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

Elaboration of a template for a protocol on illicit trade in tobacco products

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 illicit trade is an important area of tobacco control and decided to convene an expert group to prepare a template for a protocol on illicit trade on the basis of Article 15 of the WHO Framework Convention, taking into account the work of entities competent in the matter (decision FCTC/COP1(16)). Article 15 of the Convention states that the Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control. The decision was made taking into account the need to further develop the obligations set out in Article 15 in an internationally binding legal instrument. Decision FCTC/COP1(16) further states that if the Bureau of the Conference of the Parties (“the Bureau”)¹ judges the prepared template to be sufficiently well advanced, it will be presented by the Bureau for consideration by the Conference of the Parties at its second session.

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 illicit trade 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, 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 meeting on 21 April 2006, the Bureau decided that the following areas of expertise would be represented in the expert group: Public Health, Finance/Taxation, Law Enforcement/Justice and Customs (Excise)/Trade. They agreed that the experts needed to be from Contracting Parties and that they could be substituted if the need arose. In accordance with this decision, each regional office was

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.

invited to provide the Bureau, through the interim secretariat, with the curriculum vitae of one expert in their region in each of the above-mentioned competencies. Nominations were endorsed by the Bureau.

4. Two meetings were held (Geneva, 25–27 September 2006 and Cairo, 3–5 December 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 (Mr A. Rowan), a vice-chairman (Mr J. Oliver) and four rapporteurs (Mrs T. Amir, Mr L. Joossens, Dr V. Prasad and Dr Y. Saloojee).

6. The Bureau decided that intergovernmental and nongovernmental organizations 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 intergovernmental and nongovernmental organizations (reflecting the four competence areas) to attend its second meeting. The expert group invited the World Customs Organization (WCO) to provide expertise in the area of Customs (Excise)/Trade. Mr K. Igarashi from the WCO attended the second meeting of the expert group.

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, in connection with Rule 31 of the Rules of Procedure of the Conference of the Parties, to submit nominations in each of the three remaining competence areas. Three nominations were submitted, all by the Framework Convention Alliance, and the nominees were invited to attend the second meeting of the expert group; two attended.² No financial assistance was provided by WHO or any Party to facilitate the participation of the representatives of the WCO or civil society.

8. At its first meeting, the expert group commenced with presentations of background papers outlining key issues, which had been prepared by three experts from the group and one expert from WHO, 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 aspects would also be crucial to the effective operation of a protocol in practice. The group identified five main areas of work for further elaboration: Production, Distribution, Law Enforcement, International Cooperation and a Miscellaneous area covering those issues not included in the other main areas of work. During discussions, the experts listed the key substantive issues in each of the five areas of work.

10. 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.

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

² The representatives of civil society were Ms D. Arnott (Finance/Taxation) and Mr B. McGrady (Law Enforcement/Justice). Apologies were sent from Mr A. Oluwafemi (Public Health).

³ The papers were: "Overview of illicit trade in tobacco products from a public health perspective" (Mr L. Joossens), "Overview of illicit trade in non-cigarette tobacco products" (Dr V. Prasad), "Establishing an international 'tracking and tracing' regime for cigarettes" (Mr A. Rowan), "Worldwide cigarette smuggling: an empirical analysis" (Dr A. Yurekli).

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.

11. During the second meeting, the expert group decided to merge the five working groups into three: Production/Distribution, Law Enforcement/International Cooperation and Miscellaneous. Over the course of the meeting, the working groups met individually several times, after which the whole group met in a plenary session to review the progress of the working groups and to set a time to reconvene. The final outputs of the working groups were shared with the expert group in the plenary session on the last day and the group decided on the workplan for the completion of the protocol template.

12. 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 intergovernmental and 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.

13. 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.

14. 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 15.2 (marking of products to assist Parties in determining the origin and the point of diversion of tobacco products and to monitor, document and control the movement of the products and their legal status); Article 15.2(b) (consideration of the development of a practical tracking and tracing regime); Article 15.4(e) (adoption of measures to enable the confiscation of proceeds derived from the illicit trade in tobacco products); and Article 19.3 (assistance in legal proceedings related to civil and criminal liability consistent with the Convention).

15. 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, that would have the benefit of providing guidance to all Parties to the Convention, who have already assumed substantial obligations with respect to illicit trade. 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. It should be emphasized, however, that some areas identified by the expert group, particularly those dealing with licencing, jurisdiction, law enforcement and the development of a practical tracking and tracing regime, will be difficult, if not impossible, to achieve through any arrangements other than a protocol.

ANNEX

Template for a protocol on illicit trade, 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. Illicit trade in tobacco products significantly contributes to the global death and disease burden caused by tobacco consumption and also to the global rise in tobacco consumption by making cigarettes cheaper, more accessible and more difficult to regulate. “Illicit trade” as defined in Article 1(a) of the WHO Framework Convention on Tobacco Control “means 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”. This document sets out the key elements of a possible future protocol on the illicit trade in tobacco products.

