

**Briefing Note: Fifth Session of the Intergovernmental Negotiating  
Body on an Illicit Trade Protocol  
Geneva, 29<sup>th</sup> March to 4<sup>th</sup> April 2012**

## **IMPLEMENTATION, TECHNICAL ASSISTANCE AND CAPACITY-BUILDING**

### **Key recommendation**

In its report to the COP, the INB should propose a draft decision on concrete initial steps for scoping the extent and nature of technical assistance and capacity-building needs that will be generated by implementation of the Illicit Trade Protocol (ITP), as well as possible options for meeting these needs.

### **Introduction**

During discussions at INB sessions to date, the focus has been on the scope and nature of Parties' obligations, and how these can best be structured to control illicit trade in tobacco products. Many of the most vocal Parties have been those which already have extensive control policies in place, and therefore had a clear idea of what changes they would or would not be willing to make at the national level to contribute to a successful global effort. It is reasonable to assume such Parties will require little technical assistance in implementing the Protocol.

Effective illicit trade control involves a number of aspects, such as:

- Enforcement bodies that are experienced in detecting, investigating, and prosecuting groups and individuals involved in the illicit trade in tobacco products;
- Recognition that illicit trade is a form of economic (and often transnational) organised crime;
- Justice systems that are able to impose appropriate penalties on those charged and found guilty of illicit trade-related offences – which may involve revisions to legislation and procedures;
- Customs systems that can detect anomalies in trade patterns and maintain control over national borders;
- Tobacco tax administration systems that are difficult to evade and well protected against corruption, with tax markings or similar preventive measures;
- Tracking and tracing systems, which may well involve interministerial co-operation to work properly (e.g. between revenue authorities, customs and police);
- Strong collaboration with neighbouring countries and major trading partners.

For several reasons, it is very likely that many Parties lack capacity in one or more of these areas. First, Parties which formerly had low tobacco tax rates may long have believed they had no good reason to invest significant resources in controlling illicit trade in tobacco products. Second, Parties with long borders or large informal sectors, or that are located in or near conflict zones, may face particular challenges with border security and, more generally, with law and order. Third, particularly in under-resourced countries, concerted efforts to control the illicit trade in tobacco products may simply not have been a priority. (It is worth noting, however, that a number of developing countries have vigorous policies on illicit trade.) In countries with little experience in combating illicit trade in tobacco products, it may be a challenge even to meaningfully evaluate the extent of capacity-building needs without outside assistance in some form.

This variation in level of capacity, particularly in developing countries, should be seen not merely as a challenge, but also as an opportunity to adopt best practices.

Globally, spending on effective control of illicit trade in tobacco products should be seen as an investment rather than a cost – it should facilitate revenue collection, which should yield both significant health benefits (through higher effective prices) and substantial revenue. Nevertheless, there are several potential issues:

- The tobacco industry has a strong interest in positioning itself as a source of technical assistance and capacity building. However, manufacturers also have a strong interest in (mis)directing enforcement efforts towards specific types of illicit trade, particularly trade in counterfeit products (which affects their market share and profit margins) and illegal manufacturing, and away from smuggling of their own products. They also have an interest in presenting illicit trade as a problem that can be solved only via low taxation;
- Various security product vendors have an interest in selling expensive machinery and systems to governments (such as x-ray scanners for verifying the contents of containers), and may give Parties conflicting and self-interested advice that is not adapted to actual local or regional needs;
- As successful illicit trade control efforts involve multiple government ministries and agencies, coordination is essential to avoid duplication and ensure optimal allocation of resources. Developing an appropriate whole-of-government strategy may require substantial expertise;
- Building entirely new government structures or programmes is inherently challenging, particularly in financially constrained environments. Errors can be avoided through learning from other Parties' experiences and systems.

The success of the ITP will depend in large part on Parties' will to overcome these multifaceted challenges and to ensure that those Parties with little capacity or experience in controlling the illicit trade in tobacco products have access to appropriate technical assistance and capacity-building.

