



WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL

**Conference of the Parties to the
WHO Framework Convention
on Tobacco Control**

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Options for concluding the negotiations on a protocol to eliminate illicit trade in tobacco products

Note by the Convention Secretariat

INTRODUCTION

1. This paper was prepared at the request of the Bureau of the Conference of the Parties in order to inform Parties about possible options for continuing the negotiations and adopting the protocol to eliminate illicit trade in tobacco products.
2. The Bureau of the Conference of the Parties, at its session held on 29 and 30 April 2010 in Geneva, reviewed possible options to facilitate the early conclusion of the negotiations on the draft Protocol.
3. The Bureau noted that the text of the draft protocol was submitted by the Intergovernmental Negotiating Body at its fourth session to the fourth session of the Conference of the Parties and that it was the prerogative of the Conference of the Parties to decide whether to continue negotiations with a view to reaching agreement on the outstanding parts of the protocol and adopting it during its fourth session. However, since it may prove difficult in practice to conclude negotiations during a six-day session with a substantial number of other items on the agenda, the Bureau considered other procedural options and sought the views of the Parties on them.
4. The Bureau reviewed the views received at its meeting held on 19–21 July 2010 in Geneva. The Bureau noted that while the majority of Parties that sent comments expressed a preference for convening a fifth and final session of the Intergovernmental Negotiating Body in 2011 to conclude the negotiations, the view was also expressed by some that the negotiations should be concluded by the Conference of the Parties itself and that other viable options that may exist should also be reviewed. The Bureau consequently requested the Secretariat to prepare a note outlining the different options, along with their legal and financial implications, for submission to the fourth session of the Conference of the Parties.

OPTIONS

5. The following options are presented for the considerations of Parties.

(a) Continuation of the Intergovernmental Negotiating Body

6. The Conference of the Parties may decide to extend the mandate of the Intergovernmental Negotiating Body for a fifth and final session to be held in 2011, and forward to it the draft text as produced by the fourth session of the Intergovernmental Negotiating Body with a request to finalize negotiations for final consideration and adoption of the protocol by a subsequent session of the Conference of the Parties.

7. If that option is chosen, the Conference of the Parties may either decide to convene an extraordinary session in accordance with Rule 4 of its Rules of Procedure for the purpose of finalizing – if necessary – and adopting the protocol, or to have the text of the proposed protocol submitted to its fifth regular session.

8. Article 33.3 of the Convention, requiring a six-month period between the circulation of a proposed protocol to Parties and the session of the Conference at which it is proposed for adoption, would apply to this option. Accordingly, there would have to be a period of at least six months between the conclusion of the fifth session of the Intergovernmental Negotiating Body and the subsequent session of the Conference of the Parties, irrespective of whether the subsequent session was the fifth or an extraordinary session.

9. If this option is chosen, new officers, including a Chairperson, would have to be elected by the Intergovernmental Negotiating Body for its fifth session, in accordance with Rule 28 of the Rules of Procedure of the Conference of the Parties as applied by the latter with regard to the Intergovernmental Negotiating Body (decision FCTC/COP3(6), paragraph 3).

(b) Continuation of the negotiations at a subsequent session of the Conference of the Parties

10. The Conference of the Parties could decide to continue the negotiations on the draft protocol within the framework of the Conference of the Parties itself, instead of extending the mandate of the Intergovernmental Negotiating Body, a subsidiary body. To this end, the Conference of the Parties could either convene an extraordinary session during 2011 in accordance with Rule 4 of its Rules of Procedure or postpone the final negotiations on the draft protocol to its fifth session in 2012.

11. Should the extraordinary session be unable to reach complete agreement on the text of the protocol, it could then submit the draft to the fifth session of the Conference of the Parties in 2012, thus maintaining the momentum to finalize negotiations at that session. If, instead, negotiations were to be successful and a final text agreed by the extraordinary session of the Conference of the Parties, the protocol could be adopted directly by it without observing the six-month period referred to in Article 33.3 of the WHO FCTC.

12. As with a fifth session of the Intergovernmental Negotiating Body, continuing negotiations at an extraordinary session of the Conference of the Parties convened only for that purpose would enable delegations to focus entirely on the draft protocol, whereas negotiations at the fifth session of the Conference of the Parties would have to take place alongside the consideration of other items on the agenda, with inevitable logistic and time constraints as well as problems for small delegations.

