

Four COPs and counting: achievements, underachievements and looming challenges in the early life of the WHO FCTC Conference of the Parties

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ABSTRACT

As the governing body of the WHO Framework Convention on Tobacco Control (FCTC), the Conference of the Parties (COP) is mandated to 'keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation'. The COP has a range of critical roles to play spanning the setting of normative standards, the building and dissemination of knowledge, the monitoring of implementation, the facilitation of international cooperation and the mobilisation of resources to support implementation. The COP has met four times to date. It has made significant achievements in the setting of normative standards, with the adoption of a number of high-standard implementation guidelines and a declaration recording the commitment of Parties to prioritise the implementation of health measures in the context of concerns about the effect of international trade and investment obligations. Less progress has been made in other areas, including a general lack of support for the conduct of needs assessments by developing countries—though needs assessments have been designated as a prerequisite to the mobilisation of funding support—and a reluctance to consider the adoption of a robust system of implementation review. Much remains to be done to build the FCTC's implementation support structure. Other looming challenges include maintaining the voice and influence of developing countries against priorities being overly dictated by wealthier Parties and in the face of recent cutbacks to travel support pushed by the European Union, and managing the likely resource demands and other risks of the proposed illicit trade protocol.

BACKGROUND

It is now 7 years since the WHO Framework Convention on Tobacco Control (FCTC)¹ entered into force as international law, on 27 February 2005.² When nearly 9 years earlier, on 25 May 1996, the World Health Assembly (WHA) had requested the Director-General of the WHO 'to initiate the development of a framework convention',³ it was impossible to know whether that decision would ever yield an instrument of binding international law, or, if it did, when, what the form and contents of that instrument would be, or the degree and breadth of support it would garner. This was the first exercise of the WHA's power under Article 19 of the WHO Constitution to adopt conventions or agreements with respect to any matter within the WHO's competence, almost 50 years after the Constitution's entry into force on 7 April 1948.⁴ It

was uncharted territory for the WHO as an institution and for many of the governmental and non-governmental actors engaged in the undertaking.

Now, 7 years on from the FCTC coming into force, and nearly 16 years after the WHA's 1996 decision, much has undoubtedly been accomplished. The FCTC, through its terms and the institutions and processes it has generated, has raised the global profile of tobacco control, strengthened governments in their fight against the tobacco industry politically and legally (in the latter case including through the automatic incorporation of the treaty's substantive obligations into law in some countries, expansion of governments' legislative powers and strengthening of governments' hands in legal challenges in domestic and international fora), reinforced the view that tobacco products are not normal consumer products, contributing to the ongoing global denormalisation of the tobacco industry, catalysed the formation and deepening of transnational civil society coalitions, facilitated the sharing of experiences, expertise and capacity among and between governments and non-governmental organisations (NGOs) and brought new resources—political, financial and human—into the field.

Since the treaty entered into force, the Conference of the Parties (COP)—the treaty's governing body, comprised of all its Parties (now numbering 174)⁵—has met four times. The COP met annually for its first 3 years, in Geneva, Switzerland (February 2006), Bangkok, Thailand (June–July 2007) and Durban, South Africa (November 2008), before beginning to meet biennially, in Punta del Este, Uruguay (November 2010), with its next session scheduled for Seoul, South Korea, in the final quarter of 2012. The practice has been to rotate the hosting of the COP through the WHO regions—taking the FCTC out to the world, as it were—though at its most recent session, the European Union signalled its wish that all future sessions of the COP be held at WHO headquarters in Geneva. An Intergovernmental Negotiating Body (INB) negotiating a protocol to the treaty dealing with illicit tobacco trade—a subsidiary body to the COP—has also met four times,⁶ and there have been scores of intersessional meetings, seminars and workshops.

This paper examines the performance of the COP over its early years, identifying achievements, underachievements and looming challenges. It is based on an analysis of the COP's decisions, and on the author's experiences and observations as a non-governmental (NGO) participant in all four

Strategic directions and emerging issues in tobacco control

sessions of the COP and of the INB and in numerous intersessional meetings, and a participant in international NGO FCTC policy development and advocacy work. This paper does not seek to analyse the effectiveness of the FCTC at country level or to demonstrate the impact of the COP's work on domestic implementation. Progress at the domestic level is of course the ultimate purpose of treaties such as the FCTC, and NGO involvement in the COP's work is aimed at ultimately achieving on-the-ground change, but an analysis of domestic FCTC implementation is beyond the scope of this paper.

