
Elaboration of protocols (decision FCTC/COP1(16))

Elaboration of a template for a protocol on cross-border tobacco advertising, promotion and sponsorship

1. At its first session in February 2006, the Conference of the Parties to the WHO Framework Convention on Tobacco Control recognized that international collaboration for the control of cross-border advertising, promotion and sponsorship is an important area of tobacco control and decided to convene an expert group to prepare a template for a protocol on cross-border advertising, promotion and sponsorship on the basis of Article 13.8 of the WHO Framework Convention, taking into account the work of bodies competent in the matter (decision FCTC/COP1(16)). Article 13.8 of the WHO Framework Convention states Parties shall consider the elaboration of a protocol setting out appropriate measures for a comprehensive ban on cross-border advertising, promotion and sponsorship. The Conference of the Parties tasked the expert group with preparing either a template for a protocol for consideration by the Conference of the Parties at its second session, or, if unable to come up with a complete template, a progress report, setting out the scope, the main elements and the structure of a future protocol.

2. This document, prepared by the expert group, sets out the process by which members of the group were nominated and appointed, and outlines the method of work of the group. The template for a protocol on cross-border advertising, promotion and sponsorship prepared by the expert group appears as the attached Annex.

3. In accordance with decision FCTC/COP1(16) and under the direction of the Bureau of the Conference of the Parties (“the Bureau”)¹, the World Health Organization, acting as the interim secretariat to the WHO Framework Convention (pursuant to Article 24.2 and in accordance with decision FCTC/COP1(10)), invited each WHO region to nominate, in consultation with the Parties from their region, up to four experts to serve in the expert group. At its second meeting on 21 April 2006, the Bureau identified four crucial areas of expertise to be represented in the expert group (Public Health, Telecommunications/Informatics, Justice/Law Enforcement and Trade/Customs). They agreed that the experts needed to be from Contracting Parties and that they

¹ The Bureau of the Conference of the Parties comprises the officers elected from among the representatives of the Parties present at the first regular session of the Conference of the Parties, and includes a President, and five Vice-Presidents, one of whom acts as Rapporteur. Each of the WHO regions is represented by one Bureau member.

could be substituted if the need arose. In accordance with this decision, each regional office was invited to provide the Bureau, through the interim secretariat, with the curriculum vitae of one expert in their region in each of the abovementioned competencies. Nominations were endorsed by the Bureau.

4. Two meetings were held (Geneva, 13–15 September 2006 and Agra, India, 16–18 November 2006).
5. The expert group followed the procedure for election of officers as set out in the WHO Regulations for Expert Advisory Panels and Committees.¹ The group elected a chairman (Dr K. S. Reddy), a vice-chairman (Mr B. Rogers) and two Rapporteurs (Mr J. Liberman and Ms S. Ukropina).
6. The Bureau decided that civil society could participate in protocol template elaboration groups. After considering the Bureau's decision, the expert group decided at its first meeting to invite up to four representatives of civil society (reflecting the four competence areas) to attend its second meeting.
7. Acting on the expert group's decision, the interim secretariat issued an invitation to all nongovernmental organizations in official relations with the Conference of the Parties, as per Rule 31 of the Rules of Procedure of the Conference of the Parties, to submit nominations. Four nominations were submitted, all by the Framework Convention Alliance, and the nominees were invited to, and attended, the second meeting of the expert group.² No financial assistance was provided by WHO or any Party to facilitate the participation of the representatives of civil society.
8. At its first meeting, the expert group commenced with presentations of background papers outlining key issues, which had been prepared by four of the experts, followed by discussion.³ Dr D. Bettcher and Dr K. Kummer, representing the interim secretariat, also gave presentations.
9. The expert group then decided they would focus on the substantive aspects of a possible protocol, rather than procedural and institutional aspects, although it was noted that the latter would also be crucial to the effective operation of a protocol in practice.
10. As this process unfolded, there was some discussion about the appropriate boundaries of a future protocol, as compared to guidelines on the implementation of the provisions of Article 13 which Article 7 of the WHO Framework Convention requires the Conference of the Parties to propose. The point was made that, under Article 13 of the WHO Framework Convention, Parties have already agreed to strong obligations with respect to cross-border advertising, promotion and sponsorship, and that the obligations in Article 13 are specifically expressed to apply to "radio, television, print media and, as appropriate, other media, such as the internet" (Article 13.4(e)). Under Article 13.2, Parties have agreed, "in accordance with [their] constitution or constitutional principles, [to] undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship" which is to include, "subject to the legal environment and technical means available to that Party, a comprehensive ban on

¹ *Basic Documents*, 45th ed. Geneva, World Health Organization, 2005.