13. It should be taken into account that the six-month period required under Article 33.3 of the WHO FCTC would, as in the option of the continuation of the Intergovernmental Negotiating Body, also apply to the case in which the fourth session of the Conference of the Parties refers the draft protocol to an extraordinary session, with a view to its finalization and adoption, as well as to the case in which the extraordinary session is unable to adopt the proposed protocol and decides to submit it, whether entirely agreed or not, to the fifth regular session. Article 33.3, as noted above, requires at least a six-month hiatus between the communication of a proposed protocol to the Parties and “*the session at which it is proposed for adoption*” (emphasis added). The reference to “the session” makes it clear that this requirement would apply to the cases under consideration since both the fifth regular session and the extraordinary session would constitute a separate and different session from the session of the Conference of the Parties that submits the text of the proposed protocol. That legal requirement may limit the flexibility of the Conference of the Parties in considering dates for either session.

14. In summary, there should be at least six months observed between the fourth session of the Conference of the Parties and the extraordinary session, if that session was not only to negotiate but also to adopt the protocol. Similarly, a period of at least six months should be observed between the extraordinary session and the fifth session of the Conference of the Parties, should the fifth session be expected to consider and adopt the draft protocol submitted by the extraordinary session.

15. Another requirement that should be kept in mind when considering the possibility of an extraordinary session is that the text of an agreed draft protocol should be reviewed before its adoption to ensure the accuracy of its language and the consistency of its terms both within and between its authentic languages. Experience shows that international agreements adopted without such an editorial exercise have sometimes revealed problems in their interpretation and implementation because of inconsistencies in their formulation. Such a textual review is sometimes entrusted to a drafting committee of Parties that meets towards the end of the session. When considering the duration of an extraordinary session, care should therefore be taken to leave enough time for a review of the draft protocol before its adoption.

16. Finally, if this option is chosen, it would be understood that the officers elected by the Conference of the Parties at the end of its fourth session, would in accordance with Rule 21, serve as the officers for the extraordinary session, as well as the fifth session.

(c) Suspension and resumption of the fourth session of the Conference of the Parties

17. An additional option that emerged from the review of relevant practices in other international treaties is for the Conference of the Parties to suspend, rather than close, its fourth session on 20 November 2010 and to resume the fourth session at a place and time to be decided by it or by the Bureau for the sole purpose of concluding negotiations on the draft protocol.

18. Suspending the fourth session would present the procedural advantage of dispensing with the six-month period required by Article 33 since negotiations would be continued and completed by the same session of the Conference of the Parties – albeit at the resumption of its work – rather than a new session of the Conference of the Parties. The Conference of the Parties would also continue its work with the same Bureau, thus ensuring continuity at the resumed session and during the intersessional period. Should the Conference of the Parties succeed in reaching agreement on the draft protocol at its resumed fourth session, the protocol could be adopted directly on that occasion without further delay.

19. On the other hand, this option would, presumably, require the Conference of the Parties at its present session to conclude consideration of all other items on its agenda before suspending its work, with the exception of negotiations on the draft protocol and the closure of the session so as to enable the resumed session to focus entirely on the finalization of the draft protocol, and possibly items that may derive from finalizing and adopting the protocol, such as the related budget and workplan for the period preceding the entry force of the protocol. If other substantive items remained unfinished and were postponed to the resumed part of the fourth session, it would inevitably decrease the possibility of a successful conclusion of the negotiations.

20. A review of relevant precedents has revealed at least three cases in which conferences of the parties of United Nations treaties have proceeded in this manner in similar circumstances, i.e. suspended and resumed their sessions to facilitate the conclusion of negotiations on important but complex instruments. Such precedents relate to the sixth session of the Conference of the Parties of the United Nations Framework Convention on Climate Change,¹ the first extraordinary meeting of the Conference of the Parties to the Convention on Biological Diversity,² and the Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.³

TIMELINE

21. The timeline to conclude the negotiations for a protocol to eliminate illicit trade in tobacco products will be determined according to the option chosen by the Conference of the Parties. In addition to considerations such as the desire that the Parties may have to maintain momentum towards finalization of the negotiations within a relatively short time, other points that may also need to be considered are, in particular, the six-month period between the circulation of a proposed protocol to Parties and the Conference of the Parties at which it is proposed for adoption, and the financial implications of the number and duration of the sessions that will be necessary to conclude the negotiations and adopt the protocol.

22. The Secretariat has made a preliminary booking at the International Conference Center in Geneva (CICG) for the weeks of 6–13 March 2011 and 4–11 December 2011 (the only dates that are available in Geneva in 2011 for this or any other suitable venue). The Secretariat has also secured the possibility of extending the work from 14–20 March 2011 in WHO's conference facilities (with lower seating capacity compared with the CICG), should a second week, partially or in full, be required for the negotiations (and for adoption as appropriate).

