judicial disputes on payment of the IPI.
 - ✓ Simplify the current tax system that has 6 tax classes.
 - ✓ Create a systematic arrangement of the Cigarette IPI that combines fixed rates, adjusted annually in such a way that increases in the price of cigarettes do not abruptly reduce the tax burden.

4. PROTECTION AGAINST EXPOSURE TO TOBACCO SMOKE – ARTICLE 8

Beginning in mid-2008, the states of Rondônia, São Paulo, Rio de Janeiro, Paraná, Paraíba, Amazonas and Roraima, along with at least 20 municipalities, such as Cornélio Procópio and Maringá/PR, Salvador/BA, Juiz de Fora/MG, Lauro de Freitas/BA, Tubarão and Criciúma in Santa Catarina, Belém/PA, Pelotas/RS, and Manaus/AM, approved their own laws that prohibit smoking in enclosed places, in accordance with the terms of the FCTC. The respective enforcement has been carried out in some of these places, with distinction in the first five states.

Data released by the governments of São Paulo and Rio de Janeiro show compliance with the measure by more than 99% of the places inspected, and surveys show an improvement in the quality of the air in closed work places, such as bars, restaurants, night clubs and the like, as well as the health of waiters and waitresses in smoke-free environments. Surveys also show approval of the laws by smokers and non-smokers, as well as by workers and management.⁷

In some localities, the Labor Prosecutor has acted to promote smoke-free work environments, even when there is no local law with such a provision, as in the case of Porto Alegre and Passo Fundo/RS. The issue has increasingly gained space in the domain of the Labor Prosecutor as well as the unions, with a recognition of the right of all workers to a healthy work environment, without exposure to tobacco smoke.

In 2010, however, very little progress was made towards the passing of a federal law of this kind, and no other state passed its own law for tobacco-free environments. The federal law in force, 9.294, of July 15, 1996, although it presents as a general rule the prohibition of smoking in closed places, allows smoking in isolated enclosed areas, which is at odds with the international commitment undertaken by Brazil through the FCTC, because it does not ensure the protection of everyone against passive smoke.

Draft law 315/08, which proposes the prohibition of smoking in enclosed places throughout the country, was passed in March by the Commission of the Constitution, Justice and Citizenship (CCJ - *Comissão de Constituição, Justiça e Cidadania*) of the Federal Senate. Subsequently it was sent for a vote to the Commission of Social Affairs (CAS - *Comissão de Assuntos Sociais*), but the vote did not take place. Beyond the influence of the electoral season in the second half of the year, there was also intense pressure by representatives of the tobacco industry and their allies to postpone this decision.

Recommendations

- ⊗ The federal government, and not only the Ministry of Health, should take a position in favor of tobacco-free environments, and act with the Legislative Branch for the passage of laws providing for this measure.
- ⊗ The Ministry of Labor and Employment (MTE), magistrates of the Labor Courts as well as Labor Prosecutors should recognize that smoke-free work environments are a matter of occupational health and a fundamental right of the worker, and recognize that there is no safe level of exposure to tobacco smoke. The MTE should incorporate the issue into the routine of its agents, training them in the matter.
- ⊗ The Legislative Branch should pass the draft federal laws adopting Article 2º, of law 9.294/96 to Article 8º, of the FCTC and its guidelines.
- ⊗ The Legislative Branch should reject the draft federal laws that go backwards on protection of the health of all and do not adapt to the FCTC.

⁷ To review these opinion surveys, go to <http://www.actbr.org.br/biblioteca/pesquisas.asp>

- ⊗ State and municipal health enforcement bodies that still not operate in this area should be trained to incorporate the item of closed smoke-free environments into the routine of enforcement.
- ⊗ Foster partnerships between representatives of organized civil society, including unions, and government agencies for educational, informative and motivational actions, geared towards the passage and fulfillment of laws that create tobacco-free closed environments.

5. REGULATION OF CONTENT AND DISCLOSURE OF INFORMATION ON TOBACCO PRODUCTS – ARTICLES 9 & 10

Articles 9 & 10 are among the most complex of the FCTC. After COP1 a working group was created on Article 9 and, in addition to this, specialists get together regularly in the network of laboratories and tobacco research institutions (TOBLABNET) of the WHO⁸ to discuss the challenges associated with regulation of the content of tobacco products.

