Tobacco in Australia | Facts & Issues

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Background to the WHO Framework Convention on Tobacco Control

The ‘devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke’ are a truly global problem (WHO Framework Convention on Tobacco Control, Article 3).

Over the past few decades, the tobacco epidemic has spread across the world, facilitated ‘through a variety of complex factors with cross-border effects’, including trade liberalisation, direct foreign investment, global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes (WHO Framework Convention on Tobacco Control, Foreword). The globalisation of the tobacco epidemic has had profound effects. According to the 2008 global tobacco control report of the World Health Organization (WHO), tobacco kills one person every six seconds—more than five million people each year. Assuming constant prevalence of tobacco use, it is projected that by 2030 the annual number of deaths will rise to more than eight million. During the 21st century, tobacco could kill up to one billion people. Most of these deaths will occur in developing countries, where the economic impacts of the tobacco epidemic—increased social, welfare and healthcare spending by governments, and significant loss of income to families—are felt particularly acutely.

Recognising that ‘the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response’ (WHO Framework Convention on Tobacco Control, Preamble), the international community undertook the negotiation of a treaty to provide a global framework for tobacco control measures. The WHO Framework Convention on Tobacco Control (FCTC)—which was adopted in 2003, came into force in 2005, and has been one of the most rapidly and widely supported treaties in the history of the United Nations—is the first treaty ever to be negotiated under the auspices of the WHO. Its 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 by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke’ (FCTC, Article 3).

As of April 2011 the FCTC had 172 Parties. Under international law, each of the Parties—having ratified, accepted, approved or acceded to the FCTC—must perform, in good faith, all obligations contained in the Convention (Vienna Convention on the Law of Treaties, Article 26). Parties are also encouraged, under Article 2.1, to implement measures beyond those required by the Convention in order to better protect public health. In addition, 11 countries had signed the FCTC, but had not at that time ratified, accepted or approved it. In signing the Convention, these countries have undertaken, as a matter of international law, not to defeat the object and purpose of the Convention (Vienna Convention on the Law of Treaties, Article 18). As stated in the foreword to the FCTC, Signatories also ‘indicate that they will strive in good faith to ratify, accept, or approve it, and show political commitment not to undermine the objectives set out in it’.

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ii A current list of Parties to the FCTC is available from: http://www.who.int/tobacco/framework/en/.


iv A list of Signatories is also available from: http://www.who.int/tobacco/framework/en/.
References


Overview of the FCTC

The foreword to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC)\(^1\) describes the Convention as ‘an evidence-based treaty that reaffirms the right of all people to the highest standard of health’; the FCTC ‘represents a paradigm shift in developing a regulatory strategy to address addictive substances; in contrast to previous drug control treaties, the WHO FCTC asserts the importance of demand reduction strategies as well as supply issues’.

The primary obligations contained in the FCTC may be divided into two categories: those aimed at reducing the demand for tobacco products and those aimed at reducing the supply of tobacco products. The FCTC also contains a number of guiding principles, general obligations, and other additional obligations, as well as a number of complementary and facilitative provisions relating to such matters as criminal and civil liability, scientific and technical cooperation and communication of information between Parties to the Convention, institutional arrangements and financial resources, settlement of disputes, and further development of the treaty.

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18.2 Guiding principles and general obligations

Article 4 of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) sets out a number of guiding principles that should inform the measures adopted by Parties to implement the provisions of the Convention. These include:

- that every person should be informed of ‘the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke’
- that strong political commitment is necessary to develop and support comprehensive multisectoral measures and co-ordinated responses
- that international cooperation is a particularly important part of the Convention
- that the participation of civil society is essential in achieving the objective of the Convention.

General obligations to be fulfilled by each Party to the FCTC are listed in Article 5. These include the implementation and maintenance of comprehensive multisectoral national tobacco control strategies, plans and programs, and the establishment or reinforcement and financing of a national co-ordinating mechanism or focal points for tobacco control. Article 5 also requires Parties to cooperate with each other in the formulation of proposed measures, procedures and guidelines for the implementation of the Convention, and in the raising of financial resources for its implementation, and to cooperate with competent international and regional intergovernmental organisations and other bodies to achieve the objective of the Convention.

Under Article 5.3, Parties must, in setting and implementing their public health policies with respect to tobacco control, ‘act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law’. Further detail has been added to this general obligation by the adoption of guidelines for implementation of Article 5.3 at the third session of the Conference of the Parties to the Convention (COP-3). The guidelines, recognising ‘that tobacco industry interference, including that from the State-owned tobacco industry, cuts across a number of tobacco control policy areas’, aim to assist Parties in meeting their legal obligations under Article 5.3. Their purpose is ‘to ensure that efforts to protect tobacco control from commercial and other vested interests of the tobacco industry are comprehensive and effective’.

The guidelines for implementation of Article 5.3 contain four guiding principles, eight core recommended activities with 34 specific sub-recommendations, and additional recommendations on enforcement, monitoring and international cooperation.

The guiding principles provide:

1. There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests.
2. Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.
3. Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent.
4. Because their products are lethal, the tobacco industry should not be granted incentives to establish or run their businesses.

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ii The term ‘civil society’ refers broadly to the body of organisations that are non-profit and that function outside the State’s official apparatus. The term ‘civil society organisation’ is often used interchangeably with ‘nongovernmental organisation’.

The eight core ‘agreed measures for protecting public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry’ are:

1. Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties’ tobacco control policies.
2. Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.
3. Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.
4. Avoid conflicts of interest for government officials and employees.
5. Require that information provided by the tobacco industry be transparent and accurate.
6. Denormalise and, to the extent possible, regulate activities described as ‘socially responsible’ by the tobacco industry, including but not limited to activities described as ‘corporate social responsibility’.
7. Do not give preferential treatment to the tobacco industry.
8. Treat State-owned tobacco industry in the same way as any other tobacco industry.
18.3

Measures relating to the reduction of demand for tobacco: price and tax measures

Under Article 6.1, each Party to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) recognises that price and tax measures 'are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons'.

Parties have accepted obligations in respect of the adoption or maintenance of price and tax measures, and in respect of reporting on rates of taxation and trends in tobacco consumption.

18.3.1

Adoption/maintenance of price and tax measures

Article 6.2 states that each Party should adopt or maintain, as appropriate, price and tax measures, which may include tax policies and price policies on tobacco products, and prohibiting or restricting sales to and/or importations by international travellers of tax- and duty-free tobacco products.

18.3.2

Reporting

Each Party is obliged by Article 6.3 to provide, in its periodic reports to the Conference of the Parties to the Convention (COP) required under Article 21, its rates of taxation for tobacco products and trends in tobacco consumption.

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18.4

Measures relating to the reduction of demand for tobacco: non-price measures

Under Article 7, each Party to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) recognises that ‘comprehensive non-price measures are an effective and important means of reducing tobacco consumption’.

Parties have accepted a range of obligations to implement non-price measures including in relation to:
- protection from exposure to tobacco smoke
- regulation of the contents of tobacco products and of tobacco product disclosures
- restrictions and requirements for packaging and labelling of tobacco products
- promotion and strengthening of education, communication, training and public awareness of tobacco control issues
- banning tobacco advertising, promotion and sponsorship
- promoting treatment of tobacco dependence and cessation of tobacco use.

Each Party is required to adopt and implement effective legislative, executive, administrative or other measures necessary to implement the obligations in Articles 8 to 13, and must cooperate, as appropriate, with other Parties directly or through competent international bodies with a view to their implementation.

Additionally, Article 7 requires the Conference of the Parties to the Convention (COP) to assist Parties in giving effect to the provisions dealing with non-price measures to reduce the demand for tobacco by proposing appropriate guidelines for the implementation of Articles 8 to 13. Guidelines are non-binding instruments adopted by an international body to provide assistance to countries in addressing specific issues at the national or international level. The guidelines adopted by the FCTC COP are intended to assist Parties in implementing their legal obligations under the Convention. As agreements between the Parties subsequent to conclusion of the Convention regarding the interpretation and application of its provisions, the guidelines must be taken into account in legal interpretation of the FCTC (Vienna Convention on the Law of Treaties, Article 31). While some elements of the guidelines impact directly on the interpretation of Parties’ legal obligations, others are recommendatory.

As of November 2010, the COP had adopted guidelines for implementation of all the provisions requiring non-price demand reduction measures, including Article 14. The guidelines adopted for implementation of Articles 9 and 10 at this time were partial only, with additional guidelines to be elaborated in a ‘step-by-step’ process.