PREAMBLE, OBJECTIVES AND USE OF TERMS

Description

2. A protocol would generally be expected to contain a preamble, provisions setting out its objectives and guiding principles, and definitions of key terms used in the protocol. The preamble would be expected to “recall” the WHO Framework Convention on Tobacco Control and particularly the Articles of the Convention under which Parties have already assumed obligations with respect to illicit trade.

Issues for a possible future protocol

3. The preamble may specifically refer to the obligations accepted under Article 15 of the WHO Framework Convention and then set out facts, concerns or background factors, addressing such matters as:

- (a) why the elimination of all forms of illicit trade in tobacco products is important;
- (b) what the elimination of illicit trade in tobacco products would achieve;
- (c) why the development and implementation of related national law, subregional, regional and global agreements are essential to combat the illicit trade and distribution in tobacco products;
- (d) why international cooperation is particularly important to control illicit trade, and the form that such international cooperation might take;
- (e) what the characteristics of a tracking and tracing regime should be;
- (f) relevant developments in illicit trade practices and technologies such as counterfeiting that make international approaches necessary.

OBLIGATIONS

General obligations

Description

4. Obligations of a more general nature that provide guidance on implementation of the provisions of the protocol may also be included.

Issues for a possible future protocol

5. The proposed protocol may include reference to the obligations of the Parties, the relationship between and among Parties, between Parties and non-Parties, as appropriate, and between the protocol itself and other agreements and legal instruments. Parties may consider including provisions regarding the promotion of public awareness, especially among enforcement and international agencies, particularly with respect to the adverse health consequences of illicit trade in tobacco products, as well as the promotion of measures for effective dissemination of the provisions of this protocol.

Licencing

Description

6. Article 15.7 of the WHO Framework Convention requires that Parties endeavor to adopt and implement further measures including licencing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade. A licencing system and the exercise of due diligence by businesses are key measures for securing the tobacco products supply chain so as to prevent tax evasion on sales and counterfeiting. Secure business practices are cost-effective, sustainable tools for controlling smuggling. Approaches to securing business transactions include strict control of the production and distribution chain through licencing, improved market surveillance and safer production processes.

7. Effective protection against illicit trade also includes increased due diligence with respect to new and existing customers. Due diligence is the requirement that a business should take all reasonable precautions to ensure that an existing or prospective customer is capable of and committed to effectively preventing illicit trade. Adequate policies, practices and procedures that promote business integrity and prevent the business from being used by criminal elements should be strengthened or put in place. This includes ensuring the legitimacy of business partners, “know-your-customer” rules, declining suspicious transactions, the prevention and detection of criminal activity and the reporting of such suspected activities to the appropriate authorities.

8. Control of the supply chain can be accomplished through licencing by allowing authorities to identify and monitor those involved in the tobacco trade. Licencing could enable enforcement officials to establish a database of tobacco-related businesses, facilitating inspections and law enforcement; provide flexible penalties for contraventions of relevant laws; and increase the cost-effectiveness of enforcement. The revenues generated from licencing can be used to fund enforcement programmes.

Issues for a possible future protocol

9. Licencing all participants in the tobacco business, including major suppliers of inputs to the manufacturing process and tobacco leaf dealers, as well as the distribution chain, will contribute to the reduction of illicit trade. However, requiring licencing of growers and retailers may be problematic and may not be cost effective. Further, licencing of retailers may not currently be practical in states and regional economic integration organizations eligible to become party to the protocol (hereinafter collectively referred to as “entities”) where there are a large number of street vendors selling tobacco products. Similarly, licencing growers of tobacco would be difficult in entities with many small-scale farmers.

10. Parties may wish to consider the following measures for inclusion in the protocol:

- (a) All participants in the tobacco business, including major suppliers and tobacco leaf dealers, should hold licences.
- (b) Compliance with standard national tobacco control laws should be the minimum operational standard required by a licence holder.
- (c) A licence should not be assignable or transferable, and should be renewed periodically.
- (d) Tobacco merchants should be required to purchase tobacco solely from licenced tobacco sellers.
- (e) Tobacco raw material and machine makers’ suppliers should only sell products to licenced tobacco manufacturers.
- (f) A licence should be able to be refused, suspended or canceled for any contravention of licencing laws or a corresponding law, or if it does not meet applicable professional standards of conduct.
- (g) Licence fees should be set to recover administration, enforcement and informational costs.
- (h) All money collected from licencing should be used for the purposes of implementing, enforcing and administering the licencing laws.
- (i) Periodic, unannounced inspections and audits of licencees should take place, and aggressive penalties imposed for violations.
- (j) Licence holders should be required to conduct due diligence on business partners.
- (k) Tobacco licencing is a fiscal and a health issue and the control should be the responsibility of both fiscal and health officials.

Anti-money laundering provisions

Description

11. Anti-money laundering policies can ensure that payments for tobacco products are made solely from legal sources. “Know-your-customer” rules should be part of these policies. Anti-money laundering measures are designed to prevent the use of the proceeds of any illegal activity as payment for tobacco products.