Various scientific studies have been carried out for a detailed analysis of the effects of the substances presents in cigarettes and other tobacco products on health and the environment. The tobacco industry, which holds vast knowledge on the product it sells, up until now has not been able (or has not chosen) to develop a product that is safe for consumption.

There is currently a scientific consensus that it is possible to regulate tobacco products based on their attractiveness, and therefore, it is recommended to prohibit additives and flavors that make products more palatable, especially to the young or beginning public. Canada has already adopted this measure and the matter is subject to public consultation no. 112 of Anvisa, opened on December 28, 2011, whose term expires on March 31, 2011. The prohibition of additives is a public health measure and there is not any basis for supposing that it will impact the market for tobacco leaf in Brazil, considering that 85% of production is exported.

Recommendation:

- ⊗ Approve and implement public consultation no. 112 of ANVISA, which prohibits the addition of aromatizers and flavorings to tobacco products, in order to reduce their attractiveness.

6. PACKAGING AND LABELING OF TOBACCO PRODUCTS – ARTICLE 11

Brazil already adheres to the determination of the FCTC to adopt warning images and is in its third round of pictograms. However, it is possible to strengthen the measure and adjust it to the guidelines approved at COP3, an initiative whose first step was taken through public consultation no. 117, of Anvisa. ACT supports their content, for example the inclusion of warning phrases on the other side of the package.

Recommendations

- ⊗ Approval of the alteration of RDC 335/2003⁹, of Anvisa, with the suggestions made by organized civil society through public consultation no. 117.
- ⊗ Evaluation of warning images in circulation and fostering an inter-institutional working group to prepare the next round of warnings.
- ⊗ Removal of content numbers, date of validity, systems of colors or any other subterfuges that spread the misleading message to consumers that there are some brands of cigarettes that are less harmful than others.

7. ADVERTISING, PROMOTION AND SPONSORSHIP OF TOBACCO – ARTICLE 13

⁸ For more information on TOBLABNET, go to http://www.who.int/tobacco/global_interaction/toblabnet/en/

⁹ This RDC makes provisions concerning packages and advertising materials for tobacco derivative smoking products.

Currently, commercial advertising for smoking products is restricted to posters, panels and bills (Laws 9.294/1996, 10.167/2000, and 10.702/2003). However, the tobacco industry has intensified a channel of communication with its main target audiences – among them adolescents and young people, with a large expansion of points of sale throughout the country. There is also abuse of the right to engage in advertising: the tobacco industry violates the legal prohibitions by promoting events and celebrations with its brands, financing parties at academic departments and institutions in various universities, placing advertising in stadiums, dance floors, stages, sending electronic messages with ads for their products, in addition to promoting them in bars and night time celebrations through electronic games and direct approaches to smokers and non-smokers. The packages of products are increasingly seductive, with limited editions and giveaways such as iPod bases, backpacks, CDs and lighters. Institutional advertising, through what is conventionally called Corporate Social Responsibility, is also moving forward.

The National Confederation of Industries has filed a Direct Claim of Unconstitutionality, process no. 3311, before the Federal Supreme Court, to return advertising to the mass media and to put an end to warnings on the harmful effects of cigarettes.

Recommendations

- ⊗ Legally or judicially compel the smoking industries to disclose how much they invest in advertising, marketing and promotion.
- ⊗ Anvisa and other competent agencies should investigate abuses and violations of the restriction on advertising for cigarettes committed by companies that produce cigarettes.
- ⊗ Approval of amendment of RDC 335/2003¹⁰, of Anvisa, with suggestions made by organized civil society through public consultation no. 117
- ⊗ The Federal Supreme Court (STF) should dismiss the Direct Claim of Unconstitutionality (ADIN) on the alleged unconstitutionality of the current restrictions on cigarette advertising.
- ⊗ Approve the law supplementing Law 9.294/1996, so that advertising for tobacco derivative products is completely prohibited, as well as institutional advertising.