18.4.1

Protection from exposure to tobacco smoke

Under Article 8, each Party to the FCTC recognises that ‘scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability’. In areas of existing national jurisdiction as determined by national law, Parties are required to adopt and implement effective measures providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places. At other jurisdictional levels, Parties are required to actively promote adoption and implementation of these measures.

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While the text of Article 8 is relatively general—for example, it does not define ‘effective’ measures—guidelines to assist Parties in meeting their obligations under this Article were adopted by the COP at its second session (COP-2). The guidelines contain ‘agreed upon statements of principles and definitions of relevant terms, as well as agreed upon recommendations for the steps required to satisfy the obligations of the Convention.’ They ‘identify the measures necessary to achieve effective protection from the hazards of secondhand tobacco smoke,’ based on ‘the best available evidence and the experience of Parties that have successfully implemented effective measures.’

Key principles agreed in the guidelines for implementation of Article 8 include:

- that effective protection requires the creation of 100% smokefree environments
- that all people should be protected from exposure to tobacco smoke
- that legislation is necessary for effective protection and that voluntary smokefree policies are ineffective
- that good planning, adequate resources and participation by civil society are all essential for successful implementation and enforcement of smokefree legislation
- that monitoring and evaluation of the implementation, enforcement and impact of smokefree legislation is necessary
- that measures to protect people from exposure to tobacco smoke should be strengthened and expanded as necessary to reflect new scientific evidence and case-study experiences.

The guidelines also indicate what should be understood by key terms of Article 8: ‘indoor,’ ‘workplaces,’ ‘public transport’ and ‘public places.’

18.4.2

Regulation of the contents of tobacco products and of tobacco product disclosures

Articles 9 and 10 of the FCTC require Parties to adopt measures for testing, measuring and regulating the contents and emissions of tobacco products, and for disclosure of the contents, toxic emissions and constituents of tobacco products. The COP adopted partial guidelines for implementation of these obligations at its fourth session (COP-4), with guidance ‘consolidated into one set of guidelines’ because of ‘the close relationship between these two articles.’

The partial guidelines for implementation of Articles 9 and 10 provide guidance on certain aspects of regulation of the contents of tobacco products and of tobacco product disclosures, and recommendations on the process for adoption, implementation and enforcement of these measures, including their financing. Elaboration of a complete set of guidelines will continue in a ‘step-by-step’ process.

18.4.2.1

Contents of tobacco products

Article 9 of the FCTC requires action with respect to regulation of the contents of tobacco products. The COP, in consultation with competent international bodies, is required to propose guidelines for testing, measuring and regulating the contents and emissions of tobacco products. Parties are required, ‘where approved by competent national authorities,’ to adopt and implement effective measures for testing, measuring and regulating the contents and emissions of tobacco products.
The partial guidelines for implementation of Articles 9 and 10 adopted by COP-4 provide guidance on regulation to reduce the attractiveness of tobacco products by prohibiting or restricting certain ingredients. These include ingredients used to increase palatability (such as added sugars, sweeteners, flavours, spices and herbs), ingredients that have colouring properties, ingredients used to create the impression that tobacco products have health benefits (such as vitamins) and ingredients associated with energy and vitality (such as caffeine and guarana).

Guidance on other aspects of regulation to reduce the attractiveness of tobacco products and on regulation to reduce addictiveness and toxicity—including with respect to constituents of processed tobacco, the emissions of tobacco products and tobacco product characteristics—is intended to be provided at a later stage.

18.4.2.2

Tobacco product disclosures

Under Article 10, each Party to the FCTC must, 'in accordance with its national law', adopt and implement effective measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products. Parties must also adopt and implement effective measures for public disclosure of information about the toxic constituents of tobacco products and the emissions that they may produce.

The partial guidelines for implementation of Articles 9 and 10 adopted by COP-4 provide guidance on requirements for disclosure to governmental authorities about the ingredients of tobacco products and about tobacco product characteristics, such as design features. They also contain recommendations with respect to disclosure of market information to help determine regulatory needs and priorities.

Guidance on disclosure to governmental authorities of the constituents of processed tobacco and the emissions of tobacco products, and on disclosure to the public, is intended to be provided at a later stage.

18.4.3

Packaging and labelling of tobacco products

Article 11 requires each Party to the FCTC to adopt and implement measures with respect to the packaging and labelling of tobacco products. The obligations fall broadly into two categories: first, obligations with respect to the prevention of false, misleading or deceptive packaging and labelling of tobacco products; and second, obligations with respect to the display of warnings and other information on tobacco product packaging. The COP, at its third session (COP-3), adopted guidelines to assist Parties in implementing their obligations under Article 11.

18.4.3.1

False, misleading or deceptive packaging and labelling

Under Article 11.1(a) each Party shall, within three years after entry into force of the FCTC for that Party, adopt and implement, 'in accordance with its national law', effective measures to ensure that 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'. Such means include the use of 'any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products'. This may include terms such as 'low tar', 'light', 'ultra light' or 'mild'.

In adopting the guidelines for implementation of Article 11, the Parties agreed that 'the display of figures for emission yields (such as tar, nicotine and carbon monoxide) on packaging and labelling, including when used as...
part of a brand name or trademark’ has resulted in the mistaken belief that some cigarettes are less harmful than others.

The guidelines also indicate other means of promotion that may be misleading, deceptive or likely to create an erroneous impression:

- the display of terms such as ‘extra’, ‘ultra’, and similar terms in any language
- the display of quantitative and qualitative statements about tobacco constituents and emissions that might imply that one brand is less harmful than another (including statements such as ‘these cigarettes contain reduced levels of nitrosamines’)
- the display of expiry dates, where this misleads or deceives consumers into concluding that tobacco products are safe to be consumed at any time.

The guidelines recommend that Parties consider adopting ‘plain packaging’—measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style—which may ‘address industry package design techniques that may suggest that some products are less harmful than others’.

18.4.3.2

Warnings and other information

Article 11.1(b) provides that each Party shall, within three years after entry into force of the FCTC for that Party, adopt and implement, ‘in accordance with its national law’, effective measures to ensure that each unit packet and package of tobacco products, and any packaging and labelling used in the retail sale of tobacco products, ‘carry health warnings describing the harmful effects of tobacco use’. The warnings must be ‘large’ (they shall cover no less than 30% of the principal display areas, and should cover 50% or more), ‘clear, visible and legible’, and ‘rotating’. They may be in the form of, or include, pictures or pictograms.

Packaging and labelling may also include ‘other appropriate messages’ (Article 11.1b), and must ‘contain information on relevant constituents and emissions of tobacco products as defined by national authorities’ (Article 11.2). Each Party must require that textual warnings and information appear in its principal language or languages (Article 11.3).

The guidelines for implementation of Article 11 state that health warnings and messages should appear: ‘on both the front and back (or on all main faces if there are more than two) of each unit packet and package, rather than just one side … recognizing that the frontal display area is the one most visible to the user for most package types’; ‘at the top of the principal display areas’; and ‘in such a way that the normal opening of the package does not permanently damage or conceal the text or image of the health warning’ and it is ‘not obstructed by other required packaging and labelling markings or by commercial inserts and onserts’. The guidelines recommend maximising the size of warnings and messages to ‘cover as much of the principal display areas as possible’. As noted above, they also recommend that Parties consider adopting ‘plain packaging’, which may ‘increase the noticeability and effectiveness of health warnings and messages’ and ‘prevent the package from detracting attention from them’.

The guidelines recommend the use of a range of different warnings and messages. Warnings should include text ‘in bold print in an easily legible font size and in a specified style and colour(s) that enhance overall visibility and legibility’ (with ‘contrasting colours for the background of the text’), and ‘culturally appropriate pictures or pictograms, in full colour’ (recognising that warnings including pictures are ‘more likely to be noticed’ and may reach those for whom text warnings are not legible, as well as being ‘far more effective’).

The requirement that health warnings be ‘rotating’ means ‘having multiple health warnings and messages appearing concurrently’ or ‘setting a date after which the health warning and message content will change’, and the guidelines recognise that using both types of rotation increases the effectiveness of warnings.

