



**Conference of the Parties to the
WHO Framework Convention
on Tobacco Control**

Seventh session
Delhi, India, 7–12 November 2016
Provisional agenda item 6.6

FCTC/COP7/20
27 July 2016

**Issues related to implementation of the WHO FCTC and
settlement of disputes concerning the implementation or
application of the Convention**

Report by the Convention Secretariat

INTRODUCTION

1. At its sixth session (Moscow, Russia, 13–18 October 2014), the Conference of the Parties (COP), in decision FCTC/COP6(18), requested the Convention Secretariat to prepare a report for consideration at the seventh session of the COP (COP7) examining:

- (i) possible procedures for settling disputes concerning the interpretation or application of the Convention, through negotiations, diplomatic channels, or ad hoc arbitration in accordance with Article 27;
- (ii) the kind of disputes that may be subject to such procedures;
- (iii) the interaction of such procedures with other disputes settlement mechanisms

2. This report provides an examination of the issues identified in the COP decision and sets out ways in which disputes concerning the interpretation or application of the Convention might be addressed in parallel to, or as an alternative to procedures under Article 27.

ARTICLE 27 OF THE WHO FCTC: OVERVIEW

3. Article 27 of the WHO FCTC states:

1. In the event of a dispute between two or more Parties concerning the interpretation or application of this Convention, the Parties concerned shall seek through diplomatic channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation, or conciliation. Failure to reach agreement by good offices, mediation or conciliation shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it.

2. When ratifying, accepting, approving, formally confirming or acceding to the Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depository that, for a dispute not resolved in accordance with paragraph 1 of this Article, it

accepts, as compulsory, ad hoc arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties.”

Two types of procedures – diplomatic channels and arbitration

4. Article 27 provides two types of procedure for the settlement of disputes between Parties, “concerning the interpretation or application of the Convention”: settlement through “diplomatic channels”, such as negotiation or other peaceful means, including good offices, mediation, or conciliation; and a legal procedure for the settlement of disputes not resolved through such diplomatic channels. The former applies to all Parties to the Convention, and is already in operation. The latter requires the COP to adopt procedures for ad hoc arbitration, and applies to Parties that have accepted such ad hoc arbitration as compulsory for disputes not resolved in accordance with Article 27.1. Two Parties have accepted arbitration under Article 27.2 as compulsory¹, but no procedures have yet been adopted. Either type of procedure under Article 27 is applicable, “in the event of a dispute between two or more Parties concerning the interpretation or application of the Convention”.

“A dispute”

5. For the purposes of Article 27, a “dispute” may be understood as a “disagreement on a point of law or fact, a conflict of legal views or of interests between two [or more] persons”². An essential feature of “disputes” of this kind is that “the claim of one party is positively opposed by the other”³.

“Concerning the interpretation or application of the Convention”

6. A dispute must concern the “interpretation or application of the Convention” to fall within Article 27. This means that disputes not concerning the interpretation or application of the WHO FCTC, such as disputes exclusively “concerning the interpretation or application” of another international instrument, would not fall within Article 27. This is not to suggest that a dispute relating to tobacco control measures could not “concern the interpretation or application” of both the WHO FCTC and another international instrument (or instruments), whether concerning human rights, trade, investment, the environment or other areas of international law⁴. However, Article 27 procedures could only be used for those aspects of that dispute that “concern the interpretation or application” of the WHO FCTC.

THE PURPOSE OF ARTICLE 27 OF THE WHO FCTC

7. International dispute settlement generally serves a number of purposes. For example, it can de-escalate conflicts between states, and ensure that responses to grievances are managed in an orderly, rules-based manner. It can provide a means for states that have been harmed by the actions of other states to seek remedies for the harm they have suffered. It can play an important role in

¹ The declarations are available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=en#1.

² *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 11; cited in, inter alia, *Certain Property (Liechtenstein v Germany) (Preliminary Objections)* [2005] ICJ Rep 6, 16; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 99-100.

³ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)(Preliminary Objections)* [1962] 328, cited in *Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits)* [2012] ICJ Rep 422, 442; *Certain Property (Liechtenstein v Germany) (Preliminary Objections)* [2005] ICJ Rep 6, 16; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 99-100.

⁴ See, e.g., *Southern Bluefin Tuna (New Zealand/Australia v Japan) (Award on Jurisdiction and Admissibility)*, (2006) XXIII RIAA 1 (4 August 2000) 40, para 52: “it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute.”

promoting state accountability and ensuring effective implementation of international obligations, either by facilitating dialogue between states or by invoking legal responsibility.

8. Of course, the promotion of effective implementation can be pursued in a number of ways other than through dispute settlement. In the WHO FCTC context, for example, the COP has a broad role, set out in Article 23.5 of the Convention, to “keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation”. In its report to COP7, the expert group on reporting arrangements recommends the establishment of an implementation review committee, and proposes draft terms of reference for such a committee⁵.

9. Article 27 of the WHO FCTC must be understood as designed to contribute to the achievement of the Convention’s objective of “protect[ing] present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”. This objective is manifested in the Convention through the undertaking by Parties of obligations with respect to both domestic tobacco control measures and international cooperation to support the adoption and implementation of effective tobacco control measures across all Parties to the Convention. This approach is reflected in the recognition in the Convention’s preamble 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”. It also finds specific expression in Article 22, which commences: “The Parties shall cooperate directly or through competent international bodies to strengthen their capacity to fulfil the obligations arising from this Convention, taking into account the needs of developing country Parties and Parties with economies in transition”. In this sense, the WHO FCTC is analogous to human rights and certain environmental treaties in that it aims not merely to prevent states acting in ways that may cause direct harm to other states, but to enable them to realize shared collective goals.

WHAT KINDS OF DISPUTES MIGHT ARTICLE 27 OF THE WHO FCTC APPLY TO?

10. The kinds of disputes to which Article 27 of the WHO FCTC might apply are as broad as the WHO FCTC itself, spanning both obligations for domestic action and international cooperation. The subject matter of disputes might include, for example:

- acts originating in the territory of one Party undermining the effectiveness of the domestic tobacco control measures adopted and implemented by another Party, such as cross-border advertising, promotion and/or sponsorship or illicit trade in tobacco products;
- a failure by a Party to effectively implement Article 5.3 of the WHO FCTC, in a manner that allows or supports the tobacco industry to oppose or undermine global or regional tobacco control efforts;
- active opposition or undermining by a Party of another Party’s domestic tobacco control efforts, whether directly or by providing support to a third party, such as a tobacco company or an entity acting on behalf of a tobacco company;
- a Party acting on behalf of, or with the support of, the tobacco industry to oppose or undermine another Party’s tobacco control efforts.

PROCEDURES CONTEMPLATED BY ARTICLE 27

Article 27.1

11. Article 27.1 requires Parties to seek to settle disputes “through diplomatic channels”. It imposes a continuing obligation upon Parties – “[f]ailure to reach agreement ... shall not absolve parties to

⁵ Reporting arrangements under the WHO FCTC: Report by the expert group, document FCTC/COP/7/15.

the dispute from the responsibility of continuing to seek to resolve it”.

12. Article 27.1 provides Parties with broad discretion to choose their preferred means of dispute settlement, as long as this is pursued through “diplomatic channels” and by “peaceful” means. The non-exhaustive options included in Article 27.1 are negotiation, good offices, mediation, and conciliation, which, while not strictly defined by law, are generally understood as follows:

- Negotiation refers to “discussions at different levels of authority with a view to achieving common understanding or agreement”⁶;
- Good offices refers to negotiations undertaken with the assistance and encouragement of a third party who brings the parties together, but does not otherwise intervene⁷;
- Mediation involves a third party who helps the parties to reach agreement⁸;
- Conciliation is “a method for the settlement of international disputes of any nature according to which a commission set up by the parties ... proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the parties, with a view to its settlement, such aid as they may have requested”⁹. While undertaken by an independent third party, conciliation does not produce a binding final resolution, nor does it necessarily need to be based in law¹⁰.