² The representatives of civil society were Mr O. Gunasekera (Public Health), Ms F. Godfrey (Justice/Law Enforcement), Dr J. Clough (Telecommunications/Informatics) and Dr A. Mitchell (Trade/Customs).

³ The papers were: "Cross-border advertising, promotion and sponsorship – scope of the problem" (Mr M. Allen), "The Tobacco Advertising Directive in the European Union" (Mr A. Maunu), "Developing country challenges for regulation of cross-border advertising, promotion and sponsorship" (Dr K. S. Reddy) and "Sources of legal authority and jurisdiction" (Mr J. Liberman).

cross-border advertising, promotion and sponsorship originating from its territory”. Under Article 13.3, Parties that are not in a position to undertake a comprehensive ban due to their constitution or constitutional principles are required to “apply restrictions” on all tobacco advertising, promotion and sponsorship. The obligation includes, “subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects”.

11. In addition, Article 13.7 states that “Parties which have a ban on certain forms of tobacco advertising, promotion and sponsorship have the sovereign right to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship originating from their territory in accordance with their national law”.

12. In consideration of these obligations already assumed, and rights already agreed to, by the Parties to the Convention, the need for a protocol to create new obligations and rights was somewhat unclear. It was agreed that it would be difficult to discuss the appropriate boundaries of a protocol in the abstract and that it would be useful to first explore how cross-border tobacco advertising, promotion and sponsorship should best be addressed, followed by an examination of what should be included in a protocol and what might be better dealt with by guidelines (or perhaps by other arrangements).

13. At the end of the first meeting, the group identified five main areas of work for further elaboration. The first four groups were organized around types of media, namely: print; television and radio (including satellite); film; and internet, telecommunications and emerging technologies. The fifth working group was tasked with examining promotional strategies that may be used across different media.

14. Working groups were set up for each area of work and it was agreed to continue the work in the intersessional period. Each working group had one facilitator acting as the focal point for the group. The working groups sent their textual inputs to the interim secretariat for compilation into one single document, which was made available to the entire expert group prior to the commencement of the second meeting.

15. During the second meeting, it was decided that the expert group would be divided into three new groups. The first group would combine print, television and radio (including satellite), and internet, telecommunications and emerging technologies; the second group would examine tobacco product placement and portrayal in films and related cultural products, as well as promotional strategies; and the third group would focus on detailing areas in which international cooperation would be required. Each group was asked to consider what matters might be included in a future protocol.

16. When the working groups returned to a plenary session and reported on the work they had done, a fuller discussion of the appropriate boundaries of a protocol was able to take place. The expert group reached the view that much of the work of groups 1 and 2 would be better dealt with in guidelines on the obligations that Parties have already assumed under Article 13 than in a protocol. It was decided that the work of the third group, which examined areas for international collaboration, would form the core of a future protocol. The expert group then divided again, this time into working groups 1 and 2, with representatives of the third group (international collaboration) joining those working groups, in order to integrate the material that group 3 had produced. The work was brought back to a plenary session for discussion and endorsement.

17. At the end of the second meeting, it was decided that the interim secretariat, in consultation with the officers of the group, would compile the textual inputs of the working groups from the second meeting into one report. The report was then sent to all experts, as well as the representatives from nongovernmental organizations invited to attend the second meeting, for review and comment. The final version, reflecting all comments, was then distributed to the group. In accordance with decision FCTC/COP1(16), the approved report was submitted to the Bureau, and will be presented by the Bureau to the Conference of the Parties at its second session.

18. Throughout its work, the expert group was assisted by the consideration of relevant precedents in other areas of international law. Several precedents were studied for essential elements and architecture of protocols, while others were useful with respect to particular issues that arose. A list of these various precedents can be made available.

