



**WHO Framework Convention  
on Tobacco Control**

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**CONFERENCE OF THE PARTIES  
INTERGOVERNMENTAL NEGOTIATING  
BODY ON A PROTOCOL ON ILLICIT  
TRADE IN TOBACCO PRODUCTS**

**FIRST SESSION**

**GENEVA, 11–16 FEBRUARY 2008**

**SUMMARY RECORDS**

**GENEVA  
2008**

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## ABBREVIATIONS

Abbreviations used in WHO documentation include the following:

ACHR	– Advisory Committee on Health Research	OIE	– <i>Office International des Epizooties</i>
ASEAN	– Association of Southeast Asian Nations	PAHO	– Pan American Health Organization
CEB	– United Nations System Chief Executives Board for Coordination (formerly ACC)	UNAIDS	– Joint United Nations Programme on HIV/AIDS
CIOMS	– Council for International Organizations of Medical Sciences	UNCTAD	– United Nations Conference on Trade and Development
FAO	– Food and Agriculture Organization of the United Nations	UNDCP	– United Nations International Drug Control Programme
IAEA	– International Atomic Energy Agency	UNDP	– United Nations Development Programme
IARC	– International Agency for Research on Cancer	UNEP	– United Nations Environment Programme
ICAO	– International Civil Aviation Organization	UNESCO	– United Nations Educational, Scientific and Cultural Organization
IFAD	– International Fund for Agricultural Development	UNFPA	– United Nations Population Fund
ILO	– International Labour Organization (Office)	UNHCR	– Office of the United Nations High Commissioner for Refugees
IMF	– International Monetary Fund	UNICEF	– United Nations Children’s Fund
IMO	– International Maritime Organization	UNIDO	– United Nations Industrial Development Organization
INCB	– International Narcotics Control Board	UNRWA	– United Nations Relief and Works Agency for Palestine Refugees in the Near East
ITU	– International Telecommunication Union	WFP	– World Food Programme
OECD	– Organisation for Economic Co-operation and Development	WIPO	– World Intellectual Property Organization
		WMO	– World Meteorological Organization
		WTO	– World Trade Organization

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The designations employed and the presentation of the material in this volume do not imply the expression of any opinion whatsoever on the part of the Secretariat of the World Health Organization concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. Where the designation “country or area” appears in the headings of tables, it covers countries, territories, cities or areas.

## **PREFACE**

The first session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products was held at WHO headquarters, Geneva, from 11 to 16 February 2008. The proceedings are issued in one volume, incorporating the summary records of the discussions. The documentation, including the list of participants, is accessible on the following web site: <http://www.who.int/gb/fctc/>.



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## AGENDA<sup>1</sup>

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7. Date and venue of the Second session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products
8. Closure of the session

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<sup>1</sup> As adopted by the Intergovernmental Negotiating Body at its first meeting.



## LIST OF DOCUMENTS

FCTC/COP/INB-IT/1/1 Rev.2	Agenda <sup>1</sup>
FCTC/COP/INB-IT/1/2	Adoption of the agenda and organization of work Decision of the Conference of the Parties at its Second session on elaboration of a protocol on illicit trade in tobacco products
FCTC/COP/INB-IT/1/3	Progress since the Second session of the Conference of the Parties. Note by the Convention Secretariat
FCTC/COP/INB-IT/1/3 Add.1	Progress since the Second session of the Conference of the Parties Note by the Convention Secretariat
FCTC/COP/INB-IT/1/4	Drafting and negotiation of a protocol on illicit trade in tobacco products. Template for a protocol on illicit trade in tobacco products, as proposed by the expert group convened in accordance with decision FCTC/COP1(16) of the Conference of the Parties
FCTC/COP/INB-IT/1/5	Officers of the Intergovernmental Negotiating Body on a protocol on illicit trade in tobacco products
FCTC/COP/INB-IT/1/6	[Draft] Report on credentials
FCTC/COP/INB-IT/1/7	Drafting and negotiation of a protocol on illicit trade in tobacco products
FCTC/COP/INB-IT/1/INF.DOC/1	Existing agreements and arrangements relevant to the objective of the Intergovernmental Negotiating Body
FCTC/COP/INB-IT/1/DIV/1	Guide for delegates to the Intergovernmental Negotiating Body
FCTC/COP/INB-IT/1/DIV/2 Rev.1	List of participants

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<sup>1</sup> See page vii



# **SUMMARY RECORDS**

## **FIRST MEETING**

**Monday, 11 February 2008, at 14:55**

**Acting Chairperson:** Dr H. NIKOGOSIAN (Head, Convention Secretariat)

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

**1. OPENING OF THE SESSION:** Item 1 of the Provisional agenda (FCTC/COP/INB-IT/1/1 Rev.1)

The ACTING CHAIRPERSON declared open the first session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, established by the Conference of the Parties to the WHO Framework Convention on Tobacco Control at its second session, in July 2007.

**2. ELECTION OF OFFICERS:** Item 2 of the Provisional agenda (FCTC/COP/INB-IT/1/1 Rev.1)

Dr HELLER (Austria), speaking on behalf of the Parties in the WHO European Region, proposed that Mr Ian Walton-George, a European Community expert in the investigation of financial and customs fraud and in combating cigarette smuggling and counterfeiting, should preside over the Intergovernmental Negotiating Body's deliberations.

**Mr Walton-George (European Community) was elected to serve as Chairperson.**

**Mr Walton-George (European Community) took the Chair.**

The CHAIRPERSON proposed that, in accordance with Rule 28 of the Rules of Procedure of the Conference, five vice-chairpersons representing the five regions of WHO other than the European Region, should be elected.

