



This document relates to item 5 of the provisional agenda.

Fifth Session of the Conference of the Parties to the
WHO Framework Convention on Tobacco Control, 12-17 November 2012, Seoul, South Korea

FCA Policy Briefing:
The Illicit Trade Protocol (ITP)

Key recommendations

- Parties should adopt the ITP without amendment;
- Parties should agree on a road map for preparing for ITP implementation between COP5 and COP6 or ITP MOP1, in particular to protect against tobacco industry influence. This road map should focus on:
 - Scoping of technical assistance and capacity-building needs;
 - Outreach to other organizations, particularly intergovernmental organizations, which are equipped to provide relevant technical assistance or assist with capacity building;
 - Involvement of the full range of government departments and agencies in ITP implementation preparations.

Introduction

The Protocol to Eliminate Illicit Trade in Tobacco Products is the fruit of many years of discussions between Parties, starting with the drafting of FCTC Article 15 during the original FCTC negotiations, continuing with the expert group established by decision FCTC/COP1(16), which reported back to COP2 with a template for a protocol, and culminating in five sessions of the ITP Intergovernmental Negotiating Body (INB), the most recent this last April.

The starting point for these discussions was the role that illicit trade, and the fear of illicit trade, played in delaying implementation of various measures to reduce demand for tobacco, and in particular, increases in tobacco taxation. It is thus particularly appropriate that a protocol on illicit trade should be submitted to the COP for consideration and likely adoption at the same session at which draft guidelines for the implementation of Article 6 (tax and price measures) are also on the table.

As several participants in the INB process have emphasized, adoption of the Protocol, while a momentous event in its own right, will not be meaningful unless Parties make a concerted effort to effectively implement Protocol measures. In this respect, our collective effort is only beginning.

Adoption without amendment

As mentioned in the report of the INB Chair (FCTC/COP/5/7), near the close of ITP INB5, Singapore and the Philippines reserved the right to revisit one article of the Protocol: Article 12 (as it is now numbered), which deals with Free Zones and International Transit. Their central concern appeared to be the use, without specific definition, of the term “intermingling”, and the fact that the prohibition of intermingling applies only “at the time of removal from free zones”. (Article 12.2.)

In FCA's view, re-opening discussions on Article 12 at COP5 would almost inevitably lead to the re-opening of discussions on other articles and failure to adopt the Protocol at COP5. Substantive discussions of Protocol content would be very difficult, both because of the composition of Party delegations (which may not include key members of ITP negotiations) and because of lack of time.

If there are still concerns about the wording or effect of Article 12, they should be raised at the first session of the ITP Meeting of the Parties.

A road map for implementation – preparing for the five-year countdown

The Protocol contains one major provision with a fixed deadline: Article 8, on tracking and tracing. Specifically:

1. 8.1 provides for a "global tracking and tracing regime, comprising national and/or regional tracking and tracing systems and a global information sharing focal point located at the Convention Secretariat" within five years of entry into force of the Protocol;
2. 8.3 stipulates that "each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years";
3. 8.3 also stipulates a 10-year deadline for similar markings on other tobacco products.

Until the Protocol is actually open for signature and ratification, there is little way of predicting how quickly it will attract enough Parties to come into effect. However, once 40 Parties have ratified and a further 90 days have elapsed as per Article 45 of the Protocol, the five-year countdown for establishment of a global tracking-and-tracing system will begin.

Article 33 of the Protocol provides that the first session of the Meeting of the Parties (MOP) is to be held "immediately before or immediately after the next regular session of the Conference of the Parties following the entry into force of this Protocol." This means that the first session of the MOP *could come as late as two years* after entry into force of the Protocol – if the 40th ratification happened to come 90 days before a session of the COP, and COP sessions continue to be held every two years.

Even for high-capacity countries, developing and implementing a national tracking-and-tracing system, and co-ordinating it with a global system, would be a challenge to achieve from scratch in three years. And low-capacity countries may need substantial technical assistance in order to implement effective and appropriate national systems.

What all this means is that substantial preparatory work needs to be accomplished *before MOP1*. This can come only via decisions by the COP, as well as informal co-operation between FCTC Parties.