The guidelines also indicate that, in implementing the obligation to require the display of information on relevant constituents and emissions, Parties should require ‘that relevant qualitative statements be displayed on each unit packet or package about the emissions of the tobacco product’ (such as ‘smoke from these cigarettes
contains benzene, a known cancer-causing substance, and 'smoking exposes you to more than 60 cancer-causing chemicals').

Finally, the guidelines deal with the process of adopting and implementing packaging and labelling measures, indicating what may be considered 'effective measures', with recommendations on drafting, the process of entry into force of new requirements, and monitoring, enforcement and penalties.

18.4.4

Education, communication, training and public awareness

Under Article 12 of the FCTC, Parties accept a number of obligations with respect to education, communication, training and public awareness. Each Party is required 'to promote and strengthen public awareness of tobacco control issues, using all available communication tools, as appropriate.' Towards this end, each Party must adopt and implement effective measures to promote awareness of and access to information about tobacco and the tobacco industry among the general public, and to promote awareness of and participation in tobacco control by certain agencies, persons and organisations.

COP-4 adopted guidelines to assist Parties in meeting their obligations under Article 12. The objectives of the guidelines are to identify key measures necessary to successfully educate, communicate with and train people on the health, social, economic and environmental consequences of tobacco production, consumption and exposure to tobacco smoke, and to guide Parties in establishing sustainable infrastructure to support such measures.

18.4.4.1

The general public

Each Party to the FCTC is required by Article 12 to adopt and implement effective measures to promote:

- public awareness of the adverse health, economic, and environmental consequences of tobacco production and consumption and exposure to tobacco smoke, and about the benefits of cessation of tobacco use and tobacco-free lifestyles
- public access to information regarding these negative consequences, and to a wide range of information on the tobacco industry as relevant to the objective of the FCTC
- broad access to effective and comprehensive educational and public awareness programs on the health risks and addictive characteristics of tobacco consumption and the health risks of exposure to tobacco smoke.

The guidelines for implementation of Article 12 contain detailed recommendations on planning, implementing and evaluating public awareness programs, and on ensuring that the public has free and universal access to accurate information on the strategies and activities of the tobacco industry and on its products.

18.4.4.2

Agencies, persons and organisations

Each Party to the FCTC is required by Article 12 to adopt and implement effective measures to promote:

- effective and appropriate training and awareness programs on tobacco control addressed to persons such as health workers, community workers, social workers, media professionals, educators, decision-makers, administrators and other concerned persons

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awareness and participation of public and private agencies and non-governmental organisations not affiliated with the tobacco industry in developing and implementing intersectoral programs and strategies for tobacco control.

The guidelines for implementation of Article 12 contain detailed recommendations on planning, implementing and evaluating training programs and on consultation, cooperation and partnerships with civil society.

18.4.5

**Tobacco advertising, promotion and sponsorship**

Under Article 13.1, Parties to the FCTC recognise that ‘a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products’. Article 1 defines ‘tobacco advertising and promotion’ as ‘any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly’, and ‘tobacco sponsorship’ as ‘any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly’.

Article 13 requires each Party to undertake a comprehensive ban (or, if constitutional impediments prevent a comprehensive ban, restrictions) on all tobacco advertising, promotion and sponsorship, including cross-border advertising, promotion and sponsorship originating from its territory. Any Party that does not have a comprehensive ban must require disclosure to relevant government authorities of tobacco industry expenditure on advertising, promotion and sponsorship not yet prohibited. All Parties must cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising, and consider the elaboration of a protocol on cross-border advertising, promotion and sponsorship. To assist Parties in meeting these obligations, COP-3 adopted guidelines for implementation of Article 13.

18.4.5.1

**A comprehensive ban**

Article 13.2 requires each Party, ‘in accordance with its constitution or constitutional principles’, to undertake, within five years after entry into force of the FCTC for that Party, appropriate measures to implement a comprehensive ban of all tobacco advertising, promotion and sponsorship. Subject to the legal environment and technical means available to that Party, the comprehensive ban must extend to cross-border advertising, promotion and sponsorship originating from its territory. Parties also recognise their ‘sovereign right’ to ban prohibited forms of advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship (Article 13.7).

The guidelines for implementation of Article 13 state that a ‘comprehensive ban on all tobacco advertising, promotion and sponsorship applies to all forms of commercial communication, recommendation or action and all forms of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly’. The guidelines specify a range of such forms of communication, recommendation, action or contribution, including, but not limited to:

- display of tobacco products at points of sale (including vending machines)
- tobacco pack or product features with promotional aims, effects or likely effects (such as logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products)
- internet sales of tobacco products
- ‘brand stretching’ and ‘brand sharing’

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Section: 18.4.5.1

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Section: 18.4.5.2

Disclosure

Any Party that does not have a comprehensive ban on tobacco advertising, promotion and sponsorship is required under Article 13.4(d) to require disclosure to relevant government authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Such authorities may decide to make those figures available to the public and to the COP.

The guidelines for implementation of Article 13, noting that Article 13.5 encourages Parties to implement measures beyond their obligations under Article 13.4, recommend that disclosure requirements be implemented by all Parties, including those with comprehensive bans in place (in which some very limited forms of relevant commercial communication, recommendation or action might continue to exist). The guidelines include recommendations on particular information that should be required to be disclosed, and on making such information readily available to the public.
18.4.5.3
Cooperation and consideration of a protocol

Article 13.6 requires all Parties to cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising. Under Article 13.8, the Parties are required to consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship.

The Parties have acted at the multilateral level through the COP to consider the elaboration of a protocol and other means necessary to facilitate the elimination of cross-border advertising, promotion and sponsorship. The first session of the COP (COP-1) established an expert group to consider the matter of a protocol. The group—recognising the significant obligations to which Parties have already committed in respect of international cooperation under various articles of the FCTC are applicable to tobacco advertising, promotion and sponsorship—recommended that the need for a protocol be reconsidered after guidelines and other measures to promote and facilitate cooperation had been put in place. The working group that elaborated the guidelines for implementation of Article 13 developed more detailed recommendations on measures to facilitate international cooperation. These recommendations were noted by COP-3 and partially adopted by COP-4, which decided to establish a standing expert group on cross-border advertising, promotion and sponsorship.

18.4.6
Demand reduction measures concerning tobacco dependence and cessation

Under Article 14.1, each Party ‘shall develop and disseminate appropriate, comprehensive and integrated guidelines based on scientific evidence and best practices, taking into account national circumstances and priorities, and shall take effective measures to promote cessation of tobacco use and adequate treatment for tobacco dependence.’ Article 14.2 outlines a number of steps that each Party shall endeavour to take towards this end, with respect to cessation programs, programs for diagnosis and treatment of tobacco dependence, and collaboration to facilitate accessibility and affordability for treatment of dependence.

COP-4 adopted guidelines to assist Parties in fulfilling their obligations under Article 14. Recognising the differing national circumstances of Parties and the need to develop infrastructure to support tobacco cessation and treatment of tobacco dependence, the guidelines recommend a ‘stepwise’ approach: ‘Parties should use existing capacities as much as they can, and ensure that tobacco users receive at least brief advice. Once treatment of tobacco dependence, the guidelines recommend a ‘stepwise’ approach: ‘Parties should use existing capacities as much as they can, and ensure that tobacco users receive at least brief advice. Once they want to use additional services and support, parties should use the guidelines for implementation of Article 14 of the WHO Framework Convention on Tobacco Control developed after guidelines and other measures to promote and facilitate cooperation had been put in place. The working group that elaborated the guidelines for implementation of Article 14 of the WHO Framework Convention on Tobacco Control developed more detailed recommendations on measures to facilitate international cooperation. These recommendations were noted by COP-3 and partially adopted by COP-4, which decided to establish a standing expert group on cross-border advertising, promotion and sponsorship.

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18.4.6.1

Cessation programs and diagnosis and treatment of dependence

Pursuant to Article 14.2(a), each Party to the FCTC shall endeavour to design and implement effective programs aimed at promoting the cessation of tobacco use, in locations such as educational institutions, healthcare facilities, workplaces and sporting environments. Article 14.2(b) requires Parties to endeavour to include counselling services on cessation of tobacco use and diagnosis and treatment of tobacco dependence in national health and education programs, plans and strategies, with the participation of health workers, community workers and social workers as appropriate. Article 14.2(c) requires Parties to endeavour to establish programs for diagnosing, counselling, preventing and treating tobacco dependence in healthcare facilities and rehabilitation centres.

