

Existing agreements and arrangements relevant to the objective of the Intergovernmental Negotiating Body

Note by the Convention Secretariat

1. In accordance with the request of the Conference of the Parties to the WHO Framework Convention on Tobacco Control in decision FCTC/COP2(12), this document examines existing agreements and arrangements relevant to the objective of the Intergovernmental Negotiating Body established by the Conference of the Parties to draft and negotiate a protocol on illicit trade in tobacco products. The objective is to elaborate a protocol that will build upon and complement the provisions of Article 15 of the WHO Framework Convention on Tobacco Control.
2. The Conference of the Parties requested that such a report be submitted to the Intergovernmental Negotiating Body at its first session so that agreements and arrangements relevant to its objective may be taken into consideration, in order to maximize synergy and complementarity, and to avoid duplication, between the protocol and such agreements and arrangements. International and regional agreements and arrangements, as well as national agreements and arrangements with potential international impact, are reviewed.
3. The text reflects the fact that existing agreements and arrangements do not bring together the full range of issues contemplated in the report prepared by the expert group established by the Conference of the Parties to elaborate the template.¹ This document complements the report of the expert group; in concert, they are presented in order to facilitate the negotiations of the Intergovernmental Negotiating Body.

¹ Document A/FCTC/COP/2/9.

CUSTOMS

4. One element necessary to eliminate the illicit trade in tobacco products is close cooperation among customs administrations, since they play a central role in product import and export.
5. The World Customs Organization, which represents 171 customs administrations, has worked on tobacco and cigarette smuggling for some time, collaborating with WHO. It collects and validates seizure data, and assists its Member countries in their daily risk assessments, intelligence work and training. It also monitors and collects data from customs administrations on global seizure of tobacco products. In addition, it prepares annual reviews on tobacco smuggling based on seizure reports submitted by Member countries. These reports are intended to provide Member countries with strategic intelligence on the most recent smuggling trends and snapshots of emerging methods of operation. A set of “red-flag” indicators is then developed, which takes into account the initial findings of post-seizure analyses of significant seizure cases. The secured communication tools of the World Customs Organization are widely used for joint customs operations, which have been launched at interregional, regional and subregional levels to detect tobacco and cigarette smuggling.

Mutual assistance in customs matters

6. Mutual assistance is seen in a wide range of day-to-day international cooperative activities (including enhanced law enforcement and technical assistance and cooperation), which does not necessarily fall into the scope of criminal investigations or court procedures. The exchange of information and the provision of other types of assistance, intended to ensure the proper application of customs laws and to prevent, combat and investigate customs offences, including illicit trafficking in tobacco products, are normally referred as “mutual administrative assistance”. This differs from “mutual legal assistance”, which is provided, for instance, when information is required for evidentiary purposes for criminal proceedings.
7. Customs administrations operate on the basis of their national legislation, which normally grants wide-ranging powers but only within national territories and for domestic purposes. Legal systems and customs administrations’ competencies can differ widely among states. Practices in administrative and legal assistance related to customs offences also differ, thereby creating possible complications in the exchange of information. To facilitate and provide a legal basis for such exchange, an instrument for bilateral or multilateral exchange of information and provision of assistance is often needed.
8. The World Customs Organization has adopted two international conventions in this sphere, namely, the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, with 50 Parties, and the International Convention on Mutual Administrative Assistance in Customs Matters (also known as the Johannesburg Convention). More generally, the World Customs Organization developed the Model Bilateral Agreement on Mutual Administrative Assistance in Customs Matters in June 2004. These instruments include provisions on exchange of information on, among other things, new enforcement techniques that have proved their effectiveness; new trends or methods of tobacco and cigarette smuggling; transport and storage methods used in smuggling; people known to have conducted illicit trade in tobacco and cigarettes or suspected of being about to do so; and any other data that can assist customs administrations and other law enforcement authorities with risk assessment for control purposes.

