



Becoming a party to the WHO FCTC: check list

Steps required at the national level for ratification, accession, approval or acceptance of the WHO Framework Convention on Tobacco Control

Before a State can ratify, accede to, approve or accept a treaty in accordance with the provisions of the Vienna Convention on the Law of Treaties, it has to complete the necessary procedures at the national level. These procedures are governed by national law, frequently the national constitution. National law determines whether a given treaty is to be ratified by the executive or by parliament, and which procedure must be followed. It also determines whether a treaty automatically becomes domestically binding once it has become internationally binding, or whether implementing legislation is required. As the systems of different countries vary widely in this respect, the following is limited to a broad outline of the main steps and options.

In each country, the lead ministry or authority with responsibility for the WHO Framework Convention on Tobacco Control (WHO FCTC) will need to identify the applicable procedures and responsibilities.

As a general rule, the following steps will need to be taken¹:

1. Undertake a preparatory analysis and collection of documentation

The lead ministry/authority for the WHO FCTC may wish to undertake the following steps:

- Translation of the WHO FCTC and ancillary documents into the national language (in case it is not one of the 5 official languages of the WHO);
- Collection of all relevant documentation;
- Survey of the existing legal and institutional framework to determine which legislative and administrative measures need to be taken to implement the WHO FCTC;
- Cost-benefit analysis of becoming a Party to the WHO FCTC, including implementation of the measures identified;
- Assessment of whether the legal regime established by the WHO FCTC would be beneficial to the State;
- Raise awareness of the needs and benefits of becoming a Party to the WHO FCTC.

2. Consult with the government office responsible for issuing ratification instruments

The lead ministry/authority for the WHO FCTC will consult with the government office responsible for drafting ratification instruments for international agreements. This is often a legal unit in the Ministry of Foreign Affairs.

¹ Basis of this note: Checklist of general steps to be taken prior to lodging instruments of ratification, acceptance, approval, accession or the like with the Secretary-General of the United Nations, prepared by the interim Secretariat of the Stockholm Convention on Persistent Organic Pollutants in consultation with the Treaty Section of the United Nations Secretariat.

This unit will identify who at the national level would, as a rule, approve ratification of the WHO FCTC (e.g. parliament or executive). The approval will provide the basis for the issuance of an instrument of ratification by the competent government office.

3. Identify the constitutional requirements and process for domestic approval of ratification

The lead ministry/authority will contact the office or administration of the supreme national authority entitled to decide on ratification (as identified under 2. above), in order to identify the steps that will lead to the approval of ratification of the WHO FCTC. Assuming that there is political will to proceed, the supreme national authority will indicate the necessary decision-making processes that will have to be completed before the instrument of ratification can be signed and deposited.

In addition to obtaining necessary approvals within the administration of the head of state or head of government, or parliamentary debate, such processes may include passing law, a judiciary review, or evaluation at different state levels. The following principal questions will have to be answered:

(a) Approval of ratification by parliament or executive body?

This will depend on the constitution of the country. As this is unique for each country, there is a large variety of options. The authority to approve ratification may rest with (examples):

- The executive (national government)/head of state/head of government, for all treaties;
- The executive/head of state/head of government, for all treaties, while parliament is consulted/informed but does not need to give formal approval;
- The legislature (parliament), for all treaties;
- The legislature, for treaties with major political importance for the country (e.g. peace treaties, trade treaties, treaties on an international organization), and the executive/head of state/head of government, for all other treaties;
- The legislature if implementing legislation must be passed, the executive/head of state/head of government for all other treaties.

(b) Procedure by which ratification takes place?

This is again unique for each country. The following procedures may apply (examples):

- Approval first by one and then the other chamber of parliament, prevalence of one chamber in case of disagreement;
- Approval by only one chamber of parliament.

(c) Necessity of passing implementing legislation?

In some countries, an international treaty automatically becomes binding national law when it enters into force for that country. As such, it directly creates rights and obligations for national actors, even without implementing legislation.

Nevertheless, the text of a treaty may not be specific enough to allow direct application at the country level. If legislation or regulations to clarify the rights and obligations of national actors are needed, this will have to be adopted through the applicable parliamentary procedures.