The guidelines for implementation of Article 14 recommend a number of actions to strengthen or create the necessary infrastructure and develop cessation support, taking into account national circumstances and priorities. These include conducting a national situation analysis, addressing tobacco use by healthcare workers and others involved in cessation, developing training capacity, integrating brief advice into existing healthcare systems, and establishing sustainable sources of funding. The guidelines also contain agreed key components of a system to help tobacco users quit—taking into account national circumstances and priorities, Parties should establish population-level approaches (mass communication and education programs, integration of brief advice into all healthcare systems, and widely publicised and adequately staffed quitlines), as well as establish more intensive individual tobacco dependence treatment services, make medications available, and consider emerging research evidence and novel approaches.

18.4.6.2

Collaboration

Pursuant to Article 14.2(d), each Party shall endeavour to collaborate with other Parties to facilitate accessibility and affordability for treatment of tobacco dependence, including pharmaceutical products. Such products and their constituents may include medicines, products used to administer medicines and diagnostics when appropriate. The guidelines for implementation of Article 14 recommend that Parties share tobacco cessation and treatment experiences, including strategies to develop and fund support for cessation of tobacco use, national treatment guidelines, training strategies, and data and reports from evaluations of tobacco dependence treatment systems.
Measures relating to the reduction of the supply of tobacco

18.5.1 Illicit trade in tobacco products

Under Article 15.1, each Party to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) recognises that ‘the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control’.

Parties have accepted a range of obligations to facilitate the elimination of illicit trade in tobacco products, including with respect to:

- documenting and controlling the movement of tobacco products
- legislating against illicit trade
- dealing with confiscated goods, equipment and proceeds
- reporting to the Conference of the Parties (COP)
- promoting cooperation relating to investigations, prosecutions and proceedings
- further measures including licensing.

18.5.1.1 Documenting and controlling the movement of tobacco products

Under Article 15.2, each Party is required to adopt and implement effective measures to ensure that all unit packets and packages of tobacco products, and any outside packaging of such products, are marked to assist Parties in determining the origin of the products. Each Party is also required, ‘in accordance with national law and relevant bilateral or multilateral agreements’, to assist other Parties in determining the ‘point of diversion’, and to monitor, document and control the movement of tobacco products and their legal status. In addition, Parties must require that unit packets and packages of tobacco products sold on its domestic market carry the statement: ‘Sales only allowed in (insert name of the country, subnational, regional or federal unit)’, or carry any other effective marking indicating the final destination or which would assist authorities in determining whether the product is legally for sale on the domestic market. Under Article 15.3, each Party must require that the above information and marking be presented in a legible form and/or appear in its principal language or languages.

Article 15.4 requires each Party, with ‘a view to eliminating illicit trade in tobacco products’, to monitor and collect data on cross-border trade in tobacco products, including illicit trade, and exchange information among customs, tax and other authorities ‘as appropriate, and in accordance with national law and relevant applicable bilateral or multilateral agreements’. Parties are required to adopt and implement measures to monitor, document and control the storage and distribution of tobacco products held or moving under suspension of taxes or duties within its jurisdiction.

In addition, Article 15.2 requires each Party to ‘consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade’, while Article 15.7 commits each Party to ‘endeavour to adopt and implement further measures including licensing, where
appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.

18.5.1.2
Legislating against illicit trade

Under Article 15.4(b), each Party is required to enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes.

18.5.1.3
Dealing with confiscated goods, equipment and proceeds

Article 15.4(c) requires each Party to take appropriate steps to ensure that all confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products are destroyed, using environmentally friendly methods where feasible, or are disposed of in accordance with national law. Parties must also, under Article 15.4(e), adopt measures as appropriate to enable the confiscation of proceeds derived from illicit trade in tobacco products.

18.5.1.4
Reporting to the Conference of the Parties (COP)

Article 15.5 requires that information collected by Parties pursuant to Article 15.4 be provided, as appropriate, in aggregate form by the Parties in their periodic reports to the COP, in accordance with Article 21 of the FCTC.

18.5.1.5
Promoting cooperation relating to investigations, prosecutions and proceedings

As appropriate and in accordance with national law, Article 15.6 requires each Party, with a view to eliminating illicit trade in tobacco products, to promote cooperation between national agencies and relevant regional and international intergovernmental organisations with respect to investigations, prosecutions and proceedings. Special emphasis is to be placed on cooperation at regional and subregional levels.

18.5.2
Sales to and by minors

Under Article 16, Parties are required to take measures with respect to sales of tobacco products to and by minors. Parties must adopt and implement effective measures to prohibit the sales of tobacco products to ‘persons under the age set by domestic law, national law, or eighteen’; and should adopt and implement measures to prohibit the sales of tobacco products by persons under this age.

18.5.2.1
Prohibiting sales to minors

All Parties are required by Article 16.1 to adopt and implement effective measures, ‘at the appropriate government level’, to prohibit sales of tobacco products to ‘persons under the age set by domestic law, national law, or eighteen’. Such measures may include:
requiring tobacco sellers to place clear and prominent indicators about the prohibition of tobacco sales to minors at the point of sale and, in case of doubt, to request that purchasers provide evidence of having reached legal age

■ banning the sale of tobacco products in any manner by which they are directly accessible, such as store shelves

■ prohibiting the manufacture and sale of sweets, snacks, toys or any other objects in the form of tobacco products which appeal to minors

■ ensuring that tobacco vending machines are not accessible to minors and do not promote the sale of tobacco products to minors.

A Party may also, by means of a binding written declaration pursuant to Article 16.5, indicate its commitment to prohibit the introduction of tobacco vending machines within its jurisdiction, or, as appropriate, to a total ban on tobacco vending machines. As of January 2011, only two Parties had declared a commitment under Article 16.5: China had indicated its commitment to prohibit the introduction of tobacco vending machines and Estonia had indicated its commitment to a total ban on tobacco vending machines. It should be noted that, as recognised in the guidelines for implementation of Article 13, tobacco vending machines are a form of tobacco advertising and promotion and should be banned by all Parties, subject to constitutional impediments, in accordance with their obligations under that Article.

Article 16 also requires all Parties to prohibit, or to promote prohibition, of the distribution of free tobacco products to the public and especially minors (Article 16.2) and to endeavour to prohibit the sale of cigarettes individually or in small packets, which increase the affordability of such products to minors (Article 16.3). Parties are also required to adopt and implement effective measures, including penalties against sellers and distributors, to ensure compliance with the obligations on sales of tobacco products to minors (Article 16.6).

18.5.2.2
Prohibiting sales by minors

Under Article 16.7, each Party should, as appropriate, adopt and implement effective measures to prohibit the sales of tobacco products by minors.

18.5.3
Provision of support for economically viable alternative activities

Article 17 requires Parties, in cooperation with each other and with competent international and regional intergovernmental organisations, to ‘promote, as appropriate, economically viable alternatives for tobacco workers, growers and, as the case may be, individual sellers’.

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18.6 Other obligations

The World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) includes a number of complementary and facilitative provisions to support the core measures for reduction of demand for tobacco and reduction of the supply of tobacco. These include:

- in respect of tobacco cultivation and manufacture, protection of the environment and the health of persons in relation to the environment
- action to deal with criminal and civil liability
- scientific and technical cooperation and communication of information
- providing financial resources for implementation.

18.6.1 Protection of the environment and the health of persons

Under Article 18, Parties agree that, in carrying out their obligations under the FCTC, they will have due regard to the protection of the environment and the health of persons in relation to the environment in respect of tobacco cultivation and manufacture within their respective territories.

18.6.2 Liability

Parties to the FCTC agree, under Article 18, that for the purpose of tobacco control they will consider taking legislative action or promoting their existing laws to deal with criminal and civil liability, including compensation where appropriate. Parties also agree that they will, 'as appropriate and mutually agreed, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements', afford one another assistance in legal proceedings relating to civil and criminal liability consistent with the Convention.

18.6.3 Scientific and technical cooperation and exchange of information

In order to facilitate and promote the implementation of the FCTC, Parties undertake a number of obligations with respect to research, surveillance and exchange of information, reporting, and cooperation in the scientific, technical, and legal fields and provision of related expertise.

18.6.3.1 Research, surveillance and exchange of information

Under Article 20, Parties accept a range of obligations with respect to research, surveillance and exchange of information regarding tobacco and tobacco control, and related activities including cooperation and provision of training and support.