9. Following the World Customs Organization experience and models, the governments of the South Asian Association for Regional Cooperation Member States¹ negotiated the SAARC Agreement on Mutual Administrative Assistance in Customs Matters in 2005. Under its terms, Member States' customs administrations provide each other with administrative assistance, either on request or on their own initiative, in the form of information and intelligence for the proper application of customs law and for the prevention, investigation and combating of customs offences. Such information may include (a) new enforcement techniques that have proved their effectiveness; (b) new trends, means or methods of committing customs offences; (c) goods known to be the subject of customs offences, as well as transport and storage methods used in respect of those goods; (d) people known to have committed a customs offence or suspected of being about to commit one; and (e) any other data that can assist customs administrations with risk assessment for control and facilitation purposes.

10. In the European Union, the European Anti-Fraud Office – as the Directorate-General of the European Commission responsible for preventing, detecting and investigating customs frauds affecting the European Union budget – interacts on a daily basis with customs authorities worldwide. Whereas this cooperation may take place ad hoc according to operational needs, the Office has formal relationships with key operational partners through agreements and protocols with 37 countries and territories and further agreements are pending. The main purpose of these instruments is to establish and maintain channels of communication, and to ensure effective coordination, among customs authorities. The instruments ensure the rapid exchange of information on people (and transactions) suspected to have breached customs legislation, at the request of either party and spontaneously. Agreements on customs cooperation and mutual assistance are used extensively by the Office's Task Group Cigarettes in conducting investigations into large-scale smuggling in conjunction with customs authorities outside the European Union. There is legislation (Council Regulation (EC) No 515/97), which enables European Union Member States to exchange information both among themselves and with the European Commission for anti-fraud purposes, including the smuggling of contraband and counterfeit cigarettes.

Other customs-related arrangements

11. A significant increase in the number of counterfeit tobacco products in the European Union have been a source of concern for the European Police Office. In May 2005, this Office began Project Smoke, involving 29 partners including European Union Member States, other countries and international organizations. Its primary focus is counterfeit cigarette trafficking and illegal cigarette production in the European Union. The project aims to pool intelligence gathered by European Union customs authorities and to share it with relevant officials in order to assist investigations and prosecutions. Reports created by the project seek to identify the criminal networks and key individuals involved in illicit tobacco trade in the European Union.

TRACKING AND TRACING

12. Article 15.2(b) of the WHO Framework Convention specifically requires each Party to consider, as appropriate, developing a practical tracking and tracing regime which would further secure the distribution system of tobacco products, including cigarettes and assist in the investigation of illicit trade. The 12-year-old agreement between the European Commission, together with, currently, 26 of the Member States of the European Union, and Philip Morris International, which is administered by

¹ Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

the European Anti-Fraud Office, contains specific tracking and tracing provisions.¹ Namely, Philip Morris International is required to mark certain “master cases” of cigarettes (a master case contains 10 000 cigarettes); mark cigarette cartons and packs; establish a master-case database and schedules for the implementation of programmes to scan information into that database; and provide instant access for designated European Commission and Member State officials to information in the master case database concerning seized master cases. The Agreement also requires Philip Morris International to conduct additional research on the enhancement of existing tracking and tracing technologies and the development of new ones and to apply new scanning and coding technologies as they become feasible. The ultimate aim is to identify customers in the supply chain who are responsible for diverting cigarettes to the illicit market, so that appropriate action can be taken by enforcement agencies. The Agreement has mechanisms to exclude such customers from the distribution chain.

13. In a similar vein but on a national level, the Secretariat of Federal Revenue in Brazil, in conjunction with the country’s mint and printing works, has developed a public entity responsible for manufacturing a control stamp (or marker) for tobacco products. This stamp is designed to allow packages of tobacco products to be followed through the production, distribution and sales chain. It contains a unique code, traceable by the appropriate authorities, and is affixed to cigarette packages. The code, which is applied to the stamp with an invisible security ink and allows for the storage of multiple data fields relevant to the product, must be validated by a registration process and is activated only during its application on to a tobacco product at a cigarette manufacturer’s establishment. If a cigarette manufacturer uses control stamps whose electronic codes are not detected, not allocated to that specific manufacturer, or not in accordance to the product’s fiscal class, the system registers this occurrence and issues an alert to the Secretariat of Federal Revenues to start an investigation.

