



# The Framework Convention on Tobacco Control (FCTC) and the adoption of domestic tobacco control policies: the Ecuadorian experience

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## ABSTRACT

**Background:** The present work concerns the adoption of domestic tobacco control legislation in Ecuador after ratification of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC).

**Methods:** Analysis of legislation, and data collection via interviews with key actors involved in the adoption and implementation of domestic legislation passed purportedly to implement the FCTC and research of the Ecuadorian Congressional Archives.

**Results:** While the FCTC helped raise awareness about tobacco's imminent and future threats to public health, paradoxically, it had the effect of further entrenching tobacco-friendly norms. Philip Morris, with 87% dominance over the Ecuadorian tobacco market, subtly harnessed the FCTC to protect its interests. This outcome was also influenced by poor governmental readiness and intervention, lack of legislative technical capabilities and weak civil society involvement.

**Conclusions:** The Ecuadorian experience suggests that more support should be provided to health ministries, legislatures and local tobacco control organisations to offset the power of the tobacco industry as developing nations get ready to adopt domestic tobacco control legislation.

While it is generally understood that effective implementing legislation is needed following ratification of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) in order to advance national tobacco goals, little attention has yet been paid to the process of drafting such implementing legislation, especially outside of developed countries. What circumstances are conducive to drafting and adopting effective legislation, and what circumstances undercut that goal?

## METHODS

This article draws on the results of a larger research project one of the authors (SA), an Ecuadorian national, conducted on the adoption and implementation of global norms—including the FCTC—in Ecuador. In the course of that project, two sources of data collection were used: (a) interviews with key actors involved in the adoption and implementation of domestic legislation passed purportedly to implement the FCTC and (b) the Ecuadorian Congressional Archives.

## RESULTS

Ecuador signed the FCTC on 22 March 2004 and ratified it on 25 July 2006. The treaty was ratified

routinely, together with other treaties, and was not accompanied by a true commitment to adopt effective internal legislation. The Ministry of Public Health had not pushed for better domestic tobacco legislation nor did it have the technical capacity to decisively influence policy. By contrast, Philip Morris (PM), through its locally-incorporated companies, Tabacalera Andina SA (TANASA); Industrias del Tabaco, Alimentos, y Bebidas SA (ITABSA); and Proveedora Ecuatoriana SA (PROESA), as reported by Ecuador's Internal Revenue Service, some of the largest taxpayers in the country in 2006 and previous years,<sup>1</sup> was ready to act to minimise potential FCTC impacts.

The powerful PM corporate conglomerate mobilised quickly to attain the adoption of weak tobacco control policies, subtly using the FCTC against itself. First, PM adopted a clever two-part legislative strategy that maximised its influence on the content of the legislation while minimising the possibility that these weak norms would be strengthened in the future. Second, it adopted a public relations (PR) posture as a friend of the FCTC and tobacco control in Ecuador that lulled well meaning but naïve legislators into accepting PM's legislative proposals. These legislative and PR strategies, paired with low technical capabilities among lawmakers and weak civil society involvement, produced the results PM wanted.

The Ecuadorian National Congress passed the "*Ley Orgánica Reformatoria a la Ley Orgánica de Defensa al Consumidor*" ("Organic Law that Amended the Existing Organic Consumer Protection Law" (LODC, or LODC Amendment)) also known as the anti-tobacco law, on 14 September 2006, 2 months after FCTC ratification, allegedly with the purpose of regulating tobacco and implementing the FCTC in Ecuador.<sup>2</sup> However, prior to the September 2006 LODC Amendment, PM had already been heavily involved in tobacco policymaking. In March 2006, exercising the power granted by Article 171 of the Constitution, the executive passed a *decreto presidencial* (presidential decree),<sup>3</sup> which set forth a *Reglamento a la Ley Orgánica de Defensa al Consumidor* (regulation to the existing LODC (LODC Regulation)).

