The Protocol to Eliminate Illicit Trade in Tobacco Products

Convention Secretariat (2016)
Illicit trade in tobacco products: the problem
Extent of illicit trade in tobacco products

- Nearly 10% of the global cigarette trade is illicit;

- Significantly higher in low- and middle-income countries, up to 50% and more;

- If illicit trade were eliminated, governments worldwide could gain at least USD 30 billion/year in tax revenue.
Some consequences of illicit trade in tobacco products

- Public health
  Increased accessibility, affordability and consumption of tobacco products

- Link with organized crime
  Profits from illicit trade fund other criminal activities

- Loss in government revenue (taxes)
The solution:

Protocol to Eliminate Illicit Trade in Tobacco Products
Overview

- **First Protocol** to the WHO FCTC

- **New international treaty**, legally linked to the WHO FCTC, based on Article 15 WHO FCTC

- Adopted in November 2012 by COP 5 in Seoul after 4 years of negotiations (2008-2012)

- Will **enter into force** after 40 Parties to the WHO FCTC have adhered to it (through ratification/acceptance/approval or accession)

- Multisectoral: Implementation requires active involvement of multiple government sectors, including public health, trade, finance, customs, foreign affairs, law enforcement and justice
Definition and objective

- **Definition of “Illicit trade” (Article 1.6)**
  Any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity

- **Objective of the Protocol (Article 3)**
  To eliminate all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO FCTC
Structure: Three substantive parts

1) Preventing illicit trade – controlling the supply chain (Part III, Articles 6-13)
2) Law enforcement – establishing unlawful conduct with dissuasive sanctions (Part IV, Articles 14-19)
3) International cooperation – cooperation on technical, administrative, law enforcement and legal matters (Part V, Articles 20-31)
Part III: Supply chain control

- Establishment of licensing or equivalent systems (Art. 6)
- Requirement for persons engaged in supply chain to conduct due diligence (Art. 7)
- Establishment of a tracking and tracing system (Art. 8)
- Requirement of record keeping by all persons engaged in the supply chain (Art. 9)
- Requirement of security and preventive measures by all persons engaged in supply chain (Art. 10)
- All obligations to be applied to sale by Internet (Art. 11)
- Controls, prohibition of intermingling of tobacco and other products in free zones / international transit (Art. 12)
- Provisions to be applied to duty free sales (Art. 13)
Part IV: Law enforcement measures

- Parties to establish specified activities as unlawful (Art. 14)
- Legal persons to be held liable for unlawful conduct (Art. 15)
- Effective and dissuasive sanctions for liable persons (Art. 16)
- Parties to consider seizure payments (Art. 17)
- Confiscated products to be destroyed (Art. 18)
- Parties to use special investigative techniques to combat illicit trade (Art. 19)
Part V: International cooperation

- Reporting and cooperation obligations (Art. 20)
- Information sharing on enforcement issues (Art. 21)
- Confidentiality of information (Art. 22)
- Assistance and cooperation obligations (Art. 23-24)
- Protection of sovereignty of each Party (Art. 25)
- Establishment of sovereignty over criminal offences (Art. 26)
- Law enforcement cooperation (Art. 27)
- Mutual administrative and legal assistance (Art. 28-29)
- Extradition (Art. 30-31)
1. Establishment of tracking & tracing regime: within 5 years of entry into force of the Protocol (Art. 8.3)

2. Unique markings: each within 5 years of entry into force for the Party for cigarettes and their packaging, within 10 years for all other tobacco products (Art. 8.3).

3. Controls in free zones: within 3 years of entry into force for the Party (Art. 12.1)
Flexibility in implementation

Many provisions allow Parties to consider outside factors when implementing the provisions of the Protocol:

• **“as appropriate”:** take account national situation / circumstances / capacities (e.g. record keeping by all persons engaged in the supply chain – Art. 9.1)

• **“subject to national law”:** acknowledge limitations set by other areas of the law, e.g. confidentiality / privacy (e.g. use of special investigative techniques – Art. 19; information sharing – Art. 20-22)

• Parties **“are encouraged to” / “shall endeavor to”:** acknowledgment that a given action may be difficult / possible only within certain limits (e.g. licencing of retailers, growers, transporters, wholesalers – Art. 6.2)
Decision COP6(6), 2014

Calls on all WHO FCTC Parties to

- ratify the Protocol at the earliest opportunity;
- advocate entry into force of the Protocol, including through forums of relevant organizations (World Customs Organization (WCO), United Nations Office on Drugs and Crime (UNODC), World Trade Organization (WTO), others)

Requests the Secretariat to

- establish a Panel of Experts to provide technical and legal advice on Protocol matters to countries upon request
- engage with competent organizations to help accelerate entry into force of the Protocol
Becoming a Party to the Protocol

- Only States that are Parties to the WHO FCTC can become Parties to the Protocol.
- The process is the same for the Protocol as for the WHO FCTC!
- Three key steps to be taken, two at the national and one at international level. The order of the steps is determined by the constitutional requirements of each country.
Three key steps to becoming a Party

• **National level**: Enactment of national legislation and implementation of other administrative and institutional measures required to implement the Protocol

• **National level**: Approval of the Protocol for ratification or accession (usually by Parliament or executive authority).

• **International level**: Deposit of the instrument of ratification (acceptance/approval) or accession with the United Nations Treaty Section (usually by the Ministry of Foreign Affairs)
International process of becoming a Party and entry into force

**Signature**  
(uuntil 9 Jan 2014)

**Ratification (acceptance, approval)**  
1. Domestic prep. process  
2. Deposit of instrument of ratification (acc./ appr.)

**Accession**  
(from 10 Jan 2014)  
1. Domestic prep. process  
2. Deposit of instrument of accession

**Entry into force -> binding international law**  
**States -> Parties**

- **General**: 90 days after deposit of 40th instrument of ratification / accession
- **For each additional state**: 90 days after deposit of instrument of ratification / accession
Assistance to Parties

- **Expert Panel on the Protocol**
  - Composed of 2 experts per WHO region invited by the Secretariat
  - Broad range of experience and expertise, including customs, tax administration, enforcement
  - Parties may request assistance from Panel members through the Secretariat

- **Protocol Website**
  - [www.who.int/fctc/protocol/about/en/](http://www.who.int/fctc/protocol/about/en/)

- WHO FCTC Parties may contact the Convention Secretariat with questions ([protocolfctc@who.int](mailto:protocolfctc@who.int)).
Resources on the Protocol Website

www.who.int/fctc/protocol/about/en/

• **The Protocol: Questions and Answers** (6 UN languages): Answers to frequently asked questions on becoming a Party and implementing the Protocol

• **Self-assessment checklist** (E): A guide through the elements of national legislation that must be enacted to implement the Protocol

• **Steps required at national level** (E): A guide through the steps of the national process of becoming a Party

• **Becoming a Party** (E): A guide through the steps of the international process of becoming a Party