14. There are other convention protocols that have incorporated tracking and tracing elements. In the case of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition in 2001, the Parties are obliged to require that unique markings providing the name of the manufacturer, the country or place of manufacture and the serial number permitting ready identification by all states of the country of manufacture are integrated into each firearm at the time of manufacture. Further, Parties are obliged to provide appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import, and enabling the competent authorities to trace the firearm. Parties are also required to ensure that firearms being transferred from government stocks to permanent civilian use possess appropriate unique marking that will permit all Parties to identify the country in which the transfer took place.

15. Tracking and tracing is a tool used successfully in many industries, including food and beverages, pharmaceuticals, paper, and computers and electronics. Domestic postal systems and private mailing companies also use tracking systems, based on bar codes that are constantly updated for both the sender’s and receiver’s reference. Labels that allow for tracking and tracing do not present a conflict with the WTO Agreement on Technical Barriers to Trade, which was drafted in order to ensure that standards imposed by countries are useful, and are neither arbitrary nor a source of unnecessary obstacles to trade. The terms of this Agreement recognize countries’ rights to adopt the standards that they consider appropriate, for example, for human, animal or plant life or health, for the

¹ The Agreement simultaneously brings to an end all pre-existing litigation between the parties, including Philip Morris International’s case against the European Community. Significantly, it also includes substantial payments by Philip Morris International, totalling about US\$ 1250 million, which may be used in support of anti-contraband and anti-counterfeit initiatives.

protection of the environment or to meet other consumer interests, provided that the standards do not discriminate between foreign and domestic products. In so far as labels on tobacco products for tracking and tracing are genuinely useful, not arbitrary and do not give domestic goods an unfair advantage, the requirement that they be affixed to tobacco-product packages does not come into conflict with this Agreement or other similar agreements.

INTERNATIONAL CRIME AND LAW ENFORCEMENT

16. Organized crime, which includes corruption and money laundering, is associated with illicit trade in tobacco products. Overcoming smuggling and counterfeiting is recognized as one of the main challenges in the move to eliminate this illicit trade. Mutual legal assistance is one of the most powerful tools employed by governments to reduce the burden of international crime. The international agreements discussed earlier attest to countries' recognition of the need for international cooperation and assistance to tackle international crime.

Organized crime

17. There is broad international recognition of the need for international cooperation and assistance to tackle organized crime. One of the main international instruments in this area is the United Nations Convention against Transnational Organized Crime, which imposes obligations on its 137 Parties with respect to transnational organized criminal activity that extends to illicit trade in tobacco products. The scope of its application is limited to the prevention, investigation and prosecution of offences prescribed in the text; specifically, to "serious crime" (i.e. conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty) where such offences are "transnational in nature" and involve an "organized criminal group". Interestingly, the phrase transnational in nature is given broad scope and includes not only those crimes that are committed and/or planned in more than one state, but also those that are committed in one state but have substantial effects in another. The Convention defines an "organized criminal group" as a structured group of three or more people, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences prescribed in the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

18. As a cursory overview of the elements of the United Nations Convention against Transnational Organized Crime that may also apply to the illicit trade in tobacco products, Parties to this Convention must, among other things, criminalize participation in an organized crime group related to committing a serious crime as a stand-alone offence; adopt legislative and other measures to establish money laundering as a criminal offence under domestic law; criminalize a broad range of conduct that is considered to be corruption; adopt measures against corruption; establish offences relating to the obstruction of justice, which includes interference with witnesses and with public officials; and adopt measures to enable confiscation of proceeds of crime derived from offences covered by the treaty. Critical to this review, each of these elements imposes qualifications on the application of the Convention that may, in turn, limit the extent to which the treaty currently governs illicit tobacco trade. For example, it may be the case that only those examples of illicit trade in tobacco products that are transnational, serious crimes committed by an organized criminal group (following the definitions of each of these three terms) are covered. In essence, these qualifications create regulatory gaps in terms of the Convention's application with respect to illicit trade in tobacco products internationally.