In other countries, international treaties do not become immediately binding at the national level. They must first be transposed into national legislation, which establishes the corresponding rights and obligations. The legislation will also have to be adopted through the applicable domestic procedures.

Depending on their particular situation, some countries may not be in a position to ratify a treaty until the implementing legislation has been enacted.

(d) Need for a judiciary review?

In some countries, a treaty must be submitted to judiciary review by the competent court, normally the constitutional court. Only if the court determines that the treaty is consistent with the constitution of the country may ratification proceed.

(e) Need to consult sub-national governmental entities?

In federal States where sub-national governmental entities (e.g. states, provinces, cantons, Länder) have some competence in the matter covered by the treaty, there is a procedure to consult these entities as part of the ratification process.

4. Examine the need for a declaration

When approving the ratification, the supreme national authority (executive or parliament) may wish to examine the need for a declaration to be made with the submission of the instrument of ratification. Declarations may be used, for example, to clarify a country's understanding of a specific clause of the treaty.

5. Prepare and sign the instrument of ratification

After completion of the process outlined above, the government office responsible for doing so (see 2. above) will prepare the instrument of ratification, and an instrument of declaration if necessary. The instrument(s) must be signed by the head of state, head of government or minister of foreign affairs.

Model instruments of ratification/acceptance/approval and of accession are also available for download on the website of the Convention Secretariat.

6. Becoming a Party if the WHO FCTC has been signed: ratification (acceptance, approval)

As per Article 35 of the WHO FCTC, "this Convention shall be subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations".

A State that ratifies, accepts or approves the WHO FCTC will have to deposit an instrument of ratification, acceptance, or approval with the United Nations Treaty Section in New York.

In practical terms, acceptance and approval can essentially be considered synonymous with ratification, and have the same legal effect. The legal process referred to as ratification takes place at two levels, which are often confused because the same term "ratification" is frequently used for both. In practice, it is however very important to distinguish them.

"Domestic" ratification is the process by which a State's authorities prepare for "international" ratification. This domestic process is determined by the national constitution and legislation of a given State, and is therefore *different for every State*. Most national legal systems require formal approval of an international treaty by a high-level political authority, for example the national parliament. Depending on the legal system of the State, the domestic process may or may not include that all national legislation required to implement the Convention has to be enacted prior to ratification. Before proceeding to international ratification, the domestic process must be completed.

"International" ratification follows upon "domestic" ratification. It represents the State's formal commitment to the international community to be bound by the Convention. It follows an internationally defined procedure, which is therefore *the same for all States*. The commitment to be bound is expressed through the instrument of ratification, acceptance or approval, which normally consists of a one-page.

7. Becoming a Party if the WHO FCTC has not been signed: accession

Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, which must be preceded by signature to create binding obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession with the United Treaty Section, in New York.

Following are examples of scenarios when a State may decide to accede to the WHO FCTC: 1) A State that has not participated in the negotiations on the WHO FCTC wants to become a Party some years after the WHO FCTC has closed for signature; 2) A State becomes independent some years after the WHO FCTC is closed for signature; and, 3) A State's political process is too polarized to allow it to sign within the given timeframe; with a different political constellation some years later, accession becomes possible.

8. How to deposit the instrument with the United Nations Treaty Section

The Secretary-General of the United Nations is the depositary of the WHO FCTC, therefore the instrument needs to be physically mailed or hand-delivered to the Treaty Section of the United Nations in New York.

The instrument must be signed (State seal is not necessary) by the Head of State, Head of Government or Minister of Foreign Affairs.

The date of receipt of the instrument of ratification, acceptance or approval by the United Treaty Section is the official date of deposit.

To facilitate prompt processing of actions, States are urged to provide courtesy translations in English and/or French of the instrument submitted for deposit with the Secretary-General of the United Nations in other languages.

It is important to note that an instrument sent or hand-delivered to any office of the World Health Organization or to the Secretariat of the WHO FCTC, does not constitute a deposit of the instrument of ratification and will be returned to the State.