19. For a number of areas identified as suitable for inclusion in a protocol, provisions of a broadly similar nature are also included in the WHO Framework Convention itself, for example: Article 13.6 (cooperation in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising), Article 13.7 (sovereign right to ban incoming cross-border tobacco advertising, promotion and sponsorship), Article 19.3 (assistance in legal proceedings related to civil and criminal liability consistent with the WHO Framework Convention), Article 22 (cooperation in the scientific, technical, and legal fields and provision of related expertise), Article 20 (research, surveillance and exchange of information) and particularly Article 20.4 (exchange of publicly available scientific, technical, socioeconomic, commercial and legal information and information regarding practices of the tobacco industry, taking into account and addressing the special needs of developing country Parties and Parties with economies in transition), and Article 26 (financial resources).

20. In respect of these matters, the elements for inclusion in the draft template for the protocol identified by the expert group generally go substantially beyond what is set out in the Convention. Consideration will need to be given to whether these are necessarily required to be included in a protocol. There are arrangements other than a protocol that could be considered, including the development of guidelines in accordance with Article 7 of the Convention, that would have the benefit of providing guidance to all Parties to the Convention, who have already assumed substantial obligations with respect to cross-border tobacco advertising, promotion and sponsorship. If a protocol is pursued, any protocol text should be drafted so as to avoid unnecessary duplication with existing WHO Framework Convention on Tobacco Control obligations and to make clear the relationship between the protocol's provisions and the relevant Articles of the WHO Framework Convention. Finally, the expert group noted that a protocol should in no way deviate from what has already been agreed to under the WHO Framework Convention, but rather enable Parties, acting cooperatively, to move forward more effectively in taking measures to address cross-border tobacco advertising, promotion and sponsorship.

ANNEX

**Template for a protocol on cross-border advertising, promotion and sponsorship,
as proposed by the expert group convened in accordance with decision
FCTC/COP1(16) of the Conference of the Parties to the WHO Framework
Convention on Tobacco Control at its first session**

1. States and regional economic integration organizations eligible to become party to the protocol (hereinafter collectively referred to as “entities”) cannot effectively address public policy challenges that have cross-border elements in the absence of cooperation with other entities. Cooperation is required in respect of the sharing of information and expertise about the nature of the problem, its manifestations and responses to it, as well as the development of more effective responses to the problem. When the problem is dealt with by law, cooperation is also required with respect to the reporting, investigation and prosecution of offences, as well as understandings in respect of the exercise of jurisdiction by entities and the enforcement of judgments made in one entity within the territory of another.
2. All of this is true of the problem of cross-border tobacco advertising, promotion and sponsorship. No entity can deal with tobacco advertising, promotion and sponsorship on its own. With both communications and persons – both natural and corporate – able to cross borders easily, what happens in one entity, and what is done by one entity’s nationals, inevitably impacts on other entities. Domestic measures are an important element of approaches to deal with cross-border tobacco advertising, promotion and sponsorship, but their effectiveness will be limited in the absence of international cooperation.
3. This document sets out the key matters that might be included in a protocol to deal with cross-border tobacco advertising, promotion and sponsorship. It focuses primarily on the areas that require international collaboration, rather than on the general institutional elements of a possible protocol, though these are also identified.

PREAMBLE, OBJECTIVES AND USE OF TERMS

4. A protocol would be expected to contain a preamble, as well as provisions setting out its objective or objectives and guiding principles, and to define key terms used in the protocol. The expert group did not address these provisions in detail, though it noted that the preamble would be expected to “recall” the WHO Framework Convention on Tobacco Control and, particularly, the Articles of the WHO Framework Convention under which Parties have already assumed obligations with respect to cross-border tobacco advertising, promotion and sponsorship, most notably Article 13. The preamble would also be expected to recall Article 13.8 of the WHO Framework Convention, which requires Parties to the Convention to “consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship”, Article 33, which provides for the adoption of protocols to the WHO Framework Convention, and decision FCTC/COP1(16), which “[r]ecogniz[es] that international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship is an important area of tobacco control”.

OBLIGATIONS WITH RESPECT TO INTERNATIONAL COOPERATION

General obligations

Description

5. In addition to specific obligations that may be included in a protocol, as described below, it is common for international legal instruments to include obligations of a more general nature that provide guidance on the way in which parties are expected to implement the protocol's provisions. Article 5 includes such general obligations – particularly Article 5.2(b).