It's not just about Article 8

As mentioned, Article 8 requires a specific measure – unique markings on cigarette packaging, as part of a tracking-and-tracing regime. But for this measure to have much practical effect, a number of other articles of the Protocol also need to be implemented. For example (without being exhaustive):

- Article 6 (licensing) – in the absence of an effective licensing system, which provides Parties with a way to keep track of manufacturers, exporters, importers and other actors, it could be difficult to stop manufacturers from simply ignoring Article 8 requirements;

- Article 7 (due diligence) – it is not terribly useful to record the first purchaser of a shipment of cigarettes (as per 8.4.1) unless one is also obliged to verify the *bona fides* of that first purchaser (as per 7.2);
- Article 14 (Unlawful conduct including criminal offences) – for tracking-and-tracing to be effective, it needs to be illegal to manufacture, sell, transport, etc., tobacco products without the required markings (as per 14.1(b)(i));
- More generally, the purpose of tracking-and-tracing regimes is to be able to detect the point at which tobacco products make the transition between apparently legal and patently illegal commerce (or vice-versa); but such information is only useful if Parties have the ability to follow up with effective investigations and, where needed, prosecutions.

In other words, planning for Article 8 implementation involves far more than deciding technical details, such as the specifications for markings, the type of database to be used at the national level, or the model of scanner that enforcement officers may need to decode markings. Rather, Parties need to begin thinking about the entire range of ITP measures, as an integrated whole.

Countering tobacco industry and commercial influences

One complicating factor with respect to ITP implementation is the tobacco industry's strong interest in shaping Parties' policies to control illicit trade. For cigarette manufacturers, an ideal anti-smuggling policy involves low tobacco taxes and, in close collaboration with the industry, a strong enforcement focus on preventing the production and sale of counterfeit cigarettes. To achieve this, they do not hesitate to offer "free" equipment, training and even purported tracking-and-tracing solutions (see our background document on Article 8 for more details).

The primary decision makers in most governments with respect to the choice of tracking-and-tracing technology, and more generally in regards to policy on illicit trade, are rarely in the Ministry of Health. Other ministries typically co-operate with all sorts of business interests, and may quite honestly see nothing objectionable to partnerships with the tobacco industry. Customs services see themselves as pursuing multiple objectives – protection of the public, collection of tariffs but also facilitation of trade; co-operation with 'legitimate' businesses is routine and normal for customs.

A further difficulty is the tobacco industry's efforts to use apparently independent organizations and venues to push its core message of the need for industry-government "co-operation" (on the tobacco industry's terms). For example, the International Tax and Information Centre has held seminars and issued reports on the illicit trade in tobacco products, and may be perceived as an independent think-tank, despite the fact its sponsors include several major tobacco companies.¹

Thus, there exists a significant risk, in ITP implementation, of being co-opted by the tobacco industry and, as a result, of misallocating scarce resources or pursuing misguided strategies. It is important that Parties be reminded of Article 8.13 of the Protocol: "Each Party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary to the implementation of this Article." It is also worth noting that the Preamble to the Protocol makes reference to Article 5.3 of the Convention, and emphasizes "the need to be alert to any efforts by the tobacco industry to undermine or subvert strategies to combat illicit trade in tobacco products...".

¹ Cf. ITIC. The Illicit Trade in Tobacco Products and How to Tackle It. 2011. On-line at: http://www.iticnet.org/Public/other_publications.aspx. The publication notes that the cost of the publication was underwritten by "supplemental contributions from tobacco companies".

One safeguard against industry influence is to provide accessible sources of expert advice, capacity building and training. Thus, the decisions that will be taken at COP5 on these issues are important not only because they will determine the speed at which the Protocol can be effectively implemented, but also as protection against industry influence.

It should be mentioned that the tobacco industry is not the only industry that has a commercial interest in how the ITP is implemented. Security product vendors, such as those selling specific types of tax stamp technology, have an interest in representing their particular technological solution as superior. Parties without extensive knowledge of the various available technologies may find it challenging to make an informed choice between competing technologies.

To ensure the appropriate choice of technology, Parties need not only appropriate support on technological issues, but also the ability to conduct threat analyses – in other words, to make realistic assessments of the nature of the illicit trade that is already occurring, or might soon occur, in their country/sub-region. This is an area where capacity-building and technical assistance are also important.

The Secretariat's proposed approach: some comments

In Annex 2 to the Interim performance report for the 2012-2013 workplan and budget (FCTC/COP/5/20), the Secretariat provides an overview of proposed activities and budget for ITP preparatory work.