**It was so agreed.**

The CHAIRPERSON read out the names of the five nominees put forward by the regional groups, namely Mrs Loretta Asiedu (Ghana), Dr Eduardo Jaramillo (Mexico), Dr Jawad A. Al Lawati (Oman), Mr Pravir Krishna (India) and Mr John Martin (Federated States of Micronesia).

**Mrs L. Asiedu (Ghana), Dr E. Jaramillo (Mexico), Dr J.A. Al Lawati (Oman), Mr P. Krishna (India) and Mr J. Martin (Federated States of Micronesia) were elected vice-chairpersons.**

**It was determined by lot that the vice-chairpersons should serve in the following order: Dr J.A. Al Lawati (Oman), Dr E. Jaramillo (Mexico), Mr P. Krishna (India), Mrs L. Asiedu (Ghana) and Mr J. Martin (Federated States of Micronesia).**

**3. ADOPTION OF THE AGENDA AND ORGANIZATION OF WORK:** Item 3 of the Provisional agenda (Documents FCTC/COP/INB-IT/1/1 Rev.1 and FCTC/COP/INB-IT/1/2)

**The agenda was adopted.<sup>1</sup>**

The CHAIRPERSON proposed that the discussion of organization of work under agenda item 3 should be postponed pending its consideration at the first Bureau meeting and at the regional meetings.

**It was so agreed.**

(For continuation of the discussion on organization of work, see summary record of the second meeting, section 1.)

**4. PROGRESS SINCE THE SECOND SESSION OF THE CONFERENCE OF THE PARTIES:** Item 4 of the Agenda (Documents FCTC/COP/INB-IT/1/3 and FCTC/COP/INB-IT/1/3 Add.1)

Dr NIKOGOSIAN (Head, Convention Secretariat) presented a progress report on preparations for the third session of the Conference of the Parties; provision of support to the Bureau; implementation of the Convention; and extending partnerships and cooperation. The Convention Secretariat had assisted five working groups in the elaboration of guidelines on Article 5.3; and Articles 9 to 13 of the Convention. Their work included preparations for the current session of the Intergovernmental Negotiating Body, organization of the meetings of the Bureau and the third session of the Conference. He noted the Convention Secretariat's progress on: Article 14 of the Convention; the revised questionnaire used for implementation reports; elaboration of the second phase of the reporting instrument; and preparations for the second meeting of the study group on economically sustainable alternatives to tobacco growing.

The Convention Secretariat had invited intergovernmental and nongovernmental organizations with specific expertise to participate in and contribute to the working groups established by the Conference. It had initiated dialogue with intergovernmental organizations that had special expertise, particularly the World Bank and the World Customs Organization. Two recent formal requests had been received from intergovernmental organizations to become accredited observers to the Conference, attesting to the growing interest in its work. The Convention Secretariat provided assistance to Parties on reporting, financial mechanisms of assistance and issues specific to the Convention, a rapidly growing aspect of its work.

WHO, through its Tobacco Free Initiative, and other partners had convened training workshops, meetings of the WHO Tobacco Laboratory Network and the WHO Study Group on Tobacco Product Regulation and a series of regional conferences on illicit trade in tobacco products. The United Nations Ad Hoc Interagency Task Force on Tobacco Control was to discuss illicit trade, tobacco growing and global tobacco control later that month. Thus, implementation instruments ranging from

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<sup>1</sup> See page ix.

reports and guidelines to a protocol were being developed in connection with most of the substantive articles of the Convention, with political support from Parties for accelerating implementation. He thanked governments for their support of the Convention Secretariat's work.

## **5. GENERAL DEBATE (HIGH-LEVEL SEGMENT):** Item 5 of the Agenda

Dr HATAI CHITANONDH (President, Conference of the Parties to the WHO Framework Convention on Tobacco Control) said that the first session of the Intergovernmental Negotiating Body was historic, the first protocol to be negotiated under the WHO Framework Convention. The Convention covered both supply and demand. Elimination of illicit trade was one of the most important supply-reduction measures. Substantial revenues from taxes levied on tobacco products did not reach the public because of smuggling, illicit manufacturing and counterfeiting of tobacco products. Evidence indicated that organized crime syndicates were illicitly trading in tobacco products. Such trade deprived governments of tax revenue that could be used to improve public health and to carry out tobacco-control programmes.

But illicit trade in tobacco products was not solely a supply-side concern. By providing access to cheaper tobacco products, it hampered the capability of pricing and taxation measures to curb the demand for tobacco products. Elimination of that illicit trade would require close cooperation and exchange of information among Parties. The tobacco manufacturing and trading entities were well organized, and many resorted to unfair trade practices that had cross-border ramifications. The WHO Framework Convention on Tobacco Control recognized that in addition to national law, subregional, regional and global agreements had to be developed to tackle the menace of illicit trade.

The second Conference of the Parties, in Bangkok in 2007, had opened the door for the current historic negotiations. The outcome should be available for consideration by the Conference at its fourth session. Expertise was needed from areas outside health, such as trade, customs and justice, and was much appreciated. He welcomed the presence of the many public health experts who had participated in the earlier negotiations on the WHO Framework Convention and the arrival of new players. There would be synergies between experts from diverse backgrounds, but he urged participants to prioritize public health concerns while negotiating the protocol.

The CHAIRPERSON thanked the President of the Conference of the Parties for his stimulating remarks and strong leadership.

Mr SOW (Mali), speaking on behalf of the Parties in the WHO African Region, said that they endorsed the proposal for the protocol, having instituted domestic legislation and measures to meet the requirements set out in Article 15 of the Convention. In the negotiations the following points should be developed: intercountry and regional cooperation against illicit trade in tobacco; strengthening of national legislations; establishing control mechanisms to combat corruption, including limiting entry points; regulation and control of tobacco quality by establishing laboratories and procedures for the destruction of counterfeit and contraband tobacco products; strengthening capacity for tracking and tracing tobacco products and small-scale manufacturing; provision of databases on production and marketing of tobacco products; information sharing among countries; and issuing licences for the production, distribution and sale of tobacco products.

