



Building Support for Global Tobacco Control

Notes for FCA members for COP-2: protocols and guidelines

The difference between protocols and guidelines

A protocol is a legally binding international agreement that supplements an existing international agreement through either additional rights or obligations or international cooperative arrangements. Only Parties to the primary agreement are eligible to become Parties to the protocol, and the protocol is only binding on those Parties to the primary agreement that decide to become Parties to the protocol. A protocol is thus a separate instrument from the primary agreement, though closely related to it. Like any treaty, a protocol must be negotiated and adopted by States. This process usually involves the creation of a subsidiary body to the primary agreement to develop the text of the proposed protocol through a series of negotiating sessions. The draft protocol is then submitted to the Conference of the Parties (COP) to the primary agreement for adoption. Once adopted, it is opened for signature and ratification by Parties to the primary agreement wishing to become Parties to the protocol.

A guideline is a non-legally binding instrument that provides guidance to Parties to an international agreement to assist them in implementing their legal obligations under the agreement, for example, by offering best practice recommendations or case studies. A guideline creates no new legal rights or obligations. Guidelines may be drafted by a sub-group of Parties to the agreement, acting as 'key facilitators', with the support and input of other Parties and representatives of civil society. Guidelines can usually be developed much more quickly than protocols. Where the COP decides to commence work on the elaboration of a guideline, the guideline can be adopted at the next session of the COP, if support for the necessary number of inter-sessional meetings is committed. Like a protocol, a guideline must be formally submitted to the COP for adoption. Unlike a protocol, it does not then require signature and ratification by Parties individually, but stands as a non-legally binding instrument to assist Parties in the implementation of their obligations under the agreement.

The essential decision for COP-2 on a protocol on illicit trade: to commence negotiations or not to commence negotiations

In the FCA briefing paper, 'A protocol on illicit trade in tobacco products',¹ we set out the reasons why, at its second session, the COP should decide to commence the negotiation of a protocol on illicit trade. In its deliberations, the COP will consider the protocol template prepared by the expert group on illicit trade in accordance with decision FCTC/COP1(16).²

¹ Available online at <http://fctc.org/x/documents/IllicitTradeBriefing_COP2_English.pdf>.

² 'Elaboration of a template for a protocol on illicit trade in tobacco products' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control,

It is important to note that the essential decision that must be made by the COP is simply whether or not to proceed with the negotiation of a protocol (and, if so, how), rather than what the precise content of a protocol should be. The expert group's template is simply a list and description of possible elements of a protocol, developed by the expert group established pursuant to the COP-1 decision. These experts, drawn from both government and civil society, were selected on the basis of their individual expertise and in their personal capacities. Their template (or list and description of possible elements of a protocol) is thus not a COP template or even a template of a particular Party or Parties.

At COP-2, it is not necessary that the COP in any way 'adopt' the contents of the expert group's template. If the COP decides to commence negotiations, the expert group's template will likely serve as a valuable resource that Parties may consider as they negotiate a protocol. But the template would be no more than this. For this reason, it would not be appropriate for the COP to spend time 'negotiating' the text of the template. The COP should focus on the question whether to proceed with negotiations or not (and, if so, how). It is only after such a decision is taken and negotiations commence that detailed negotiation of the contents of a protocol should be undertaken.

The decision for COP-2 on guidelines on Article 8 (protection against exposure to tobacco smoke): whether or not to adopt guidelines, and, if so, what their precise content should be

At COP-2, the COP will have the opportunity to adopt guidelines for the implementation of Article 8 of the Convention. These guidelines will not be legally binding on Parties, but will provide guidance on the implementation of their obligations under the Convention. Draft guidelines have been developed by Parties to the Convention, acting in their capacity as Parties, in a transparent process open to all Parties to the Convention equally, and with the input and support of civil society.³ In the joint FCA / Global Smokefree Partnership briefing paper, 'Proposed Guidelines for the Implementation of Article 8 of the WHO Framework Convention on Tobacco Control',⁴ we set out the reasons why the COP should adopt the draft guidelines without change.

second session, provisional agenda item 5.4.1, A/FCTC/COP/2/9, 19 April 2007), available online at <http://www.who.int/gb/fctc/PDF/cop2/FCTC_COP2_9-en.pdf>.

³ 'Elaboration of guidelines for implementation of the Convention – Article 8: Protection from Exposure to Tobacco Smoke' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, second session, provisional agenda item 5.3.1, A/FCTC/COP/2/7, 26 April 2007), available online at <http://www.who.int/gb/fctc/PDF/cop2/FCTC_COP2_7-en.pdf>.

⁴ Available online at <http://fctc.org/x/documents/Article8_COP2_Briefing_English.pdf>.