Issues for a possible protocol

6. A protocol may include an Article setting out the Parties' general obligations. Such a provision may be modeled on Article 2.1 of the Cartagena Protocol, which states: "Each Party shall take necessary and appropriate legal, administrative and other measures to implement its obligations under this Protocol."

Identification of contact points

Description

7. Advertising originating within entity A may be received in entity B. While entity B may be able to take some domestic measures targeted at those within its territory involved in the dissemination or availability of the advertising, such measures will often not be as effective in controlling the advertising as if it were eliminated at source, and entity B may be put to considerable expense and inconvenience that would not arise if the advertising were eliminated at source by entity A. While entity B may seek to exercise extraterritorial jurisdiction to try to eliminate the material at source, again, this would put it to considerable expense and inconvenience, and raise potentially complex enforcement challenges that would not arise if the material were eliminated at source by entity A. Entity B needs to be able to easily inform entity A of the advertising, about which entity A may well not know, and request it to take appropriate action.

Issues for a possible protocol

8. Parties to the protocol could be required to identify a contact point within their entity – such as a relevant enforcement agency, government department or other competent authority – that would serve as an initial point of contact for that entity for all matters relating to cross-border tobacco advertising, promotion and sponsorship.¹

¹ Note the relationship to Article 20 of the Convention (Research, surveillance and exchange of information).

Information collection and sharing

Description

9. Where advertising originating within entity A is received in entity B, it may also be received in entities C, D and E. Rather than each of entities B, C, D and E separately informing entity A of the material and requesting it to take action, it will often be more efficient if Parties share information about their concerns and any requests for action that they have made. The same will be true of information relating to the problem of cross-border tobacco advertising, promotion and sponsorship generally, including ways in which it might be combated.

Issues for a possible protocol

10. Parties to the protocol could be required to monitor cross-border tobacco advertising, promotion and sponsorship, as well as relevant developments in advertising and technology, and share relevant information with one another.

11. Information could be required to be provided, collected and shared relating to cross-border tobacco advertising, promotion and sponsorship that breaches laws, the origin of such advertising, the body or bodies responsible for its production and dissemination, pending investigations or enforcement action, the outcome of any investigations or enforcement action, and relevant lessons learned.¹

Scientific and technical cooperation

Description

12. Technological developments mean that advertising techniques are constantly evolving and that advertising can be disseminated more easily than ever before, making it more difficult to control. But technology also offers potential responses including means of electronically blocking, filtering and removing offending material. If entities are to be able to understand and apply developments in technology and advertising techniques to eliminate or counter advertising in the most effective and efficient manner, such technologies and expertise relating to them must be shared.

13. Given the possibilities offered by technology in addressing cross-border tobacco advertising, promotion and sponsorship, entities need to take proactive steps to discover relevant technologies that may be available, and to develop such technologies where necessary. This may involve contacting and liaising with relevant experts and agencies and also conducting, commissioning or encouraging research to obtain the necessary information or develop the necessary technologies. This can be done most efficiently and effectively if done cooperatively by a number of entities.

¹ Note the relationship to Article 20 of the Convention (Research, surveillance and exchange of information).

Issues for a possible protocol

14. Parties could agree to collaborate in the encouragement and development of new technologies to eliminate or counter cross-border tobacco advertising, promotion and sponsorship, and to share information with one another about such technologies and the modalities of such cooperation.¹

Technical and financial assistance

Description

15. Entities will vary in their capacity to take measures to eliminate or counter cross-border tobacco advertising, promotion and sponsorship. The inability of one entity to fully implement its obligations under a protocol is likely to have an impact on the capacity of other entities to protect their citizens from cross-border tobacco advertising, promotion and sponsorship; technical and financial assistance should be provided, as required. In particular, the special needs of developing countries and countries with economies in transition must be recognized.

