Status of the Protocol to Eliminate Illicit Trade in Tobacco Products

Report by the Convention Secretariat

INTRODUCTION

1. In its fifth session (Seoul, Republic of Korea, 12–17 November 2012), the Conference of the Parties (COP) adopted the Protocol to Eliminate Illicit Trade in Tobacco Products\(^1\). At its sixth session (Moscow, Russia, 13–18 October 2014), the COP adopted decision FCTC/COP6(6), which requested the Convention Secretariat to:

   (a) continue to promote ratification, acceptance, approval, formal confirmation and accession to the Protocol, including through multisectoral face-to-face and online meetings, and by promoting the use of the self-assessment checklist by all government sectors involved in the Protocol implementation;

   (b) identify and establish a panel of experts, composed of up to two experts per WHO region, mandated to support the Secretariat to provide technical and legal advice upon request, including on customs, tax administration and enforcement, and to facilitate the exchange of information, experiences and challenges among Parties, including on existing good practices and opportunities in implementation of the Protocol;

   (c) further engage with the World Customs Organization (WCO), the United Nations Organization on Drugs and Crime (UNODC), the World Trade Organization (WTO) and other bodies, as appropriate, in order to identify means of accelerating the entry into force of the Protocol, particularly by facilitating multisectoral discussions;

   (d) to continue to develop and make available the technical capacity required within the Secretariat to support Parties wishing to advance their work in the areas covered by Article 15 of the WHO FCTC and the Protocol; and

   (e) identify mechanisms of technical and financial support to Parties in implementation of the Protocol\(^2\).

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\(^1\) See decision FCTC/COP5(1).

\(^2\) See decision FCTC/COP6(6).
2. In decision FCTC/COP6(20), the COP, acknowledging that the first session of the Meeting of the Parties (MOP1) would not take place in the financial period 2014–2015, decided to reallocate US$ 345 000 from Voluntary Assessed Contributions (VAC) to promote the Protocol’s entry into force, and to support of the work of the panel of experts on the Protocol. The activities undertaken in these two areas are reflected in paragraphs 3–14 below.

3. In accordance with Article 44 of the Protocol, it is subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations that are Party to the WHO FCTC. The Protocol enters into force on the 90th day following the date of deposit of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary3. The Protocol was signed by 54 WHO FCTC Parties4, and at the time that this document was written, there were 19 Parties to the Protocol5. At least 21 more Parties to the WHO FCTC need to become Parties to the Protocol before it can enter into force.

ACTIVITIES SINCE THE SIXTH SESSION OF THE CONFERENCE OF THE PARTIES

Promotion of ratification and entry into force of the Protocol

4. To raise awareness of the Protocol and promote its entry into force, the Convention Secretariat organized a series of multisectoral, subregional workshops for Parties to the WHO FCTC. These workshops brought together officials from different government sectors involved in the implementation of the Protocol, including health, customs, justice, finance and trade, with experts on Protocol matters, members of civil society and representatives of intergovernmental organizations (IGOs), including the WCO, the World Bank and WHO. A total of 54 WHO FCTC Parties have been invited to, and 51 WHO FCTC Parties have attended these workshops.

5. The following subregional Protocol workshops were held – in the South-East Asia Region: Nay Pyi Taw, Myanmar, 9–11 December 20146 and Colombo, Sri Lanka, 13–14 October 20157; in the Eastern Mediterranean Region: Kuwait City, Kuwait 23–24 March 20158; in the Americas Region: Panama City, Panama, 22–24 April 20159; and in the African Region: Gaborone, Botswana, 6–8 May 201510. A further workshop was organized by the WHO Regional Office for Africa in cooperation with the Convention Secretariat in Harare, Zimbabwe, from 20–22 April 201611.

6. In addition, the Convention Secretariat cooperated with WHO on the following meetings on tobacco control issues, where it organized dedicated sessions to the Protocol: Black Sea Economic Cooperation (BSEC) Meeting on Tobacco Tax and Illicit Trade, Istanbul, Turkey, 29 September 2015;

3 Article 45 of the Protocol.
4 From 10 January 2014, the Protocol can no longer be signed. The list of signatories is available at http://who.int/fctc/protocol/ratification/en/.
5 Austria, Burkina Faso, Côte d’Ivoire, Democratic Republic of the Congo, Ecuador, France, Gabon, Iraq, Latvia, Mali, Mongolia, Nicaragua, Portugal, Saudi Arabia, Spain, Sri Lanka, Turkmenistan, and Uruguay, as well as the European Union.
6 WHO FCTC Parties that participated: Cambodia, China, Japan, Lao People’s Democratic Republic, Malaysia, Myanmar, Philippines, Republic of Korea, Thailand and Viet Nam.
7 WHO FCTC Parties that participated: Bangladesh, Bhutan, India, Maldives, Nepal, Sri Lanka and Timor-Leste.
8 WHO FCTC Parties that participated: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.
9 WHO FCTC Parties that participated: Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama.
10 WHO FCTC Parties that participated: Botswana, Burkina Faso, Democratic Republic of the Congo, Gambia, Lesotho, Madagascar, Mali, South Africa, Swaziland and Togo.