THE ROLE OF THE COP

As the treaty's governing body, comprised of all its Parties, the COP is the one forum through which multilateral government FCTC decision-making process takes place. COP decisions reflect the sum of the diverse political and financial realities that prevail in the FCTC's Parties at the arbitrary points in time at which they happen to meet, and generate new political realities multilaterally and in the jurisdictions of individual Parties. The precise impacts of the COP's decisions on domestic tobacco control activity vary with domestic legal, political, social and cultural circumstances and resource levels.

The Convention establishes the COP as the treaty's governing body and defines its role: to 'keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation'. Specific activities to be performed by the COP include:

- ▶ developing normative instruments to assist implementation of the Convention;
- ▶ promoting and facilitating the exchange of information;
- ▶ promoting and guiding the development and refinement of methodologies for research and the collection of data;
- ▶ promoting the development, implementation and evaluation of strategies, plans, programmes, policies, legislation and other measures;
- ▶ considering implementation reports submitted by Parties and adopting regular reports on the Convention's implementation;
- ▶ promoting and facilitating the mobilisation of financial resources for the Convention's implementation;
- ▶ coordinating and cooperating with relevant organisations and bodies of the United Nations system and other international and regional intergovernmental organisations and non-governmental organisations and bodies as a means of strengthening the implementation of the Convention; and
- ▶ a 'catch-all', 'consider other action, as appropriate, for the achievement of the objective of the Convention in the light of experience gained in its implementation'.

These diverse activities can be drawn into five categories, all critical to the treaty's success: the setting of normative standards; the building and dissemination of knowledge; the monitoring of implementation; the facilitation of international cooperation; and the mobilisation of resources (of all kinds) to support implementation. Across these categories, the COP is empowered—legally and politically—to set high-level political and funding priorities, and negotiate detailed substantive, procedural and operational text on a multiplicity of subjects.

THE WORK OF THE COP SO FAR

It is impossible in a short paper to give a comprehensive account of all of the 83 decisions taken by the COP at its first four sessions. There is no substitute for reading the COP's decisions, together with the documents prepared by the Convention

Secretariat that provide the essential background material on which many of these decisions are based (as well as the briefing papers developed by non-governmental organisations (NGOs), primarily the Framework Convention Alliance (FCA)).⁷ This section seeks to identify some of the highlights of the COP's early work and some of the areas in which only modest progress has been made.

Major achievements

Implementation guidelines

The most significant achievement of the COP so far has been the development and adoption of implementation guidelines. FCTC guidelines are drafted by working groups of FCTC Parties who volunteer to participate in these groups, with drafts then being shared with all other FCTC Parties for comment, before being submitted to the COP for consideration. They are designed to assist Parties to implement their obligations under the Convention by providing detailed, practical recommendations that elaborate on sometimes sparsely worded Convention provisions, and thereby offer practical guidance to policymakers and advocates.

While guidelines are often described as non-legally binding, in contrast to the provisions of the treaty itself, in truth the position is somewhat more complex, with differences in legal implications between sets of guidelines and between elements of each set of guidelines according to the precise language used and its relationship with the text of the treaty. Some elements of the FCTC's guidelines may, for example, be more than simply 'recommendations' that Parties adopt measures beyond those that they are legally obliged by the FCTC to implement, but rather constitute 'subsequent agreement(s) between the parties regarding the interpretation of the treaty or the application of its provisions'.⁸

Implementation guidelines have been adopted for six of the Convention's articles; Article 5.3 (protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry),⁹ Article 8 (protection from exposure to tobacco smoke),¹⁰ Article 11 (packaging and labelling of tobacco products),¹¹ Article 12 (education, communication, training and public awareness),¹² Article 13 (tobacco advertising, promotion and sponsorship)¹³ and Article 14 (demand reduction measures concerning tobacco dependence and cessation).¹⁴ Partial implementation guidelines have been adopted for Articles 9 and 10 (regulation of the contents of tobacco products and regulation of tobacco product disclosures).¹⁵

On the whole, the guidelines succeed in providing practical guidance and set high standards for treaty implementation. They provide an example of a common practice in international law of States being prepared to adopt higher normative standards where these standards are not perceived as having the status of 'hard' treaty obligations. While all of the guidelines are noteworthy and should be read closely by those interested in the subject matters with which they deal, two stand out for this author.

