30 August 2000

Tobacco Free Initiative
World Health Organisation
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Switzerland

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Dear Sir/ Madam

SUBMISSION WITH REGARD TO THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

The World Health Organisation (WHO) has prescribed a maximum length of 5 pages for submissions and therefore, we are only able to provide a brief summary of some of our key concerns. This submission contains the following sections:

- Information requested by the WHO;
- concerns about consultation in relation to the Framework Convention on Tobacco Control (FCTC);
- concerns about the position taken by the WHO;
- concerns about the Framework Convention on Tobacco Control.

INFORMATION REQUESTED BY THE WHO

Submitter: The Tobacco Institute of Southern Africa (TISA)

Scope of Activities: TISA is the trade association of the tobacco industry in South Africa. The Institute’s membership consists of South African manufacturers of tobacco products and tobacco growers.

Interest in the FCTC process: See above

Source of funding: TISA is funded by its members.
CONCERNS ABOUT CONSULTATION IN RELATION TO THE FCTC

The FCTC process to date has been seriously flawed because there has been no consultation with the tobacco industry. It is important to note that the pre-hearing submissions and hearings are mainly a response by the WHO to criticism of its stated position that: “The tobacco industry, its trade associations and key allies should be kept from the negotiating process”.

The requirement that pre-hearing submissions should not exceed five pages and post-hearing replies three pages, raises very serious concerns about the meaningfulness of this process. We are equally concerned about the requirement that testimony at the hearings should be restricted to a maximum of five minutes.

We hope that these “pre-hearing submissions” will be used to seriously inform the FCTC process and will not be used by the Tobacco Free Initiative (TFI) to legitimise what it is planning to do, regardless of the inputs received.

We are concerned that this submission process may be turned into some type of pseudo-referendum which will simply be used to mobilise support for the position of the WHO.

For the reasons mentioned above, the “pre-hearing submissions” and the “two-day hearings in Geneva” this October, do not constitute adequate consultation.

We are accordingly of the view that unless the process is amended to allow for on-going participation by all stakeholders including the tobacco industry, it will continue to be seriously flawed.

CONCERNS ABOUT THE POSITION TAKEN BY THE WHO

An impression has been created that the WHO appears to be:

- intolerant of the views of the tobacco industry;
- antagonistic towards tobacco-related views that are different from its own;
- oversensitive to criticism or anything that it perceives to be criticism of its approach to tobacco issues.

Further, it appears that the WHO is attempting to demonize those holding tobacco-related views that are different from its own. It is not clear whether the WHO acknowledges that the industry, its employees and adults who choose to smoke should, inter alia, enjoy the following rights and freedoms under the United Nations’ Universal Declaration of Human Rights:
- Equality before the law, equal protection of the law as well as equal protection against any
discrimination and equal protection against any incitement to such discrimination;
- the right to freedom of opinion and expression, including the freedom to hold opinions
without interference and to seek, receive and impart information and ideas through any
media and regardless of frontiers;
- the right to protection against interference with and attacks upon one’s privacy, honour and
reputation;
- the right to freedom of peaceful assembly and association;
- the right to work and to free choice of employment;
- the right to freely participate in the cultural life of the community;
- the right to a social and international order in which the rights and freedoms set forth in the
Universal Declaration of Human Rights can be fully recognised.

CONCERNS ABOUT THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

The Violation of Human Rights

Tobacco products are legal products, smoking is a legal activity and millions of consumers have
made an informed decision to choose to smoke. There is no evidence to suggest that the WHO
acknowledges the rights of adults to choose to smoke. A failure to acknowledge these rights is a
violation of the UN Declaration and a violation of the rights contained in the constitutions of
many member States. A prohibition on the advertising of tobacco products and a prohibition on
sponsorships by tobacco companies will also violate rights contained in the UN Declaration and
the constitutions of member States. These are just two examples of measures that will be
unconstitutional in many States. We therefore cannot see what purpose will be served by
attempting to enact a uniform set of rules, many of which will ultimately be struck down by the
constitutional courts of member States.