Issues for a possible future protocol

12. Parties may wish to consider that payments for tobacco-related transactions such as the sale, storage or distribution of tobacco products should only be allowed in the currency and same amount as the invoice, by wire or cheque from financial institutions located in the entity of the intended market of retail sale of the tobacco products.

Tracking and tracing

Description

13. Article 15.2(b) of the WHO Framework Convention requires that Parties consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.

14. “Tracking”, and its variants, refers to the ability of competent authorities to systematically monitor the movement of tobacco products from the place of manufacture, through the distribution chain, to the intended market of retail sale, making sure all relevant duties and taxes have been paid.

15. “Tracing”, and its variants, refers to the ability of competent authorities, on the occasion of an audit or a seizure of a genuine product, to recreate the route taken by a tobacco product from the place of manufacture, through the distribution chain, to the point where the product has been diverted into illegal trade channels.

16. An international tracking and tracing regime would help to prevent, detect and eliminate the illicit trade of genuine tobacco products, making it more difficult for smugglers. Such systems would need to be implemented at an international level, rather than each entity developing its own domestic system, in order to ensure that tracking and tracing across borders could be facilitated. The approach is both proactive, in that tracking provides information and verification to law enforcement agencies, and reactive, in that tracing provides an opportunity to identify the participants in the illegal trade whenever an audit or a seizure is made. A tracking and tracing regime would allow for a detailed analysis of individual seizures of genuine tobacco products and an analysis of smuggling trends on larger scales. It will also provide an opportunity for the identification of the point of diversion of tobacco products to the illicit market.

17. The tracking and tracing regime works by coding packs, cartons, master cases and, if desirable, pallets at the time of manufacture or at the first distribution centre, using both covert and overt security features. This process, with the addition of verification technologies, allows for the immediate identification of illegal products. Additionally, information on the packs enables enforcement officials to distinguish genuine or legal from illegal products immediately by simply scanning the products.

18. A covert code (not readily discernable to the naked eye) placed on each pack, carton, master case and pallet at the time of manufacture or at the first distribution centre could be scanned at each point in the legal distribution chain and its relevant movement recorded. Following the seizure of tobacco products, investigators could trace the movement of the consignment and identify the point at which it was diverted into illegal channels. While the technology already exists to do this at relatively low cost and has been put into place in multiple instances, a component of long-term viability of the system is the continued research into and implementation of state-of-the-art methods for tracking and tracing. The covert code should be highly secure, containing specific and robust security features.

19. Current technology allows for the implementation of a secure and cost-effective tracking and tracing system.

Issues for a possible future protocol

20. Each Party may wish to consider adopting measures to ensure that all packs, cartons, master cases and pallets of tobacco products sold or manufactured under its jurisdiction carry

machine-scannable covert and overt codes to uniquely identify the product and, in addition, display distinctive visible overt markings, such as tax stamps. These codes and markings should be “non-removable”. This is in addition to current markings of tobacco products that allow for the identification of the date of manufacture of the product, the facility at which the product was manufactured, the machine of manufacture, the production shift during which the product was manufactured and the intended market of retail sale. This unique code is the basis of the tracking and tracing system.

Record-keeping

Description

21. Authorities can require manufacturing and distributing bodies operating in their jurisdictions to keep computerized records of relevant information on all shipments through the use of machine readable codes and overt markings linked to a tracking and tracing system. This information should be in a single standard format, and should be reported to the appropriate authorities as prescribed. Parties should provide this information at the request of any other Party.

22. Additionally, licenced or authorized manufacturers of tobacco and tobacco-related products can also be obliged to keep similar full records of their products and shipments, such that, upon inquiry on the basis of an ongoing investigation, they can be required to divulge information required for the investigation. For manufacturers that produce products either installed or serviced by them or their agents, similar appropriate records can be kept.

Issues for a possible future protocol

23. Parties may wish to consider that for the purposes of this protocol, manufacturers and distributors of tobacco products maintain the computerized data for not less than five years. Parties may also consider that manufacturers and distributors of tobacco products should maintain real-time access to the information as prescribed by the appropriate authorities. Entities need a rapid and efficient way of obtaining such information (from each other, if needed) and the Parties may decide that the protocol should set out clear rights and responsibilities with respect to information sharing.

24. Information required under this protocol, which may facilitate the exchange of information between the competent domestic authorities, could include: date of manufacture of the product, facility at which the product was manufactured, machine of manufacture, production shift during which the product was manufactured, first purchaser, order number, shipment date and destination, point of departure from the consignor’s factory or warehouse, consignee and the intended market of retail sale.

Security and preventive measures

Description

25. All efforts should be taken to prevent tobacco and tobacco-related products from being diverted during their transport. Tobacco manufacturers should be required to control their supply chain and not to facilitate smuggling. Those manufacturers who do not properly control their supply chains should be issued with civil penalties upon certain seizures of their products.

