

FORMIDABLE FRAMEWORK

The FCTC's recently adopted protocol against illicit trade enables legitimate stakeholders to thwart tobacco smugglers and counterfeiters on multiple fronts.

By Jeannie Cameron

On Nov. 12, the 176 parties to the World Health Organization's Framework Convention on Tobacco Control (FCTC) unanimously adopted the protocol to eliminate illicit trade in tobacco products during the fifth Conference of the Parties (CoP5), in Seoul, South Korea. As the FCTC's first protocol, the adoption was a momentous occasion and marked the conclusion of four years of negotiation through five multilateral intergovernmental negotiating bodies (INBs) in Geneva.

The protocol will remain open for signature until Jan. 9, 2014. Any country that signs the protocol during the open period is allowed to ratify it at any point in the future. Signature of the protocol signifies an intention to implement its provisions but does not imply legal compliance. Ratification is the step by which a state gives its consent to be bound to the provisions. At that point, it has either carried out the obligations nationally as it interprets them, or is intending to do so. If a state does not sign the protocol in the open period, it will not be able to ratify it. Instead, it can become a party to the protocol by means of accession. In practice, ratification and accession will have the same legal effect. For example, the U.S. government signed the FCTC in May 2004, and although it has not ratified it, it has the right to become a party to the treaty by means of accession.

Once the protocol has 40 ratifications or accessions, it officially enters into force as international law 90 days later. At present, the protocol process is in the national domain,

where governments consider their obligations in terms of protocol compliance and prepare for implementation of the provisions.

The protocol is divided into several parts. Three of them are substantive—Part III: Supply Chain Control; Part IV: Offenses; and Part V: International Cooperation.

Supply chain

Part III includes measures governments must take to ensure the tobacco product supply chain is secure and includes some of the most high-profile measures, covering mostly finished tobacco products and tobacco-making machinery. Remarkably, inputs were omitted as part of the supply chain-control provisions, even though it can be hard to counterfeit a cigarette without tobacco or without cellulose acetate (filter tow) to make filters.

Omitting inputs had always been controversial throughout the negotiations, but such was the wisdom of the negotiators not to include them. In any case, it is presumed national governments will include cigarette components when drafting national laws and regulations. Included are requirements for licensing of manufacturers, and importers and exporters of both tobacco products and tobacco-manufacturing equipment. The provisions include requirements for due diligence—"know your customer"—when entering into business relationships with those involved in any capacity in the tobacco supply chain.

This area specifies how long transaction records must be

kept, as well as security measures relating to payments. It requires tobacco-related Internet sales and duty-free sales to be compliant with all the protocol's provisions.

Most importantly, there are provisions addressing the movement of tobacco products in containers through free-trade zones, and in particular the intermingling of tobacco products with nontobacco products where there is an intention to disguise them. Not included in the early drafts of the protocol, this provision was introduced by the African region into the preamble during the INB2 meeting in 2008 and gained the support of significant parties such as the European Union. The World Customs Organization, the Organization for Economic Cooperation and Development and the tobacco industry had consistently raised free zones as problematic. By INB4 in 2010, the issues of international transit and transshipment were added, ensuring greater weight for governments to take enforcement action in these areas.

Tracking and tracing

Perhaps the most talked-about parts of the protocol are the tracking and tracing provisions outlined in Article 8. The protocol requires a global tracking and tracing regime, comprised of national and/or regional tracking and tracing systems, to be established within five years from the treaty's entry into force. In addition, a global information-sharing focal point is to be established at the FCTC secretariat, to act as a central hub for information on global tobacco movements. The information fed into the hub will come from governments, which are obligated to establish their own national tracking and tracing systems. In this way, the national system becomes part of a global "regime." Information is to be accessible to all parties, either directly or via a link, to help them establish the legal status of tobacco products, their origins and possible points of diversion, and to enable the monitoring and controlling of the movement of tobacco products through the supply chain.

To ensure information is compatible and accessible, the protocol specifies the data that national tracking and tracing systems must include. Central to this requirement is a unique identification marking contained in a nonremovable code or stamp on the pack, unit packages and any outside packaging of the tobacco products. The unique identification mark must contain some of the information outlined in the protocol's list of data fields. These include:

- the date and location of manufacture
- the name of the manufacturing facility
- the machine used for manufacture
- the production shift or time of the manufacture
- the name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer
- the intended market of retail sale
- a product description
- any warehousing and shipping data
- the identity of any known subsequent purchaser
- the intended shipment route, the shipment date, the destination, the point of departure and the consignee

It is clear that the requirements relate specifically to tracking and tracing functionality—the ability to track forward and trace backward through the supply chain to establish any point of diversion. To do this accurately, tracking and tracing systems need to be able to aggregate the same unique identification markings onto packs, cartons, master cases and pallets, and the relevant codes or stamps need to be applied to tobacco products at the point of manufacture. In addition, the protocol allows tracking and tracing systems to include verification of appropriate taxes and duties paid at the point of manufacture, import or release from customs or excise control.