Issues for a possible protocol

16. Parties could agree to mobilize all relevant existing and potential resources, financial or technical, in respect of development of, access to and application of technologies, and with respect to ways in which breaches of the law can be effectively investigated and prosecuted and judgments ultimately enforced. Provisions to this effect could recognize the special needs of developing countries and countries with economies in transition.²

Investigation and pursuit of legal action

Description

17. Entity A may form the view that its tobacco advertising, promotion and sponsorship laws may have been breached and decide that it wants to investigate to determine whether enforcement action should be taken. Some of the evidence of a breach, as well as some or all of the bodies involved in the breach, may be located in another entity or entities. In order to fully investigate the possible breach, entity A will need assistance from the entity or entities in which such evidence or bodies may be located.

18. After investigating a possible breach of its tobacco advertising, promotion and sponsorship laws, entity A may decide that the material it has uncovered justifies enforcement action in its entity. It may need to obtain and use documents that are located in another entity, or obtain and use evidence from witnesses located in another entity. It will generally need the assistance of that other entity to do so.

¹ Note the relationship to Article 13.6 (“Parties shall cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising.”) and Article 22 of the Convention (Cooperation in the scientific, technical and legal fields and provision of related expertise).

² Note the relationship to Article 26 of the Convention (Financial resources).

Issues for a possible protocol

19. Parties could agree that relevant enforcement agencies within their territory will assist their counterparts in other Parties with the investigation of possible breaches of the law and the bringing of enforcement proceedings. This could include assistance with respect to the exchange of information (such as in relation to company information and corporate structure of bodies thought to be responsible for offending conduct), searches (of premises or records) and the obtaining of evidence (production of documents, interviews of witnesses).

20. Parties could also agree on mechanisms through which evidence obtained in one entity can be used in the courts of another. This may be necessary, for example, in a situation where a witness is located in an entity other than the entity investigating or taking enforcement action and the witness does not travel to the latter entity to give evidence.

21. Parties could also agree to create an administrative mechanism for the cooperation of contact points and enforcement agencies, allowing a Party that has identified a case of cross-border tobacco advertising, promotion or sponsorship to request assistance of other Parties and to report the case to all Parties and the protocol secretariat. Notification and response procedures could include the following minimum obligations on the part of the Party in whose territory the cross-border advertising, promotion or sponsorship originates:

- (a) acknowledge the receipt of a request for assistance from another Party;
- (b) take all necessary measures to investigate the matter, e.g., contact the body or bodies involved in the breach present in its territory, and request the body or bodies to cease the illegal activity;
- (c) respond within in a reasonable timeframe to the request for assistance.¹

Exercise of jurisdiction

Description

22. The same act of tobacco advertising, promotion or sponsorship may breach the laws of more than one entity. In order to avoid the problem of multiple entities bringing enforcement proceedings against the same body over the same conduct, or alternatively of no entity bringing enforcement proceedings because each expects another to do so, entities will need to have developed an understanding about how to determine who will be expected to exercise jurisdiction in cases of overlapping jurisdiction.

Issues for a possible protocol

23. Parties could agree on the bases on which they may exercise jurisdiction over cross-border tobacco advertising, promotion or sponsorship. For example, where advertising, promotion or sponsorship originates in an entity, or is the activity of its nationals – whether corporate or natural – the entity may exercise jurisdiction to regulate the cross-border effects of the advertising, promotion or sponsorship in other entities. The basis for such jurisdiction is in:

¹ Note the relationship to Article 19 of the Convention (Liability).

- (a) the principle of territoriality, under which an entity may exercise jurisdiction over activities commenced within its territory although completed extraterritorially;
- (b) the principle of nationality, under which an entity may exercise jurisdiction over its nationals wherever they may be.

24. In addition, where advertising, promotion, or sponsorship has effects within an entity, but originates in another entity, the affected entity may exercise jurisdiction to regulate the cross-border effects of the advertising, promotion or sponsorship in its territory. The basis for such jurisdiction is in:

- (a) the principle of territoriality, under which an entity may exercise jurisdiction over extraterritorial activities constituting an offence where at least one constituent element of the offence occurs within its territory (triggered by the advertising “entering” the territory, which enlivens a “sovereign right to ban” the advertising, as recognized in Article 13.7 of the WHO Framework Convention);
- (b) the effects doctrine, under which an entity may exercise jurisdiction over activities having or intended to have a substantial effect within its territory.