Article 5.3 guidelines

Article 7 of the FCTC requires the COP to propose guidelines on only Articles 8, 9, 10, 11, 12 and 13 of the treaty. At its first session, the COP recognised that guidelines on Article 5.3 (and 14) would also be valuable,¹⁶ and, owing to leadership by several developing countries and strong advocacy from civil society, primarily the NGO Corporate Accountability International, at its second session, the COP decided to commence the development of guidelines.¹⁷

The Article 5.3 guidelines build upon a very briefly expressed but critical treaty obligation ('In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law'), and a preambular recognition of 'the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts'. They constitute a detailed set of recommendations spanning a number of critical areas of government activity:

- ▶ raising awareness about the nature of tobacco products and tobacco industry interference with Parties' tobacco control policies;
- ▶ limiting government interactions with the tobacco industry and ensuring transparency of any interactions;
- ▶ rejecting government partnerships and non-binding or non-enforceable agreements with the tobacco industry;
- ▶ avoiding conflicts of interest for government officials and employees;
- ▶ requiring that the tobacco industry provide information about its activities;
- ▶ addressing purported tobacco industry corporate social responsibility;
- ▶ ending the granting of government incentives, privileges or benefits to the tobacco industry and government investment in the tobacco industry; and
- ▶ treating state-owned tobacco industries like other members of the tobacco industry.

The guidelines are premised on four guiding principles, the first of which is succinctly stated: 'There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests'.⁹ The guidelines represent a powerful statement by the COP on the nature of the tobacco industry, affirming that it should not be regarded as an ordinary 'stakeholder' in government policy development and implementation, and a powerful tool to be used by governments and advocates against tobacco industry efforts to influence government policy.

Article 13 guidelines

Article 13 of the FCTC requires Parties to 'undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship' unless precluded from doing so by their constitution or constitutional principles, in which case the obligation is to 'apply restrictions'. The Article 13 guidelines elaborate on the meaning of the imprecise term 'comprehensive' and conclude with a very useful 'Indicative (non-exhaustive) list of forms of tobacco advertising, promotion and sponsorship within the terms of the Convention'. The guidelines recognise as advertising, promotion and/or sponsorship a number of activities not traditionally regarded as falling within these concepts, including the retail display of products; packaging and product design features (with a recommendation that plain packaging be considered, a recommendation also made in the guidelines on Article 11), 'corporate social responsibility' and payments or other contributions to retailers to encourage or induce them to sell products. The guidelines should serve as a starting point for any government or NGO embarking on the regulation of tobacco advertising, promotion and sponsorship.

The guidelines' significance—and capacity to move the practices of States forward—can be seen in Australia's decision to introduce world-first plain tobacco packaging, with one of the

objects of the Bill being 'to give effect to certain obligations that Australia has as a party' to the FCTC,¹⁸ and the Explanatory Memorandum including references to the recommendations that plain packaging be considered in the Article 11 and 13 guidelines.¹⁹

The Punta del Este declaration

At its fourth session (COP-4), the COP adopted the Punta del Este Declaration on the implementation of the WHO Framework Convention on Tobacco Control.²⁰ The Declaration was proposed by the government of Uruguay, the host of COP-4 and a global leader in tobacco control, which was at the time (and remains) under attack by Philip Morris International (PMI), challenging Uruguay's tobacco packaging laws under a bilateral investment treaty between Uruguay and Switzerland.²¹ The adoption of the Punta del Este Declaration was both a political demonstration of solidarity with Uruguay and an instrument designed to add legal weight to Uruguay's defence to the PMI attack and to future challenges of its kind.