7. The Convention Secretariat is preparing to hold the following subregional Protocol workshops prior to COP7: in the Americas Region: Brasilia, Brazil, 14–16 September 201612; and in the Western Pacific Region: Nadi, Fiji, 26–28 September 201613. Additional subregional Protocol workshop are planned to be held for the European Union and its Member States in February 2017, and for the Newly Independent States of the European Region in March 2017.

8. Findings of the subregional Protocol workshops indicate several common challenges faced by WHO FCTC Parties in ratifying the Protocol, which include: tobacco industry interference, specifically increasing attempts to encourage adoption of the Codentify14 system, and tobacco industry attempts to present itself as a partner in Protocol implementation; a lack of mutual ownership of the Protocol across government sectors; difficulties in engaging in inter-ministerial collaboration and coordination during the implementation process; and the lack of capacity and resources for Protocol implementation.

9. Issues also vary by region. For example, challenges identified in the African Region include a lack of understanding of the ratification process and a prioritization of tobacco control legislation over Protocol ratification; in the South-East Asia Region these include a large-scale illicit trade, government instability, tobacco licensing issues and the lead agency for the Protocol failing to involve the Ministry of Health. For all regions, it was found that assistance is needed in translating the Protocol into simple language; implementing a tracking and tracing system; improving information sharing; and producing best practices of and a cost analysis for the implementation of the Protocol.

10. On a technical level, countries saw a challenge in demonstrating the benefits of the Protocol to decision-makers; understanding how to implement a tracking and tracing system; building capacity in all relevant government sectors; and engaging with and obtaining support from experts, particularly on technical clarification of each provision of the Protocol.

11. Based on the information obtained in subregional and bilateral meetings, the Convention Secretariat continues to compile information on Parties’ progress in preparing for ratification of and accession to the Protocol.

Establishment of a panel of experts on the Protocol

12. As mandated by the COP, the Convention Secretariat has established a panel of experts on the Protocol. It is composed of two experts per WHO region mandated to support the Secretariat in providing assistance and advice to Parties in core areas of the Protocol and facilitate information

12 WHO FCTC Parties that will be invited: Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela.
13 WHO FCTC Parties that will be invited: Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.
14 Codentify was developed by Philip Morris International and has been endorsed by British American Tobacco, Japan Tobacco International and Imperial Tobacco.
15 This is an ongoing exercise. An overview is being made on the following website: http://www.who.int/fctc/cop/cop7/Documentation-Supplementary-information/en/.
Panel members will undertake relevant activities individually and as a group. In order to effectively fulfil its mandate, panel members will share experiences from interventions and missions at country level and form a network and repository for the exchange and dissemination of relevant good practice, knowledge and information.

13. Parties, through their WHO FCTC focal points, are invited to address requests for assistance to the Convention Secretariat. The Secretariat will assign each request to a panel member, within the limits of available funding and taking into account the specific expertise required for the assignment as well as the experts’ availability, regional affiliation, familiarity with the situation of the requesting Party and language requirements. Panel members may also be invited to participate as experts and resource persons in Protocol workshops at the regional, subregional and national levels.

14. The expert panel held a coordination meeting (Geneva, Switzerland, 3–4 May 2016) to discuss its modalities of work. The experts discussed challenges and opportunities related to the implementation of the Protocol and how the panel members, individually and collectively, might help Parties to accelerate Protocol ratification.

15. During the coordination meeting, the expert panel developed a list of possible actions, which will be notified to Parties through the Secretariat website. The panel also made a number of suggestions for the Convention Secretariat to consider in order to provide better assistance and advice to Parties, including:

   a) plan and organize a meeting of decision-makers from WHO FCTC Parties that are close to ratification;
   b) plan and organize a meeting of WHO FCTC Parties with free zones;
   c) plan and organize a meeting of finance ministers on the margins of statutory meetings of the International Monetary Fund (IMF) and the World Bank Group; and
   d) establish a repository for the collection of information on Protocol-related matters.