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Research

Parties undertake, under Article 20.1, to develop and promote national research and to co-ordinate research programs at the regional and international levels in the field of tobacco control. Towards this end, each Party must initiate and cooperate in, directly or through competent international and regional intergovernmental organisations and other bodies, the conduct of research and scientific assessments, and in so doing promote and encourage research that addresses the determinants and consequences of tobacco consumption and exposure to tobacco smoke as well as research for identification of alternative crops.

Training and support

Article 20.1 also requires each Party to promote and strengthen, with the support of competent international and regional intergovernmental organisations and other bodies, training and support for all those engaged in tobacco control activities, including research, implementation and evaluation.

Surveillance

Under Article 20.2, Parties are required to establish, as appropriate, programs for national, regional and global surveillance of the magnitude, patterns, determinants and consequences of tobacco consumption and exposure to tobacco smoke. Towards this end, the Parties should integrate tobacco surveillance programs into national, regional and global health surveillance programs so that data are comparable and can be analysed at the regional and international levels. Each Party is required, under Article 20.3(a), to endeavour to establish progressively a national system for the epidemiological surveillance of tobacco consumption and related social, economic and health indicators.

Exchange of information

Article 20.4 requires Parties, 'subject to national law', to promote and facilitate the exchange of publicly available scientific, technical, socio-economic, commercial and legal information, as well as information regarding practices of the tobacco industry and the cultivation of tobacco. In so doing, Parties must take into account and address the special needs of developing country Parties and Parties with economies in transition.

Each Party is required to endeavour to progressively establish and maintain:
- an updated database of laws and regulations on tobacco control and, as appropriate, information about their enforcement, as well as pertinent jurisprudence
- updated data from national programs for epidemiological surveillance of tobacco consumption and related indicators (as required to be established under Article 20.3(a)).

Cooperation

Parties are required to endeavour to cooperate with competent international and regional intergovernmental organisations and other bodies, including governmental and non-governmental agencies, in surveillance and exchange of information on tobacco consumption and related indicators (Article 20.3(b)), and with WHO in the development of general guidelines or procedures for defining the collection, analysis and dissemination of tobacco-related surveillance data (Article 20.3(c)). Parties are also required to cooperate with each other in the development of programs for regional and global tobacco control (Article 20.4(a)), and with competent international organisations to progressively establish and maintain a global system to regularly collect and disseminate information on tobacco production, manufacture and the activities of the tobacco industry that have an impact on the FCTC or on national tobacco control activities (Article 20.4(c)).
In addition, Parties should cooperate, in regional and international intergovernmental organisations and financial and development institutions of which they are members, to promote and encourage provision of technical and financial resources to the FCTC Secretariat to assist developing country Parties and Parties with economies in transition to meet their commitments on research, surveillance and exchange of information (Article 20.5).

18.6.3.2 Reporting and exchange of information

Under Article 21, each Party to the FCTC is required to submit to the Conference of the Parties (COP) periodic reports on its implementation of the Convention. These reports must include information on various matters that are specified in Article 21 including:

- legislative, executive, administrative or other measures taken to implement the Convention
- constraints or barriers encountered in implementation of the Convention and the measures taken to overcome these barriers
- financial and technical assistance provided or received for tobacco control activities
- surveillance and research
- other specified information relating to taxation, advertising, promotion and sponsorship, cross-border trade in tobacco products (including illicit trade), the health effects of tobacco consumption and exposure to tobacco smoke, and legislation, regulation and pertinent jurisprudence.

Periodic reporting is critical to monitoring FCTC implementation and to maximising the effectiveness of the Convention in practice. As recognised by the COP at its first session (COP-1), Parties’ periodic reports form the basis for the COP’s function of regularly reviewing implementation of the Convention and taking the decisions necessary to promote effective implementation, as well as enabling Parties to understand and learn from each other’s experience.

Article 21 provides that the frequency and format of periodic reports shall be determined by the COP, with each Party to make its initial report within two years of the entry into force of the FCTC for that Party. COP-1 decided that Parties’ second and third reports would be required to be submitted within five and eight years of entry into force for each Party. The fourth session of the COP (COP-4) decided to replace this reporting cycle linked to the date of entry into force with a new, standardised cycle. From 2012, all Parties will submit implementation reports at regular two-year intervals in advance of biennial COP sessions.

The format for Parties’ initial reports was provisionally adopted by COP-1, with the third session of the COP (COP-3) adopting revisions, as well as a more detailed questionnaire format for Parties’ second reports. COP-4 adopted the second questionnaire, with amendments, as the single reporting instrument for Parties’ regular biennial reports.

Parties’ periodic reports are publicly available on the website of the Convention Secretariat, along with the reporting questionnaire and instructions, and annual summaries of global progress in implementation prepared by the Convention Secretariat.
18.6.3.3
Cooperation in the scientific, technical and legal fields and provision of related expertise

Article 22 promotes cooperation between Parties to the FCTC in the scientific, technical and legal fields and in the provision of related expertise. The COP is required to promote and facilitate transfer of technical, scientific and legal expertise and technology with the financial support secured in accordance with Article 26 (Financial resources). Parties are required to cooperate, directly or through competent international bodies, to strengthen their capacity to fulfil the obligations arising from the FCTC, taking into account the needs of developing country Parties and Parties with economies in transition. Such cooperation is to promote the transfer of technical, scientific and legal expertise and technology to establish and strengthen national tobacco control strategies, plans and programs. This may be aimed at a number of ends, including facilitation of development, transfer and acquisition of technology, skills and capacity; provision of technical, scientific, legal and other expertise; provision of material support; identification of tobacco control methods; and promotion of research.

18.6.4
Financial resources

Parties recognise under Article 26 ‘the important role that financial resources play’ in achieving the objective of the FCTC, and each Party is required to provide financial support in respect of its national activities intended to achieve the objective of the Convention, in accordance with its national plans, priorities and programs.

The Parties agree that ‘all relevant potential and existing resources, financial, technical or otherwise, both public and private that are available for tobacco control activities, should be mobilized and utilized’ to assist Parties in meeting their obligations under the Convention. Article 26 requires Parties to promote, as appropriate, the utilisation of bilateral, regional, subregional and other multilateral channels to provide funding for the development and strengthening of multisectoral comprehensive tobacco control programs of developing country Parties and Parties with economies in transition. In particular, Parties represented in relevant regional and international intergovernmental organisations agree to encourage these entities to provide financial assistance for developing country Parties and Parties with economies in transition to assist them in meeting their obligations.

Under Article 26, COP-1 was required to review existing and potential sources and mechanisms of assistance based on a study conducted by the Convention Secretariat and other relevant information, and consider their adequacy. The COP shall take the results of this review into account in determining the necessity to enhance existing financial mechanisms or to establish new mechanisms to channel additional financial resources, as needed, to developing country Parties and Parties with economies in transition.

Following the review, COP-1 recognised ‘the urgent need for assistance to developing country Parties and Parties with economies in transition to support them in their implementation.’ The COP-1 decision on financial resources and mechanisms of assistance:

- called upon developing country Parties and Parties with economies in transition to conduct needs assessments and communicate their prioritised needs to development partners
- reaffirmed the responsibility of developed country Parties to provide assistance, in accordance with their obligations under the Convention, through bilateral, regional, international or non-governmental channels
- urged international financial institutions, international organisations and other development partners to channel resources to developing country Parties and Parties with economies in transition, based on specific requests
- requested the Secretariat to provide assistance to developing country Parties and Parties with economies in transition in the conduct of needs assessments and in securing technical and financial assistance, and to launch...
an awareness-raising campaign among potential development partners to mobilise financial and technical support.

At the second session of the COP (COP-2), the Parties reaffirmed the importance of financial resources in achieving the objective of the Convention, recognising ‘the need for taking immediate action to provide all necessary assistance to Parties to ensure sustained and predictable availability of funds.’ The COP-2 decision:

- requested the Secretariat to actively seek extra-budgetary contributions from Parties and other international donors, including intergovernmental organisations, specifically for the purpose of helping Parties in need to carry out needs assessments and develop project and program proposals for financial assistance from all available funding sources
- invited the Director-General of the WHO to support the Secretariat in this work and urged donor Parties to provide voluntary extra-budgetary contributions specifically for the purpose of this work
- requested the Secretariat to prepare and present, at each session of the COP, an implementation report on activities undertaken to implement the COP’s decisions on financial resources and mechanisms of assistance.