The Declaration, which builds on the FCTC's opening preambular paragraph, '*Determined* to give priority to their right to protect public health', records:

- ▶ the 'firm commitment' of the FCTC's Parties 'to prioritise the implementation of health measures designed to control tobacco consumption in their respective jurisdictions';
- ▶ FCTC Parties' 'concern regarding actions taken by the tobacco industry that seek to subvert and undermine government policies on tobacco control'; and
- ▶ FCTC Parties' 'right to define and implement national public health policies pursuant to compliance with conventions and commitments under WHO, particularly with the WHO FCTC'.

The Declaration refers to three WTO Agreements that have sometimes been viewed as posing a challenge to the implementation of tobacco control measures—the General Agreement on Tariffs and Trade,²² the Agreement on Technical Barriers to Trade,²³ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²⁴—and notes the importance that all attach to the protection of public health, in the case of TRIPS, as reinforced by the Doha Declaration on the TRIPS Agreement and Public Health.²⁵ The Declaration both shows a confidence that international trade and investment agreements leave States sufficient regulatory space to adopt and implement FCTC measures without being concerned that they will fall foul of other international obligations, and makes positive statements to that effect, which may be expected to be referred to by courts or tribunals in any proceedings brought against an FCTC Party under trade or investment agreements.

Underachievements

It may be cynically—but perhaps fairly—argued that the setting of normative standards, and the adoption of political declarations, is the easy part of the COP's role, particularly when these may be portrayed as 'aspirational' standards that may never be attained in practice. In the common parlance, what matters in the end is putting one's money (and political capital) where one's mouth is—or 'walking the talk'. On this front, the performance of the COP thus far has been—perhaps not surprisingly—more modest.

Funding of needs assessments

The level of funds committed by FCTC Parties to the work of the COP and the Convention Secretariat, particularly for activities to support implementation in developing countries, has

Strategic directions and emerging issues in tobacco control

been low compared to need.^{26–29} This can be observed acutely in the lack of support provided for the conduct of needs assessments in developing countries. At its first session, the COP recognised ‘the urgent need for assistance to developing country Parties and Parties with economies in transition to support them in their implementation’ and called upon developed country Parties to ‘provide technical and financial support to developing country Parties and Parties with economies in transition through bilateral, regional, international or non-governmental channels’.³⁰ It ‘considered’ that ‘detailed needs assessment at country level’ was a prerequisite to the mobilisation of funding and called upon developing country Parties and Parties with economies in transition to conduct such assessments and communicate their prioritised needs to development partners.

Though needs assessments are seen as the pivot on which the mobilisation of financial resources turns, by the time of COP-4, the Secretariat had been able to support only eight such assessments: Bangladesh, Ghana, Guatemala, Jordan, Lesotho, Mexico, the Republic of Moldova and Papua New Guinea.³¹ Though this was clear to the Parties at COP-4, in the 2012–2013 budget and workplan adopted there, support for needs assessments and ‘promotion of access to available resources and mechanisms of assistance’ was made entirely subject to the raising of extrabudgetary contributions. On 31 March 2011, the Australian government and two Australian NGOs, the Cancer Council Australia and the National Heart Foundation of Australia, announced a joint contribution of \$A100 000 to support the conduct of needs assessments in Pacific Island countries, the first extrabudgetary contribution of this kind.³²

Implementation monitoring

There has thus far been a reluctance to consider adopting a robust system of implementation monitoring of the kind that is now common in environmental and human rights treaties.³³ The Convention Secretariat is mandated to consider the implementation reports that Parties are obliged to submit and to produce an annual summary of reports, which is to: reflect international and regional progress, highlight significant achievements and reflect the spirit of shared learning.³⁴

While informative, these reports convey little about what is happening in individual Parties and the conclusions that can be drawn from them about the successes and challenges of implementation are very general. This is not surprising, nor intended as a criticism of the Secretariat. It is difficult for a treaty Secretariat to draw attention to the experiences—particularly failings—of individual Parties. A mature treaty requires a robust system of implementation review, with Parties’ performance considered by an independent body with the mandate to make recommendations, and with the learnings obtained through this review process fed back into decision making on COP priorities and the mobilisation of resources.