## **History**

At INB3, the Secretariat presented a feasibility study on a global tracking-and-tracing regime (see FCTC/COP/INB-IT/3/INF.DOC./5), as well as an "Assessment of potential requirements at

national level for an international tracking and tracing system for tobacco products” (FCTC/COP/INB-IT/3/INF.DOC./8), which looked at feasibility in three low-income/lower middle-income countries. These documents aimed largely to inform Parties as to whether some draft provisions of the Protocol were feasible, rather than constituting an attempt to scope out the technical assistance and capacity-building needs that the Protocol in its entirety would generate.

At COP4, the Secretariat provided an information document on the financial implications of the ITP, FCTC/COP/4/INF.DOC./1. This document assumed that ITP implementation would start during the 2012-2013 biennium and would follow the basic pattern of FCTC implementation; it foresaw six regional workshops, 25 country visits and six expert papers per biennium. This document provided guidance to Parties as they considered the COP budget.

As that document pointed out, the extent of assistance needs will depend on final ITP provisions. Furthermore, it is unlikely that all capacity building and technical assistance needs will be met by the Secretariat alone. Indeed, it is unlikely that any existing organisation has (or can reasonably be expected to acquire) sufficient expertise in all areas of ITP implementation to provide comprehensive technical assistance and capacity-building.

In short, although the Secretariat (in co-operation with Parties) has conducted or commissioned research on various issues relevant to FCTC implementation, it has not been mandated to date to engage in a comprehensive assessment of technical assistance and capacity-building needs relating to Protocol implementation.

### **Towards comprehensive assessment: some ideas**

In an ideal world, FCTC Parties which decided to ratify the Protocol would begin by assessing their existing legislation, regulations and policy to verify the extent to which: 1) they fulfil ITP obligations and 2) are effective in controlling illicit trade in tobacco products. In countries which do not already have a co-ordination mechanism or strategy on illicit trade in tobacco products, this initial assessment could be particularly complex, as relevant provisions may be scattered across tax and customs legislation, enforcement strategies vis-à-vis organised crime, tobacco control legislation within the ministry of health, etc. (This is a process which is common to many international instruments, and is frequently kicked off with a self-assessment check-list.<sup>1</sup> In this case, it requires a high level of commitment across multiple government agencies to complete successfully.)

A second step would then involve identifying capacity-building and technical assistance needs. If, for example, a Party has no experience with tax marks or any other type of unique identifying mark, it may need substantial technical assistance to choose and implement an appropriate system. (In its present form, the draft Protocol would not require the “unique, secure and non-removable identification markings” specified in Article 7.3 to be tied to the tax status of a package of cigarettes, i.e. to indicate whether taxes have been paid or not. One issue for individual Parties to consider is whether to combine the two functions. In FCA’s view, tax stamps or other types of markings issued by governments are to be preferred to industry-controlled markings, such as the Codentify system developed and licensed by Philip Morris

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<sup>1</sup> Cf. Survey on Capacity Building Needs and Priorities for the Implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture. IT/CBCM-1/08/3.

International.) Police forces may need training in investigative techniques, customs services in the implementation of monitoring systems, and so on. Low-capacity Parties may require assistance even to identify technical assistance needs in some areas.

A third step is to consider what partner(s) and mechanism(s) would be most appropriate to obtain the relevant technical assistance and capacity-building. A comparison with other international instruments suggests mechanisms to address technical assistance needs can range from simple written guidance on implementation<sup>2</sup> and needs assessment toolkits to workshops, training courses and regular visits from technical experts.<sup>3</sup>

This work would lead to the fourth step – actual provision of technical assistance and capacity-building.

It may appear that Parties have considerable time to deal with these issues as they come up: the global tracking-and-tracing regime, for example, is due to be fully operational five years after entry into force of the Protocol, i.e. 2018 at the earliest. However, waiting until the first Meeting of the (ITP) Parties (MOP) would be not only a source of delay but potentially a serious mistake, as it will make it difficult for the MOP to take informed decisions on governance, staffing needs, type of collaboration with other organisations and so on. Moreover, action needs to start as quickly as possible at the national level for a global regime to have a meaningful impact five years down the road.