Issues for a possible future protocol

26. In an effort to detect and prevent the illicit manufacturing of and trafficking in tobacco products and to eliminate the theft, loss or diversion of such products, each Party may consider taking measures to oblige tobacco manufacturers to control the supply chain of their tobacco products, and, in the case of product seizures, issue dissuasive civil penalties to the manufacturer.

Internet sales

Description

27. Sales of cigarettes and other tobacco products over the internet (and through other mail-order sales) typically evade tobacco taxes and other relevant regulations. Internet sales may provide a lower level of control, specifically in the area of identification of the parties to a particular transaction. These internet sales also reduce tobacco tax revenues, as the shift of the point of tax control from the seller to the purchaser makes it exponentially more difficult to collect otherwise-applicable taxes. Sales to consumers across international borders, by mail or by means of the internet, should be licenced.

Issues for a possible future protocol

28. Parties may wish to consider imposing a prohibition on sales over the internet by any body other than by licenced, bonded bodies that can ensure the payment of any applicable tax.

Enhanced law enforcement capacity

Description

29. Criminal organizations involved in large-scale manufacturing and distribution of illicit tobacco products employ a variety of sophisticated techniques to expand their operations and avoid detection or apprehension. These criminal enterprises have developed global distribution networks and have access to a vast amount of illicit revenues and resources. In order to combat the illicit tobacco trade and organized crime effectively, the customs and law enforcement communities must be adequately resourced, including:

- (a) sufficient numbers of trained officers to undertake complex international investigations, enhanced border examinations and manufacturing facility inspections;
- (b) appropriate analytical resources to increase target selection and employ intelligence-controlled policing;
- (c) access to state-of-the-art detection and surveillance technologies;
- (d) access to training programmes.

30. In the absence of adequate police, customs and regulatory resources, effective implementation of illicit trade measures will be limited. Experience has demonstrated that entities where laws are not rigorously enforced become weak links and have the potential to be exploited by transnational organized crime (for example, as safe havens or launching pads).

Issues for a possible future protocol

31. Parties may wish to consider the inclusion of a provision dealing with the adequacy of customs and law enforcement capacity. The provision could obligate Parties to take appropriate measures to increase the effectiveness of police, customs and regulatory agencies in combating all forms of the illicit tobacco trade.

1. Offences

Description

32. Establishing a comprehensive set of offences for violations of the law is fundamental to effective and practical law enforcement. Preventing and deterring the establishment of safe havens, as well as the illicit trade, are key objectives.

Issues for a possible future protocol

33. The establishment of an agreed upon range of violations in domestic law would facilitate international collaboration and mutual legal assistance and deter the displacement of criminality between territories. Parties may wish to consider adopting measures to establish the following conduct, when committed intentionally on an individual or organized basis, as criminal offences:

- (a) growing, producing, manufacturing, selling or offering for sale tobacco without a licence;
- (b) unauthorized possession of raw leaf tobacco;
- (c) failing to maintain books and records;
- (d) maintaining fraudulent books and records;
- (e) selling or offering for sale manufacturing equipment and inputs to unauthorized individuals and bodies;
- (f) unauthorized possession of manufacturing equipment or inputs;
- (g) smuggling of tobacco products, manufacturing equipment or inputs;
- (h) making false statements to an inspector, auditor or customs officer;
- (i) obstructing inspectors and auditors from performing their duties;
- (j) unlawful possession of improperly untaxed or labelled and stamped tobacco products;
- (k) counterfeiting tobacco packaging or fiscal stamps;
- (l) possessing counterfeit tobacco products or fiscal stamps;
- (m) mis-declaring the value, description and quantity of tobacco products;
- (n) defacing tobacco product stamping or marking with the intent to evade tracking and tracing protocols;
- (o) unauthorized selling or offering for sale tobacco products over the internet or through mail order;
- (p) bribing or attempting to bribe an official, or accepting a bribe, to undermine the provisions and objectives of this protocol.

34. To ensure all individuals and bodies involved in illicit tobacco trade offences are held to account for their actions, Parties may consider the inclusion of a provision that deals with, among others, conspirators, organizers, abettors and facilitators. Parties may also consider adopting measures to establish as criminal offences conspiring or attempting to commit an offence as established by the protocol, or organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with the protocol. Parties may also wish to include provisions to ensure that violations of law applicable to both exports and imports are of equal gravity and severity.

2. Sanctions and penalties

Description

35. The illicit tobacco trade should be strongly penalized with the imposition of appropriate sanctions and penalties. The variety of penalties may include probation, restitution, fines, community service, incarceration or a combination thereof.

Issues for a possible future protocol

36. Article 15.4(b) of the WHO Framework Convention requires Parties to enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes. Parties may wish to implement criminal and/or other remedies for offences under this protocol with a view to deterring illicit trade. Consideration may be given to making the commission of an offence established in accordance with this protocol liable to sanctions that take into account the gravity of that offence. Parties may also wish to consider adopting measures that take into consideration any previous conviction of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence covered by this protocol.