25. Parties could agree on the circumstances in which they will expect to, or may be expected to, exercise jurisdiction. Criteria would be agreed upon for determining which country is best placed to exercise jurisdiction and would include:

- (a) the chances of successful enforcement proceedings;
 - location of evidence
 - location of defendant (e.g., where the corporation is incorporated)
 - resources available for prosecution
- (b) potential for enforcement of a judgment or order made;
 - location of defendant’s assets
 - location of defendant
- (c) where an outcome most likely to promote the objectives of the WHO Framework Convention and/or the protocol is most likely to be achieved;
- (d) whether a particular entity is likely to receive economic benefits arising from the offending behaviour, such as tax revenue on sales – this may be a factor weighing in favour of that entity being expected to exercise jurisdiction;
- (e) whether the advertising appears to have been primarily directed at a particular entity.

26. Decisions to exercise jurisdiction or to decline to exercise jurisdiction would be explained against the agreed criteria.

Recognition and enforcement of foreign judgments

Description

27. Where an entity decides to exercise jurisdiction over a body that is not located in its territory or has no assets in its territory, it may obtain a judgment against that body, but that judgment may be ineffective if it cannot be enforced in an entity in which the body is located or in which it has assets. It may be necessary for entities to agree on the circumstances in which judgments made in one entity will be recognized and enforced in other entities.

Issues for a possible protocol

28. Parties could agree to recognize and enforce judgments made by other Parties under WHO Framework Convention-implementing laws on tobacco advertising, promotion and sponsorship, when a defendant is located in, or has assets in, their territory. Categories of exception, in which a Party may decline to recognize or enforce a judgment, could be specified, such as:

- (a) when recognition and enforcement of the judgment would be contrary to public policy in the Party in which recognition or enforcement is sought;
- (b) when the judgment appears to have been rendered without procedural fairness having been accorded to the defendant;
- (c) when the judgment is irreconcilable with a judgment relating to the same offence in the Party in which recognition or enforcement is being sought or in any other entity.

COORDINATION OF ACTIVITIES UNDER A PROTOCOL

Description

29. The effectiveness of the international cooperative measures to address cross-border tobacco advertising, promotion and sponsorship identified above would be enhanced by defining coordination needs and clarifying or establishing the necessary institutional arrangements to facilitate such coordination. Such institutional arrangements could ensure the existence of a central point of information and activity, the avoidance of unnecessary duplication of activities and use of resources, and the capacity for leadership to be taken on issues of shared interest and concern.

Issues for a possible protocol

30. A protocol could define coordination needs and clarify or establish the necessary institutional arrangements to facilitate such coordination. For example, a protocol could provide for the empowerment of an existing body, or the establishment of a new body, to act as an international “knowledge hub” and liaison on matters of cross-border tobacco advertising, promotion and sponsorship, collecting and disseminating relevant information and conducting or commissioning research into relevant issues. Such a body may be part of the secretariat to the protocol or an independent body. Possible activities of such a body may include:

- (a) keeping an up-to-date register of contact points within all Parties on matters related to cross-border tobacco advertising, promotion and sponsorship that would be available to all other Parties;
- (b) monitoring cross-border tobacco advertising, promotion and sponsorship, including relevant developments in advertising and technology, and sharing relevant information with Parties to the protocol (such monitoring and research functions may be proactive);
- (c) developing public awareness-raising campaigns, which would encourage both Parties and members of the public to provide the coordination body with relevant information in respect of cross-border tobacco advertising, promotion and sponsorship;
- (d) establishing an easy-to-use internet “hotline” through which reports or complaints about cross-border tobacco advertising, promotion and sponsorship could be made by members of the public;

- (e) liaising with bodies that have expertise in relevant legal, regulatory or technological matters, including international bodies such as the International Telecommunications Union (ITU) and the Internet Corporation for Assigned Names and Numbers (ICANN);
- (f) coordinating Parties' efforts to encourage and develop new technologies to eliminate or counter cross-border tobacco advertising, promotion and sponsorship;
- (g) ensuring that any identified research needs are communicated to existing research funding bodies and to interested researchers so that research resources can be pooled and cross-border advertising, promotion and sponsorship research needs prioritized by research funding bodies and researchers;
- (h) performing a technical assistance and training role, and encouraging relevant technical assistance or training activities to be included within existing tobacco control education, assistance and training programs. In this context, the particular needs of developing countries and countries with economies in transition for technical and financial assistance would be acknowledged.