It is worth examining the experience in scoping out technical assistance needs for other international instruments.

In the case of the United Nations Convention against Corruption (CAC), which was adopted in 2003 and came into force in 2005, the UN Economic and Social Council (ECOSOC) adopted a resolution in 2005 calling on member states to “continue to make adequate voluntary contributions to the United Nations Crime Prevention and Criminal Justice Fund” to provide technical assistance with CAC implementation, and calling on the Secretary-General “to provide the United Nations Office on Drugs and Crime (UNODC) with the resources necessary to enable it to promote, in an effective manner, the entry into force and implementation” of CAC.<sup>4</sup> At the first meeting of the CAC Conference of the Parties, the Parties to that Convention decided to set up an open-ended intergovernmental working group on technical assistance.<sup>5</sup> That working group met for the first time in 2007, by which time UNODC had produced an extensive background paper on “Successful practices and coordination for effective technical assistance”.<sup>6</sup> Since then, the UNODC has developed extensive and varied mechanisms for providing technical assistance to CAC Parties, ranging from self-assessment checklists to regional training workshops, ad hoc national training, a database of anti-corruption experts, legislative drafting, review of national legislation and policies, and so on.<sup>7</sup>

The points to note are:

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- 2 Cf. Guidance on the National Implementation of the 1996 Protocol to the London Convention 1972 (on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter).
  - 3 Cf. United Nations Environment Programme. Assessment of Existing Capacity Building Needs to Analyse Persistent Organic Pollutants (POPs) in Developing Countries. Final Report. June 2008.
  - 4 ECOSOC Resolution 2005/18.
  - 5 CAC Resolution 1/5.
  - 6 CAC/COSP/WG.3/2007/2.
  - 7 CAC/COSP/2011/10.

- In the case of CAC, the mechanism for providing technical assistance was known and already existed at the time of entry into force – there was an existing and comparatively large agency with specialised expertise covering the full range of issues involved in the Convention;
- Technical assistance was identified from the beginning as a key element in successful implementation;
- The Secretariat needed sufficient time and budget to prepare or commission appropriate background papers;
- The Parties decided technical assistance was so important that they set up an intergovernmental working group to oversee it.

If we compare with the ITP, it is worth noting:

- As mentioned, the types of expertise required to provide ITP implementation assistance are quite varied and are unlikely to be found in any single organisation. While the FCTC Secretariat clearly can and must play a coordinating role, it is unlikely to develop in-house expertise in customs systems or investigative techniques, to name two examples.
- The only mechanism at present for Parties to discuss ITP technical assistance needs is discussion at this INB or at the COP. As the body that is thinking specifically about the ITP, the INB is best placed to make recommendations on what needs to be done.

Given these differences, Parties should give consideration as soon as possible to:

1. On a trial basis, starting the process of scoping out implementation, technical assistance and capacity-building needs. While a broader needs assessment process will probably need to wait until after the first MOP, it is important to get at least an overview of the *types* of technical assistance that are likely to be most urgent, so as to allow the ITP Parties to consider possible collaborative arrangements at their first meeting. This could take various forms, such as an ad hoc grouping of Parties which undertake to evaluate their own situation and report back. It would be important to ensure that the Parties include a reasonable cross-section of income groups and experience in combating illicit trade.
2. Establishing an expert group, with specialised knowledge in relevant areas (customs, policing, tax administration, technical assistance for implementation of other international instruments, etc.), to develop options for scoping and meeting technical assistance and capacity-building needs, for presentation at COP6 (or possibly the first ITP MOP, depending on date of entry into force). To identify appropriate experts, Parties would likely need to come to COP5 with their own lists of potential nominees. One possibility would be for this expert group also to look at reports of the ‘volunteer’ Parties mentioned in the previous point.