

# Opportunities and risks of the proposed FCTC protocol on illicit trade

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## ABSTRACT

Illicit trade in tobacco products presents a threat to public health because it undermines the use of tax and price policies, which are among the most effective mechanisms for reducing tobacco consumption. Parties to the WHO Framework Convention on Tobacco Control (FCTC) are in the final stages of negotiating a protocol aimed at strengthening international cooperation in the fight against illicit tobacco trade. While an effective multilateral response to illicit tobacco trade would make a significant contribution to global tobacco control, achieving this through the FCTC forum is challenging. First, while illicit tobacco trade is a health problem, the expertise, experience and capacity needed to combat illicit trade are not traditionally found in health agencies. The development of links with other agencies, both domestic and international, is critical to ensure both an effective response and an efficient use of limited governmental and non-governmental resources. Second, in many parts of the world, the tobacco industry cooperates closely with governments in the combating of illicit trade. This cooperation poses risks for tobacco control, particularly if relationships and norms of cooperation spill over into other areas of FCTC implementation. An examination of the industry's positioning suggests that it sees an opportunity to portray itself as 'legitimate' and 'responsible', a friend of governments, and a way to integrate itself into FCTC processes. This paper makes suggestions for moving forward in this challenging area towards ensuring that the approach taken actually reduces illicit tobacco trade, strengthens tobacco tax policies and does not operate to undermine the FCTC.

## BACKGROUND

Well-designed tax and price policies reduce tobacco consumption.<sup>1</sup> Therefore, the evasion of taxes on tobacco products undermines tobacco control. It also has a major effect on economies. It is estimated that US\$40.5 billion in global tax revenue is lost each year due to illicit tobacco trade.<sup>2</sup> Like other kinds of profitable illicit activity, illicit tobacco trade occurs both within jurisdictions and across borders.

For these reasons, an effective multilateral response to combat illicit tobacco trade is an essential part of global tobacco control. Parties to the WHO Framework Convention on Tobacco Control (FCTC)<sup>3</sup> have undertaken to implement a range of anti-illicit trade measures. They are now in the final stages of negotiating a protocol to the FCTC designed to further strengthen international cooperation in the fight against illicit tobacco trade.

But achieving an effective multilateral approach, particularly through an international health agency, is not easy.

First, the expertise, experience and capacity needed to effectively combat illicit trade are not generally found in health agencies.

National measures required to effectively address illicit trade ordinarily fall within the mandates and expertise of customs, revenue, law enforcement and justice agencies. Internationally, it is bodies such as the United Nations Office on Drugs and Crime and the World Customs Organization that have the expertise and resources to combat smuggling, illicit manufacturing and money laundering and to provide the technical assistance and training that states need in order to implement effective domestic customs and law enforcement counter-measures. The FCTC Secretariat and the WHO do not have experience in these areas.

Second, the tobacco industry is attempting to increase the attention being given to illicit trade and convince policy makers that implementation of tobacco control measures including tax increases, retail display bans and plain packaging will increase illicit trade.<sup>4-5</sup> The industry's strategy is twofold: dissuade governments from implementing effective tobacco control measures and position itself as a 'legitimate' and 'responsible' partner, ready, willing and able to support and work with governments.<sup>6-9</sup>

The FCTC was in its early infancy in mid-2007 when its Conference of the Parties (COP) decided to commence negotiation of an illicit tobacco trade protocol.<sup>10</sup> At that time, WHO, government health officials, tobacco control NGOs and many others involved in those early discussions had little experience in the operation of treaties, let alone in dealing with illicit tobacco trade through international instruments.

The excitement of having secured a global tobacco control treaty has been sobered by the reality that treaties are difficult to implement. Substantial technical and financial resources and support are needed, particularly in low- and middle-income countries. This is particularly the case for the FCTC, which has a powerful, well-resourced, unscrupulous industry relentlessly fighting against its successful implementation. In its most recent global FCTC progress report, the FCTC Secretariat underlined some of the key constraints and barriers that many Parties are facing including the lack of adequate technical and financial resources and capacities, weakness or lack of effective legislation, tobacco industry tactics, and insufficient intersectoral cooperation.<sup>11</sup>

There has been significant development of treaty experience and knowledge within the tobacco control and broader public health community over the past 6 years since the FCTC entered into force.