Vigilant and considered cooperation with the tobacco industry in tracking and tracing tobacco products should be undertaken since their objectives differed from that of the WHO Framework Convention, which was to reduce consumption. Cooperation between WHO and ILO was needed.

Ms BAQUERIZO GUZMÁN (Ecuador), speaking on behalf of the Parties to the Convention of the Group of Latin American and Caribbean States, said that they were committed to rapidly finalizing a protocol. The protocol would help to eradicate an illegal activity that threatened health and indeed

life. The template for the protocol would promote exchange of information on customs, criminal justice, Internet sales, intellectual property, health and fiscal policy. International cooperation, technical assistance and capacity building, were essential for effective implementation of the protocol. In order to facilitate the equitable and effective participation of States, and taking into account the smaller number of delegates representing countries from her region, work in committees should be avoided where possible. Bodies responsible for monitoring existing international agreements relevant to the mandate of the Intergovernmental Negotiating Body should be involved.

Mr AHMADI (Islamic Republic of Iran) said that investigations and legal action had illustrated the involvement of multinational tobacco companies in illicit trade in tobacco products and that of transnational criminal groups in large-scale smuggling. Illicit trade in tobacco products was as lucrative as illicit trade in drugs, without the corresponding criminal penalties. Many developing countries suffered the ravages of such trade. A coordinated international response to illicit trade was needed. The protocol should address a comprehensive approach to the fight against illicit trade in tobacco products, including liability; smuggling; illicit manufacturing and counterfeiting; the responsibility of Contracting Parties for harm emanating from activities under their jurisdiction and the important corollary of corporate responsibility; and the need to take into account the limited capacities of developing countries. The protocol should envisage an article on relationships with other agreements and legal instruments in order to ensure complementarity and consistency. The unified coding system in place under the Convention on International Trade in Endangered Species of Wild Fauna and Flora concerning caviar products could be used as a model for a tracking and tracing system. Finally, the protocol should play an important role in the further evolution of international health law.

Dr HELLER (Austria) speaking on behalf of the Parties in the WHO European Region, broadly identified with the goals of the protocol. He welcomed the progression envisaged, from the preparatory stage involving fewer experts to the negotiating phase at an intergovernmental conference, with the aim of adopting a meaningful, well balanced and practicable instrument allowing for ratification by the greatest possible number of Parties. Flexibility and a strong sense of compromise would be needed for completion of the protocol by 2010, to which the countries of the European Region were firmly committed.

Mr VIJAVAT ISARABHAKDI (Thailand) said that his country had made its entertainment establishments, dining places and outdoor markets virtually smoke free. Thailand had had laws for 16 years to control tobacco products and protect non-smokers' health. However, the elimination of illicit trade in tobacco products posed a challenge. Eleven per cent of domestic sales was estimated to come from smuggling – one of the lowest rates in South-east Asia, yet higher than the global average. In many developing countries, tobacco companies capitalized on loopholes in governing systems, limited resources and the absence of concerted efforts to control smuggling. Combating illicit trade in tobacco products was a major priority that required a well-coordinated, multilateral and comprehensive tobacco-control policy in the quest to achieve a tobacco-free environment both in Thailand and worldwide.

Mr OTTO (Palau), speaking on behalf of the Pacific island Parties, recalled that in May 2003, when the WHO Framework Convention had been adopted, one person had been succumbing to a tobacco-related disease every 8 seconds. Five years later, 152 countries had become Parties to the Convention, yet one person was dying every 5.4 seconds from a tobacco-related disease. One transnational tobacco company was deliberately marketing its deadly product in developing countries in order to reduce the risk of the legal complications that it had faced in the United States of America and elsewhere. The Pacific island countries favoured a strong protocol to stop the tobacco industry to increasing its profits at the expense of people's lives.

Mr FLORENCIO (Brazil) said a protocol on illicit trade in tobacco products would protect Member States against organized crime which resorted to manufacturing, smuggling and counterfeiting. Production tracking and tracing systems should be implemented by governments free from interference from the tobacco industry, yet such governmental action necessitated effective international cooperation. Organized crime needed organized response. Criminal organizations were flexible, decentralized and supported by networks of illegal financial transactions. Those could not be mapped without mechanisms for international cooperation among justice, police and intelligence officials.

He emphasized mutual legal assistance and regulated sharing of governmental, corporate, financial and other documents that supported law enforcement. The debate should not duplicate fiscal and customs aspects of illicit trade in tobacco products, that were addressed under existing intellectual property agreements. The focus of the protocol was protection of public health, not intellectual property or trademark rights. Discussions should include quality of patents; flexibility established by international instruments such as the Agreement on Trade-Related Aspects of Intellectual Property Rights; and identification of intellectual property rules that might negatively affect public health initiatives in developing countries.

Mr LOGAR (Slovenia), speaking on behalf of the Parties in the European Union, said that the growth in illicit trade in tobacco products had exceeded all forecasts and was a significant contributor to organized crime. Revenue losses to governments globally were estimated at over 30 billion euros annually. Worldwide efforts to reduce the number of smoking-related deaths by control measures were undermined by illicit trade. Unless measures were taken, the number of smoking-related deaths, already near five million annually, would continue to rise. The smuggling and counterfeiting of tobacco products was a global problem that required a global, multilateral response.

Mr KRISHNA (India) said that the growth of tobacco consumption was of great concern. His Government had developed substantial legislation and back-up rules for smoke-free areas, and the banning of advertisements would soon be in place. It had planned an ambitious tobacco-control programme, raising the budget from nearly US\$ 10 million to more than US\$ 100 million. Until everyone in the country was involved, the menace could not be tackled effectively. His Government supported all the demand and supply-reduction measures in striving to create a tobacco-free world for the next generation.