31. Depending on the institutional structure to be elaborated, Parties could agree to require the responsible body to provide reports on implementation of the cross-border elements of Article 13. Such reports might also address further development needs for the protocol.

NON-PARTIES

Description

32. While a protocol would only bind Parties to it, Parties will need to be conscious of the possible role of non-Parties in both contributing to or frustrating the achievement of the objectives of the protocol. Parties should encourage non-Parties to act consistently with the protocol and to cooperate with Parties to the protocol to the maximum extent possible, and should also be willing to provide assistance to non-Parties regarding action that promotes the objectives of the protocol. In this context, it should be noted that non-Parties to the protocol may still be Parties to the Convention, and so already have assumed obligations under Article 13 with respect to cross-border tobacco advertising, promotion and sponsorship.

33. Parties should also acknowledge that many of the issues of jurisdiction on which they may reach agreement among themselves are also likely to arise with respect to non-Parties. Parties should agree that they will exercise extraterritorial jurisdiction in respect of non-Parties, where appropriate.

Issues for a possible protocol

34. Parties to the protocol could agree to encourage non-Parties to adhere to the terms of the protocol, to contribute appropriate information and administrative and other forms of assistance, and to cooperate with Parties in pursuing the objectives of the protocol.

35. Parties could agree to cooperate with non-Parties by responding to requests for assistance which would further the objectives of this protocol, including the provision of appropriate information.

36. Parties could agree to exercise jurisdiction, where appropriate, over cross-border advertising, promotion, and sponsorship originating in their territory, or engaged in by their nationals, and receivable in the territory of a non-Party entity, and over cross-border tobacco advertising, promotion

and sponsorship originating in the territory of a non-Party but having an effect within the territory of a Party.

OBLIGATIONS WITH RESPECT TO DOMESTIC MEASURES

37. In addition to the obligations with respect to international cooperation listed above, there are a number of areas that, while appearing to be primarily matters for domestic implementation rather than for international cooperation as such, may be included in a protocol on the basis that they would appear to be necessary to ensure that the international cooperation sought by the WHO Framework Convention and by a possible protocol could be realized. They reflect the fact that all Parties need to play a role in combating cross-border tobacco advertising, promotion and sponsorship and that a gap in one Party's laws may, in practice, have consequences for another Party. Such areas are listed below.

Corporate liability

Description

38. Not all entities have liability laws that apply to corporate bodies. It would appear that if Parties to the Convention and the protocol are to play their part in addressing cross-border tobacco advertising, promotion and sponsorship, they will need to be able to apply their tobacco advertising, promotion and sponsorship laws to the behaviour of corporate bodies which engage in these practices. If they do not have such laws in place, corporate bodies may seek to take advantage of this gap, with consequences for other entities that may be put to the expense and inconvenience of attempting to deal with incoming material.

Issues for a possible protocol

39. Parties may agree to introduce laws and mechanisms for holding corporate bodies responsible for the conduct of their officers and employees where such laws and mechanisms do not already exist.

40. It should be noted that references to liability in a possible protocol should be worded in such a way as to recognize that different jurisdictions may use criminal, civil or administrative methods to achieve similar objectives, and that the classification of a sanction as criminal, civil or administrative may vary between jurisdictions.

Sanctions against cross-border tobacco advertising, promotion and sponsorship

Description

41. Domestic legislation needs to be supported by sanctions that operate as effective deterrents in practice. If the laws of any one Party provide sanctions that are low and that do not deter in practice, those with an interest in engaging in cross-border tobacco advertising, promotion and sponsorship may seek to take advantage of these lower sanctions, again with consequences for other Parties.

Issues for a possible protocol

42. The protocol could require Parties to develop and apply sanctions that are effective, proportionate and dissuasive to cross-border tobacco advertising, promotion and sponsorship. These

may include not only fines, but also other remedies such as the funding of corrective advertising or education.