For cigarettes, these provisions must be met within five years of the protocol's entry into force. Other tobacco products must comply within 10 years. It also applies to tobacco products that are manufactured in or imported into a party's territory. Logistically, therefore, it will require significant organization and cooperation between manufacturers and the countries into which they export, as importing countries will need to ensure tobacco products entering their territories comply with national obligations, which may differ from the exporting country's compliance requirements.

Offenses

Part IV of the protocol deals with unlawful conduct and criminality in relation to the tobacco trade. It includes issues such as liability, prosecutions, sanctions and permitted investigative techniques including electronic surveillance. It also covers seizure payments, encouraging authorities to impose levies, proportionate to lost taxes and duties, on producers, manufacturers, distributors, importers or exporters. This part also requires seized tobacco, tobacco products or machinery to be destroyed.

International cooperation

Part V of the protocol covers information sharing and cooperation between FCTC parties in terms of implementation and accessing recorded information. It deals with information sharing and cooperation in relation to law enforcement, including mutual administrative assistance, jurisdiction with respect to criminal matters and extradition. There are requirements for international assistance and cooperation in training, scientific, technical and technological matters, as well as in the investigation and prosecution of offenses.

International cooperation is a significant part of the protocol, and the phrase "cooperation with competent international organizations," appears repeatedly throughout its text. In this light, it seemed odd that the CoP rejected Interpol's request to receive FCTC observer status, especially given the fact that the World Trade Organization and the World Customs Organization had been accredited. As the leading international law enforcement agency, Interpol's remit includes a large proportion of what is contained in the protocol's provisions.

"Interpol is the world's largest international police organization, with 190 member countries," the group wrote on its application. "It facilitates cross-border cooperation, supports and assists all organizations, authorities and services whose

mission is to prevent or combat international crime. A fundamental part of this work is combating the activities of those transnational organized criminals who generate significant profit from a wide range of illicit activities on a regional and increasingly global basis.”

Interpol said it was in a good position to assist the FCTC parties—the majority of which are also members of Interpol—in coordinating and facilitating international cooperation to eliminate illicit trade in tobacco products, as much of it was its core business and part of the normal support services it provided to its member states. The organization also pointed to its observer status to the U.N. General Assembly.

In the end, only the South Center, an NGO dealing with health and climate change, was granted status.

The CoP based its rejection of Interpol’s application on the fact that the organization had accepted \$15 million, spread over a period of 10 years, from Philip Morris International to assist in its fight against the illegal trade in tobacco products. This was deemed by the CoP to be a breach of FCTC Article 5.3: “In setting and implementing their public health policies with respect to tobacco control, parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”

Given that issues of illicit trade do not directly relate to health policy—a significant point made clear during CoP2 in Bangkok by the chair of the protocol negotiations, Ian

Walton George, of the European Anti-Fraud Office (OLAF), then there had to be another reason as to why Interpol was not admitted.

While much was made of the PMI-Interpol connection—a link presented in such a way as to portray an underhanded and inappropriate relationship between an enforcement agency and a tobacco company—not a word was spoken about the fact that OLAF had received funding from four major tobacco companies for the very same goal!

In 2007, Japan Tobacco International gave OLAF \$400 million over 15 years; in 2009, PMI pledged \$1.25 billion over 12 years; and in 2010, British American Tobacco gave \$200 million and Imperial Tobacco U.K. pledged \$300 million over 20 years.

While some observers blamed the tobacco-control NGOs for Interpol’s exclusion, could there be some law enforcement turf wars at play here?

At the end of the day, however, the new protocol provides a formidable international legal framework for tackling the illicit trade, and that is largely because it goes beyond just the issue of intellectual property and counterfeiting, and covers the smuggling of genuine products and tax evasion as well. The document covers all aspects of illicit trade and takes into consideration not only the interests of brand owners, but also those of governments by addressing the loss of tax revenues.

In this way, it is a truly comprehensive framework. **TR**



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