The text for the LODC Regulation was submitted to the President's attention by the Ministry of Industry and Commerce (MICIP). PM was directly involved in the drafting of the LODC Regulation with the MICIP. As Avelina Pérez, PM's Corporate Affairs Manager, interviewed for this paper, put it, "[...] we participated actively in the

drafting of the *Reglamento* with the MICIP. We did so because we believe that it is better to be a part of the regulatory process". The resulting LODC Regulation did not modify in any substantial manner its 2001 predecessor as far as advertising is concerned; for example, it did not include sanctions and enforcement mechanisms.

Additionally, the already existing prohibition of smoking in public places was kept as mere rhetoric, as it continued to allow venues in the hospitality industry the choice not to ban smoking, and it upheld ventilated smoking zones. The Guidelines for the Implementation of Article 8 of the FCTC (protection from exposure to tobacco smoke), recently adopted by the Conference of the Parties to the WHO FCTC, advise against maintaining smoking zones, against ventilation as a replacement for a smoke-free environment and against voluntary compliance policies.<sup>4</sup> In private workplaces, the LODC Regulation deferred to employers and employees to determine a smoking policy. Finally, misleading labelling strategies such as "milds" and "lights" were also expressly upheld, ignoring Article 11 of the FCTC.

Commenting on the text of the Regulation, Dr Carlos Salvador, President of the *Comité Inter-institucional de Lucha Contra el Tabaco*, CILA (Inter-institutional Committee for the Fight Against Tobacco) and President of the Ecuadorian Academy of Medicine, wrote in a letter of 4 April 2006 to the Executive Director of the Ecuadorian Tribune for Consumers and Users that the LODC Regulation "included measures that give the appearance of restricting tobacco, but which do not accomplish anything in reality", and that "it is clear that this so-called reform has been done exclusively because of the pressure of the tobacco industry, and to satisfy its interests". Additionally, in the words of María José Troya, Executive Director of the Ecuadorian Tribune for Consumers and Users, interviewed for this study, "PM had such power that they were able to exert influence at the Presidential level for the adoption of the [LODC] Regulation".

After the LODC Regulation was passed in March 2006, PM proceeded to further buffer potential FCTC impact by pursuing reform of a higher-level legal body, what in the Ecuadorian legal system is called an "organic law". These laws set forth the organisation and activities of the State in general; the organisation of political parties, the exercise of political rights and the electoral system; and the guarantees for fundamental rights and their procedural protection. Due to their nature, they require an absolute majority vote as a condition for their adoption, ie, 50% plus one of the membership of the assembly, a vote that is harder to muster than the normal requirement of a majority of those actually present. Therefore, having an organic law that introduced only minor and ineffective tobacco control policies was the most effective way to minimise the impact of the FCTC, because it locked deficient regulations from prompt amendment in the future.

It was a brilliant incremental policy strategy adopted by PM. With the LODC Regulation—a lower-level regulatory body, passed by the executive power—in place, the road was made easier for PM to pursue higher-order legislation based on the "consistency" argument. In other words, insufficient regulations on tobacco control were introduced via presidential decree, away from public debate. Afterwards, it was a matter of arguing that consistency was required in tobacco control, and that therefore the organic law needed to agree with the existing LODC Regulation. As Avelina Pérez put it, "We are not afraid of regulations, we think they are necessary. We are afraid of inconsistency".

The bill to amend the Organic Law for Consumer Protection was introduced by Pascual Del Cioppo, a congressman and member of the Social Christian Party, which has historically had strong ties to the business sector. Dr Salvador asserted that PM worked with Congressman Del Cioppo to introduce the bill, who brought it on their behalf. The text of the bill introduced by Congressman Del Cioppo is extremely simplistic and incomplete, including one single article that only prohibits smoking in public places.<sup>5</sup> Regardless, such prohibition had already been introduced in 2001 by the first version of the LODC Regulation, and was never enforced. By contrast, two other bills that had been filed earlier by other representatives and that incorporated much more exhaustive regulations—including rules on advertising, ingredient disclosures, sales to minors and manufacturing and commercialisation permits—never went forward.<sup>6</sup>