Mr ZHANG Xiulian (China) said that the WHO Framework Convention had taken effect in China in 2006 and government bodies had been combating illicit trade in tobacco products, such as smuggling and cigarette counterfeiting, evading national taxes, infringing intellectual property rights and disrupting market order, all of which harmed the interests of sovereign States and consumers. A protocol to tackle global illicit trade in tobacco products would reinforce implementation of Article 15 of the Convention and counteract illicit business. The wide scope of obligations in the protocol should take into account conditions prevalent in the different countries and grant sufficient autonomy to sovereign States.

Mr ARTUCIO RODRÍGUEZ (Uruguay) said that his country had hosted the first conference in WHO's Region of the Americas on illicit trade in tobacco products. The Intergovernmental Negotiating Body must reach consensus on the eradication of illicit trade as rapidly as possible. Uruguay was committed to achieving that goal. Its main concern would always remain the health and lives of human beings.

Mr GUTH (European Community) said that the member countries of the European Union were deeply concerned that illicit trade undermined public health initiatives by making cheap cigarettes widely available, particularly to vulnerable groups. Illicit traders were depriving governments of important tax revenue. Owing to the nature of and profits generated by illicit trade, those involved

often committed other more serious types of crime. Attitudes towards tobacco were shifting worldwide, and nowhere more quickly than in the European Union. Nevertheless, some 650 000 people still died there every year of tobacco-related diseases.

The aim of having a protocol on illicit trade adopted by the fourth Conference of the Parties in 2010 was ambitious. Discussions would not be easy. The current meeting demonstrated that governments recognized the problem of tobacco smuggling, and were willing to tackle it as a global problem that could not be solved by regional or national initiatives alone.

Mr DE SILVA (Sri Lanka) said that his country had achieved comprehensive implementation of the WHO Framework Convention. Parliament had unanimously adopted legislation aimed at monitoring the production, marketing and consumption of tobacco and alcohol products and curtailing children's access to them. Legislation also prohibited: the advertising of those products in any media or in public places; the sale of tobacco and alcohol products to young people under 21 years of age; smoking in enclosed public areas; and the sale of tobacco and alcohol products through vending machines. During the first year of the legislation's implementation, about 10 821 prosecutions had been carried out and 17.5 million Indian rupees recovered through fines.

Illicit trade in tobacco products embraced national as well as cross-border activities that could only be combated through an intersectoral approach. Enacting legislation and signing instruments also required political commitment through effective implementation of regulations. Sri Lanka pledged support to the current negotiations which, it was confident, would result in a comprehensive protocol.

Mr WALTER (alternate to Ms Marshall, Australia) said that his country had a complex regulatory regime directed at illicit trade in tobacco that made it unprofitable for businesses involved in licit trade to divert goods into the illicit market. The protocol should allow countries maximum flexibility in the way they achieved results and not specify particular approaches. Australia was also concerned about the emphasis in the template protocol on criminal justice responses to illicit trade in tobacco. Existing international instruments and mechanisms, such as the United Nations Convention against Transnational Organized Crime and the Financial Action Task Force, addressed some of the concerns outlined in the protocol. He advocated formal communications between the Intergovernmental Negotiating Body and the United Nations bodies, such as the Convention on Crime Prevention and Criminal Justice, which already had the relevant mandate and expertise, particularly in the area of transnational crime.

Dr RIMZHA (Belarus) said that his country had adopted tougher legislative provisions on the illicit import, transfer, storage and manufacture of tobacco raw materials and tobacco products. Tobacco products could not be sold to anyone under 18 years of age and smoking was prohibited in health care institutions and cultural, educational and sports facilities. Tobacco products could not be offered as prizes in competitions, lotteries or games. Those programmes curtailed demand in order to reduce morbidity and mortality rates from tobacco-related diseases. Illicit trade in tobacco products was prohibited. Belarus would contribute actively to the elaboration of a protocol. Only international cooperation would achieve the common goals set with regard to illicit trade in tobacco products.

Mr TAGAYA (Japan) suggested that, in the area of Customs, the Convention Secretariat should deepen its cooperation with the World Customs Organization and relevant international organizations. There were budgetary constraints to establishing a tracking and tracing mechanism that required advanced technical methodology. Tobacco was a legitimate product and all tobacco trade could not be deemed illicit. If tobacco products were smuggled or counterfeited, domestic customs or trademark laws could deal with those offences. Where illicit activities were carried out by transnational criminal organizations and international cooperation was required in order to investigate or provide legal assistance, existing bilateral and international frameworks could be utilized. Japan would not support the imposition under the protocol of a uniform obligation on States Parties to create new categories of crime or to introduce a special international cooperation mechanism solely for tobacco products. Anti-

counterfeiting measures for tobacco products should give careful consideration to existing international agreements and domestic legislation. The protocol should be a multilateral instrument that many States could accept. Too many specific obligations might reduce the level of acceptance and, consequently, the number of signatories. The protocol should be elaborated on the basis of diverse legal systems and social and cultural backgrounds and allow for a degree of discretion and flexibility.

Dr SAN MARTÍN (Paraguay) said that with the assistance of nongovernmental organizations and experts from WHO, his country would reduce its rate of tobacco consumption, which was already among the lowest in Latin America. However, the growth of transnational criminal gangs which organized the production, transport, distribution and sale of legitimate tobacco products could jeopardize the fragile progress made. The protocol should include the most stringent measures in order to thwart those criminal organizations, including the possibility of extradition. He stressed improved capacity building as international cooperation would be the most effective tool for achieving success in tobacco control.