Corruption

19. Corruption has been addressed at both the global and regional levels and continues to receive substantial domestic and international attention. Corruption has been recognized as one of the contributing elements to illicit trade in all products, including tobacco products.

20. The United Nations Convention against Corruption aims to prevent, investigate and prosecute corruption in the public sector, complementing other United Nations initiatives.¹ The Convention, which at present has 103 Parties, considers a broad range of conduct to be corruption: embezzlement; misappropriation or diversion of property by a public official; trading in influence; abuse of functions; money laundering; participation as accomplice, assistant or instigator and attempting to commit an offence; illicit enrichment; funding of political parties; and obstruction of justice.

21. Moreover, this Convention is the first instrument that aims to standardize definitions on conduct related to corruption. Besides strengthening cooperation among countries through mutual legal assistance with respect to investigations and extradition, the Convention also requires states to develop preventive measures in the public and private sector and to establish specific offences related to the various practices of corruption.

22. The Inter-American Convention Against Corruption, developed under the auspices of the Organization of American States, was adopted to promote and strengthen the development, by the Parties to the Convention, of mechanisms needed to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance and to promote, facilitate and regulate cooperation among the Parties to ensure the effectiveness of implementation of such measures. The Convention, which currently has 33 Parties, addresses both the giving or offering of items of value to public officials and the solicitation, receipt or acceptance of items of value by public officials in return for favourable acts or omissions; the acts or omissions performed by public officials to receive such an item of value; and fraudulent use of property gained through such acts or omissions. The scope of application is broad, including all principals and co-principals, instigators, accomplices and accessories after the fact who commit, attempt to commit, or conspire to commit acts of corruption under the Convention. Further, two or more Parties may, by mutual agreement, apply the terms of the Convention with respect to any acts of corruption not already addressed in its provisions.

23. However, though both the United Nations Convention against Corruption and the Inter-American Convention Against Corruption have broad terms, they focus on tackling corruption within the public sector. In the context of the fight against illicit tobacco trade, this means that other international instruments dealing with corruption in the private sector must also be reviewed. OECD in particular has been playing a leading role in the fight against corruption in the past 10 years by developing anti-corruption standards and normative principles that govern the conduct and activities of the public and private sectors (the latter focusing on multinational enterprises).

24. The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its two related recommendations² require parties to implement policy

¹ Including the Code of Conduct for Law Enforcement Officials, United Nations General Assembly resolution 34/169, and the International Code of Conduct for Public Officials, resolution 51/59.

² Namely, the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions and the Recommendation of the Council on the Tax Deductibility of Bribes of Foreign Public Officials of 1996.

measures to prevent, detect, investigate, prosecute and sanction bribery of foreign public officials. Where possible under a party's domestic legal system, bribes and the proceeds of bribery are to be subject to seizure and confiscation. The Convention also establishes a two-phase peer review mechanism. Phase 1 consists of a review and evaluation of the implementation of the Convention in the domestic laws and regulations of the parties in order to determine if they have met its minimum standards. During phase 2, a working group is created in order to assess how well the Parties are applying their laws to fight bribery. Because of the pressure that this peer review mechanism applies to states, this Convention is recognized as one of the most influential international anti-corruption instruments.

25. OECD has also intensified its fight against corruption by adopting measures with respect to the operation of export credits, tax deductibility, transparency and accountability, especially in the public sector.

26. OECD's Guidelines for Multinational Enterprises are non-binding government recommendations to multinational enterprises. They provide voluntary principles and standards for responsible business conduct in a variety of areas, combating bribery among them. Specific steps have been taken to promote implementation of the Guidelines, including establishing national contact points (government offices responsible for the implementation and promotion of the Guidelines). These Guidelines are one of the first international instruments recognizing multinational enterprises as international actors. Consequently, it is particularly relevant to the fight against illicit tobacco trade, as these recommendations may apply directly to the manufacturers of tobacco products.