Yet the lessons learnt about FCTC implementation have not so far been adequately integrated into the illicit trade protocol deliberations. Proposed obligations have been negotiated in somewhat of a vacuum, with very little discussion so far about how the protocol will be implemented in practice, how it will be financed or what institutional arrangements would best facilitate its implementation.

### COOPERATION BETWEEN GOVERNMENTS AND THE TOBACCO INDUSTRY ON ILLICIT TRADE

In many parts of the world, the tobacco industry works closely with governments in anti-illicit trade activity.<sup>6 7</sup> Types of 'cooperation' and 'collaboration' between governments and the tobacco industry in relation to illicit tobacco trade include industry training of customs and other government officials,<sup>12</sup> meetings and exchanges of information, participation in workshops and conferences,<sup>13</sup> and the contribution of resources<sup>6 7 14</sup> to 'assist' governments in their surveillance, monitoring and law enforcement activities.

The COP-2 decision to commence the negotiation of an FCTC protocol on illicit trade '[r]eaffirm[ed] the importance of Article 5.3, of the Convention, which states: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from the commercial and other vested interests of the tobacco industry in accordance with national law". Acknowledging the need to assist Parties in resisting tobacco industry influence, Parties also decided to develop guidelines for the implementation of Article 5.3.<sup>15</sup>

Adopted at COP-3, the Article 5.3 guidelines contain a number of recommendations such as limiting interactions with the tobacco industry to only those strictly necessary for effective regulation, ensuring transparency with respect to interactions with the industry and rejecting partnerships with the industry.

While combating illicit trade has revenue protection and law and order objectives, it is clearly a 'public health polic[y] with respect to tobacco control' and thus subject to the requirements of Article 5.3. The practical application of Article 5.3 guidelines relating to government interactions with the tobacco industry to combat illicit tobacco trade may be less clear-cut than in most other areas of tobacco control. However, close government-industry cooperation that includes features such as non-transparency, inappropriate industry ownership or control of information, the 'donation' of resources by the tobacco industry and tobacco industry corporate social responsibility public relations elements clearly contravenes Article 5.3.

Tobacco industry involvement in the smuggling of its products has been well documented.<sup>16-18</sup> The FCTC has been seen as an opportunity to address the industry's complicity in illicit trade and apply tougher regulations in relation to its compliance with tax laws, just as it has for other measures such as bans on advertising, promotion and sponsorship, and strengthened health warnings.

However, the tobacco industry is seeking to integrate itself into the FCTC illicit trade protocol negotiation process and domestic illicit trade control activity. This should be understood as part of a broader attempt to re-invent itself as a 'responsible' industry selling a risky product rather than a moral pariah knowingly selling a harmful and addictive product.<sup>19-21</sup> The tobacco industry sees illicit trade as an area where it can portray itself as a 'partner' in a joint struggle—the 'legitimate' companies 'working together' with governments and intergov-

ernmental agencies against 'illegitimate' counterfeiters, smugglers and organised criminals. Unfortunately, the tobacco control community has not adequately anticipated the extent to which the tobacco industry would pursue and appear to succeed in this re-invention.

### RISKS

An FCTC protocol on illicit tobacco trade that is not properly linked to the international customs, law enforcement and criminal justice architecture will likely do little to tackle the most significant underlying causes of illicit trade in the countries in which it is the greatest problem. These causes—under-resourced customs, law enforcement and criminal justice agencies; lack of capacity to enact, monitor and enforce legislation and regulations; weak governance systems; corruption; lack of technological capacity—are not specific to tobacco products.<sup>2 22-24</sup> Over 4 years after the COP decided to commence protocol negotiations, there has been little discussion of how such linkages might be effected.