Mr PADILLA (Philippines) said that, in determining the method of work for the current session, it should be ensured that smaller delegations were equitably heard on every issue. Information sharing and better coordination would play a significant part in tobacco control. Given the limitations and different levels of development in various countries, the sharing of technology, technical expertise, capacity building and training were also of consequence. Countries involved in the control of illicit trade should treat each other as equal partners, especially in public health matters.

Mr GÖRÜN (alternate to Mr Çelik, Turkey) said his country had recently renewed and extended the tobacco control law under which smoking in all public places was prohibited. By June 2008, all workplaces including cafés, restaurants and bars would become smoke free. Turkey fully supported the WHO Framework Convention and wished the Intergovernmental Negotiating Body success in its endeavours.

Mr SINCOVICH (World Customs Organization), speaking at the invitation of the CHAIRPERSON, said that his organization attached great importance to internationally consolidated law enforcement on illicit trade in tobacco products. Countering tobacco smuggling was given high priority in its customs enforcement strategies, and required close cooperation among customs administrations and other law enforcement agencies at national and international levels. The protocol would initiate internationally coordinated law enforcement actions with significant implications for customs enforcement tactics. Customs administrations would play important roles in the implementation of the internationally agreed countermeasures. The World Customs Organization encouraged all member administrations to examine the template for the protocol, participate in its development, and strengthen their statutory powers to counter illicit trade in tobacco products. Such powers could also apply to other types of smuggling and fraud. The protocol held enormous potential for addressing the illicit trade epidemic and for an ambitious agreement that would fully realize that potential.

Mr OLUWAFEMI (Framework Convention Alliance on Tobacco Control), speaking at the invitation of the CHAIRPERSON, said that his organization was made up of over 350 organizations from over 100 countries working to support the implementation of the WHO Framework Convention and its related protocols. The world could found a protocol that would save lives and deliver billions in extra revenue to governments. Illicit trade in tobacco products affected all countries but no country could deal with it on its own. Organized crime in illicit trade threatened law and order everywhere. The Parties to the WHO Framework Convention had recognized that international cooperation was essential in combating illicit trade. The protocol must deliver its promise.

Key measures should include control of the tobacco supply chain, criminalization and enforcement, and international cooperation efforts. There should be a clear mandate for a draft text to be produced for the next session of the Intergovernmental Negotiating Body, incorporating all the elements in the template.

Mr DORADO MAZORRA (Corporate Accountability International), speaking at the invitation of the CHAIRPERSON, said that the future protocol should prioritize health over commercial interests and establish civil and criminal responsibility for harm caused by illicit trade, which represented about 10% of world trade in tobacco products. The obligations under the protocol should impose responsibility on the tobacco industry for the entire production and marketing chain, and discourage governments from cooperating with the industry through donations or agreements that purported to combat illicit trade. The tobacco industry was taking strategic measures to strengthen sales, for example, by splitting its international operations from those in the United States of America in order that new States would come under their influence.

**The meeting rose at 17:20.**

## **SECOND MEETING**

**Tuesday, 12 February 2008, at 11:10**

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

### **1. ORGANIZATION OF WORK** (continued from the first meeting, section 3)

The CHAIRPERSON said that, after consultations in the Bureau and regional groups, it had been proposed that the work of the Intergovernmental Negotiating Body be conducted mainly in plenary, so that even small delegations could be fully involved. Small, focused working groups could be formed to discuss specific technical issues. The decision would apply to the current session only. He was confident of substantive progress during the session, which would enable him to draw up a Chairperson's text of a protocol on illicit trade in tobacco products for submission to the Intergovernmental Negotiating Body at its second session. He said that, if he saw no objection, he would take it that participants wished to adopt the method of work he had suggested.

**It was so agreed.**

The CHAIRPERSON said that the report on credentials of delegates to the Intergovernmental Negotiating Body would be ready for consideration the next day. He accordingly suggested that consideration of item 3 of the agenda be suspended again until that time.

**It was so agreed.**

(For continuation of the discussion, see summary record of the fourth meeting, section 1.)

### **2. DRAFTING AND NEGOTIATION OF A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS:** Item 6 of the Agenda (Documents FCTC/COP/INB-IT/1/4 and FCTC/COP/INB-IT/1/INF.DOC./1)

The CHAIRPERSON invited general comments about the template for the protocol on illicit trade in tobacco products contained in document FCTC/COP/INB-IT/1/4 and the document on existing arrangements relevant to the Intergovernmental Negotiating Body (FCTC/COP/INB-IT/1/INF.DOC./1).

Mr FRANJGA (Slovenia), speaking on behalf of the European Union, said that illicit trade both undermined health objectives and led to loss of revenue for governments, which could adversely affect funding of health care.

The protocol must contain measures that genuinely addressed illicit trade. It must be pragmatic, and take into account the practical consequences of the measures it contained. It must be proportionate, balancing the beneficial effects of the measures against the burden of compliance imposed on the tobacco industry, the tobacco supply chain and national administrations.

The European Union aimed to negotiate a text that could be ratified by all Parties to the Framework Convention and which could be adopted by 2010. It particularly wanted strong provisions

on tracking and tracing; rules for ensuring the legitimacy of customers and for due diligence; provisions to prevent money laundering and to allow for asset confiscation; and record-keeping.

The European Union wished to reserve its position on licensing, enhanced law enforcement, offences, sanctions and penalties; and jurisdiction until specific proposals were available for consideration. It also requested that the parts of the template dealing with an international institutional framework, institutional arrangements, financial resources, implementation mechanisms and law-making processes should not be discussed at the current session.