Money laundering

27. Several organizations have dedicated resources for combating money laundering in so far as it is an element of organized crime and tied to illegal trade in tobacco products. In response to mounting concern over money laundering, the Financial Action Task Force on Money Laundering was established by the G-7 Summit that was held in Paris in 1989. With 34 members, the Task Force is an intergovernmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorism financing. It is a policy-making body that works to generate the necessary political will to bring about legislative and regulatory reforms in these areas. The Task Force has published over 40 recommendations for meeting its objectives, including nine special recommendations on terrorism financing.

28. The International Money Laundering Information Network is an Internet-based network assisting governments, organizations and individuals in the fight against money laundering. It was established in 1998 by the United Nations on behalf of a partnership of international organizations involved in anti-money laundering. The Anti-Money Laundering Unit of the United Nations Office on Drugs and Crime now administers and maintains this Network on behalf of 11 partner organizations.

29. As the world's largest international police organization, the International Criminal Police Organization – Interpol – facilitates cross-border police cooperation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime. The Interpol Money Laundering Automated Search Service Project, once operational, will enable anti-money laundering and terrorism financing investigators and analysts throughout the world automatically to compare queries on suspected money laundering and terrorism financing activities against database records submitted by Interpol member countries. The first version of the search service should be ready for informal testing by selected countries in late 2007.

Smuggling and counterfeiting

30. Agreements and arrangements designed to combat smuggling and counterfeiting are some of the most useful tools for eliminating illicit trade in tobacco products. A key example is the Agreement between the European Commission, together with 26 of the Member States of the European Union, and Philip Morris International. The Agreement recognizes the significant problem that contraband and counterfeit tobacco products present to the collection of tax and customs revenues as well as to general tobacco regulation in the European Union, and seeks to implement a comprehensive and efficient system to fight against cigarette smuggling and counterfeiting.

31. The Agreement includes terms under which Philip Morris International agrees to implement sales and distribution practices to ensure that its cigarettes are sold, distributed, stored and shipped in accordance with all legal requirements, including strong measures to ensure a complete understanding of the identity of tobacco customers, anti-money laundering initiatives and strict record-keeping requirements. The Agreement obliges Philip Morris International to sell its cigarettes in brands and amounts consistent with legitimate demand in the intended market. Additionally, in the event of future seizures of its products in the European Union, Philip Morris International agrees to cooperate by examining seized products to determine whether they are counterfeit, by providing documentation and examination results, and by providing relevant information relating to seized contraband products. Significantly, Philip Morris International will also be required to make supplementary payments equivalent to at least 100% of the duties and taxes due on the smuggled cigarettes that are seized. If the number of cigarettes seized in a year exceeds a predefined baseline amount, the supplementary payments will include an additional amount equal to 400% of the duties and taxes due on the seized cigarettes. Between the implementation of the Agreement and end-June 2007, more than 1000 individual seizures were reported, totalling over 900 million cigarettes, with about 80% of these cigarettes found to be counterfeit. (These steps are in addition to those mentioned above in relation to tracking and tracing its products.)

32. A related, pertinent example of a law enforcement arrangement is the European Anti-Fraud Office's Task Group Cigarettes. The Office recognizes the serious impact of the illicit tobacco trade on the European Union budget as well as on the budgets of Member States. Its Task Group was established in 1994 to tackle the widespread and growing problem of cigarette smuggling. Today it comprises 11 senior full-time investigators conducting investigations into large-scale cigarette smuggling operations worldwide. In addition to its operational work, the Task Group Cigarettes analyses seizure data from the 27 Member States of the European Union, conducts risk analyses and monitors trends in the illicit tobacco market in cooperation with other bodies and organizations, as well as overseeing the Agreement with Philip Morris International on behalf of the European Commission.

