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DEATH CLOCK

SINCE THE OPENING OF THE
FIRST WORKING GROUP FOR
THE FRAMEWORK CONVENTION
ON TOBACCO CONTROL ON
25 OCTOBER 1999

58,417,533

PEOPLE HAVE DIED FROM
TOBACCO-RELATED DISEASES.
(AS OF 9AM GENEVA TIME
ON 2 APRIL 2012)

MEETING OF MINDS

The desire of Parties not to squander scarce money and resources is understandable, and admirable, but thought needs to be given as to how best this can be achieved.

For the Convention Secretariat to serve as the Secretariat for the Meeting of the Parties (MOP) is sensible, but the need for financial efficiency should not supersede the requirement for effective arrangements to supervise and discuss both the FCTC and the protocol. It is essential to have a cost-efficient, yet effective MOP that does not undermine or weaken the governance of the COP.

Requiring the MOP to always be held 'in conjunction' with the COP is not a good idea, particularly as the current wording in languages other than English may require the meetings to always be held simultaneously.

Holding the MOP and COP back to back could save money, as small delegations could attend both meetings and save on travel costs. But holding the meetings simultaneously risks undermining the effectiveness of both the COP and the MOP as they compete for resources. If an attempt were made to complete both in the time usually allotted for the COP session alone it is unlikely there would be time to deal adequately with both FCTC and ITP implementation.

In other treaties such combined meetings are rare and only occur, as with Kyoto, where a protocol adds substantive details to an existing convention. This is not the case with the ITP, which adds complex and detailed additional commitments requiring very different expertise from Parties than that required by the FCTC itself.

Flexibility is also needed as there may be times and circumstances where the MOP and the COP need to be held completely separately and to exclude this possibility in the protocol itself does not make sense.

This is a problem which can, and must, be fixed before the text is finalised.

Financing the MOP – A Question of Equity

A separate but equally serious problem is the funding of the MOP. Prior to entry into force it is entirely appropriate that the Protocol should be financed by the COP. However, subsequent to ratification, for the COP to continue to finance the MOP would be unfair and problematic.

There is a serious risk that joint budgeting would result in significant underfunding of FCTC administration and implementation. Protocol implementation is likely to require wide-ranging capacity building, and involve co-operation with numerous partners. Without thorough scoping it is difficult to evaluate the resource implications of this work.



**THE ONLY EQUITABLE
SOLUTION IS THE SECOND
OPTION PUT FORWARD
BY THE INTER-SESSIONAL
WORKING GROUP: THAT
ONLY PARTIES TO THE
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FINANCE THE PROTOCOL.**



It would also mean that the protocol could become financially dependent on Parties with no stake in its success. Last but not least, if the financing of the MOP comes from COP funds, it increases the risk that Parties' contributions to protocol implementation will come out of already stretched health ministry tobacco control budgets.

The only equitable solution is the second option put forward by the inter-sessional working group: that only Parties to the protocol would finance the protocol. ■

KENYA REFORMS RAISE TOBACCO TAXES 25 PERCENT

After years of ineffective taxation of tobacco products in Kenya, changes are underfoot to simplify and improve the system. Finance Bill 2011, now before Parliament, would collapse the four tax bands, which were based on Retail Selling price (RSP), into one. In general, this would result in a 25 percent rise in tobacco taxes.

Tobacco use is becoming a major concern in Kenya, especially amongst youth. Roughly 19 percent of adult males and slightly less than 2 percent of women use tobacco¹; while prevalence rates for youth have gone up from 13 percent (10 percent girls and 16 percent boys) in 2001 to 15 percent (14.5 girls and 14.9 boys) in 2007 (GYTS)².

Kenya signed and ratified the WHO Framework Convention on Tobacco Control (FCTC) in June 2004, committing itself to implementing a number of measures, including putting in place favourable tax and price policies targeted at reducing demand for tobacco products. It enacted the Tobacco Control Act in October 2007.

“THE REAL PRICE OF CIGARETTES HAS FALLEN. THIS, COUPLED WITH INCREASED CONSUMER INCOMES, HAS MADE CIGARETTES MORE AFFORDABLE AND THEREFORE ACCESSIBLE, ESPECIALLY TO YOUTH.”

The International Institute for Legislative Affairs (ILA) in 2011 commissioned a study on the 'Economics of tobacco taxation in Kenya', which sought amongst other things to determine the responsiveness of tobacco consumption to changes in prices and taxation. The study found that:

Real cigarette tax revenues are shrinking: Real cigarette tax revenues have been shrinking even as consumption increases. Cigarette tax yield share fell from 35 percent to 30 percent between 2000 and 2008.

The price of tobacco products has dropped and affordability increased:

The real price of cigarettes has fallen. This, coupled with increased consumer incomes, has made cigarettes more affordable and therefore accessible, especially to youth. Moreover, cigarettes in Kenya are still sold in single sticks, even though this is a violation of the Tobacco Control Act.