COP-3 and COP-4 continued the mandate to the Convention Secretariat to work on the mobilisation of resources for implementation and to support developing country Parties and Parties with economies in transition in accessing sources of assistance. COP-4 recognised, in particular, the need to further integrate FCTC implementation within the broader development agenda, requesting the Secretariat to actively engage in and contribute to work in other fora, cooperating with relevant United Nations agencies, funds and programs and other development partners. Taking note of the indication in Parties’ periodic reports ‘that lack of resources is one of the most important obstacles to implementation of the Convention,’ COP-4 also requested a review, with broad participation, of progress in the mobilisation of resources and the performance of the mechanisms of assistance. A report and recommendations based on this review are expected to be presented to the fifth session of the COP (COP-5) in late 2012.

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Implementation and development of the FCTC: decisions of the Conference of the Parties

The Conference of the Parties (COP) to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) is the formal body through which the Parties meet and make decisions about the implementation and development of the Convention. Article 23 of the FCTC requires the COP to keep the implementation of the FCTC under regular review and to take the decisions necessary to promote its effective implementation.

The COP held its first regular session, COP-1, in Geneva, Switzerland from 6–17 February 2006. Subsequent regular sessions have rotated through the WHO regions, with COP-2 held in Bangkok, Thailand from 30 June–6 July 2007, COP-3 held in Durban, South Africa from 17–22 November 2008, and COP-4 held in Punta del Este, Uruguay from 15–20 November 2010. COP-5 is to be held in the Republic of Korea in the last quarter of 2012.

The COP’s regular sessions allow the Parties to the FCTC to take significant substantive decisions, such as to adopt guidelines, as well as to provide for a program of intersessional work to support the implementation and further development of the Convention. Such work includes:

- elaborating guidelines
- negotiating protocols
- requesting the preparation of technical reports and recommendations
- mobilising financial resources and mechanisms of assistance
- overseeing reporting and exchange of information
- facilitating international cooperation.

The COP’s work is supported by the Convention Secretariat, an independent body housed within WHO’s Geneva offices and mandated under Article 24 of the FCTC to perform the treaty secretariat functions specified by the Convention and determined by the COP. The Secretariat cooperates with other international agencies and bodies, particularly WHO’s Tobacco Free Initiative and other relevant WHO offices, to carry out the work program mandated by the COP.

Elaborating guidelines

As noted in Section 18.4, a guideline is a non-binding instrument adopted by an international body to provide assistance to countries in addressing specific issues at the national or international level. Article 7 of the FCTC requires the COP to propose appropriate guidelines for implementation of the non-price measures to reduce demand for tobacco in Articles 8 to 13. The guidelines are intended to assist Parties in implementing their legal obligations under these articles. As agreements between the Parties subsequent to conclusion of the Convention regarding the interpretation and application of its provisions, the guidelines must be taken into account in legal interpretation of the FCTC (Vienna Convention on the Law of Treaties, Article 31).

As of November 2010, the COP had adopted guidelines for implementation of all the provisions requiring non-price demand reduction measures (see Section 18.4): Article 8 (Protection from exposure to tobacco smoke),
Articles 9 and 10 (Regulation of the contents of tobacco products and regulation of tobacco product disclosures), Article 11 (Packaging and labelling of tobacco products), Article 12 (Education, communication, training and public awareness), Article 13 (Tobacco advertising, promotion and sponsorship), and Article 14 (Tobacco dependence and cessation). The COP had also adopted guidelines for implementation of Article 5.3 (Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry) (see Section 18.2). The guidelines adopted for implementation of Articles 9 and 10 at this time were partial only, with additional guidelines to be elaborated in a ‘step-by-step’ process.

Each set of guidelines was drafted intersessionally by a working group of Parties and representatives of intergovernmental and non-governmental organisations with relevant expertise. The draft guidelines were then considered and adopted by the COP: COP-2 adopted the guidelines for implementation of Article 8; COP-3 adopted the guidelines for implementation of Articles 5.3, 11 and 13; and COP-4 adopted the guidelines for implementation of Articles 12 and 14 and partial guidelines for implementation of Articles 9 and 10. As well as continuing the working group elaborating guidelines for implementation of Articles 9 and 10, COP-4 decided to establish a working group of fiscal and health experts to elaborate guidelines for implementation of Article 6 (Price and tax measures to reduce the demand for tobacco).1

18.7.2

Negotiating protocols

A protocol is a legally binding international agreement that supplements an existing international agreement through additional rights or obligations or cooperative arrangements. Ordinarily, only Parties to the primary agreement are eligible to become Parties to the protocol, and the protocol is only binding on those Parties to the primary agreement that decide to become Parties to the protocol. A protocol is thus a separate instrument from the primary agreement, though closely related to it.

COP-1 recognised the Parties’ obligation to consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border tobacco advertising, promotion and sponsorship, as required by Article 13.8, and the need to further develop the obligations set out in Article 15 (Illicit trade in tobacco products) in an internationally binding legal instrument.2 Towards this end, COP-1 established two expert groups tasked with the preparation of protocol templates for consideration by COP-2.

18.7.2.1

Cross-border tobacco advertising, promotion and sponsorship

The expert group on cross-border tobacco advertising, promotion and sponsorship comprised experts in public health, telecommunications/informatics, justice/law enforcement and trade/customs from Parties in each of the WHO regions. Representatives of civil society participated in its work. The template presented by the expert group to COP-2 set out a range of elements of a possible future protocol on cross-border tobacco advertising, promotion and sponsorship, including provisions dealing with identification of contact points within Parties, information collection and sharing, scientific and technical cooperation, technical and financial assistance, investigation and pursuit of legal action, exercise of jurisdiction, recognition and enforcement of foreign judgments, and coordination of activities.3

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Noting that the significant obligations to which Parties have already committed in respect of international cooperation under various articles of the FCTC are applicable to tobacco advertising, promotion and sponsorship, the expert group recommended that the need for a protocol on cross-border advertising, promotion and sponsorship be reconsidered after guidelines and other measures to promote and facilitate cooperation had been put in place. As noted in Section 18.4, the working group that elaborated the guidelines for implementation of Article 13 developed detailed recommendations on measures to facilitate international cooperation. These recommendations were noted by COP-3 and partially adopted by COP-4, which decided to establish a standing expert group on cross-border advertising, promotion and sponsorship.

18.7.2.2
Illicit trade in tobacco products

The expert group on illicit trade in tobacco products comprised experts in public health, finance/taxation, law enforcement/justice and customs (excise)/trade from Parties in each of the WHO regions. Representatives of civil society participated in its work. The expert group presented to COP-2 a template setting out a range of measures to be considered for inclusion in a protocol on illicit trade.1 These included:

- licensing schemes for participants in the tobacco business
- measures to eliminate money laundering
- measures to enable the tracking and tracing of tobacco products
- record-keeping requirements and obligations on tobacco manufacturers to control their supply chain, with penalties for those that fail to do so
- restrictions on internet sales of tobacco products
- criminalisation of participation in illicit trade in various forms
- a variety of measures to enhance law enforcement and international cooperation, including powers of search, confiscation and seizure, information sharing, obligations with respect to mutual legal and administrative assistance, and extradition arrangements.

After considering the expert group’s report, COP-2 decided to establish an intergovernmental negotiating body (INB) open to all Parties to draft and negotiate a protocol on illicit trade, which will build upon and complement the provisions of Article 15 of the FCTC.2 The INB held four negotiating sessions between COP-2 and COP-4, where a report and partial draft protocol were considered.3 As noted in the report, the draft protocol reflected the INB’s agreement on 26 draft provisions for consideration by the COP, while 23 remained under discussion by the INB. The provisions on which the INB had reached agreement included provisions dealing with tracking and

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tracing of tobacco products, information sharing, law enforcement cooperation, liability of legal persons, special investigative techniques, and institutional arrangements.

COP-4 acknowledged the progress made and decided to extend the INB’s mandate for a final session that would finalise a draft protocol text for consideration by COP-5. The COP also decided to establish a small informal working group to work during the period between COP-4 and the INB’s final session in early 2012. The working group will deal with certain draft articles on which the INB has not reached agreement, and on matters referred by INB-4 to COP-4. It will also consider how the text of the draft protocol, and its implementation, can best complement existing relevant agreements and arrangements, including the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, in order to maximise synergy and to avoid duplication. This work is expected to involve discussions with the United Nations Office on Drugs and Crime, the World Customs Organization and other relevant international bodies.

