

Article 2.1: A substantive element of the FCTC

The global health community often discusses “neglected” FCTC articles, such as Articles 14 (cessation), 17 (alternative livelihoods), 18 (environment) and 19 (liability). But there is one article so ignored that many who have been plugged into the treaty process since negotiations began might not remember it exists: Article 2.1. Other FCTC articles set a floor for the obligations of Parties to address the tobacco epidemic. Article 2.1 was inserted to ensure that no ceiling was imposed.

In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.

In essence, no policy aimed at further restricting tobacco use can be said to go beyond the FCTC, because it would fall under Article 2.1. Like all framework conventions, the FCTC is a living document. Its explicit obligations and recommendations reflect knowledge and best practices from 2003, but one of the COP's most important functions is to translate new information and experience into actions. The FCTC's objective is to “protect future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke and to reduce *continually* and substantially the prevalence of tobacco use and exposure to tobacco smoke.” Our work will not be complete until the epidemic is ended.

In the 15 years since the treaty came into force, our collective understanding of the tobacco control mission has evolved to include so-called “endgame” policies. The meaning of “endgame” in this context is a bit vague, but in general endgamers seek policy solutions that go beyond merely controlling the harm caused by tobacco, but have the goal of ending the tobacco epidemic by reducing smoking prevalence to the lowest possible levels.

Some governments have gone beyond the FCTC floor. Uruguay's single-presentation law is not specifically mentioned in Article 11 or anywhere else in FCTC documents. Seven “Aspire” countries have put in place plans to achieve minimal prevalence by a certain date, using both “traditional” and endgame policies. While plain packaging was not included in the text of the FCTC, it was later introduced in the Article 11 guidelines. After Australia first implemented it, the policy has now spread rapidly in the last few years despite strong industry opposition.

Some innovative measures are emerging from a jurisdiction that pioneered the smoke free public places movement at time when protecting everyone from secondhand tobacco smoke seemed an impossibility. The state of California in the United States has abandoned the tobacco control paradigm entirely and launched a campaign to achieve zero percent commercial tobacco use by 2035. They seek to accomplish this through a variety of policy and educational interventions, including efforts to phase out the sale of commercial tobacco products city by city. Already two California cities have passed such laws, and more intend to follow.

Article 2.1 fills a troubling gap in specific FCTC obligations. Treaty negotiations, and the resulting text, focused on interventions designed to reduce demand for tobacco products, rather than supply, with the exception of measures to reduce the illicit trade of tobacco products and a reference in Article 16 to “prohibit the sales of tobacco products” to minors. It is vital to our common goal to continue depressing demand and assisting nicotine addicts in quitting, especially in jurisdictions with relatively high prevalence. But ignoring retail sales is akin to fighting with one arm tied behind the back. In most places, tobacco is more available than nearly any other consumer product.

Reinforcing the advent of novel tobacco policy interventions is a growing understanding of the tobacco epidemic as a human rights issue. We must remember that the Preamble of the FCTC recalls Art 12 of the International Covenant on Economic, Social, and Cultural Rights, which states that “it is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” In the past few years experts in both the human rights and public health spheres have determined that the marketing and sale of tobacco is itself a violation of human rights norms, and that governments have a duty to intervene to protect their citizens. In 2017, the Danish Institute for Human Rights, after examining the practices of Philip Morris International, concluded that “[T]obacco is deeply harmful to human health, and there can be no doubt that the production and marketing of tobacco is irreconcilable with the human right to health.” This concept was included in the Cape Town Declaration on Human Rights and a Tobacco-Free World, adopted by the World Conference on Tobacco or Health, and confirmed by the Asia Pacific Conference on Tobacco or Health and the European Network for Smoking and Tobacco Prevention. Most recently, the Healthy Latin America Coalition, citing FCTC Article 2.1, encouraged countries to move toward “the progressive elimination of the marketing of tobacco products.”

Whenever a nation plans to go beyond the floor of the FCTC, the tobacco industry threatens to sue and often follows the threat with actual legal action, saying that under international law the government does not have the “right” to go so far. Courts almost always agree that they’re wrong. Governments have the right to “go beyond” the FCTC to end the tobacco epidemic, both according to FCTC Article 2.1 itself and a recognized understanding of national sovereignty. Human rights norms suggest that governments have not only the right, but also a duty to do more than simply control the harm caused by the tobacco industry.