13. While Article 27.1 is already operational, and does not require further action from the COP, the COP could decide to develop guidance or procedures to facilitate the settlement of disputes under Article 27.1, including by:

- requesting the Convention Secretariat to perform a role in supporting Parties’ efforts to resolve disputes, for example, by making arrangements for Parties to meet and providing administrative support if necessary;
- elaborating expectations with respect to the transparency and/or or confidentiality of dispute settlement;
- where appropriate, providing for the notification of the dispute, or its settlement, to other Parties, and for the involvement of other Parties in its resolution.

Article 27.2

14. The term “arbitration” is typically used in public international law contexts to describe “the settlement of disputes between States by Judges of their own choice and on the basis of respect for law”¹¹. The words “ad hoc” suggest a dispute settlement mechanism constituted on a case-by-case basis, rather than a standing body. Taken together, the term “ad hoc arbitration” suggests that procedures adopted by the COP should provide for the constitution of a tribunal for each individual dispute (or potentially a series of related disputes) and for the parties to the dispute (or disputes) to

⁶ Kari Hakapää, “Negotiation”, in Rudiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, May 2013).

⁷ See e.g. Pact of Bogota, signed and entered into force 30 April 1948, 30 UNTS 55, art IX and X.

⁸ Francisco Orrego Vicuña, “Mediation”, in Rudiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, December 2010).

⁹ Institute de Droit International, “International Conciliation”, IDI Resolution II/1961 (11 September 1961).

¹⁰ Jean-Pierre Cot, “Conciliation”, in Rudiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, April 2006).

¹¹ See, eg, Hague Convention on the Pacific Settlement of Disputes, 1907, article 37; Hague Convention on the Pacific Settlement of Disputes, 1899, article 15.

select the arbitrators. Within these limits, the COP has broad authority to determine the procedures to be used.

15. Dispute settlement clauses of the nature of Article 27 are found in many other treaties, notably in all modern environmental treaties. Under the relevant provisions of the latter, a dispute may be submitted for arbitration or to the International Court of Justice if it has not been resolved by the stipulated diplomatic means, provided that all parties to the dispute have accepted this through a declaration upon ratifying or acceding to the treaty.

16. Arbitration procedures have been adopted under a number of such clauses¹². Most of these procedures reflect a common understanding of the term “arbitration”, and do not vary significantly based on subject matter. They typically provide a means for parties to initiate proceedings; for the parties to the dispute to choose their arbitrators; for the establishment of the applicable law; for the establishment of dispute settlement timeframes; for the operation of rules on provisional measures, expert evidence, confidentiality, counterclaims, party default and non-appearance; for notification to the treaty Secretariat and to other treaty parties; for the finality and format of the award; and for sharing of expenses of proceedings. Such procedures generally resemble non-treaty-specific rules for inter-state arbitration, such as the Permanent Court of Arbitration Rules¹³. It is worth noting, however, that none of the dispute settlement procedures of the environmental treaties have ever been used¹⁴.

17. The COP is not bound to replicate the procedures of other forums. It may select those that it believes will best support the purpose of dispute settlement under the WHO FCTC. If the COP decides to develop procedures for the purposes of Article 27.2, matters to which it might give consideration include in particular:

- notification of disputes to other Parties, and opportunities for other Parties to participate in disputes;
- whether to have open or closed proceedings;
- the role of expert evidence during proceedings;
- whether documentation should be made publicly available and/or provided to other Parties
- types of remedies that may be available;
- notification of disputes to observers, and opportunities for observers to participate in disputes;
- notification of disputes to other relevant organizations and bodies;
- the type of expertise that might be required of arbitrators;
- conflict of interest rules for arbitrators and counsel, particularly in light of Article 5.3 of the WHO FCTC.