18.7.3

Requesting technical reports and recommendations

In addition to the elaboration of formal instruments such as guidelines and protocols, the COP may fulfil its mandate to promote effective implementation of the FCTC by requesting the preparation of informal documents such as reports and recommendations. These documents are prepared to facilitate discussion by the COP, including consideration of the need for formal instruments.

18.7.3.1

Economically sustainable alternatives to tobacco growing

COP-1, taking into account Parties’ obligations, including under Article 17 (Provision of support for economically viable alternative activities)—and considering that hundreds of thousands of families, particularly in developing countries, are engaged in tobacco agriculture and that, in the medium to long term, there is likely to be a reduction in demand for tobacco products—recognised the need to promote economically viable alternatives for tobacco workers, growers, and, as the case may be, individual sellers. As such, COP-1 established an ad hoc study group, open to interested Parties to the Convention and representatives of civil society, with the objectives of summarising the uptake of existing economically viable alternatives, reporting on initiatives being taken by Parties in accordance with Article 17, and recommending to the COP cost-effective diversification initiatives and mechanisms to assess the impact over time of the tobacco companies’ practices. The study group held two meetings in the intersessional periods between COP-1 and COP-3. Its reports to the COP emphasised the long-term nature of the tasks assigned to it.

COP-3, considering that the pursuit of alternative livelihoods to tobacco growing should be addressed with a long-term sustainable approach and from a development perspective—and mindful of the important work being undertaken in this area by other agencies with recognised expertise (including the United Nations Food and Agriculture Organization, the United Nations Development Programme, the United Nations Environment Programme and the World Bank)—decided to establish an FCTC working group on economically sustainable alternatives to tobacco growing to replace the study group. The working group’s mandate covered a range of tasks, including promotion of research and information exchange, identification and development of mechanisms and

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areas of cooperation with relevant intergovernmental and non-governmental organisations, and elaboration of policy options and recommendations for implementation of Articles 17 and 18 of the Convention. COP-4 requested the working group to continue its work and to submit a working report to COP-5.\(^\text{i}\)

### 18.7.3.2 Liability

COP-4 decided to initiate work on Article 18 of the Convention (Liability), requesting the Convention Secretariat to prepare jointly with WHO’s Tobacco Free Initiative ‘a comprehensive report on the matter of liability in the context of Article 18’, including possible mechanisms on appropriate means by which the COP could support Parties in their activities in accordance with this Article.\(^\text{ii}\) The report is to be presented for consideration by COP-5.

### 18.7.3.3 Smokeless tobacco products and electronic cigarettes

COP-4 decided to request the Convention Secretariat to prepare jointly with WHO’s Tobacco Free Initiative ‘a comprehensive report based on the experience of Parties on the matter of smokeless tobacco products and nicotine delivery systems including electronic cigarettes’.\(^\text{iii}\) The report is to be presented for consideration by COP-5.

### 18.7.4 Mobilising financial resources and mechanisms of assistance

Under Article 26 (Financial resources), COP-1 was required to review existing and potential sources and mechanisms of assistance to facilitate implementation, based on a study conducted by the Convention Secretariat and other relevant information, and consider their adequacy. The COP shall take the results of this review into account in determining the necessity to enhance existing financial mechanisms or to establish new mechanisms to channel additional financial resources, as needed, to developing country Parties and Parties with economies in transition to assist them in meeting the objectives of the Convention.

Following the review, COP-1 recognised ‘the urgent need for assistance to developing country Parties and Parties with economies in transition to support them in their implementation’.\(^\text{iv}\) The COP-1 decision on financial resources and mechanisms of assistance:

- called upon developing country Parties and Parties with economies in transition to conduct needs assessments and communicate their prioritised needs to development partners
- reaffirmed the responsibility of developed country Parties to provide assistance, in accordance with their obligations under the Convention, through bilateral, regional, international or non-governmental channels

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urged international financial institutions, international organisations and other development partners to channel resources to developing country Parties and Parties with economies in transition, based on specific requests.

requested the Secretariat to provide assistance to developing country Parties and Parties with economies in transition in the conduct of needs assessments and in securing technical and financial assistance, and to launch an awareness-raising campaign among potential development partners to mobilise financial and technical support.

At COP-2, the Parties reaffirmed the importance of financial resources in achieving the objective of the Convention, recognising ‘the need for taking immediate action to provide all necessary assistance to Parties to ensure sustained and predictable availability of funds.’ The COP-2 decision:

- requested the Secretariat to actively seek extra-budgetary contributions from Parties and other international donors, including intergovernmental organisations, specifically for the purpose of helping Parties in need to carry out needs assessments and develop project and program proposals for financial assistance from all available funding sources
- invited the Director-General of the WHO to support the Secretariat in this work and urged donor Parties to provide voluntary extra-budgetary contributions specifically for the purpose of this work
- requested the Secretariat to prepare and present, at each session of the COP, an implementation report on activities undertaken to implement the COP’s decisions on financial resources and mechanisms of assistance.

COP-3 and COP-4 continued the mandate to the Convention Secretariat to work on the mobilisation of resources for implementation and to support developing country Parties and Parties with economies in transition in accessing sources of assistance. COP-4 recognised, in particular, the need to further integrate FCTC implementation within the broader development agenda, requesting the Secretariat to actively engage in and contribute to work in other fora, cooperating with relevant United Nations agencies, funds and programs and other development partners. Taking note of the indication in Parties’ periodic reports ‘that lack of resources is one of the most important obstacles to implementation of the Convention,’ COP-4 also requested a review, with broad participation, of progress in the mobilisation of resources and the performance of the mechanisms of assistance. A report and recommendations based on this review are expected to be presented to COP-5.

18.7.5

Overseeing reporting and exchange of information

In accordance with Article 21 (Reporting and exchange of information) and Article 23, the COP oversees Parties’ periodic reporting on their implementation of the Convention. Periodic reporting is critical to monitoring FCTC implementation and to maximising the effectiveness of the Convention in practice. As recognised by COP-1, Parties’ periodic reports form the basis for the COP’s function of regularly reviewing implementation of the Convention and taking the decisions necessary to promote effective implementation, as well as enabling Parties to understand and learn from each other’s experience. COP-4 recognised the need for further attention to the role of...
reporting, requesting that COP-5 be presented with recommendations to better facilitate regular review of progress in implementation.

Article 21 provides that the COP shall determine the frequency and format of Parties’ periodic reports, with each Party to make its initial report within two years of the entry into force of the FCTC for that Party. COP-1 decided that Parties’ second and third reports would be required to be submitted within five and eight years of entry into force for each Party. COP-4 decided to replace this reporting cycle linked to the date of entry into force with a new, standardised cycle. From 2012, all Parties will submit implementation reports at regular two-year intervals in advance of biennial COP sessions.

The format for Parties’ initial reports was provisionally adopted by COP-1, with the third session of the COP (COP-3) adopting revisions, as well as a more detailed questionnaire format for Parties’ second reports. COP-4 adopted the second questionnaire, with amendments, as the single reporting instrument for Parties’ regular biennial reports.

COP-4’s decision on updating and harmonising the reporting arrangements invited WHO to use the data received through Parties’ implementation reports as a principal source of information for relevant surveillance and monitoring activities, avoiding the use of a parallel international system for regular collection of data concerning tobacco control. It also requested the preparation of a report containing recommendations for taking into account in the reporting instrument the key measures contained in the guidelines for implementation of the Convention, and for the standardisation of definitions and indicators deriving from specific articles of the Convention and the guidelines, as well as the promotion of their use by the Parties in their national data collection initiatives. This report is expected to be presented for consideration by COP-5.

### 18.7.6 Facilitating international cooperation

Parties to the FCTC accept a wide range of obligations in respect of international cooperation for effective tobacco control. Some important cooperation takes place through sessions of the COP, as well as smaller intersessional meetings such as guideline working group meetings and implementation workshops. Other aspects of cooperation are focused regionally or bilaterally. The COP, acknowledging the potential of technological, scientific and economic cooperation among developing countries—particularly in view of the fact that the tobacco epidemic disproportionately affects populations in developing countries, and of its expected growth in developing countries in the future—has placed particular emphasis on South–South cooperation.