LOOMING CHALLENGES

Relative voice and influence

The relative ‘strength’ of the text of the FCTC is commonly attributed to the standards pursued by developing countries in its negotiation. Hammond and Assunta describe developing countries as having saved the FCTC ‘from being gutted by a handful of developed countries’.³⁵ Developing countries were ‘vocal, spirited, and led the charge for most of the progressive provisions’. While it can be difficult to generalise, on the whole, the majority of developing country Parties have continued to push strongly for high implementation standards, with

the fruits of these efforts being seen in the implementation guidelines that have been adopted so far.

However, there are reasons to be concerned that the volume of developing countries’ voices may be dimmed in the years ahead. The shift from negotiation of the treaty into implementation brings with it a need for decisions to be made about the allocation of resources. When important work of the COP and the Secretariat are not supported by core funds, but rely on the making of extrabudgetary contributions, higher-income Parties exert an ever-greater influence on priority setting. This is a common reality in intergovernmental organisations including WHO itself, whose extrabudgetary budget—the amount not financed through regular contributions from member states under a formula that takes into account their wealth and population (whether through voluntary additional contributions from states or funding from non-state actors)—increased from 48.8% to 77.3% from 1998–1999 to 2008–2009.³⁶ There are signs that reliance on extrabudgetary contributions may increase over time. This was played out at COP-4 with a decision taken by one Committee, dealing with substantive normative matters, to establish a working group to develop implementation guidelines on the critical Article 6 (price and tax measures to reduce the demand for tobacco) not being met by an allocation of core funding in the other Committee, dealing with procedural, institutional and financial matters.

Further, at COP-4, a decision, pushed by the European Union, was taken to ‘harmonise the travel support available to Parties to the WHO Framework Convention on Tobacco Control in line with current WHO administrative policies for travel support in favour of least developed countries’.³⁷ This may sound relatively innocuous but it is likely to have significant implications for developing country representation at future sessions of the COP.

Under the travel support policy adopted for the FCTC negotiations, and continued since, one economy class airline ticket and per diem was provided for each State classified by the World Bank as a ‘low-income’ or ‘lower-middle-income’ country.³⁸ In contrast, under WHO administrative policies, one economy class airline ticket without per diem is provided to each WHO Member State classified by the UN as a ‘least developed country’. The FCTC travel support regime had been adopted in 2000 to ensure more representative participation by poorer countries in the FCTC negotiations than had been the case in prenegotiation working group meetings held in 1999 and 2000.³⁹

Transitional arrangements were agreed under which the change will fully take effect after the fifth session of the COP. Fishburn and Selin calculate that the effect will be that 38 Parties will lose all travel support (8 from WHO’s African Region, 8 from the Americas, 6 from the Eastern Mediterranean, 4 from Europe, 3 from South-East Asia and 9 from the Western Pacific) and 40 will lose per diem support (25 from Africa, 3 from the Eastern Mediterranean, 5 from South-East Asia and 7 from the Western Pacific). Securing funding for travel to international meetings out of stretched domestic resources is seldom easy. The change in composition of sessions of the COP that this ‘harmonisation’ will effect will inevitably be reflected in the culture, processes and outcomes of the COP’s deliberations.

Managing the illicit trade protocol

At its second session, the COP decided to commence negotiating a protocol to the treaty to deal with illicit trade in tobacco products.⁴⁰ Illicit trade is an important matter for tobacco control because of its undermining of tax and price policies, which are among the most effective mechanisms for reducing

tobacco consumption.⁴¹ Its crossborder nature makes multilateral cooperation essential to effectively combat it.

In hindsight, in embarking on protocol negotiations, the COP may have underestimated the time and resources that would be required to negotiate the protocol and then to implement it. The Intergovernmental Negotiating Body established to negotiate the protocol appears to not yet have come to grips with the implications of the lack of expertise and capacity in the health sector to deal with illicit trade, or the need to embed a multi-lateral approach to illicit trade within the existing international law enforcement and customs infrastructure.⁴² Further, the tobacco industry is energetically seeking to position itself as a partner of governments in a joint fight against illicit trade, creating various political and institutional challenges for Parties, the Secretariat, WHO and NGOs.⁴² Careful thought and management will be required to achieve a multilateral approach that actually reduces illicit trade in practice and does not undermine implementation of the rest of the FCTC.