Use of licensing as an alternative enforcement mechanism

Description

43. While the successful exercise of jurisdiction over bodies based in foreign entities can be achieved, it is generally not a simple matter. Parties may wish to employ alternative enforcement mechanisms that could, in certain circumstances, avoid the need for the exercise of jurisdiction over foreign bodies. One method of achieving this may be to require all manufacturers, wholesalers or importers who wish to operate within an entity to be licensed in the entity, and for a relevant authority to have the power to revoke the licence for breach of a domestic tobacco advertising, promotion and sponsorship law by that body or by a related corporate body, such as a parent company (whether the related corporate body is located within the territory or outside the territory). An alternative, or perhaps complementary, method might be for Parties to consider the imposition of bans on the sale or supply of products by relevant domestic bodies for a certain period as a sanction for breach of the law by that body or a relevantly related corporate body. Under such arrangements, an entity would not be exercising jurisdiction over foreign bodies but rather over local bodies in circumstances that may include breach of domestic law by a related foreign corporate body. While there appears to be nothing to stop individual Parties from enacting such laws domestically in the absence of their being included in a protocol, there may be benefit in all Parties agreeing that they will, or may, enact and apply such laws.

Issues for a possible protocol

44. Parties may agree to require all manufacturers, wholesalers or importers who wish to operate within their territory to be licensed in their territory and to provide a relevant authority with the power to revoke the licence for breach of a domestic tobacco advertising, promotion and sponsorship law by that body or by a related corporate body, such as a parent company (whether the related corporate body is located within the territory or outside the territory). Parties may agree to enact laws allowing for the imposition of bans on the sale or supply of products by relevant domestic bodies for a certain period as a sanction for breach of the law by that body or a relevantly related corporate body.

Education, training and public awareness

Description

45. Education, training and public awareness are important aspects of many international instruments. They would be particularly so in the case of an international instrument dealing with cross-border tobacco advertising, promotion and sponsorship. Given the enormous volume of material now so easily available to people across the world, government agencies cannot alone monitor it all to search for offending content. In these circumstances, members of the public play a key role in monitoring compliance and informing the relevant agencies of material that needs to be eliminated or countered.

Issues for a possible protocol

46. Parties could agree to conduct education, training and public awareness programs about the nature of the problem of cross-border tobacco advertising, promotion and sponsorship and what concerned members of the public can do about it (such as report instances to an agency, including an easily accessible complaints website). Parties could also agree to include such education, training and public awareness-raising within existing programs, or to encourage others providing tobacco control education, training and public awareness-raising to include such issues in their programmes.¹

INSTITUTIONS, IMPLEMENTATION MECHANISMS, LAW-MAKING PROCESSES AND FINAL CLAUSES

47. This document does not explore provisions dealing with institutions, implementation mechanisms, law-making processes and final clauses in detail, but notes that such provisions would be required in a protocol. The expert group did not consider such provisions in detail, though it noted that provisions dealing with compliance monitoring and dispute settlement, in particular, would require attention. Such provisions would need to reflect the fact that the protocol would be dealing with cross-border issues, in which a failure by one Party to meet its obligations could impact on the ability of other Parties to achieve their objectives with respect to protecting their citizens from cross-border tobacco advertising, promotion and sponsorship. This is not the case for all of the provisions of the WHO Framework Convention, some of which deal essentially with domestic (non-cross-border) matters in which the failure by one Party to meet its obligations would be unlikely to have significant consequences for the ability of other Parties to achieve their objectives.

48. It would be expected that a protocol would contain provisions dealing with each of the following:

Institutional arrangements and financial resources

- (a) Conference of the Parties [Meeting of the Parties]
- (b) Choice of body
- (c) Holding of meetings
- (d) Functions of the protocol supreme body
- (e) Rules of procedure and financial rules
- (f) Admission and participation of observers
- (g) Secretariat (including functions and costs)
- (h) Subsidiary bodies
- (i) Financial mechanisms and resources

Implementation mechanisms

- (a) Monitoring and reporting
- (b) Compliance monitoring
- (c) Assessment and review
- (d) Dispute settlement

¹ Note the relationship to Article 12 of the Convention (Education, communication, training and public awareness).

Law-making processes

- (a) Amendments
- (b) Annexes

Final clauses

- (a) Relationship with the WHO Framework Convention
- (b) Reservations
- (c) Withdrawal
- (d) Signature, ratification, acceptance, approval, formal confirmation or accession
- (e) Entry into force
- (f) Depositary
- (g) Authentic texts

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