3. Search, confiscation and seizure

Description

37. When elements of the illicit tobacco trade are uncovered by law enforcement, authorities must have the legal basis to search for and seize contraband tobacco products, the tools of the trade (such as manufacturing and printing equipment and conveyances) and corroborating evidence (such as books, records, financial transactions, price lists and telephone numbers). These items may be found in residences, storage facilities, outbuildings, third-party institutions and conveyances. Seizure of contraband tobacco products and offence-related property not only prevents continuation of criminal offences, but also provides crucial evidence needed for judicial prosecution.

Issues for a possible future protocol

38. Parties may wish to consider the inclusion of provisions to grant customs and law enforcement officials search and seizure powers. The scope of these provisions could include authorizing competent authorities to search for evidence with respect to a commission of an offence under this protocol and seize such evidence when found. The provisions could also enable the confiscation of tobacco products, property, equipment, conveyances or other instrumentalities used in or destined for use in offences covered by this protocol.

4. Destruction and disposal

Description

39. When it comes to the disposition of property seized during illicit tobacco trade investigations, key considerations include ensuring that tobacco products, whether diverted, counterfeit or illicitly manufactured, do not enter into circulation and depriving the criminal element of ready access to manufacturing equipment. In addition, consideration should be given to authorizing the customs and law enforcement communities to use seized property for training purposes (such as the identification

of contraband, counterfeit packaging and concealment methods) and to reinvesting the proceeds from the sale of seized property to enhance law enforcement capacity and training.

Issues for a possible future protocol

40. Article 15.4(c) of the WHO Framework Convention requires Parties to take appropriate steps to ensure that all confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products are destroyed, using environmentally friendly methods where feasible, or disposed of in accordance with national law.

41. The disposal of seized tobacco products can be viewed from two perspectives. The first is that confiscated tobacco products should be destroyed outright by authorities, as Parties should not be involved in the distribution and resale of tobacco products given the public health risks. The second is that outright destruction of confiscated tobacco products potentially enables tobacco manufacturers to double their sales in the form of earnings from the initial transaction which were seized and a subsequent sale to fill the void generated by the seized product.

42. Parties may consider the inclusion of flexible obligations as they relate to the disposal of confiscated property. Such obligations might include: the destruction of confiscated tobacco products and manufacturing equipment, using environmentally friendly methods where feasible, unless other disposal, such as the sale of seized tobacco products back to the manufacturer, has been officially authorized; the disposal of, in accordance with domestic law and administrative procedures, all other confiscated property, conveyances, equipment and other instrumentalities; and adopting other measures to assure that seized properties can be used for training and enhancing law enforcement capacity.

5. Proceeds of crime and seizure of assets

Description

43. Money laundering techniques include currency smuggling, dividing deposits into smaller amounts to avoid triggering financial institutions' automatic query systems ("smurfing"), the use of money service businesses such as currency exchanges and wire services, electronic fund transfers and the commingling of licit and illicit funds. Targeting the proceeds of crime is a critical component of an effective law enforcement programme. Depriving criminals of their ill-gotten gains removes their motivation and financial capacity to continue their criminal enterprise.

Issues for a possible future protocol

44. Article 15.4(e) of the WHO Framework Convention requires Parties to adopt measures as appropriate to enable the confiscation of proceeds derived from the illicit trade in tobacco products.

45. Parties may wish to consider the inclusion of a comprehensive set of anti-money laundering and proceeds of crime provisions, including establishing criminal offences for:

- (a) acquiring, possessing or using property derived from the proceeds of crime related to offences covered by this protocol;
- (b) converting or transferring property derived from the proceeds of crime related to offences covered by this protocol, for the purpose of concealing or disguising the illicit origin of the

property, or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(c) concealing or disguising the true nature, source, location, disposition, movement, ownership of or rights with respect to property derived from the proceeds of crime related to offences covered by this protocol;

(d) explicitly authorizing the confiscation and disposition of the proceeds of crimes;

(e) creating a reverse onus obligation on the offender to prove that property is not the proceeds of crime once it has been established the offender engaged in a pattern of criminal activity relating to the illicit trade in tobacco products;

(f) promoting the development of asset-sharing arrangements between Parties.

46. Parties could establish judicial or extrajudicial procedures to give effect to an order of confiscation originating from another Party to this protocol where the proceeds of crime, property, equipment or other instrumentalities referred to under the proceeds of crime provisions of this protocol are situated in their territory.

47. In relation to the cooperation between Parties in securing the proceeds of crime which have been deposited abroad, consideration could be given to investigative measures to trace the assets, or to preventive or interlocutory measures to immobilize the assets, for example, by freezing, seizing or confiscating them. An asset-sharing agreement would require putting in place a system of asset valuation and disposal. There are issues relating to asset sharing, such as whether the domestic legal system allows a “property” confiscation system, “value” confiscation system or both. In a property-based system, the property is either used in or acquired with the profits from tobacco-related crimes for which a defendant is convicted regardless of property ownership. In a value-based system, a confiscation order can be enforced only against property that is owned by the offender but not necessarily related to the crime. The protocol would need to clearly define a unified system.