Ms MEJÍA DE RIVERA (alternate to Mr Urbizo, Honduras) said that the proposal on licensing contained in paragraph 6 of the template was unrealistic and would have little impact. The paragraph stated that the distribution of tobacco products should be controlled by measures including licensing; however, distribution could include importation, which was governed by the agreements drawn up by WTO and other free-trade agreements concluded by the country concerned. The proposal was also unrealistic for countries such as her own, where a large proportion of tobacco products were distributed by retailers.

In respect of the proposals on tracking and tracing (paragraphs 13–19 of the template), disputes might arise pending the introduction of covert codes, seals or bar codes, since, in the interim, there would be no unified system of coding and no single date for its introduction. The proposed measures relating to record-keeping (paragraphs 21–23) would be difficult to extend to the retail level.

There were, as yet, no legal provisions governing Internet sales of tobacco products in her country. The Executive Directorate for Imports had issued a ruling on the extension of trade licences to cover tobacco products. Licences could possibly be extended to cover counterfeit tobacco products.

The template also provided for measures to prevent money laundering, which were already covered in her country by a law passed in 1997. The current session should concentrate on measures to eliminate all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, which were all examples of fraud at a global level.

Mrs ASIYEDU (alternate to Mr Baah-Duodu, Ghana), speaking on behalf of the Parties in the WHO African Region, said that the template provided a sufficient basis for negotiations on the protocol, which should include clear provisions for law enforcement, tracking and tracing, licensing and sanctions and penalties which could be easily implemented in practice. Its provisions should be compatible with the measures already introduced by some African countries under Article 15 of the Framework Convention. The Parties of the African Region could benefit, not only from financial assistance, but also from sharing information and best practices with other countries.

Mr LEGUERRIER (Canada) said that a strong, effective, practical protocol would be essential for comprehensive tobacco control. His country supported in principle all the elements described in the template. The protocol should identify basic obligations related to each element which all Parties should observe, while allowing them the flexibility to adopt additional measures suited to their domestic context. He would return to the issue of the institutional framework later.

Dr OTTO (Palau), speaking on behalf of the Pacific island Parties, agreed that a strong protocol was needed. The template identified the most important issues. Financing of implementation of the protocol (paragraphs 83–85) should receive particular attention, as it did in Article 26 of the Framework Convention itself, since developing countries had limited resources at their disposal.

The CHAIRPERSON said that delegates appeared to be satisfied that the template covered all the major areas related to illicit trade in tobacco products and that no important issues had been omitted. He invited comments on the individual sections of the template.<sup>1</sup>

#### **Preamble, objectives and use of terms** (paragraphs 2 and 3)

Mr WALTER (alternate to Ms Marshall, Australia) said that the relation between the protocol and the Framework Convention should be explained at the beginning of the text and not at the end. The first part of the protocol should also include a statement of its purpose, for instance “to prevent and combat illicit trade in tobacco products as well as to promote cooperation among Parties to that end”. There should also be some explanation of the terms used; it might be sufficient to state that terms would be used in the same sense as in the Framework Convention unless otherwise specified.

Dr ABOU ALZAHAB (Syrian Arab Republic) suggested the inclusion of a statement, perhaps in the preamble, emphasizing the adverse health effects of both legally and illicitly traded tobacco products. Otherwise, the tobacco industry might employ the wording of the protocol to imply that legally traded products were not harmful.

The CHAIRPERSON suggested the inclusion of a statement to the effect that nothing in the protocol should discourage Parties from adopting even more stringent measures if they wished.

Mr OKUMA (alternate to Mr Tagaya, Japan) noted that tobacco products were not, in themselves, illicit commodities and that the scope of regulation varied between jurisdictions. The protocol must be consistent with existing domestic legislation and with bilateral and multilateral international agreements.

Ms BAQUERIZO GUZMÁN (Ecuador) suggested that, in the definition of illicit trade in paragraph 1, the words “including marketing, export and import” should be added after “production”.

Dr WAHISH (Sudan) said that the definition of “illicit trade” should include a reference to the advertising of tobacco products, which was part of marketing. In his country, both direct advertising and indirect forms such as product placement in films and radio programmes were being combated.

#### **Obligations** (paragraphs 4 and 5)

Dr TOESSI (Benin) said that the protocol should clearly describe the measures to be adopted and limits that should not be exceeded. Otherwise, countries might adopt inconsistent measures that did not reflect the spirit of the Framework Convention.

#### **Licensing** (paragraphs 6 to 10)

The CHAIRPERSON said that licensing was a key issue. It was important to decide whether the protocol should provide for licensing at all stages of the manufacture of products, at various levels of sale, or for non-tobacco items used in the manufacturing process, such as machinery or the cellulose acetate tow used to make cigarette filter tips.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) said that his country had adopted provisions governing tobacco use, pending the adoption of a law, as tobacco use was a global epidemic

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<sup>1</sup> See document FCTC/COP/INB-IT/1/4, Annex, Annex.

responsible for a wide range of diseases and many deaths. Tobacco should be monitored in the same way as the vectors of major infectious diseases, such as cholera. Licensing was required at the levels of manufacture, importation and distribution. Such health protection measures would not encroach on the traditional functions of finance ministries, operating through customs services. Rather, health security would be ensured by health ministries in collaboration with customs services and should precede any fiscal measures. At the current session, delegates should explore ways of bringing together health security and customs services. Licensing should reinforce anti-smuggling activities and both ministries should provide mutual support.

Mr LEGUERRIER (Canada) said that licensing was an essential element in controlling the domestic tobacco industry and reducing illicit trade in tobacco products; it also promoted ethical, law-abiding business practices. His country licensed manufacturers, importers and distributors.

The protocol should include obligations regarding the non-transferability of licences and the right of Parties to suspend or cancel licences. Eligibility requirements could include security bonds for the collection of tax revenue and tax compliance. The collection and use of licensing revenues was a matter for domestic fiscal policy and should not be included in the protocol.