18. Article 27.2 dispute settlement would only be available for disputes not resolved under Article 27.1 and for Parties that had accepted, through a declaration in writing to the Depositary, compulsory, ad hoc arbitration in accordance with procedures adopted by the COP.

¹² See, e.g. Convention on Biological Diversity, article 27 and Annex II.1; Vienna Convention on the Ozone Layer, article 11, COP Decision VCI/7 and Annex II; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, article 20 and Annex VI.; FAO International Treaty on Plant Genetic Resources for Food and Agriculture, article 22 and Annex II; Minamata Convention on Mercury, article 25 and Annex E.

¹³ Permanent Court of Arbitration Rules (2012) <https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf>.

¹⁴ Katharina Kummer Peiry, “Turning Wastes into Valuable Resources: Promoting Compliance with Obligations?”, in *Environmental Policy and Law*, 41/4-5 (2011); idem, “Transboundary Movements of Hazardous Wastes and Chemicals”, in P.A. Nollkaemper and I. Plakokefalos (eds), *The Practice of Shared Responsibility* (Cambridge University Press, 2016).

INTERACTION OF WHO FCTC DISPUTE SETTLEMENT PROCEDURES WITH OTHER DISPUTE SETTLEMENT MECHANISMS

19. Over the last few years, tobacco control measures implemented by Uruguay and Australia have been challenged in international legal forums. Uruguay's tobacco packaging and labelling measures were challenged by Philip Morris Switzerland under a 1988 bilateral investment treaty between Switzerland and Uruguay. Australia's tobacco plain packaging measures are being challenged by four members of the World Trade Organization (WTO) under the WTO Agreements, including one Party to the WHO FCTC, and were challenged by Philip Morris Asia under a 1993 bilateral investment treaty between Australia and Hong Kong. The investment treaty challenge against Australia was dismissed on 17 December 2015 as inadmissible on the basis that the initiation of the arbitration constituted "an abuse of rights"¹⁵. The investment treaty challenge against Uruguay was dismissed on the merits on 8 July 2016¹⁶.

20. These challenges have generated significant concern about the implications of international trade and investment agreements for WHO FCTC implementation, reflected in a decision adopted at the sixth session of the COP¹⁷, in which the COP noted that:

- "the tobacco industry has used and might use international trade and investment rules to challenge tobacco control measures taken to implement the WHO FCTC"; and
- "the burden in terms of time and resources caused by the tobacco industry's challenges to government efforts in tobacco control through the use of international trade or investment rules"¹⁸.

21. That decision encouraged Parties "to cooperate in exploring possible legal options to minimize the risk of the tobacco industry making undue use of international trade and investment instruments to target tobacco control measures"¹⁹.

22. Legal challenges to tobacco control measures under trade or investment agreements, alleging breaches of obligations under such agreements, may or may not also give rise to questions "concerning the interpretation or application" of the WHO FCTC. Whether they do so will depend on the terms of the relevant agreement, what the complainant is alleging, how the claim is being defended (including how the WHO FCTC is being invoked), and how the relevant tribunal chooses to exercise its jurisdiction (assuming jurisdiction exists).

23. As noted above, Article 27 applies to disputes that concern the "interpretation or application of the Convention". A tribunal established under Article 27 could therefore potentially resolve questions "concerning the interpretation or application" of the WHO FCTC that form part of a dispute under a trade or investment agreement if that question or questions were properly put before it. However, the implications for a trade or investment dispute would depend on the circumstances, and could be relatively limited. The use of the WHO FCTC Article 27 dispute settlement would not, for example,

¹⁵ *Philip Morris Asia Limited v Commonwealth of Australia (Award on Jurisdiction and Admissibility)* (PCA Case N° 2012-12, 17 December 2015) [588].