6. Special enforcement techniques

Description

48. To disrupt and dismantle transnational organized crime networks and to penetrate criminal organizations at the highest possible levels, law enforcement must employ a variety of complex enforcement techniques, including:

(a) employing electronic surveillance to record meetings and conversations between key figures and co-conspirators and to track suspect shipments of tobacco products;

(b) utilizing undercover agents to infiltrate criminal conspiracies;

(c) facilitating controlled deliveries of suspect shipments to their final destination in order to identify the supply chain as well as the intended recipients.

49. The use of special enforcement techniques permits authorities to identify production facilities, distribution networks, *modi operandi*, concealment methods, proceeds of crimes and key individuals in criminal organizations. Evidence lawfully obtained through the use of these techniques increases the probability of conviction during judicial proceedings. Many jurisdictions require judicial authorization before such techniques are employed.

Issues for a possible future protocol

50. Parties could consider taking the necessary measures to allow for the appropriate use of controlled delivery and for the competent authorities in their territory to use other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, for the purpose of effectively combating organized crime involvement in illicit trade.

7. Jurisdiction

Description

51. Effective international approaches to control illicit trade are likely to involve a combination of domestic enforcement, exercise of extraterritorial jurisdiction in certain circumstances and enforcement of judgments made in other entities in situations where the body that has breached an entity's laws is located, or has assets, in another entity. Given the transnational nature of the illicit tobacco trade, provisions of this nature are critical to the effective pursuit of those individuals or bodies involved in these illicit activities.

Issues for a possible future protocol

52. In addressing the issue of jurisdiction over criminal offences, the terms of the proposed protocol ought to minimize the ability of alleged offenders to avoid prosecution through the use of safe havens and jurisdictional gaps. To achieve this end, each Party to the proposed protocol could establish jurisdiction when an offence is committed:

- (a) wholly or partly within its territory;
- (b) on board a vessel that is flying the flag of that Party or an aircraft that is registered under the laws of that Party at the time that the offence is committed;
- (c) by a national of that Party or a stateless person who has his or her habitual residence in its territory;
- (d) outside the territory of a Party in cases where it is foreseeable that the extraterritorial activity will lead to the commission of a serious offence within the territory of that Party.

53. Parties may wish to establish their jurisdiction over the relevant offences when an alleged offender is present in their territory and agree not to oppose extradition solely on the grounds that he or she is one of its nationals.

International cooperation

1. Information sharing

(A) Statistical trade data

Description

54. In developing strategies and deploying resources to combat the illicit tobacco trade at the local, regional and international levels, law enforcement and customs communities need access to timely, comprehensive and reliable information on the nature and scope of the licit and illicit trade. Such

information raises awareness within governments and with the general public about the impacts of the illicit tobacco trade on community safety and public health.

Issues for a possible future protocol

55. Article 21 of the WHO Framework Convention obligates each Party to submit to the Conference of the Parties, through the Convention Secretariat, periodic reports on its implementation of this Convention; these reports should include aggregate data on the cross-border trade in tobacco products, illicit trade and the distribution of tobacco products held or moving under suspension of taxes or duties within its jurisdiction. In developing this protocol, Parties may wish to consider elaborating on the data elements to be shared, in order to support the preparation of comprehensive assessments. Required data elements could include:

- (a) tobacco data (e.g., import, export, manufacturing, tax-paid and tax-free sales and production);
- (b) details of tobacco product confiscations (e.g., quantity, value of seizure, product description, date and place of manufacture, counterfeit vs. legal brands);
- (c) agricultural production data;
- (d) non-sensitive information on trends, concealment methods, and *modi operandi* used in the illicit trade;
- (e) steps taken or envisaged by the Party to implement the protocol provisions;
- (f) specific import and export records and licences for use in detection of illegal shipments;
- (g) any other information that the Party considers relevant to the achievement of the objectives of the protocol and suitable for inclusion in their communications.

56. Many of the data elements described above are routinely available in the public domain; therefore, it would not be difficult to share this non-sensitive information. This data could be analysed in trend analyses and in making risk assessments of vulnerable regions or entities requiring greater attention. The Parties should also agree on the use of common statistical tools and formats. This would perhaps be very difficult to achieve, especially in those territories where levels of computerization or Electronic Data Interchange (EDI) are still in the nascent stage. As tobacco statistics form a part of the overall trade statistics, it may be difficult for Parties to separately collect, compile and disseminate tobacco-related statistics. There may be a need to build data collection, collation and analysis capacity in many entities.

57. Parties may also give consideration to domestic laws as they pertain to the protection and safeguarding of personal and proprietary information and data. The scope of statistical consolidation with relevant regional and international intergovernmental organizations would need to be worked out. The role of intergovernmental and nongovernmental organizations would be important, especially as whistle-blowers and in the information analyses of the illicit tobacco trade.

(B) Operational investigation data

Description

58. Given the transnational nature of organized crime and international trade routes, a significant percentage of illicit tobacco trade investigations have an international aspect. Competent authorities must be prepared to share and protect sensitive operational information and intelligence on a case-by-case basis.

