

Policy Briefing: Next Steps on Illicit Trade

Fourth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control, 15-20 November 2010, Punta del Este, Uruguay

Recommendations

- FCA believes that further negotiations to conclude a protocol are necessary;
- Given that the Parties and the Secretariat clearly need time to conduct essential preparatory work, FCA recommends that the INB be held later in 2011 rather than earlier;
- FCA recommends the establishment of a working group, reporting to the next INB and involving staff and experts from relevant international agencies, to help ensure that the provisions of the protocol complement and do not duplicate the provisions of existing international agreements and the work of existing agencies;
- Parties need to ensure the protocol does not encourage interactions between the industry and Parties' law enforcement and other relevant agencies that are contrary to Article 5.3 or other provisions of the FCTC.

Background

The fourth session of the Conference of the Parties (COP) to the WHO Framework Convention on Tobacco Control (FCTC) will be presented with the results of negotiations at the third and fourth sessions of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products (INB), including a report from the Chairperson of the INB and a current draft protocol text (documents FCTC/COP/4/4 and FCTC/COP/4/5). The Chairperson reports that although the INB did not reach a final agreement on the draft protocol, it "made very significant progress and reached consensus on 26 provisions, while 23 remain under discussion".¹

In preparation for consideration by the COP of next steps in relation to the draft protocol, the COP Bureau requested that the Secretariat prepare a paper 'to inform Parties about possible options for continuing the negotiations and adopting the protocol' (document FCTC/COP/4/INF.DOC./3). The Secretariat reports that "the COP may decide to extend the mandate of the Intergovernmental Negotiating Body for a fifth and final session to be held in 2011, and forward to it the draft text as produced by the fourth session of the Intergovernmental Negotiating Body with a request to finalise negotiations for final consideration and adoption of the protocol by a subsequent session of the COP".² It also reports that "there would have to be a period of at least six months between the conclusion of the fifth session of the Intergovernmental Negotiating Body and the subsequent session of the Conference of the Parties".³

Why Fighting Illicit Trade Matters

Illicit trade is a vitally important issue for tobacco control, particularly because of its impact on use of price rises (usually through tax increases). Price rises are the single most effective means of reducing tobacco consumption. To the extent that cheap illicit tobacco products are available in any country, they reduce the impact of price rises on prevalence rates. Across the world, the tobacco industry has used the threat of illicit trade to lobby governments against tax rises. This was the key justification for including Article 15 in the FCTC.

¹ FCTC/COP/4/4 Report of the Chairperson of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products to the fourth session of the Conference of the Parties, paragraph 26.

² FCTC/COP/4/INF.DOC./3 Options for concluding the negotiations on a protocol to eliminate illicit trade in tobacco products, paragraph 6.

³ Ibid, paragraph 8.

FCA considers an effective protocol, properly linked to existing international agencies with relevant expertise in dealing with customs and law enforcement matters, including transnational organised crime, to be an essential part of an FCTC strategy against illicit trade in tobacco products. An effective protocol will have a real and permanent impact in reducing the extent of the illicit tobacco trade, without undermining or contradicting any provision of the FCTC.

Therefore, it is FCA's view that further negotiations to conclude a protocol are necessary. An INB is preferable to the option of suspending and reconvening the COP to discuss the protocol, since INB Party delegations are more likely to include a good balance of health, legal and customs expertise.

Timing of an INB

The Secretariat has made "a preliminary booking at the International Conference Centre in Geneva (CICG) for the weeks of 6-13 March 2011 and 4-11 December 2011 (the only dates that are available in Geneva in 2011 for this or any other suitable venue). The Secretariat has also secured the possibility of extending the work from 14-20 March 2011 in WHO's conference facilities (with lower seating capacity compared with the CICG), should a second week, partially or in full, be required for the negotiations (and for adoption as appropriate)." ⁴

FCA believes that it is more important to make thorough preparations for an INB 5 than it is to hold one early. It would be a serious and possibly terminal setback for negotiations if an INB 5 were to end without an agreement on the text of the protocol.

There is a need for continuing dialogue between Parties over the remaining supply chain control articles (including the critical issues of licensing and due diligence).