Congressman Del Cioppo's bill was assigned to the Consumer Protection Commission within the Congress. PM approached the members of the Commission directly. As Avelina Pérez comments, "we met with Alfredo Castro Patiño, then President of the Commission, and with its members, on a permanent basis. This was the part that involved the most intense work. We collaborated with the Commission constantly. It was an open collaboration; we worked with them in their offices". In fact, during the Congressional debates, Castro Patiño openly stated on several occasions that "[...] so it happens that this law was drafted through consensus with tobacco makers, with companies that make cigarettes in this country; they agree with the law [...] I repeat again, all this law was done through consensus with tobacco makers [...] it was this Commission's idea, together with tobacco makers—and hear this clearly, because it is important—to put in place all this strong regulations, yes sir, regulations that are not easy, they are hard".<sup>7</sup> PM's lobby was not limited to the drafting commission. "I met with about 60 representatives. They all knew me by name. We went to the plenary floor debates every day. We were a part of the process", said Pérez.

As Castro Patiño's intervention shows, legislators went forward with the bill because, in good faith, they bought the argument that the industry itself wanted to be regulated. Likewise, PM's overt lobbying attitude was possible because it was undertaken under the same discourse. Additionally, representatives agreed with the values advanced by the FCTC and they believed in regulating tobacco in general. Of seven interventions in the first round of debates, five favoured tobacco regulations. However, they relied entirely on anecdote, had no real technical grasp as to how to translate that normative position into effective policy, were not familiar with the regulations contained in the FCTC, and rarely mentioned it.<sup>8</sup> Except for two or three representatives—Marcelo Dotti, Carlos Kure Montes and Ramiro Izurieta Dillon—the legislators apparently did not have the slightest idea of what tobacco control regulations should accomplish and simply followed the scheme introduced by the industry-influenced bill that focuses on fining smokers rather than establishments, a relatively ineffective strategy.

The bulk of the debates in the second round of debating centred around the amounts that should be levied as fines against individuals smoking in public places, instead of debating a requirement of 100% smoke-free environments, or how to set forth a simple but effective enforcement system.<sup>9</sup> No one really took a good look at the FCTC vis à vis the reform being introduced to realise that the latter's substantive regulations did not fully meet the standards set by the treaty. PM took

advantage precisely of this information and expertise vacuum, while the existence of the FCTC moved representatives toward supporting “tobacco control” legislation.

The public health governmental sector and civil society organisations, for their part, were not adequately organised to counteract PM’s strategies. A tobacco control organisation existed in CILA, which comprised the Ministry of Public Health, the Red Cross, the Ecuadorian Tribune for Consumers and Users and members of the civil society devoted to tobacco control. However, CILA was weak and lacked institutional resources and information. It did not have permanent technical and lobbying staff, and its members were and still are full-time officials in the Ministry of Health, the Red Cross, or the Tribune for Consumers and Users. The President of CILA, Dr Carlos Salvador, is a pulmonologist with a busy private practice and many other professional commitments. He said in an interview, “The CILA was not aware that the Consumer Commission was working on a draft amendment for the Consumer Protection Law. The tobacco industry brought the bill and worked the draft within the Congress”. D. Salvador further stated that “the tobacco industry moved the reform forward in a surreptitious manner, as they always do. . . In fact, the amendment was based on recommendations furnished by TANASA, ITABSA and PROESA—Philip Morris’s subsidiaries in Ecuador—to the Consumer Protection Commission”.

These companies had issued proposals for legal reform on tobacco control in the past. For example, a “Proposal for Integral Regulations on Tobacco Products” written in 2005—after the FCTC had been signed by Ecuador, but prior to its ratification—by TANASA, ITABSA and PROESA, includes an extensive set of recommendations for future reforms. In this proposal, ITABSA relies on the “consistency” and “predictability” argument to support a variety of regulations that appear to be restrictive, but that in general aim at protecting the conglomerate from competition, for example, by suggesting a minimum price for all cigarettes sold in the Ecuadorian market.