Important elements of the Secretariat's proposed approach include:

1. Recognition of the importance of *scoping technical assistance and capacity-building needs* – in other words, we don't yet know the nature and the magnitude of assistance Parties may need to implement the Protocol;
2. The need for better *co-ordination with other international organizations with relevant expertise*. Because of the cross-cutting nature of the Protocol, capacity-building will need to involve co-operative arrangements with other organizations;
3. The need for *more technical information, particularly on tracking-and-tracing systems*. Despite extensive discussions at FCTC INBs, at the expert group that prepared the ITP template, at ITP INBs and at various intersessional meetings, there are still a number of technical issues that Parties need guidance on and/or that will require further co-ordination – notably the interface between national tracking-and-tracing systems to create a functioning global regime;
4. The need for *country missions by experts*. To be implemented effectively, the Protocol will require more than simply transposing the language of the Protocol into national law. It will require co-operative action by multiple government ministries and agencies, such as finance, revenue, health, customs, justice and police. It is likely that substantial numbers of Parties will need individualized advice and support;
5. The need for *international and interministerial co-operation*. The Secretariat proposes to kick-start regional co-operation via regional workshops attended by one health and one non-health representative from each FCTC Party.

The key question that Parties will need to discuss is this: Is the suggested budget sufficient to make sufficient progress on *all* the above elements? Or should work on some issues be postponed to ensure other elements are better covered?

Scoping of technical assistance and capacity-building needs

We note in particular that the scoping of technical assistance and capacity-building needs would depend on a self-assessment checklist to be completed by Parties, with no specific budget allocated to this item. Self-assessment checklists are widespread in the initial stages of implementing new international instruments. They of course depend on respondents' access to relevant information, which may be difficult to achieve for many Parties in the case of the ITP.

By way of comparison, it is worth reviewing Parties' responses to tax-related questions in the FCTC official instrument (particularly sections 2.8 and 2.9). In theory, *every* Party should be able to provide precise information about present and past tobacco tax rates – after all, it is the government itself that sets tax rates. In practice, some Parties provide no information at all on tax rates; others provide present tax rates, but no indication of trends; and many provide no information on the *price* of tobacco products. This points to lack of staff (i.e. the person tasked with answering the questionnaire simply does not have the time to do any research), to lack of communication between the health ministry (which generally receives the FCTC questionnaire) and the finance ministry officials who would have the relevant tax information and history, or to lack of clarity about the meaning of the questions.

A self-assessment checklist for the ITP would need to look at Parties' capacity to do things such as:

- a) Conduct a successful investigation into a sophisticated cigarette-smuggling ring, and prosecute the ring leaders;
- b) Develop a detailed call for tenders for a system of unique markings that meets the criteria of Article 8, including the database, scanners and other elements needed to make tracking-and-tracing useful;
- c) Set up a licensing system for manufacturers, importers and exporters, enact and enforce a prohibition on failure to register, and keep the registry of licensees up to date.

Questions on such issues are clearly not ones that most tobacco-control officials, housed in health ministries, can answer off the top of their heads. A meaningful self-assessment would require fairly lengthy discussions with other ministries and agencies, often about topics about which the relevant health ministry may have relatively little technical knowledge to begin with.

One concern for FCA is that the Parties that are *most* likely to need substantial technical assistance are the ones that are *least* likely to have the staff and the structures to conduct a meaningful self-assessment, at least without outside support.

An alternative approach would be to design the country missions envisioned in the proposed budget as *scoping* missions, to a representative sample of Parties. In other words, experts would be sent to a certain number of Parties to sit down with the relevant ministries and agencies to discuss the extent to which illicit trade control measures are already in place, the work that will need to be done to comply with the Protocol and the capacity-building and technical assistance needs that will have to be met. Information from such missions would provide a much clearer picture of what sorts of co-operative arrangements with other organizations will be needed to implement the Protocol. While clearly Parties would need to consent to host such missions, an effort could be made to recruit Parties that met certain criteria (e.g. one large and one small low- or lower-middle-income Party per region, a reasonable mix of Parties with and without existing markings systems, Parties with and without explicit national strategies on controlling illicit trade in tobacco products, etc.)

If this change is seen as too drastic, it would at least be important to ensure that sufficient staff or consultant time is available to provide appropriate support, from Geneva, for the self-assessment process.

Co-ordination with international organizations with expertise in protocol-related matters

By the first session of the MOP, it would be very helpful for the Secretariat to know enough about technical assistance and capacity-building needs, and to have had sufficient discussions with relevant partners, that it can provide a clear overview of possible co-operative arrangements. Ideally, this would allow MOP1 to mandate the Secretariat to sign memoranda of understanding, or otherwise formalise co-operative arrangements.