23. The Conference of the Parties may wish to consider the option of March 2011 for convening the fifth session of the Intergovernmental Negotiating Body or the resumption of a suspended fourth session of the Conference of the Parties, both of which would not require the minimum six-month period to be observed in accordance with Article 33.3. The option of March 2011 could also be considered for an extraordinary session of the Conference of the Parties, if the session was only to negotiate but not to adopt the protocol.

¹ FCCC/CP/2000/L.3.

² EXCOP 1 Decision EM-I/1.

³ CCW/CONF.I/8/Rev.1.

24. Should the extraordinary session of the Conference of the Parties be charged both with negotiating and with adopting the protocol, the December 2011 option could be considered, given the minimum six-month period to be observed in accordance with Article 33.3.

25. If the negotiations were to continue through a fifth session of the Intergovernmental Negotiating Body, followed by an extraordinary session of the Conference of the Parties to finalize – if necessary – and to adopt the protocol, those sessions could be convened respectively in March 2011 and December 2011, to observe the minimum six-month period required after the circulation of the proposed protocol to Parties by the fifth session of the Intergovernmental Negotiating Body.

FINANCIAL IMPLICATIONS

26. The cost of the fifth session of the Intergovernmental Negotiating Body would be approximately US\$ 2 100 000 for a one-week session (US\$ 1 860 000 of direct costs and US\$ 240 000 of programme support costs payable to WHO), and approximately US\$ 3 050 000 for a two-week session (US\$ 2 700 000 of direct costs and US\$ 350 000 of programme support costs). The same costs would apply in the case of an extraordinary session of the Conference of the Parties or the resumption of the fourth session of the Conference of the Parties.

27. If the negotiations were to continue and be finalized by the fifth session of the Intergovernmental Negotiating Body, an extraordinary session of the Conference of the Parties later in the year would be necessary to adopt the protocol, unless adoption were to be delegated to the fifth regular session of the Conference of the Parties. The cost of such a short (presumably two-day) extraordinary session held on WHO premises would be approximately US\$ 565 000 (US\$ 500 000 of direct costs and US\$ 65 000 of programme support costs).¹ However, should a one-week session be scheduled instead to finalize the text submitted by the Intergovernmental Negotiating Body before its adoption, the cost would be higher, up to US\$ 2 100 000.

28. The table below provides a summary of the different options outlined above, the possible time frame and financial implications.²

Options	Timeline		Financial Implications
(a) Continuation of the INB	Negotiations	By INB5, potentially in March 2011; no requirement for a minimum six-month period before that session (Article 33.3)	US\$ 2 100 000 for a one-week session <i>or</i> US\$ 3 050 000 for a two-week session

¹ In the option of a two-day session at WHO for the sole purpose of adopting the protocol, it is assumed that Parties' delegations would be mainly composed of representatives from permanent missions in Geneva and that financial support for travel would be provided only for those Parties that do not have a permanent mission in Geneva.

² Please note that in the table, INB refers to the Intergovernmental Negotiating Body. INB4 and INB5 refer to the fourth and fifth sessions of the Intergovernmental Negotiating Body respectively. Similarly, COP refers to the Conference of the Parties. COP4 and COP5 refer to the fourth and fifth sessions of the Conference of the Parties.

Options	Timeline		Financial Implications
	Adoption	1. By an extraordinary session of the COP at end-2011; potentially in December 2011 to comply with the requirement for a minimum six-month period (Article 33.3)	US\$ 565 000 for a two-day session at WHO <i>or</i> US\$ 2 100 000 for a one-week session in the CICG
		2. COP5 in 2012; the minimum six-month period would apply (Article 33.3)	Already foreseen in the proposed budget and workplan 2012–2013
(b) Continuation by the COP	Negotiations	1. Extraordinary session of the COP in 2011; potentially in March 2011 if only negotiations are planned; the minimum six-month period (Article 33.3) would apply if the session were also to adopt the protocol	US\$ 2 100 000 for a one-week session <i>or</i> US\$ 3 050 000 for a two-week session
		2. COP5 in 2012	Already foreseen in the proposed budget and workplan 2012–2013
	Adoption	1. Same extraordinary session of the COP in 2011, if negotiations are concluded	No additional cost (see above)
		2. COP5 in 2012; the minimum six-month period would apply (Article 33.3)	Already foreseen in the proposed budget and workplan 2012–2013
(c) Suspension and resumption of the COP4	Negotiations	Resumed COP4 in 2011, potentially in March 2011; no requirement for a minimum six-month period before that resumed session	US\$ 2 100 000 for a one-week session <i>or</i> US\$ 3 050 000 for a two-week session
	Adoption	Same resumed COP4 in 2011	No additional costs (see above)

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