ILLICIT TRADE CHALLENGES

Kenya is the main tobacco manufacturing hub for 17 countries in the region. The market is dominated by two manufacturers that control up to 99 percent of the market. The estimated annual production of cigarettes, the most sold tobacco product, is 5.5 billion sticks. Other tobacco types sold include cigarillos, tobacco nuts and chewing tobacco.

The challenges faced by authorities in controlling trade include: A porous coast line and expansive dry land borders; undeclared production; unaccounted-for exports; undeclared imports of raw tobacco and finished products; counterfeited products; and under-declared tax values.

In response, the Kenya Revenue Authority (KRA) has instituted various measures, including:

- Deploying resident tax officers to carry out periodic checks on production;
- Using an electronic cargo-tracking system for in-transit exports and imports; as well as
- Paper-based stamps.

Tax Policy

Excise Tax structure on tobacco products: The excise tax system in Kenya has been in a constant state of reform over the years, switching from specific rates to ad valorem rates, back to specific and sometimes a hybrid of both specific and ad valorem³.

The changing tax regimes have not produced predictable impacts on consumption and revenue. In fact, in many instances it has led to huge revenue losses, suggesting that the

design and administration of the excise duties is problematic. A recent IMF study (2010) found the structure for tobacco products at the time was too complex and lacked policy rationale, making it difficult for the government to reduce consumption, predict revenue and control illicit trade.

Tax share in cigarette prices: Kenya's tax share was 42 percent in 2007 and 55 percent in 2008, which falls below the 70 percent tax threshold recommended by the WHO.

Milestone: 25 Percent Increase in Tobacco Taxes

According to the Kenya Revenue Authority, the Finance Bill 2011 excise tax on cigarettes would lead to a rate of Kshs 1200 per mille or 35 percent of the RSP, irrespective of the brand. The effect is as follows:

- The tax rate for lower-end cigarettes, formerly described as plain cigarettes and categorized under Tier A, has risen by 71.4 percent.
- The rate for the second tier, effectively all soft cap cigarettes, rose by 20 percent.
- Even though the rate for the up-market brands may fall to an average of Kshs 1600 per mille, the general effect is an increase of Kshs 2 billion, representing a 25 percent increase in tobacco taxes.
- The chances of substitution between brands has been minimized based on the reasoning that all forms and brands of cigarettes have the same negative health impact on the consumer.

These gains need to be protected and advanced.

Recommendations:

- The current tax structure as reviewed by the Minister of Finance in his 2011-12 proposals to Parliament and contained in the Finance Bill 2010 should be adopted. This will protect and increase government revenue while contributing to tobacco control objectives.
- The Ministry of Finance should shift cigarette taxation towards internationally accepted norms. Such practices include

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KENYA

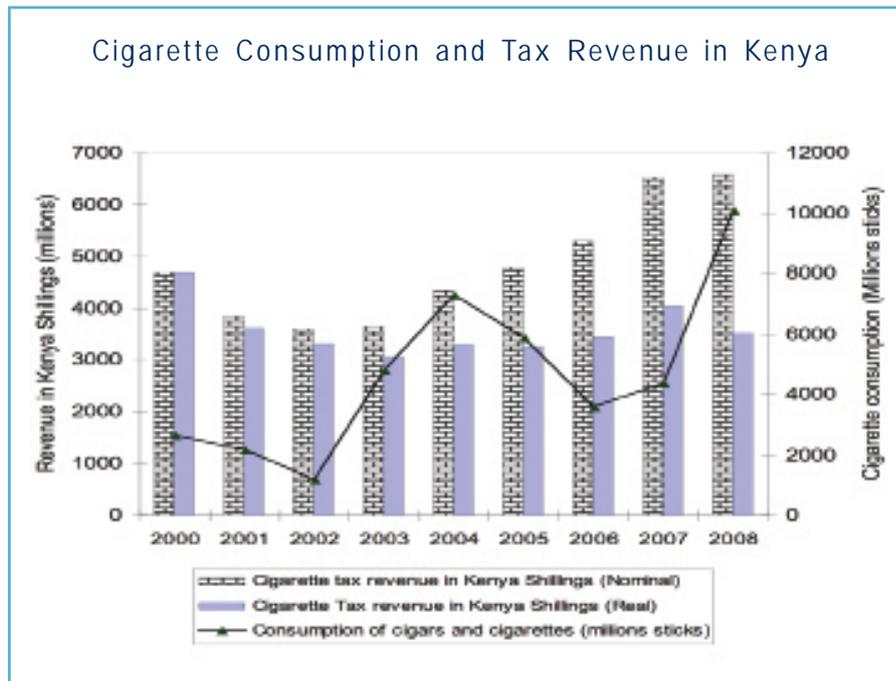
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increasing tax rates for tobacco products to at least 70 percent of retail prices, and ensuring that they are adjusted periodically to keep pace with inflation and rise faster than consumer purchasing power.

iii. The Ministry of Finance should liaise with the Ministry of Public Health to develop mechanisms that result in earmarking tobacco revenue for public health programmes. This will create synergy between the revenue argument for tobacco taxation and the health argument.

iv. Operationalisation of the Tobacco Control Fund as provided in Sec. 7 of the TCA 2007 and strengthening of the Tobacco Control Board by ensuring that it is well facilitated to perform its mandate as outlined in Sec 6 of the TCA 2007. ■

Vincent Kimosop
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1. Kenya Demographic and Health Survey (KDHS) 2008-09.
2. Global Youth Tobacco Survey (GYTS) is a school-based survey of students aged 13–15 years that provides information on demographics, tobacco use prevalence, and knowledge and attitudes.
3. Gerson et al, 2010.