Engagement with international bodies

16. The Protocol recognizes the need for enhanced cooperation between the Convention Secretariat and several IGOs, including WCO, UNODC, WTO and other bodies, as appropriate. Furthermore, the COP has requested the Secretariat to coordinate with international organizations on Protocol-related matters.

17. As such, the Convention Secretariat has promoted the Protocol at high-level global events and raised the importance of customs, law enforcement and other relevant governmental sectors in supporting the work of the Protocol, especially in reference to the complementary benefits to public health, economics, crime prevention and security that would result from its implementation. The panel of experts at its coordination meeting also identified the engagement of each panel member with international bodies and IGOs.


17 The Convention Secretariat, in coordination with several experts on the panel, as well as expert consultants for the Protocol, identified 30 priority countries (based on signature, attendance of multisectoral, subregional meetings on the Protocol, and requests for assistance) to focus on regarding the ratification of the Protocol to Eliminate Illicit Trade in Tobacco Products.

18 The 2016 Annual Meetings of the International Monetary Fund and the World Bank Group are scheduled to take place on 7–9 October 2016, and the Spring Meetings of both bodies are scheduled for 21-23 April 2017, in Washington, D.C (https://www.imf.org/external/am/).

19 This is under development and will be included in the information database.
organizations active in his/her areas of expertise, and with his/her professional network, including at the regional level, as a potentially effective means of outreach and cooperation.

**Development of instruments to promote and implement the Protocol**

18. The Convention Secretariat continues to promote the use of the self-assessment checklist it prepared for Parties to assess their legal, regulatory and policy frameworks in view of the requirements of the Protocol\(^{20}\). A checklist of steps required at the national level in order to become a Party to the Protocol, as well as an overview of key terms and procedures related to ratification and entry into force have also been prepared and made available to Parties\(^{21}\). In addition, an expert paper addressing questions and answers on key aspects of the Protocol is available on the Secretariat website in all six languages of the COP\(^{22}\).

19. Likewise, model instruments for ratification, acceptance and approval (for WHO FCTC Parties that have already signed the Protocol) as well as a model instrument for accession (for WHO FCTC Parties that have not signed the Protocol) have been prepared by the Convention Secretariat and are available in all six languages on its website\(^{23}\).

20. Finally, several technical papers have been prepared on the promotion and implementation of the Protocol, including a set of questions and answers about the Protocol, the role of the tobacco industry in illicit trade, a case study of becoming a Party to the Protocol and a subregional study on illicit trade in Central America\(^{24}\).

**Identification of mechanisms of technical and financial support to Parties**

21. The Convention Secretariat has identified mechanisms for both technical and financial support to Parties wishing to advance work in areas covered by Article 15 of the WHO FCTC and the Protocol by facilitating the exchange of information between Parties requiring support and those which have already implemented the respective measures. These include the identification of international experts in relevant areas of work to support implementation of Article 15 of the WHO FCTC as well as ratification of the Protocol, upon the request of Parties.

22. In addition, the Convention Secretariat has concluded discussions with the European Union (EU) about a grant for conducting work on the Protocol in Eastern EU- and neighbouring countries. This represents a successful fundraising mechanism that will allow the Secretariat to support WHO FCTC Parties in becoming Parties to the Protocol and in its implementation.

**POSSIBLE WAY FORWARD**

**Further action to promote entry into force and implementation of the Protocol**

23. To further support the ratification process, the COP may wish to consider extending the mandate of the panel of experts, and to request the Secretariat in cooperation with the panel to undertake the relevant activities identified by the panel, subject to availability of funding.

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\(^{20}\) The self-assessment checklist is available at [http://www.who.int/fctc/protocol/about/en/](http://www.who.int/fctc/protocol/about/en/).

\(^{21}\) [http://who.int/fctc/protocol/about/en/](http://who.int/fctc/protocol/about/en/).


\(^{24}\) All documents are available at [http://www.who.int/fctc/protocol/about/en/](http://www.who.int/fctc/protocol/about/en/).
24. In addition, the COP may wish to request the Secretariat to:

a) continue to promote ratification, acceptance, approval, formal confirmation and accession to the Protocol;

b) continue to provide advice and assistance to WHO FCTC Parties in becoming Parties to the Protocol, as well as on technical aspects of Protocol implementation, in cooperation with the expert panel as appropriate; and to continue to facilitate the work of the members of the panel of experts, both individually and collectively, subject to availability of funding;

c) further engage with IMF, WCO, UNODC, WTO, the World Bank and other bodies, as appropriate, in order to facilitate meaningful multisectoral discussions and promote the entry into force of the Protocol; and

d) report on its activities to the eighth session of the COP (COP8).