After the Congress approved the law, it was submitted to the President of Ecuador for his endorsement or objections, according to Article 153 of the Constitution. At this point, CILA attempted to introduce modifications by offering the President of Ecuador comments on the law. Nevertheless, these efforts were too little, too late. They only suggested minor changes, and only some of those changes were introduced by the President. Perhaps the most important recommendation had to do with enforcement of the prohibition against smoking in public places: CILA proposed that ventilated smoking zones be replaced by 100% smoke free environments both in public places and the workplace, and that fines for those breaching the prohibition be levied against owners of establishments, not only against smokers as the law had it.

The president did not pick up on these recommendations, cantering his veto on the amounts of fines that should be levied against those who smoke in public places.<sup>10</sup> As a result, the law fines only the smokers violating this prohibition, which renders it entirely unenforceable because the authorities charged with enforcement have no capabilities for effectively levying such fines. The draft law approved by the Congress in the second debate established fines of US\$50. In his veto, the President, Alfredo Palacio, through the Acting President, Vice President Alejandro Serrano, modified this amount to US\$1000. The debate thus centred on a secondary issue, the amount of fines, drawing attention away from the more relevant questions.

The text of the law as approved does little to advance anti-tobacco regulations as established by the FCTC. It includes a

rather convoluted, unenforceable prohibition to smoking in public places that does not effectively protect non-smokers from second-hand smoke, setting forth a long list of venues ranging from sports facilities to cinemas to office buildings, but expressly allowing smoking in public “centres of nocturnal diversion”, ie, the hospitality industry. Second, it mandates that warnings must be displayed on tobacco packages, but not in a rotating manner as established by the FCTC, 11.1.(b)(ii); it makes such warnings only 40% of the package’s display area (while the FCTC, 11.1.(b)(iv), recommends 50%); and it does not include pictures or pictograms (FCTC 11.1.(b)(v)). Third, it includes fines to businesses selling cigarettes to children, and business closures for recidivists, but it does not create an agency charged with levying and enforcing sanctions. For all enforcement matters, it remits to Article 84 of the existing LODC, which determines that sanctions will be handled by *jueces de contravenciones* (misdemeanour judges), who have no training or capabilities to enforce smoking regulations. Additionally, the law is silent on regulations for advertising, promotion and sponsorship of tobacco products.

Even though aspects of the law related to smoking in public places and to exposure to second-hand smoke were destined to be unenforceable from the outset, it has in fact generated a small amount of voluntary compliance. In the months following its publication, shopping centres, hospitals and some office buildings in the main cities banned smoking in their facilities.<sup>11</sup> This shows that the public sympathises with regulations to prevent tobacco exposure from second-hand smoke. To date, there are no official evaluations of the applicability of the law. The statute did not create an agency charged with its enforcement and follow-up.

## CONCLUSIONS

Domestic tobacco regulations in Ecuador, adopted allegedly to implement the FCTC, were rendered significantly ineffective by the concurrence of the role of the tobacco industry, poor legislative capacity and low civil society involvement. As this experience shows, in contexts with these variables—common in developing countries—FCTC ratification may have little relevance for the adoption of effective domestic policies. This suggests that, in these contexts, stronger support by governments, international intergovernmental organisations and international non-governmental organisations from developed countries is needed throughout the policymaking process as developing nations begin to adopt domestic legislation to implement the FCTC. In Ecuador’s experience, as members of CILA related to one of the authors (SA), the regional office of WHO, the Pan-American Health Organization, assisted CILA in

### What this paper adds

- ▶ Little attention has been paid to the process of drafting legislation to implement the Framework Convention on Tobacco Control (FCTC), especially outside of developed countries.
- ▶ This article identifies the challenges faced by one developing country when attempting to implement the FCTC domestically. It suggests that more support should be provided to health ministries, legislatures and local tobacco control organisations in developing countries as they get ready to adopt domestic tobacco control legislation.



its involvement in the adoption of domestic legislation. However, support provided was not enough, and it was too sporadic. More sustained assistance—for example, technical and financial assistance for hiring professional lobbyists and experts—would have allowed for better legislation. This assistance should be channelled through domestic organisations, which provide permanence and are able to read the subtleties of the domestic environment.

**Competing interests:** None.

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## The lighter side



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