TRANSPARENCY OBLIGATIONS MUST APPLY TO ENTIRE PROTOCOL

Complete transparency with respect to interactions with the tobacco industry is essential to the effective implementation of the Illicit Trade Protocol (ITP) because Parties continue to recognise tobacco industry interference as the greatest threat to the implementation of the FCTC and its life-saving measures. This view was supported by the decision on the first day of INB5 to exclude the industry from the proceedings, a precedent set at the INB3.

The Conference of the Parties decision that created the INB (FCTC/COP2(12)) reaffirmed “the importance of Article 5.3 of the WHO FCTC, which requires the Parties to act to protect their public health policies from commercial and other vested interests of the tobacco industry in accordance with national law”, as Parties launched negotiations on an ITP. Given the industry’s ongoing complicity in illicit trade in tobacco

products, it is particularly important to reinforce the need for maximum possible transparency.

In implementing the Protocol, Parties will interact with the industry in a range of ways, from tracking and tracing tobacco products through the supply chain to auditing and enforcement to investigating possible criminal activity. Currently, Article 7 of the draft text of the ITP states that “Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry,” and that “Each Party shall ensure that its designated competent national authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of the provisions of this Article.”

This provision is a welcome first step in reinforcing Article 5.3 obligations, but these obligations shouldn’t apply only to Article 7 but rather to the entire Protocol, given the diversity of interactions with the industry and the danger posed to the effectiveness of the Protocol by keeping these interactions behind closed doors.

To ensure maximum possible transparency with the tobacco industry, we urge Parties to include a more general obligation, in Part II or Part V of the Protocol, which enshrines the principle of maximum transparency with respect to interactions with the industry. ■

Corporate Accountability
International and the Network
for the Accountability of Tobacco
Transnationals (NATT)



Give us what we want or we shoot!

ORCHID AWARD



To all Parties who persisted in raising concerns about incorporating private agreements into international law.



The Framework Convention Alliance (FCA) is a global alliance of NGOs working to achieve the strongest possible Framework Convention on Tobacco Control. Views expressed in the Alliance Bulletin are those of the writers and do not necessarily represent those of the sponsors.

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WHY 'LEGALLY BINDING AND ENFORCEABLE AGREEMENTS' SHOULD BE DELETED

Saturday's plenary discussions saw spirited exchanges about the inclusion of the words, "legally binding and enforceable agreements" in Articles 6 and 9 of the protocol. Several delegations called strongly for their deletion.

FCA supports this position for a number of reasons:

1. Setting a dangerous precedent

FCA has talked to international law experts, none of whom could come up with a single example of a treaty in which agreements between governments and private actors are referred to in the manner of the current drafts of Article 6 and 9. Including the current wording in this protocol would set a precedent for future treaties, whether in public health or other areas. This shouldn't happen without the full implications being extensively (and independently) reviewed.

It would be particularly alarming to set this precedent, in a protocol to the HO FCTC, via a reference to private agreements between governments and the tobacco industry.

2. Lack of transparency

While an agreement may be legally binding and enforceable, this does not mean that the agreement – or all of its elements – is available for public scrutiny. Parts of the agreement, or related elements such as side agreements, annexes and correspondence, may remain secret. This is the case in some existing agreements.

Development of national law ordinarily involves transparent parliamentary, legislative and administrative processes, opportunity for public submissions, the full public availability of relevant information and the opportunity for legal challenge by the public through independent courts. The development of private agreements is a completely different process and can take place behind closed doors with no opportunity for public input, knowledge of issues being negotiated or ability to challenge the agreements concluded.

In addition, any amendment of national law ordinarily takes place in a transparent

process. By contrast, agreements ordinarily can be amended by mutual agreement of the parties. So their content can change over time through non-public, non-transparent processes.

3. Non-compliance with FCTC Article 5.3

The fact that an agreement is legally binding and enforceable does not mean that it complies with Article 5.3 and its



THAT AN AGREEMENT IS LEGALLY BINDING AND ENFORCEABLE DOES NOT MEAN THAT IT COMPLIES WITH ARTICLE 5.3 AND ITS GUIDELINES



Guidelines. This depends on a number of factors including how the agreement is negotiated, whether the agreement (meaning all of its terms) is publicly available, what is actually in the agreement, whether information about the implementation of the agreement is publicly available and the way in which disputes that arise under the agreement are resolved. Again, some of the agreements at issue do not comply with Article 5.3 and its Guidelines. ■

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