In some areas, cooperation is facilitated by special arrangements or mechanisms established by the COP. For example, Parties share pictorial health warnings and messages through a central international database established pursuant to the COP decision adopting the guidelines for implementation of Article 11 (Packaging and labelling of tobacco products). A database or databases are expected to be developed for the sharing of information in relation to other articles on which guidelines have been adopted, as requested in the decisions adopting the guidelines for Articles 9 and 10 (Regulation of the contents of tobacco products and regulation of tobacco product disclosures), Article 12 (Education, communication, training and public awareness), and Article 14 (Tobacco dependence and cessation). Another means used by the COP to facilitate international cooperation is the establishment of dedicated groups, such as the standing expert group on cross-border advertising, promotion and sponsorship established by COP-4.

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The FCTC and trade agreements

In its Preamble, the FCTC states the determination of its Parties ‘to give priority to their right to protect public health’. Under Article 2.2, the Parties agree that they may enter into other bilateral or multilateral agreements on issues relevant or additional to the Convention, provided that such agreements are compatible with their obligations under the Convention. In the ‘Punta del Este Declaration’ adopted at COP-4, the Parties reaffirmed their ‘firm commitment to prioritize the implementation of health measures designed to control tobacco consumption in their respective jurisdictions’, declaring their concern regarding actions taken by the tobacco industry that seek to subvert and undermine government policies on tobacco control.

The ‘Punta del Este Declaration’ recalls relevant exceptions provided to the obligations of Parties to the World Trade Organization (WTO) agreements, and recognises that ‘measures to protect public health, including measures implementing the WHO FCTC and its guidelines fall within the power of sovereign States to regulate in the public interest’. Mindful that closer cooperation with the WTO would support Parties to the FCTC in implementing the Convention, COP-4 also adopted a decision requesting the Convention Secretariat to cooperate with the WTO with the aim of information sharing on trade-related tobacco control issues. The decision also requested the Secretariat to monitor trade disputes regarding FCTC-related tobacco control measures and other trade-related issues of relevance to FCTC implementation, facilitate information sharing between Parties on trade-related issues, and communicate regularly with relevant WHO offices on tobacco control issues raised at WTO committees. A report exploring additional options for cooperation with the WTO on trade-related tobacco control issues as a means of strengthening implementation of the Convention is expected to be presented for consideration by COP-5.

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Enforcement of the FCTC

As is the case in many areas of international law, obligations that Parties have accepted under the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) are difficult to enforce in any formal way. There is no body with the power to hold Parties to the obligations they have accepted under the Convention, or to apply sanctions where these obligations are not met. However, most countries take their international legal obligations seriously—particularly those obligations that they have voluntarily accepted by ratifying a treaty. International legal obligations have strong normative effects, creating expectations about the way countries will behave. These expectations are held by countries in relation to each other, by civil society in relation to countries, and they tend to become ingrained within the work of governmental and intergovernmental organisations and institutions.

Where a Party or Parties to the FCTC believe a particular Party to be in breach of its obligations under the Convention, or to be incorrect in its interpretation of a provision of the Convention, the Party or Parties may seek to hold that Party to its obligations, either informally through the application of diplomatic pressure, or formally through the dispute settlement provisions in Article 27 of the Convention. Article 27 provides that Parties should seek settlement of a dispute through diplomatic channels, such as negotiation, good offices, mediation or conciliation. Should diplomatic channels fail, Article 27 provides that Parties which have declared their acceptance of compulsory ad hoc arbitration under the Convention may submit the dispute to settlement by an arbitral body under procedures to be adopted by the COP. As of January 2011, only two Parties to the Convention—Azerbaijan and Belgium—had declared their acceptance of compulsory ad hoc arbitration in accordance with procedures to be adopted by the COP, and the COP had not yet begun to consider possible procedures for arbitration. In any event, formal dispute settlement provisions are rarely used in practice, with countries usually disinclined to formally ‘interfere’ in the domestic affairs of other sovereign states. This is particularly the case in relation to those provisions of the Convention that cannot be said to have cross-border implications.

A significant means through which Parties may be encouraged to adhere to their obligations under the FCTC—and dissuaded from breaching these obligations—is the effective monitoring of Parties’ implementation of the Convention and the dissemination of information gained through the monitoring process. Implementation monitoring occurs through a range of activities associated with the FCTC undertaken by the Parties themselves, by the Convention Secretariat, and by both domestic and international non-governmental organisations. The most significant FCTC implementation monitoring activity currently undertaken at the international level is reporting: both official reporting pursuant to Article 21 of the Convention (see ‘Reporting and exchange of information’ in Section 19.6.3.2), and ‘shadow reporting’ undertaken by civil society. Reporting is key to identifying and publicising both failures and successes in Parties’ implementation of the FCTC, thereby influencing the way in which Parties approach their obligations.

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Chapter 18: The WHO Framework Convention on Tobacco Control

18.9 What the FCTC means for Australia

Australia became a Signatory to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) on 5 December 2003, soon after the Convention opened for signature. Australia was one of the first 40 countries to ratify the FCTC, and so became a full Party on 27 February 2005, the date on which the FCTC came into force. Australia is thus legally bound to perform, in good faith, the full range of obligations outlined above. Australia submitted its first report to the Conference of Parties (COP) on its implementation of the FCTC in February 2007, and its second report in November 2010.

Australia is a federation (known as the Commonwealth of Australia), whose government derives its powers from the national Constitution. While the states and territories that make up the Australian federation have plenary power to legislate within their respective jurisdictions, the Commonwealth Parliament has only those legislative powers specifically accorded to it in the Constitution. The Commonwealth may enact laws to implement an international treaty to which Australia is a party pursuant to its power to make laws with respect to external affairs under section 51(xxix) of the Constitution. This power is subject to a requirement that the treaty deal with a matter of ‘international concern’ and that it embody precise obligations rather than mere vague aspirations. The FCTC—which provides a framework for international cooperation to address the global health crisis caused by tobacco, and prescribes a range of specific tobacco control measures to be implemented by Parties—clearly meets these conditions. Where a treaty is relied on to enliven the legislative power conferred on the Commonwealth Parliament by section 51(xxix), the legislation must be ‘appropriate and adapted’ to the implementation of the obligations contained in the treaty if it is to be constitutionally valid. The law in question must be ‘reasonably capable of being considered as giving effect to the treaty and therefore as being a law upon a subject which is an aspect of external affairs’.

Historically, tobacco control legislation in Australia has included both Commonwealth and state and territory enactments. Certain areas, such as protection against secondhand smoke, and aspects of advertising in retail outlets, have been left to the states and territories. Commonwealth legislative power was not broad enough to allow comprehensive regulation of these areas. In light of Australia’s ratification of the FCTC, the constitutional context has changed. While there may still be practical and political reasons for continuing to deal with certain matters at a state and territory level, the Commonwealth Government would have power to legislate in areas that have historically been beyond it in order to implement Australia’s obligations under the Convention.

Beyond the creation of governmental tobacco control obligations and the resulting change in the scope of the legislative power of the Commonwealth, the FCTC has deepened the connections between the development of tobacco control policy in Australia and internationally. With Australia a Party to the Convention and an active participant in its processes, the work that takes place through the FCTC COP is highly relevant to domestic tobacco control. The COP has adopted detailed guidelines for effective implementation of many of the broad range of legislative, executive, administrative and other measures required under the Convention. Together, the FCTC and its guidelines help to set the priorities of Australian governments, both Commonwealth and state and territory, in relation to tobacco control policies and programmes.

The FCTC also provides a framework for international cooperation in those areas of tobacco control in which Australia and other Parties cannot effectively act alone—in particular, the regulation of cross-border tobacco advertising, promotion and sponsorship and the implementation of measures to address illicit trade in tobacco products—as well as requiring cooperation to allow all Parties, including developing country Parties, to move

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ii The reports are available online from: http://www.who.int/fctc/reporting/aus/en/index.html

iii R v. Burgess; Ex Parte Henry (1936) 55 CLR 608.


vii Ibid, p487.
forward in implementation of the Convention. Australia has the responsibility to cooperate with other FCTC Parties to address trans-boundary tobacco control problems, and to assist other Parties in meeting common challenges to effective tobacco control.

On a wide range of issues, progress in tobacco control in Australia is now intimately connected with FCTC processes, with the COP working at the international level in areas in which Australia—while certainly a leading country internationally—can still do more. Those interested in tobacco control in Australia need to keep abreast of international developments if they are to understand the full context in which Australian tobacco control policy is now made and implemented.