The New WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products – Challenges Ahead

By Jonathan Liberman

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Introduction

At its recent fifth session held in Seoul, South Korea, from November 12-17, the Conference of the Parties (“COP”) to the WHO Framework Convention on Tobacco Control (“WHO FCTC”) adopted the Protocol to Eliminate Illicit Trade in Tobacco Products (“Protocol”). The COP called upon all parties to consider signing, ratifying, accepting, approving, formally confirming, or acceding to the Protocol at the earliest opportunity, with a view to bringing the Protocol into force as soon as possible.[1] The Protocol will be open for signature from January 10, 2013, and will enter into force on the 90th day following the 40th party joining the Protocol.

This Insight outlines the contents of the Protocol and the major challenges that its ratification and implementation are likely to present for the Convention and the World Health Organization (“WHO”) in light of its focus on customs and law enforcement matters.

The Protocol: Background and Content

The Protocol to Eliminate Illicit Trade in Tobacco Products is the first protocol to the WHO FCTC, which is the first convention negotiated under Article 19 of the WHO’s Constitution. The WHO FCTC was “developed in response to the globalization of the tobacco epidemic”[2] and adopted by the World Health Assembly in May 2003. It entered into force in February 2005 and now has 176 parties. Its objective is “to protect present and future
generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.”[3] Parties undertake to implement a range of measures relating to matters such as: protection against tobacco industry influence; taxation; protection against exposure to tobacco smoke; product regulation and disclosure; packaging and labelling; education, communication, training, and public awareness; advertising, promotion, and sponsorship; cessation; illicit trade; sales to and by minors; economically sustainable alternatives; protection of the environment; liability; and international cooperation.

The Protocol’s objective is “to eliminate all forms of illicit trade in tobacco products, in accordance with the terms of Article 15” of the treaty.[4] Its preamble explains the reasons for its negotiation and adoption: illicit trade in tobacco products undermines price and tax measures designed to strengthen tobacco control; the increase in accessibility and affordability of illicitly traded tobacco products has adverse effects on public health; illicit trade in tobacco products undermines states’ economies and adversely affects their stability and security; and illicit trade in tobacco products generates financial profits that are used to fund transnational criminal activity.

The main elements of the Protocol include:

- **supply chain control**: including licensing (or equivalent control) of manufacture, import, and export of tobacco products and manufacturing equipment; exercise of due diligence through the supply chain of tobacco, tobacco products, and manufacturing equipment; tracking and tracing of tobacco products based on unique identification markings such as codes or stamps; record-keeping; suspicious transaction reporting; and the intermingling of tobacco products with non-tobacco products at the time of removal from free zones;
- **offenses**: including the establishment of offenses; liability of legal (i.e., corporate) persons; the application of sanctions; and the use of special investigative techniques (including controlled delivery, electronic surveillance, and undercover operations); and
- **international cooperation**: including information sharing; cooperation in the investigation and prosecution of offenses; training and technical assistance; mutual administrative assistance; mutual legal assistance; and extradition.

**A Customs and Law Enforcement Protocol to a Health Treaty**

The Protocol is, in its content, essentially a customs and law enforcement treaty born into a health institution. The Protocol’s text evinces some acknowledgment of this. Its preamble recalls and emphasizes the importance of other relevant agreements such as the UN Convention Against Transnational Organised Crime, the UN Convention Against Corruption, and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The preamble also recognizes the need to enhance cooperation between the Protocol’s Secretariat—which is also the Secretariat to the WHO FCTC (“Convention Secretariat”)—and the UN Office on Drugs and Crime, the World Customs Organization (“WCO”), and other bodies. The Protocol contemplates its governing body, the Meeting of the Parties (“MOP”), requesting the cooperation of competent international and regional intergovernmental organizations, including financial and development institutions, in order to provide technical and financial cooperation for achieving its objective.

Yet it is not clear how the WHO—either the Convention Secretariat, or the WHO Secretariat and its regional offices, which support implementation of the treaty—will be able to facilitate the Protocol’s implementation.[5] This was prefigured in the lead-up to and at the recent
session of the COP. Anticipating the Protocol’s adoption, the Convention Secretariat developed for the COP’s consideration a document outlining the activities and budget required for preparation of the entry into force of the Protocol.[6] The Secretariat’s projections anticipated the Protocol entering into force within two years of adoption, based on the experience of the treaty, and the first session of its MOP being convened immediately before or immediately after the sixth session of the COP, in the second half of 2014. The document specified the kind of work that the Secretariat would perform, including providing technical assistance, raising awareness, preparing technical papers, and cooperating with relevant international organizations. The Secretariat would “utiliz[e] existing capacity” but would “require some additional capacity to carry out the protocol-related tasks.” Additional staff would be required to cover Protocol-specific issues that are not currently covered by the Secretariat, such as: matters related to customs and supply chain control; criminal law and law enforcement; and IT issues related to the global information sharing focal point—i.e., the heart of the Protocol. Three professional staff —“one per area of expertise”—supported by two administrative staff, would be needed.

In the budgetary arrangements agreed by the COP, U.S. $195,000 was committed from core funds (voluntary assessed contributions) for staff to work on the Protocol prior to its projected entry into force and the first session of its MOP.[7] This represents less than the cost of employing one qualified staff member for one year.[8]

In the absence of financial and human resources for the Secretariat, the European Union, the Protocol’s primary originator and financial supporter, distributed a “Roadmap for carrying out priority tasks for the implementation of the Protocol in the period up to MOP1,” which included:

In the first six months of 2013, assess each Article of the Protocol to determine what has to be done in order to implement its provisions – check list to be prepared.