Dr AMATSU (Togo) said that it would be impossible to license all retailers. The protocol should perhaps specify measures such as a ban on retail sales from unlicensed establishments, as was already the case in some countries. His country had a similar problem with the sale of medicines, which were widely available in street markets and other unofficial outlets.

Mr URAKAWA (Japan) said that licensing and/or registering tobacco products for trade was an effective control measure. Rather than licence all participants, as proposed in paragraph 10(a), it would be sufficient to license businesses at the manufacturing and distribution stages.

In respect of paragraph 10(c), he said that some forms of authorized assignment or transfer of a licence due to mergers or inheritance should be permissible. There should be no requirement for licences to be renewed periodically, as that would increase administration costs.

It was unrealistic to require tobacco merchants to purchase only from licensed tobacco sellers operating in international trade, as proposed in paragraph 10(d), and might also conflict with existing WTO agreements. Furthermore, a regulation prohibiting the sale of raw materials and machinery to licensed tobacco manufacturers, as proposed in paragraph 10(e), would be problematic.

In respect of paragraphs 10(g) and (h), he said that the use and amount of licence fees were matters for individual countries. In the respect of paragraph 10(i), Inspection regimes should be determined by the competent authority of the Party concerned. In paragraph 10(j), the range of business partners and the concept of “due diligence” should be clarified.

Dr GAO Xingzhi (China) said that his country supported the proposal for a licensing system. Tobacco regulation in China included a licensing system for manufacturing, distribution, import and export, which also covered raw materials and machinery.

Licence fees should not be compulsory under the protocol and such fees were not charged in China. The protocol should not stipulate the licence purpose nor the issuing authorities. Parties should decide those matters for themselves.

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that some of them had adopted licensing or registration practices in order to identify and register various elements in the supply chain for tobacco products. Licensing and registration should be permissible, terms should be defined in the protocol, and should apply to manufacturers, distributors, importers, exporters and – optionally – to tobacco growers and retailers.

Speaking on behalf of his own delegation, he said that some of the provisions of paragraph 10 were ambiguous and should be clarified.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that paragraph 9 should include tobacco-leaf producers or retailers, as tobacco-leaf smuggling was widespread in developing countries. His country had regulated the production and sale of tobacco leaf. Licensing would facilitate the exchange of information on such measures.

Paragraph 10(h) should be expressed more flexibly, as countries might already have legislation governing the use of licence revenues. In respect of the proposals in paragraph 10(k), it was going too far to give health authorities any responsibility for licensing; however, they could be given a role in monitoring, such as collecting indicators of the illicit tobacco trade and reporting on inspections.

Mr JAMA (Kenya) said that licensing helped countries to monitor their production of tobacco and should be closely linked to tracking and tracing procedures. The term “entities” in paragraph 9 should be precisely defined. The possible uses of licence fees proposed in paragraph 10(g) should also include the development of tobacco-control strategies, for the benefit of developing countries.

The structure of the template should be made more logical. For instance, money laundering provisions appeared just after the section on licensing, but was also discussed in the section on proceeds of crime and seizure of assets (paragraphs 43–47).

Mr NAVARRETE (Chile) said, with reference to paragraph 9, that in his country, retailers were obliged to register with the fiscal authorities. Similarly, in respect of paragraph 10(d), which proposed the licensing of tobacco sellers. A licence could easily be forged; a public register of tobacco sellers, published by the competent authority, would provide additional credibility. With reference to paragraph 10(k), he said that the health authorities should issue licences, but subsequently, at the marketing stage, licensing should be managed by the fiscal authorities.

Mr FISCH (Brazil) observed that two types of licences existed in his country: one for cigarette manufacture, which was issued by the fiscal authorities, and one relating to imported brands of tobacco products, which was issued by the health authorities. Some brands had been specially developed for illicit sale in Brazil and were unknown in their countries of origin. A reference to brand licences could, therefore, be included in the protocol.

Dr OTTO (Palau), speaking on behalf of the Pacific island Parties, said that they supported the strong licensing provisions laid out in paragraphs 6 to 8 of the template. In paragraph 10(a), it should be made clear that the phrase “All participants in the tobacco business” included major suppliers of inputs to the manufacturing process, including equipment and filter tow. The licence fees referred to in paragraph 10(g) should be used to develop tobacco-control strategies.

Ms MERIZALDE (Ecuador) said that she supported the Syrian proposal to include tobacco-leaf producers in the protocol. Her own country’s legislation defined tobacco products as those manufactured wholly or partly from tobacco leaf and intended to be smoked, sucked, inhaled, chewed or used as snuff.

In paragraph 10(c), the protocol should clearly state which licences had to be periodically renewed and how often. The licensing requirement should not unduly restrict trade.

Dr YEARWOOD (Trinidad and Tobago) said that the phrase “All participants in the tobacco business” in paragraph 10(a) was too broad. In her country, it was considered impractical to license small retailers, whose businesses were often short-lived. The protocol should refer specifically to manufacturers, importers, exporters, wholesalers and distributors.

In respect of paragraph 10(g), Parties should have the flexibility to use licence fees for purposes other than administration, enforcement and information costs. If, however, the licence fees were insufficient to cover administration of licensing, the protocol should require Parties to supply the necessary resources. In respect of paragraph 10(j), licensing authorities should bear the responsibility of conducting due diligence on licence applicants or potential licence holders.

Ms QUIGLY (alternate to Ms Marshall, Australia) said that her country had a strong licensing regime. In respect of paragraph 10(g), the imposition of fees and economic sanctions might increase the economic imbalance between licit and illicit trade. With reference to paragraph 10(h), she agreed with previous speakers that countries should decide for themselves on the use of income from licence fees.