¹⁶ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7).

¹⁷ FCTC/COP6(19) Trade and investment issues, including international agreements, and legal challenges in relation to implementation of the WHO FCTC

¹⁸ FCTC/COP6(19) Trade and investment issues, including international agreements, and legal challenges in relation to implementation of the WHO FCTC, preamble.

¹⁹ FCTC/COP6(19) Trade and investment issues, including international agreements, and legal challenges in relation to implementation of the WHO FCTC, para. 1.

preclude a dispute being brought under a trade or investment agreement²⁰. If the treaty and related instruments which provided it with jurisdiction otherwise gave it the competence to hear the dispute, a trade or investment tribunal would not be bound to decline or stay proceedings that included matters also before a WHO FCTC dispute settlement panel²¹. In addition, whether, and how, a tribunal hearing a dispute under a trade or investment agreement might take account of the determination of a WHO FCTC dispute settlement panel would depend on the particular circumstances of the case, including the jurisdiction of the relevant tribunal (and the limits to such jurisdiction).

24. It should be emphasized, however, that the WHO FCTC's contribution to the defence of tobacco control measures challenged under trade or investment agreements does not depend on the use of Article 27 dispute settlement. The WHO FCTC and COP decisions, including implementation guidelines, can be expected to strengthen Parties' legal position in defending challenged measures without recourse to Article 27 dispute settlement. These instruments can demonstrate broad international consensus on the seriousness of the harm caused by tobacco use and on the types of measures that contribute to reducing tobacco use and protecting and promoting public health; inform the interpretation or application of particular provisions in trade or investment agreements, such as whether a measure is "necessary" to protect health; and provide evidence of factual matters that may be in dispute, such as the regulatory goal of a tobacco control measure implemented by a Party to the WHO FCTC, the contribution such a measure makes to the achievement of a State's regulatory goal, and the importance of a regulatory goal pursued²².

25. In addition, there are a range of options available to encourage Parties to first address questions or concerns about the relationships between WHO FCTC implementation and trade and investment agreements through or under the auspices of the COP, before pursuing them in other forums. For example, the COP has a broad power to "establish such subsidiary bodies as are necessary to achieve the objective of the Convention"²³. It could use this power to create a forum for the discussion by Parties of such questions.

26. This may not preclude challenges being pursued in other forums. However, it could allow for discussion of relevant questions in a WHO FCTC forum between sessions of the COP, and establish an expectation among parties that any questions, disagreements or potential disputes relating to the relationships between WHO FCTC implementation and trade or investment agreements should in the first instance be raised in WHO FCTC forums. Such discussion need not be limited to legal questions "concerning the interpretation or application of the Convention".

ACTION BY THE CONFERENCE OF THE PARTIES

27. The COP is requested to consider this report and provide further guidance.

= = =

²⁰ See, e.g. *The MOX Plant Case (Ireland v United Kingdom)(Request for Provisional Measures)* International Tribunal for the Law of the Sea, case no. 10, 3 December 2001, para 50; Dispute Concerning Article 9 of the OSPAR Convention (2003) XXIII RIAA 59, 99-100.

²¹ See, e.g. *Eureka v Slovak Republic (Award on Jurisdiction, Arbitrability and Suspension)*, PCA Case No. 2008-13, 26 October 2010, paras 291-292. Compare *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)*, ICSID Case N° ARB/02/6, 29 January 2004, where the tribunal stayed proceedings pending determination by the local court which had been granted exclusive jurisdiction over contractual aspects of the dispute.

²² See, e.g. Background Paper, Workshop on Trade and Investment Issues Relevant to Implementation of the WHO Framework Convention on Tobacco Control, 31 March 2014
http://www.who.int/fctc/2014_PM_WHO_FCTC_wshop_backgroundpaper.pdf

²³ Article 23.5.f