Issues for a possible future protocol

59. The trans-boundary movement of illicit tobacco trade can be further curbed if there is timely sharing of relevant information and specific intelligence about tobacco-related illegal activity within the territories of Parties and non-Parties. This would also include the sharing of information to facilitate ongoing investigation between competent national authorities on matters such as:

- (a) licenced manufacturers, exporters, importers, wholesalers, warehouses, transporters and retailers;
- (b) identification, monitoring and prosecution of persons, organizations and companies involved in illicit manufacturing and trafficking of tobacco products or criminal activities;
- (c) investigations, prosecutions and judicial proceedings;
- (d) specific records of import and export of tobacco products;
- (e) specific records relating to payments for import and export of tobacco products.

60. The timely sharing of data and information, especially the sharing of intelligence, is a key issue in the effective implementation of the protocol. There would also be a need to agree on common profiling programmes and methods of exchanging information between Parties.

(C) Operational data protection and safeguards

Description

61. The need to protect and safeguard tactical operations is paramount as unauthorized disclosure of operational information could compromise costly, long-term investigations; reveal the identity of undercover operators and informants; and result in the destruction of vital evidence.

Issues for a possible future protocol

62. Article 21.4 of the WHO Framework Convention provides that information exchanges are subject to national law regarding confidentiality and privacy. Parties are obligated to protect, as mutually agreed, any confidential information that is exchanged. In developing this protocol, consideration should be given to the inclusion of obligations concerning the protection and safeguarding of sensitive information.

2. Technical assistance and cooperation in scientific, technical and technological matters

Description

63. The development of national, regional, bilateral and multilateral capacity to provide technical assistance would be necessary for effective action against illicit trade. This would include the transfer of expertise or state-of-the-art technology in the areas of intelligence collection, law enforcement capacity, tracking and tracing, information management, interdiction, electronic surveillance and forensic analysis.

Issues for a possible future protocol

64. In the context of the protocol and taking into consideration the needs of developing entities, Parties may wish to consider adopting obligations to encourage cooperation and to facilitate the transfer of technical, scientific, and legal expertise, as well as technology; customs and law enforcement capacity building; and effective planning, development and enforcement of strategies and measures.

65. The development of stand-alone data and of an information network pertaining to tobacco trade only would be difficult for many developing entities. There are issues concerning the capacity of tax and enforcement authorities, and Parties may not be able to establish a separate database system only for tobacco trade. The standardization of formats and database technology would be essential. Parties may need the advice of relevant regional and international intergovernmental organizations on the use of appropriate technologies in the collection of data and sharing of intelligence. A workplan with focus areas requiring special attention may be beneficial.

3. Cooperation in respect of investigation and prosecution of offences

Description

66. Parties may take the necessary measures to strengthen cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution, litigation and punishment of those engaged in the illicit tobacco trade. This would include simultaneous joint, integrated trans-boundary investigation for crimes committed across jurisdictions. Entities must often seek cooperation between themselves and foreign governments, as well as with relevant regional and international intergovernmental organizations.

Issues for a possible future protocol

67. Parties would need to cooperate within and outside governments, as well as with non-Parties, to ensure effective transnational cooperation. This would help in the development and sharing of analytical expertise, the analysis of illicit tobacco trade trends and also in building the capacity of Parties to adopt, implement and administer the investigative skills needed. It would also facilitate compliance monitoring and assessment. The extent of cooperation should be mutually agreed upon between Parties. Accordingly, it would be possible to use any technical, administrative or legal means for simultaneous investigation and the sharing of information between the investigating agencies. The planning for coordinated and integrated investigation across boundaries would require Parties to be familiar with each other's domestic laws and criminal justice systems. Parties would be jointly and severally obligated to work out strategies for litigation and prosecution.

4. Cooperation in training

Description

68. The training of customs, law enforcement and excise and tax officials in the areas of surveillance and investigation, as well as joint patrolling and coordinated investigations, is central to the effective implementation of illicit trade measures. In addition, government officials, nongovernmental organizations and others engaged in the collection of taxes and trade data or

involved in the sale, distribution, storage and shipment of tobacco products must be knowledgeable with respect to the policies, practices and laws against the illicit tobacco trade.

Issues for a possible future protocol

69. To increase operational knowledge and maximize the effectiveness of human resources, Parties could agree to cooperate in and promote internationally the development and implementation of educational and training programmes, including the strengthening of national capacity building. The protocol should provide a clear time frame for such capacity building and training programmes. This may require the cooperation of relevant regional and international intergovernmental organizations.

5. Mutual legal and administrative assistance

Description

70. It is important for Parties to afford one another the widest appropriate measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the protocol.

Issues for a possible future protocol

71. Parties may consider affording mutual legal assistance to each other, to the fullest extent possible under relevant laws, treaties, agreements and arrangements, with respect to investigations, prosecutions and judicial proceedings in relation to the offences covered under this protocol. Mutual legal assistance may include one or all of the following:

- (a) taking evidence or statements from persons;
- (b) effecting service of judicial documents;
- (c) executing searches and seizures, and freezing of assets;
- (d) examining objects and sites;
- (e) providing information, evidentiary items and expert evaluations;
- (f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) identifying or tracing the proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) facilitating the voluntary appearance of persons in the requesting Party;
- (i) any other type of assistance not contrary to the domestic law of the requesting Party.