Achieving this ambitious objective depends in part on having a reasonable estimate of the extent and nature of prospective ITP Parties' technical assistance and capacity-building needs, as well as the time to discuss in detail with partner organizations the training and expert support they already offer or could add to their training programmes without too much difficulty. In some cases, it will also be important that Parties make the case, in the governing bodies of prospective partners, that illicit trade in tobacco products needs to be a priority issue.

For example, the United Nations Office on Drugs and Crime has a wide range of capacity-building initiatives and programmes, several of which are probably relevant to ITP implementation. It may be helpful to consider involving representatives of prospective partner organizations, such as UNODC, in the technical assistance/capacity building scoping exercise discussed in the previous point.

Regional workshops, intergovernmental and interministerial cooperation

The Secretariat proposal envisions one regional workshop per region, bringing together a minimum of one health and one non-health representative per Party for a two-day workshop. Parties may wish to discuss how much can be achieved in a two-day meeting of this type. Realistically, they would provide a review of key articles of the Protocol; a few relevant case studies of successful Party initiatives; the opportunity to meet relevant experts face-to-face, and also to strike up or deepen relationships with colleagues from other countries.

A possible issue is that there might not be a critical mass of officials from one type of agency or department (say, police or customs) at a particular workshop. And only Parties with sufficient resources to bring delegates from all relevant ministries and agencies would get the full benefit from the workshop.

Another possible concern, as with self-assessment checklists, is that the Parties who are most in need of technical assistance may have the most difficulty getting maximum benefit from a regional workshop. In particular, it is very important that Parties send the right representatives – but these may be more difficult to identify in the case of Parties where interdepartmental discussions on ITP implementation have yet to occur.

It is worth at least discussing the advantages and disadvantages of other possible approaches. For example:

- Where there are already regional or sub-regional meetings of officials from a particular 'target' ministry (say, of finance officials), it might be possible to add an ITP-related session for their benefit;
- Some type of training-of-trainers model could be set up. For example, one representative of each type of 'target' ministry from each region could come together for a longer period (e.g. one week), talk through the practical aspects of implementation, and engage their regional colleagues by phone or on-line meetings;
- As mentioned in the Secretariat document, on-line meetings are substantially cheaper than in-person workshops (but also have significant drawbacks);

- It would of course be possible to re-direct the budget for large workshops towards smaller but longer meetings – either more single-country missions or sub-regional or topical meetings. Fewer Parties would be directly involved, but those that were might get more substantial support.

FCA does not have a specific recommendation with respect to the format for pre-MOP1 capacity-building activities. We note, however, that the Secretariat is attempting to achieve a number of ambitious objectives with a comparatively small budget. If Parties are not willing to increase this budget, they may wish to consider doing a smaller number of things (in particular, more systematic scoping activities) but doing them in more depth.

Relationship between ITP and the rest of the FCTC

As noted in other FCA briefs (see *FCA Policy Briefing: International Cooperation* and *FCA Policy Briefing: Mechanisms of Assistance*) it is our view that COP5 should discuss not only an implementation plan for the Illicit Trade Protocol, but also the mechanisms of assistance for implementation of the Convention itself.

It will be important to maintain a balance within the Secretariat between ITP implementation and the central mission of implementing a public health treaty. It would be unfortunate, for example, if professional staff with ITP-related tasks and expertise came to outnumber those working on the rest of the Convention. It would also be unacceptable if the costs of ITP implementation were covered by cuts to the budget for other aspects of the FCTC.

In this respect, we welcome the Secretariat's suggestion that the cost of preparatory work for ITP implementation should be covered from extrabudgetary contributions.

Concluding comments

FCA agrees that the Illicit Trade Protocol should be adopted without amendment at COP5, and that extensive discussions should occur at this session on the preparatory work that is needed even before the Protocol comes into effect.

FCA commends the Secretariat for its work in developing a two-year plan to prepare for the ITP's entry into force. For this plan to be successful, Parties need to analyse it in detail and commit to making substantial efforts of their own at the national, regional and global levels.

In FCA's view, it is particularly important that the first session of the MOP:

- Have a clear view of the extent and nature of technical assistance and capacity-building needs, particularly amongst low and middle-income Parties;
- Receive specific proposals on co-operative arrangements with potential partner organizations (such as the United Nations Office on Drugs and Crime).

It is also crucial that individual Parties that have not already done so engage in a whole-of-government analysis of the practicalities of ITP implementation.

Finally, it is crucial that Parties collectively guard against tobacco industry efforts to impose an industry-friendly agenda on ITP implementation.