CONCLUSIONS

The first 7 years of the FCTC's life have been a frenetic period of activity for all involved in its ongoing development and implementation. Some solid normative foundations have been laid, but there is much work still to be done in building its implementation support structure. As the first WHO treaty of its

kind, with no institutional template to follow, lesson learning for all those involved was always bound to be rapid, intense and sometimes painful. Tobacco Control first went to print in 1992, the year before Roemer and Taylor's exploratory initiation of the long process that ultimately delivered a treaty.⁴³ What will have become of the FCTC by the time Tobacco Control turns 40, in 2032? We should hope and work hard for the best, but take nothing for granted. It is hard to think of another treaty that has such a well resourced industry so committed to undermining it.

Competing interests None.

Provenance and peer review Commissioned; externally peer reviewed.

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Recommendations

- The COP should adopt a robust system of implementation monitoring of the kind common in environmental and human rights treaties, with Parties' performance of their obligations considered by an independent body with the mandate to make recommendations, and with learnings obtained through the review process informing the COP's decision making on priorities and the mobilisation of resources.
- The COP should provide sufficient funding to allow needs assessments to be conducted in developing countries, and ensure systematic follow-up to mobilise resources to meet identified needs.
- The COP should provide support to ensure participation in the meetings and work of the COP of representatives from low-income and lower-middle-income countries, so that the work of the COP and the future course of the FCTC are not overly determined by rich countries.
- The COP should ensure that the proposed illicit trade protocol does not undermine the FCTC by inefficiently drawing limited resources and allowing the tobacco industry inappropriate involvement in international and domestic FCTC processes

What this paper adds

- Many articles examining the successes and challenges of FCTC implementation in individual countries or regions have been published, but there has been little examination of the work of the FCTC's governing body, the Conference of the Parties (COP).
- This paper outlines the role of the COP and examines its performance over its early years, identifying achievements, underachievements and looming challenges.

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Nigeria: how British American Tobacco undermines the WHO FCTC through agricultural initiatives: invited commentary

As Nigeria took a giant step in domesticating the WHO Framework Convention on Tobacco Control with the passing of the National Tobacco Control Bill (NTCB) in March 2011, British American Tobacco Nigeria (BATN) has come up with new strategies to undermine the treaty.

Through a rigorous Corporate Social Responsibility programme, BATN now presents itself as a stakeholder in Nigeria's agriculture sector, targeting rural farm communities that make up 70% of Nigeria's population.

As soon as the bill was passed, BATN moved swiftly to organise a Farmers' Productivity Awards in Oyo State. The event was adequately publicised in the media and as part of this image whitewash, 207 tobacco farmers from Iseyin were rewarded for their bumper yields in the 2010 crop year. Loyal farmers received water pumps, knapsack sprayers and fertilisers, among other 'awards'.

However, the event revealed more than mere image laundering. It also showed how much the company had wormed its way into the heart of the Nigerian government, as Ahmed Abdullah, the agriculture minister, spent time commending BATN for contributing to agricultural development in Nigeria.

That endorsement from the federal government was the stimulus BATN needed to expand its activities to other rural

communities beyond Oyo. In subsequent months, the company organised farmers' events in two other states—Ekiti and Ogun.

In Ekiti, the company donated a 4.5 million nairas cassava processing cottage industry to the Odo-Oro community as part of what it claimed was a poverty alleviation initiative.¹

In Ogun State, a cassava processing plant allegedly built for N4.5 million was donated to another community at an event graced by a representative of the state governor, who also eulogised BATN's intervention in agriculture.²

This evolving relationship between BATN and the Nigerian government is another attempt by the company to pull the wool over the faces of Nigerians. However, tobacco control groups have mounted a campaign urging all levels of government at all levels to stop endorsing the tobacco industry's activities that portray it as 'responsible'. We will continue doing this by pointing out relevant sections of the WHO Framework Convention on Tobacco Control that condemn such partnerships.

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Four COPs and counting: achievements, underachievements and looming challenges in the early life of the WHO FCTC Conference of the Parties

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