72. The protocol should include a provision recognizing the ability of a Party to decline the rendering of mutual legal assistance on the grounds of the absence of dual criminality. There may perhaps be the option of providing such assistance, to the extent that a Party may decide at its discretion, irrespective of the conduct, what would constitute an offence under the domestic law of the requested Party. Without prejudice to domestic law, the competent authorities of a Party may also, without prior request, consider transmitting information relating to criminal matters to a competent authority of another Party, where such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request being formulated by the latter Party, pursuant to this protocol. The provisions of this protocol should not affect the obligations under any other treaty, bilateral or multilateral, that governs, in whole or in part, mutual legal assistance.

(A) Designated central authority and other enabling provisions for mutual legal assistance

Description

73. Appointing a central authority has proven effective in facilitating and managing mutual legal assistance requests under other bilateral and multilateral instruments.

Issues for a possible future protocol

74. The protocol could obligate Parties to identify a central authority (agency or person) to coordinate mutual legal assistance requests. The central authority should preferably be an agency that has the necessary skills and competence to process the requests and the necessary legal capacity to execute the request. The effective implementation of these proposed provisions would depend on the harmonization achieved by the Parties, in their domestic laws, with international treaties.

6. Extradition

Description

75. When a suspected or convicted criminal flees to another territory, some form of international cooperation is required to eliminate the safe havens and to make the perpetrators of crime accountable.

Issues for a possible future protocol

76. Parties may wish to consider how the protocol might address the issue of extradition with a view to minimizing the use of safe havens by alleged offenders. In this respect, Parties ought to be obliged to recognize a defined set of offences as extraditable offences under any existing extradition arrangements in force between Parties. In the case of Parties that make extradition conditional upon the existence of a treaty, the potential protocol could also form the legal basis for extradition. Similarly, in the case of Parties that do not make extradition conditional upon the existence of a treaty, the defined offences should be recognized as extraditable between the Parties.

77. In order to protect individual rights, any extradition provision should also be subject to a range of safeguards with respect to issues such as grounds for refusal of requests for extradition, the operation of domestic law and the documentation required for extradition requests.

International institutional framework

1. Convention Secretariat

Description

78. It would be desirable to use the Convention Secretariat to service the protocol. The Convention Secretariat could function as per the arrangement under Article 24 of the WHO Framework Convention (*Secretariat*) and apply, *mutatis mutandis*, to this protocol.

Issues for a possible future protocol

79. The Convention Secretariat would need to build its capacity in servicing the needs of the protocol. There would be a need to work out a coordination mechanism between Parties and non-Parties, and also between Parties and regional and international intergovernmental organizations. It would also be necessary to ensure that any conflict of interests between these intergovernmental organizations and the Convention Secretariat are addressed. Therefore, there would be a need to include a mechanism that respects the mandates of respective entities, organizations, bodies and treaties.

2. Committees

Description

80. The Conference of the Parties to this protocol could establish such committees as are deemed necessary for the implementation of this protocol.

Issues for a possible future protocol

81. The Conference of the Parties may wish to consider establishing one or two permanent committees to provide advice on scientific, technological and implementation matters. These committees could assist the Conference of the Parties, for example, in technological matters, timely monitoring, assessments of the capacity of each Party to effectively implement the provisions of the protocol and preparing assessments of the outcomes of implementation measures.

3. Financing of the protocol (financial mechanism)

Description

82. The effective enforcement and coordinated action against trans-boundary tobacco crimes would require a system of governance at the international, regional and bilateral levels. The financial mechanism would need to be equitable and balanced and the commitment should be predetermined and predictable.

Issues for a possible future protocol

83. The Conference of the Parties would need to decide on the financial arrangement, funding priorities and eligibility criteria relating to the financing of the protocol.

4. Contribution

Description

84. The financing of the protocol could consist of mandatory contributions, supplemented by voluntary contributions. The mandatory contributions should be made annually by all Parties into the general fund.

Issues for a possible future protocol

85. A separate, dedicated fund for managing the protocol, with clearly defined contributions, would help in working out the scope of activities in the implementation of the protocol. Parties may therefore wish to consider establishing a dedicated or special fund, especially for providing technical assistance and training. Contributions in kind could also be considered. The disbursement from the dedicated fund should only be for identified areas, based on advice from relevant experts.

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

86. The expert group did not explore in detail all the provisions dealing with institutions, implementation mechanisms, law-making processes and final clauses. However, it would be expected that a protocol could contain provisions dealing with each of the following:

Institutional arrangements and financial resources

- (a) Conference of the Parties: choice of body, holding of meetings, functions of the protocol supreme body
- (b) Rules of procedure
- (c) Admission and participation of observers

Implementation mechanisms

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

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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