The Democratic Deficit

It is a fundamental principle of democracy that people should be consulted about and involved
in the process of making laws which affect their rights. In making a FCTC, the WHO will be
making policy in relation to many sensitive areas which affect the rights of the citizens of every
State. These people will not be able to participate in the development of the FCTC. The WHO
is a non-elected body and is therefore not accountable to the citizens of any State. The WHO’s
lack of accountability becomes even more problematic when one considers that financial
sponsorship for the FCTC is being provided by powerful vested interests, namely the
pharmaceutical industry. A law-making process that suffers from an absence of accountability,
transparency and public participation lacks legitimacy and democratic credentials. In an
international atmosphere that increasingly emphasises such qualities, the present endeavour by
the WHO is severely deficient.
The Domain of the Sovereign State

The WHO is infringing on the domain of the Sovereign State. The FCTC represents an unprecedented expansion of the WHO’s jurisdiction into the sphere of the Sovereign State. The WHO’s justification for this is that:

- Sovereign States are incapable of developing and implementing their own tobacco control policies and laws; and that
- the FCTC constitutes a response to a request by Sovereign States to address this incapacity.

This justification is not only a complete fallacy, but it is also reminiscent of other justifications for outside intervention in the affairs of Sovereign States - many infamous infringements of the rights of Sovereign States have been justified on the basis that they constituted a response to a call for help.

Duplication - An Additional Layer of Tobacco Control Legislation

All Sovereign States have the power to make tobacco control policies that are in line with the policy of the WHO. Sovereign States can and do use this power and it is well known that the WHO is supporting and assisting countries to make comprehensive tobacco control legislation. We therefore cannot see why the WHO wants to make an additional layer of tobacco control legislation at a multilateral level when this is clearly a duplication of what is already being done in Sovereign States throughout the world.

The WHO assisted the South African government to make the Tobacco Products Control Amendment Act, Act 12 of 1999. A number of the key provisions of this Act are unconstitutional. This legislation is also unworkable, unenforceable, damaging to the local economy and it will not assist the South African government to achieve its tobacco control objectives.

It would therefore appear that the WHO is not only planning to duplicate the tobacco control legislation that is already being made by Sovereign States, but it is also planning to duplicate the problems contained in these tobacco control laws.

An Economic Threat to Developing Countries

A FCTC will present a very serious economic threat to the economies of many countries and severely threaten the food security of millions of rural families. A FCTC will threaten the livelihoods of tens of millions of people in some of the poorest least-developed countries in the
world, including SADC countries where AIDS, malaria and numerous poverty-related diseases are rampant.

**Multilateral Implications**

A FCTC which intends to regulate the supply of a product would be incompatible with the principles of a multilateral trading system as envisaged by the World Trade Organisation.

**Practical Problems and a Lack of Enforceability**

A multilateral convention that attempts to impose a uniform set of rules without taking into account the different legal, social, economic and cultural norms and practices that exist in various societies and countries, will inevitably be plagued by insurmountable practical problems. Such a convention would also be very costly to implement and impossible to enforce. Creating expensive, supra-national bureaucracies will only compound these problems. In any event, the creation of such bureaucracies will amount to a duplication of resources, because there are already thousands of anti-tobacco posts in health ministries, health departments and anti-tobacco NGOs around the world which have been created to achieve the same objectives.

A FCTC will also transform law-abiding states, industries and citizens into a new class of pariah states, criminals and outcasts.

**CONCLUSION**

TISA supports the development of reasonable tobacco control measures. However, for the reasons mentioned above, we cannot see what purpose will be served by developing and implementing a Framework Convention on Tobacco Control.

Kindly note that we will not be making a verbal submission at the hearings in October.

Should you require any further information, please do not hesitate to contact the writer.

Yours faithfully

EDWARD SHALALA
CHIEF EXECUTIVE OFFICER