There is also a continuing need for work to ensure that the provisions of the protocol complement and do not duplicate the provisions of existing international agreements and the work of existing United Nations and other intergovernmental agencies, and for consideration of how efforts to combat illicit tobacco trade can be integrated into existing arrangements. When the second session of the COP took the decision to establish the INB, it mandated the INB "to take into account existing agreements and arrangements relevant to the objective of the intergovernmental negotiating body in order to maximise synergy and complementarity, and to avoid duplication, between the protocol and such agreements and arrangements". ⁵

FCA recommends that a working group of Parties be established to further consider this aspect of the INB's mandate before the next negotiating session. To facilitate effective discussions on maximising synergy and complementarity and avoiding duplication, all efforts should be made to ensure that staff from the UN Office on Drugs and Crime (UNODC), the World Customs Organization (WCO) and other agencies with relevant expertise participate in the working group.

Given that the Parties and the Secretariat clearly need time to conduct preparatory work, FCA recommends that the INB be held later in 2011 rather than earlier.

Costs

There are grounds for serious concern about funding for the additional negotiations. According to the Secretariat: "the cost of the fifth session of the Intergovernmental Negotiating Body would be approximately US\$ 2,100,000 for a one-week session ... and approximately US\$ 3,050,000 for a two-week session ... If the negotiations were to continue and be finalised by the fifth session of the Intergovernmental Negotiating Body, an extraordinary session of the Conference of the Parties later in the year would be necessary to adopt the protocol, unless adoption were to be delegated to the fifth regular session of the Conference of the Parties. The cost of such a short (presumably two-day) extraordinary session held on WHO premises would be approximately US\$ 565,000". ⁶

If Parties are serious about concluding a protocol, it is vital that they provide the necessary funds so that other important work of the Secretariat is not threatened by a financial crisis.

As requested by the INB, the Secretariat has also produced an estimate of costs likely to be associated with implementation of the protocol (document FCTC/COP/4/INF.DOC./1). For the first two years after entry into force, the costs are estimated at US\$ 6.45 million, of which US\$ 3.4 million is the estimated cost of administration (including six additional Secretariat staff), approximately US\$ 1.7 million for technical assistance and travel support, and approximately US\$ 1.36 million for information

⁴ Ibid, paragraph 22.

⁵ A/FCTC/COP/2/DIV/9 Decisions document from COP 2, page 30, point 3.

⁶ FCTC_COP4_ID3-en.pdf paragraphs 26 and 27.

technology (IT) support. Subsequent costs for each biennium are estimated at US\$ 5.95 million. These are costs at the international level: even more important are the initial costs to individual Parties (particularly low and middle income country Parties) of implementing the protocol, although in the medium to long term the protocol should produce substantial increases in tax receipts as illicit trade declines. These cost issues must be addressed as part of continuing negotiations on mutual assistance, technology transfer and other means of implementation support.

Industry Agreements

FCA has published a legal analysis of the publicly available legally binding European Union (EU) agreements with Philip Morris International, British American Tobacco, Japan Tobacco Inc and Imperial Tobacco Ltd.⁷ This analysis raises concerns about elements of the agreements in relation to Parties' obligations under Articles 5.3, 12 and 13 of the FCTC.

The EU agreements are not the only arrangements between governments and the tobacco industry in relation to illicit trade that give rise to such concerns. FCA will be conducting further research on other agreements known to exist between governments and the industry, some legally binding (for example in Canada and Colombia) and some not (such as the memoranda of understanding in effect in many countries).

It is very important that the protocol does not encourage interactions between the industry and Parties' law enforcement and other relevant agencies that are contrary to Article 5.3 or other provisions of the FCTC. In their efforts to develop a robust international system to control illicit trade in tobacco products, Parties will need to safeguard against tobacco industry interference, including by avoiding secret, non-transparent arrangements or interactions, inappropriate sharing of data and information, particularly sensitive law enforcement information and techniques, and dependence on industry funding.

⁷ http://www.fctc.org/index.php?option=com_content&view=article&id=430:legal-analysis-of-eu-agreements-with-multinational-tobacco-companies&catid=165:illicit-trade&Itemid=192.