33. In another approach against smuggling and counterfeiting, the Government of the United Kingdom of Great Britain and Northern Ireland launched the Tackling Tobacco Smuggling Strategy in 2000. One of the key elements of the strategy is to work with tobacco manufacturers to restrict the supply of domestically manufactured cigarettes that are available to smugglers. To achieve this, in 2001, Her Majesty's Customs and Excise Department (now HM Revenue and Customs) signed memorandums of understanding with the main tobacco manufacturers supplying the domestic market. Enhanced memorandums containing stronger commitments were signed in 2006, in which the tobacco manufacturers agreed to sell their tobacco products in brands and amounts consistent with legitimate demand in the export market; respond to requests following significant seizures of their product to identify the production and movement history of the consignment; and cease supplying customers where they fail to demonstrate effective product control. In relation to counterfeiting, the

memorandums of understanding require manufacturers to, among other things, take steps against trademark infringements by taking action against suspected trademark infringements where there is a reasonable prospect of success. The new memorandums were complemented by legislation imposing obligations on manufacturers and penalizing them for failure to comply with them. For example, tobacco manufacturers are liable for penalties of up to £5 million if, after a formal warning, they do not take the steps necessary to control their supply chain.

34. Regarding future possible agreements, the Office of the United States Trade Representative announced in October 2007 that Canada, the European Union, Japan, Mexico, New Zealand, Republic of Korea, Switzerland and the United States of America had begun negotiations on an anti-counterfeiting trade agreement. Its objective is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis. The agreement will not be negotiated under the auspices of any international organization.

Mutual legal assistance

35. Mutual legal assistance refers to the formal procedures by which a country requests and provides assistance to facilitate the investigations, law enforcement and judicial proceedings of another country. In the context of illicit tobacco trade, the term refers to a broad range of cooperative measures that assist in the enforcement of laws and prosecution of relevant offences established under different domestic legislation. Measures can include the gathering and exchange of information, executing seizures and searches, and assisting in taking evidence and in taking statements from people.

36. International instruments on mutual legal assistance may cover illicit trade in tobacco products, including a handful of multilateral treaties governing the provision of mutual criminal assistance at a regional level and a significant number of bilateral agreements that differ in their context. The vast number of agreements makes it difficult to examine them individually. However, they generally have common characteristics that are reflected in the United Nations Model Treaty on Mutual Assistance in Criminal Matters. Adopted by the United Nations General Assembly in 1990,¹ this Model Treaty is used pro forma in bilateral treaties of mutual legal assistance in criminal matters.

37. The Model Treaty envisages a range of cooperative measures, including taking evidence and statements from people; assisting in making available detained people or other people to provide evidence in relation to investigations; effecting service of documents for judicial proceedings; executing searches and seizures; and providing information and evidentiary items including bank, financial, corporate and business records. However, the Model Treaty does not apply to arrest and detention with a view to extradition, enforcement of criminal judgments (except to the extent permitted by domestic law or by the obligations dealing with proceeds of crime in certain cases), transfer of people in custody to serve sentences, or the transfer of criminal proceedings. This reflects a narrow approach to mutual assistance, which contrasts with the approach taken by some bilateral treaties that do address these issues.

38. The mutual legal assistance commitments under the Model Treaty apply to any offence, the punishment of which falls within the jurisdiction of the judicial authorities of the state requesting assistance. The severity of an offence (usually determined by the maximum duration of imprisonment) may trigger the operation of the Model Treaty. Similarly, a requirement of “dual criminality” – that is, the offence in question is an offence in both participating states – may be a prerequisite for the grant of assistance. Additionally, states may refuse to grant assistance on various grounds: these include

¹ Resolution 45/117.

security and public interest concerns, and political reasons, but assistance may not be refused solely on the ground of secrecy of banks and similar institutions.

39. In addition to regional and bilateral treaties that deal specifically with mutual criminal assistance, other multilateral treaties also include provisions governing mutual legal assistance with respect to the subject matter of the treaty itself, which may be relevant to illicit tobacco trade. One example is Article 18 of the United Nations Convention against Transnational Organized Crime, which requires Parties to extend mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the Convention. Another is Article 46 of the United Nations Convention against Corruption, which creates mutual legal assistance obligations with respect to offences covered in that Convention.

INTELLECTUAL PROPERTY

40. Counterfeit products typically, and most directly, breach intellectual property laws protecting trademarks,¹ although they may also involve breaches of copyright, industrial designs, patents and undisclosed information. As reflected in the report of the expert group convened by the Conference of the Parties to the WHO Framework Convention,² counterfeit tobacco products pose a substantial challenge to eliminating illicit trade in tobacco products.