An illicit trade protocol that is not properly integrated into the existing international infrastructure will also carry substantial risks for the FCTC. It is clear that effective implementation of the proposed protocol will require significant financial and technical resources. There is a danger that resources will be diverted from other areas of FCTC implementation, in which the FCTC Secretariat and WHO do have well-established institutional expertise.

Further, in the absence of adequate resources for implementation, it is likely that the tobacco industry stands ready to provide funding to governments to 'work together' on protocol implementation. The model for this approach has been recently set with two multimillion dollar, 20-year 'cooperation agreements' between British American Tobacco (BAT) and the European Union (\$200 million)<sup>6</sup> and Imperial Tobacco and the European Union (\$300 million),<sup>7</sup> entered into in July and September 2010, respectively. According to BAT, 'it initiated the discussions with the European Commission for an agreement to tackle the problem jointly' because it 'sees illicit trade as a major threat to legitimate tobacco companies'.<sup>25</sup> It stated:

Under the agreement, British American Tobacco will be joining forces with and working alongside the European Commission and the law enforcement authorities of the Member States. The agreement will see cooperation in a number of areas for the purpose of tackling illicit trade in tobacco and includes the funding by British American Tobacco of \$200m (€134m) over the next 20 years.

The European Commission has confirmed that the Agreement 'was initiated by BAT' and that 'BAT will work with the European Commission, its anti-fraud office OLAF, and Member States' law enforcement authorities to help in the fight against contraband and counterfeit cigarettes'.<sup>26</sup>

Finally, if there is to be cooperation between governments and the tobacco industry in combating illicit trade, facilitated by an intergovernmental organisation(s), careful thought needs to be given to what is an appropriate role for the FCTC Secretariat and/or WHO and what is best handled by other intergovernmental organisations. WHO has made it clear that it will not work with the tobacco industry.<sup>27</sup> This must remain the case. Not surprisingly, BAT has a different view: 'Tackling illicit trade requires co-operation and understanding between legitimate tobacco companies, governments and organisations such as the World Customs Organisation, World Trade Organisation and World Health Organisation'.<sup>18</sup>

## What this paper adds

- ▶ A number of published papers have demonstrated that illicit tobacco trade presents a threat to public health and call for an effective global response. The proposed illicit trade protocol to the WHO Framework Convention on Tobacco Control is invariably portrayed as that response, with little explanation or exploration of what would be needed for the proposed protocol to be effective in practice.
- ▶ With the protocol negotiations entering their final stages, this paper outlines the challenges that must be confronted if an effective global response is to be achieved, identifies the risks that the protocol poses to tobacco control and offers suggestions for moving forward.

## CONCLUSION

Illicit tobacco trade is a serious problem for public health and one that must be tackled multilaterally. However, a number of challenges must be addressed to ensure that the approach taken actually reduces illicit tobacco trade, strengthens tobacco tax policies and does not operate to undermine the FCTC. These include:

- ▶ devising appropriate arrangements and parameters for cooperation with other intergovernmental organisations to ensure that resources are most efficiently and effectively deployed, and that efforts to deal with illicit tobacco trade do not detract from the implementation of successful evidence-based tobacco control measures that fall within the expertise and competence of health agencies;
- ▶ considering institutional arrangements within the COP and WHO to quarantine the FCTC Secretariat, the COP and the WHO from unacceptable cooperation with the tobacco industry;
- ▶ ensuring that resources required for protocol development and implementation are not drawn from other areas of FCTC implementation—that is, notwithstanding difficult financial times, ‘new money’ must be found, and it must not be obtained from the tobacco industry in a manner that contravenes the FCTC;
- ▶ ensuring that, notwithstanding the close cooperation that has already developed between a number of Parties and the tobacco industry in combating illicit trade, the FCTC remains health focused and that its culture remains one in which the ‘fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests ...’ is always recognised.

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