8. ILLICIT COMMERCE IN TOBACCO PRODUCTS – ARTICLE 15

One of the main impediments to increasing the prices and taxes on cigarettes in Brazil is the allegation, made by the tobacco industry, that this would cause a growth in the size of the market for illegal products.

The increase in the number of seizures and destruction of products by the Federal Revenue Bureau and the Federal Police is not necessarily a symptom of increased illegal activity, but could be the result of better functioning and activation of these institutions. Evidence indicates that this second reason accounts for the change.

Illegal commerce in tobacco products faces two challenges in Brazil. In the first place, the figures for the illegal market basically come from the industry. A survey through official sources or that is independent of industry is lacking. In the second place, international experience should be more readily accepted, which shows that fighting smuggling is not associated with manipulation of the price of a product, but does involve the adoption of measures for enforcement and control. To overcome the challenge of enforcement and control, Brazil must have a global strategy to confront the illegal entry of cigarettes coming from Paraguay – the main problem of the illegal market.

Recommendations

¹⁰ This RDC makes provisions concerning packaging and advertising materials for tobacco derivative smoking products.

- ⊗ Create a system for the collection of independent data on illicit commerce. At present, the Federal Revenue Bureau mainly uses data from the tobacco industry.
- ⊗ Increase cooperation with Paraguay, both at the technical and political levels, to bring about a significant reduction in the illegal entry of cigarettes into Brazil
- ⊗ Increase coordination of actions by agencies involved in the suppression of illegal commerce with the creation of a Task-Force, led by Federal Revenue and working in association with the directorate of CONICQ, and prepare a strategic plan for combating smuggling of cigarettes, with goals, responsibilities and needs for the human and material resources determined for confronting the problem.
- ⊗ Conduct studies on the relationship between legal and illegal markets and tax policy, since the connection between increased taxes and replacement of legal cigarettes with illegal ones is unknown.
- ⊗ Strengthen legislation and legal procedures to act against illicit commerce in cigarettes. Identify the problem in the law and penal procedures that are hindering the application of sanctions and inhibiting the search and seizure of contraband cigarettes.
- ⊗ Create national mechanisms for discussing the position of Brazil in international negotiations on the protocol of the illegal market, involving the participation of organized civil society without links to the industry.

9. ALTERNATIVES TO GROWING TOBACCO AND PROTECTION OF THE ENVIRONMENT – ARTICLES 17 and 18

Before discussing in greater detail the Recommendations concerning the issue of tobacco growing in Brazil, it is important to emphasize that the adoption of public policies on tobacco control at the national level does not have a direct impact on tobacco growing. The purpose of this Article in the context of a public health treaty was to protect the families of farmers who grow tobacco from possible impact in the productive sector that may arise as a result of the reduction of demand for tobacco leaf. The global market for tobacco leaf has its own dynamic which is vulnerable to the interests of the big tobacco processing companies and not to policies for the protection of health.

However, since the big companies have been systematically using farmers to mount opposition to measures for tobacco control, and since most farming families do not have access to productive alternatives due to the lack of public agricultural policies and the monopoly of the tobacco industry in the growing regions, it is essential to foster this debate, keeping in view what Brazil intends to build in terms of agricultural policies for the thousands of farming families in Brazil. Do we want to increase the production of tobacco in the country and submit to an even greater number of farmers engaged in growing tobacco? Or do we want agricultural policies to increase our capacity for food production? In the first option we could actually be creating a problem for the country when the demand for tobacco begins to diminish globally.

The most important thing is to emphasize that even if sectors of the Brazilian government opt for continuing to facilitate the increase of tobacco production in the country, it is not acceptable for this option to interfere with public health measures.

Recommendations

- ⊗ Expand human and financial resources available for activities of the Program of Support for the Productive Diversification of Tobacco Growing Areas
- ⊗ Integrate public policies and regulatory initiatives aimed at tobacco growing, with the coordination and political articulation of the CONICQ
- ⊗ Offer and coordinate public policies that address the demands resulting from the socio-environmental impact of tobacco production