The Secretariat should farm out this work to experts in the Parties and use experts who have been involved in the discussions of the Protocol. This work could be done in capitals and exchanged between the experts electronically. Then, if necessary, it could be pulled together by a dedicated member of the Secretariat and made available to all Parties (translation needed in 6 languages).[9]

The COP requested the Convention Secretariat to develop a self-assessment checklist “for use by Parties in assessing their legal, regulatory and policy frameworks in view of the requirement[s] of the protocol” “as early as possible in 2013.”[10] The “farming out” of this work to “experts” seems an unusual way to prepare such documents, which will likely be the first “official” documents outlining the Protocol’s requirements. It is not apparent, for example, who will have input or sign-off. This “farming out” proposal reflects the lack of capacity and subject matter expertise in the Convention Secretariat in the areas at the heart of the Protocol. After the Protocol’s entry into force, the MOP will be functioning and adopting its own budget and workplan (including for the operation of the Protocol Secretariat). At that point, it is not clear that parties to the Protocol would or should turn the Protocol Secretariat, institutionally a part of the WHO, into a mini customs and law enforcement agency for tobacco products.

Cooperation With the Tobacco Industry in Combating Illicit Trade?
Under Article 5.3 of the WHO FCTC, parties commit, “[i]n setting and implementing their public health policies with respect to tobacco control[,] . . . to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.” Guidelines on the implementation of Article 5.3 adopted by the COP at its third session underline the “fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests” and recommend, among other things, that parties establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.[11]

The Protocol’s preamble records that its parties are “[m]indful” of Article 5.3, underlining that, while the Protocol deals with customs and law enforcement matters, as a Protocol to the FCTC, it applies to “the setting and implementing [of] public health policies with respect to tobacco control.”

In sharp contrast, the international agencies that have the expertise and capacity to facilitate and support activity to combat illicit trade—such as the WCO and INTERPOL—tend to view the tobacco industry as just another private industry stakeholder, with which close cooperation is to be expected.[12] This tension played out at the recent COP, at which parties decided to defer INTERPOL’s application for COP observer status.[13] INTERPOL had applied for intergovernmental organization observer status as it “believes that it can play an important role in assisting the parties to the WHO FCTC, the majority of which are also member countries of INTERPOL, to coordinate and facilitate international cooperation to eliminate illicit trade in tobacco products.”[14] Controversy arose over INTERPOL’s acceptance on June 12, 2012, of a pledge of fifteen million Euros over three years from the multi-national tobacco company, Philip Morris International,[15] and more broadly over its attitude to cooperate with the tobacco industry, as described in an article by its General Counsel and Legal Officer published just prior to the COP:

Any success against the ITTP [illicit trade in tobacco products] requires that law enforcement and national authorities work together with the legitimate tobacco industry for a number of reasons. Tobacco companies are able to assist governments in different aspects, including providing resources to enhance capacity, providing technical assistance such as schemes to distinguish genuine tobacco products from counterfeit products and training customs officials in relation to contraband products.[16]

The WCO welcomed the adoption of the Protocol, declaring that it would “continue to seek, identify and promote synergies with the Convention Secretariat with a view to ensuring the smooth implementation of this important international treaty.”[17] On November 23, 2012, the Secretaries General of WCO and INTERPOL met at WCO headquarters “to reaffirm cooperation between the two organizations in their efforts to bolster the fight against transnational organized crime.” They “reaffirmed the roles and mandates of their respective organizations, agreed to coordinate their activities more efficiently at the international level, emphasized the need for customs and police to work together more closely at the national level, and committed to enhancing future cooperation and coordination.”[18]

The tobacco industry sees illicit trade as an area in which it can portray itself as a “partner” of governments and intergovernmental organizations and “legitimise” itself as an ordinary private sector entity.[19] Both Philip Morris International (“PMI”) and British American Tobacco (“BAT”) have welcomed the Protocol’s adoption, with PMI “applauding the World Health Organization”[20] and BAT expressing a belief that “the Protocol . . . could really
strengthen international co-ordination and enforcement, providing an effective framework for tackling illicit trade” and that:

the only way to stop these smugglers, counterfeiters and tax evaders – some of whom have links to weapons, drugs, people trafficking and other organized crime activities – is for regulators, law enforcement authorities and the tobacco industry to work together. It’s also important that other government departments get involved as this will directly impact their areas of responsibility.[21]

Conclusion

In 1997, after work towards the creation of the WHO FCTC had commenced, PMI obtained advice from a consulting firm on how it might respond to the threat of a WHO treaty. The firm described the “campaign” being waged by WHO “and its allies” as “as close to war as a civil campaign gets” and an “all-out, multi-sided assault that will allow no quarter.” It outlined three alternatives “short of caving in altogether” that the “targets of the assault” should consider. The first—“No treaty”—was “preferable but not really a practical course to pursue.” The second—“Delay the adoption of a treaty”—would “[i]n the end . . . simply delay the more onerous aspects of WHO’s objectives.” The third—“Achieve an acceptable framework that would effectively restrict subsequent protocols”—was also not ultimately secured, but, notably, this alternative contemplated that “[a] treaty, for example, that is restricted to addressing teen smoking and/or smuggling might be acceptable.”[22]

There is little doubt that the tobacco industry regards the Protocol—the development, and now adoption, of which it has supported—as creating an opportunity to take back ground lost upon the creation of the WHO FCTC. Two overriding challenges now that the Protocol has been adopted will be to ensure that it neither overwhelms other parts of the WHO FCTC—in terms of attention, budget, and personnel—nor dilutes the norms and values of that treaty.

About the Author:

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Endnotes:


[3] Id. art 3.

[4] Protocol to Eliminate Illicit Trade in Tobacco Products, supra note 1, Annex, art. 3.


[12] Liberman, supra note 5, at 341.