Agreement on Trade-Related Aspects of Intellectual Property Rights

41. WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights sets a minimum standard of protection for intellectual property but, to some extent, leaves WTO Members free to determine how to implement the provisions of the Agreement in their legal system. It covers all of the main areas of intellectual property, including those relevant to counterfeit tobacco products. Article 51 of the Agreement on Trade-Related Aspects of Intellectual Property Rights requires WTO Members to allow trademark owners to apply to prevent customs authorities releasing counterfeit trademark goods into free circulation. Article 61 requires WTO Members to provide criminal procedures and penalties for commercial trademark counterfeiting, with remedies sufficient to act as a deterrent.

The Paris Convention for the Protection of Industrial Property

42. The Paris Convention for the Protection of Industrial Property predates the Agreement on Trade-Related Aspects, Trade-Related Aspects of Intellectual Property Rights and sets out basic obligations, with respect to trademark protection, that are applicable to the packaging and labelling of tobacco products. It is administered by WIPO and has 171 contracting member countries, making it one of the most widely adopted treaties worldwide. Although the trademark obligations under the Convention are not as extensive as those set out in the Agreement on Trade-Related Aspects of Intellectual Property Rights, some Parties to the Convention are not WTO Members, with the result that their obligations are governed by the Paris Convention alone.

¹ Trademarks are words, names, symbols, devices or combinations of these, used by manufacturers and merchants to identify their goods and distinguish them from the products of their competitors.

² Document A/FCTC/COP/2/9.

43. The provisions of the Paris Convention that are most relevant to illicit trade in tobacco products relate to the seizure of products on their importation and after they have been imported into a country. Article 9(1) provides that goods unlawfully bearing a trademark or a trade name may be seized on importation into countries where such a mark or trade name is entitled to legal protection. Similarly, under Article 9(2), goods may be seized in the country where the mark or trade name was unlawfully affixed to the product, or after they have entered the country of importation. If domestic legislation does not allow goods to be seized on importation, Article 9(5) requires that a country must prohibit the products from being imported or they must be seized after entering the country of importation. As such, these provisions allow for the seizure of counterfeit tobacco products that have been or are being imported into another country.

44. According to Article 10(1) of the Paris Convention, these seizure obligations also apply where goods bear, either directly or indirectly, a “false indication of the source of the goods or the identity of the producer, manufacturer, or merchant”. Importantly, Article 10(2) classifies as an “interested party” any producer, manufacturer, or merchant “engaged in the production of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used”. This means that any tobacco manufacturer established in the locality that is falsely identified as the source of the counterfeit products may request a seizure to be made, or the competent authority of a contracting member to prohibit the use of a trademark that is liable to create confusion with the manufacturer’s own trademark.

Forum and group arrangements

45. Since 2004, the World Customs Organization, WIPO and Interpol have organized an international forum for governments and representatives of the private sector. This forum, known as the Global Anti-Counterfeiting and Piracy Meeting, aims to improve, at both international and regional levels, the implementation of legislation and programmes dedicated to the elimination of counterfeiting and smuggling. It aims to achieve this primarily through recommendations. Although these recommendations do address areas other than the elimination of illicit tobacco trade, the success of the forum has had an important impact on strengthening and widening the scope of cooperation between the main relevant actors in the international community.

46. In October 2000, the Interpol General Assembly approved the addition of intellectual property crime to the Organization’s official mandate. Shortly afterwards, the Interpol Intellectual Property Action Group was formed as a public–private partnership. Core membership of the Action Group consists of representatives from national law enforcement and customs authorities, international intergovernmental organizations, inter-industry private sector representative bodies and patent protection entities. The Action Group’s mission is to provide an advisory group function, assist Interpol in producing strategies to combat transnational organized intellectual property crime, and encourage national central bureaus and national law enforcement authorities in Interpol member countries to dedicate more resources to tackling intellectual property crime.

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