MOP1

25. As noted above, an additional 21 Parties to the WHO FCTC need to become Parties to the Protocol to allow its entry into force.

26. In accordance with Article 33.1 of the Protocol, MOP1 will be convened “immediately before or after the next regular session of the COP following the entry into force of the Protocol”. Under Article 45.1, the Protocol shall enter into force on the 90th day following the date of deposit of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession. Accordingly, if the 40th instrument is deposited on or before 9 August 2016, the Protocol will enter into force on 6 November 2016, and MOP1 will accordingly be held on 14–16 November 2016, immediately after COP7.25

27. If the 40th instrument is deposited later than 9 August 2016, MOP1 will be held back-to-back with COP8, which is expected to take place in late 2018. Depending on the number of ratifications, acceptances, approvals, formal confirmations or accessions, as well as the time frame within which these will occur, there might be a significant time gap between the entry into force of the Protocol and the convening of MOP1. While this would give ample time to Parties to prepare for national implementation of the Protocol, it would mean a long time span during which no action would be taken at the international level. The COP may wish to consider measures to avoid this.

28. One option would be for the COP to establish a subsidiary body to carry out substantive preparations for MOP1, in the manner of the Intergovernmental Working Group (IGWG) established by the World Health Assembly (WHA) to prepare COP1 to the WHO FCTC. This could accelerate decision-making by MOP1. Such a body would provide a forum for technical and political discussions on many Protocol matters, including the tracking and tracing regime to be established in accordance with Article 8 of the Protocol. Nevertheless, only the MOP has the authority to make decisions on these matters. A subsidiary body could not provide concrete guidance to Parties on Protocol

25 The text of Article 33.1 of the Protocol allows MOP1 to be held either immediately before or immediately after the COP. The Bureau in October 2015 accepted the proposal of India, as the host Government, to convene MOP1 immediately after COP7. Accordingly, if COP7 is to be the “next” regular session following the entry into force of the Protocol, entry into force must occur on or before 6 November 2016, to allow MOP1 to be convened, which requires the deposit of the 40th instrument on or before 9 August 2016.
implementation. Accordingly, there would be an inevitable delay in measures prescribed by the Protocol becoming effective. Holding an IGWG would have cost implications. COP may wish to consider deciding in a similar manner as at its sixth session to use the unspent funds allocated for MOP1 in the current biennium to fund Protocol-related activities, including an IGWG. However, additional funds would be required.

29. In this respect, it should be noted that some provisions must be implemented by Parties within a certain time period following the entry into force of the Protocol, namely Articles 6.5 (key inputs, five years), 8.1 (global tracking and tracing, five years), 8.3 (identification markings, five years and 10 years), 12.1 (free zones, three years) and 13.2 (duty free sales, five years). A long time gap between the entry into force of the Protocol and the convening of MOP1 may in practice mean shortening the time Parties have to implement these provisions. This is of particular concern with regards to the establishment of the global tracking and tracing regime, which will require guidance and decisions by the MOP. The tracking and tracing regime is a key element of the Protocol, and its establishment will be a priority.

30. Accordingly, an alternative possibility would be to convene MOP1 six months after the entry into force of the Protocol (to allow sufficient time for logistics and technical preparations), in conjunction with a very short (half day) extraordinary session of the COP convened in accordance with Article 23.2 of the WHO FCTC, to be immediately followed by MOP1.

31. The COP may wish to consider whether such a deviation from Article 33.1 of the Protocol might be justifiable to avoid a long delay between the entry into force of the Protocol and the convening of MOP1, a gap which would shorten the time available to Parties to implement the time-bound obligations of the Protocol (including in particular the tracking and tracing system), thus placing an undue burden on Parties and subsequently leading to a delay in the implementation of the Protocol.

32. Holding MOP1 in conjunction with a short extraordinary session of the COP would have cost implications. COP may wish to consider deciding in a similar manner as at its sixth session to use the unspent funds allocated for MOP1 in the current biennium to fund the extraordinary session of COP and MOP1. However, additional funds would be required.

**ACTION BY THE CONFERENCE OF THE PARTIES**

33. The COP is invited to note this report and provide further guidance, particularly in relation to the possible way forward.

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26 See decision FCTC/COP6(20) Amendment to the workplan and budget for the financial period 2014-2015
27 Funds allocated for MOP1 in the Workplan and Budget for 2016-2017: USD 300'000 covered by VAC and USD 242'000 covered by extrabudgetary funds, see decision FCTC/COP6(27), [http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6(27)-en.pdf](http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6(27)-en.pdf).