Mr URAKAWA (Japan) said, that with reference to paragraph 10(k), since responsibilities were allocated by individual governments, the protocol should not seek to regulate the issue.

Ms MATSAU (South Africa) supported the provisions of paragraph 10 in general but expressed concern that loopholes in the provisions would provide opportunities for illicit trade, for instance with respect to small retailers. Some of those provisions fell outside the scope of the Intergovernmental Negotiating Body; however, she was concerned that the statements by some speakers that countries should decide for themselves on certain matters might give rise to in-country or bilateral trade agreements, which would negate the aims of the protocol. It was important to state clearly how much authority the protocol would have, even within a specific country.

Dr PRAKIT VATHESATOGKIT (Thailand) said that, in his country, retailers were licensed, with fees charged and planned increases, as increasing the price of tobacco reduced consumption. With reference to paragraph 10(k), health authorities should be involved in licensing, particularly at the retail level.

Mr TAGOE (Ghana) said that the aim of the protocol was to control the tobacco business, not to eliminate tobacco use altogether. Regarding paragraph 10(c), a thriving business might be destroyed if it could not transfer its licence to a new owner. Transfers should be allowed, subject to an inspection by the licensing authority.

Mr GÖRÜN (alternate to Mr Çelik, Turkey) said with reference to paragraph 10(f) that the product types licensed should be restricted on a regional basis. Product names and packaging designs should be covered by a licensing procedure, but that should not serve as an encouragement to purchase.

Dr MAHGOUB (Sudan) said that paragraph 10(a) should be amended to read: “All participants in the tobacco business, including major growers, users, suppliers, retailers and wholesalers ...”.

Ms SEKOU MADOUGOU (Benin) said that, in developing countries, the main problem was at the retail level, where there was a well-developed informal sector that was not under government control. The provisions in the protocol governing the retail sector should therefore be reinforced.

Ms HAOUICHAT (Algeria) agreed with the previous speaker. Her country had adopted licensing on the manufacture, distribution and import of tobacco products. Implementation of the legislation was hampered by retailers and street vendors, whose activities were difficult to control. The sale of cigarettes individually rather than in packets was of particular danger to young people.

Ms ALI-HIGO (Djibouti) agreed with the representatives of Benin and Algeria. In poor countries, retail and informal trade was growing, and retailers were beyond the reach of tobacco-control policies. The proposals in the template were not excessively specific. Licensing measures must be feasible and respect countries' existing regulations. The protocol must establish a minimal “common denominator” for action to control illicit trade.

Professor GONSU (alternate to Mr Nkou, Cameroon) said that selling cigarettes individually, which was common in developing countries, rendered control measures such as tracking and labelling ineffective and made it difficult to establish a cigarette's constituents and provenance. The protocol should include a recommendation for the adoption of legislation permitting tobacco products to be sold only in labelled packets, which would facilitate tracking, reduce consumption and discourage illicit trade.

Mr MALOBOKA (Namibia) said that there should be as few loopholes as possible in the protocol. It was intended to combat illicit trade, not regulate legal trade or refine existing trade protocols. It should ensure that vulnerable regions, especially Africa and Asia, were adequately protected.

Dr BEKBASAROVA (Kyrgyzstan) supported the proposals relating to licensing, but noted that the template did not address the problem of smokeless tobacco products. Chewing tobacco accounted for a large proportion of the illicit market in Central Asia. A clear statement in the protocol about the status of such products would assist her Government in that task.

Dr LEWIS-FULLER (Jamaica) said that her country supported the principle of licensing along the entire supply chain of tobacco products, with penalties for any violations. Licence fees should be used as the country concerned saw fit. Licensing was a public health issue as much as an economic one. Strict licensing would reduce illegal imports of tobacco or illegal products such as weapons or illicit drugs. The formidable problem of licensing informal retailers must be addressed, since larger distributors and wholesalers colluded with small retailers, thus avoiding licensing controls.

She agreed with the remarks made by the representative of South Africa. The aim of the current meeting was to draw up a strong joint protocol through collective effort. If countries claimed that their existing regulations were good enough, then the loopholes that made illicit trade possible would remain, and the perpetrators would merely transfer their activities to those countries that had the weakest controls.

Dr AYOUB (Jordan) said that the licensed participants in the tobacco business listed in paragraph 10(a) should include tobacco growers, producers, distributors and sellers. In respect of paragraph 10(h), governments should use any licence fees as they saw fit.

Dr AL-HALWACHI (Bahrain) said that, in his country, the sale of any goods without a licence was considered equivalent to begging. Non-Bahraini nationals imported large quantities of tobacco products and employed street children to sell them illicitly. Some products were counterfeits or contained lead or other dangerous substances. He agreed with the representative of Kyrgyzstan that the protocol should cover various types of tobacco products.

Mr ONANGA (Congo) said that the licensing of all the steps in the supply chain was justified and might also encourage stricter border controls, for example, between his own country and its closest neighbour. Licensing would reduce smuggling and illicit trade, even if it could not eliminate them altogether.

Dr ABOU ALZAHAB (Syrian Arab Republic) asked whether the term "tobacco" in paragraph 10(d) referred to tobacco leaf or tobacco products, or both. The protocol should state clearly each time what was meant. Tobacco products were more often sold in newsagents' shops or supermarkets; the protocol should make it clear whether such establishments must be licensed to do so.

Ms FLORES SALGADO (Peru) said that the licensing of small retailers could be optional, to help those Parties in which informal sales were a problem. Licensing should be related to the volume of sales in a country, with the aim of restricting the number of small retailers in the long term.

**The meeting rose at 13:00.**

### **THIRD MEETING**

**Tuesday, 12 February 2008, at 15:15**

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

**DRAFTING AND NEGOTIATION OF A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS:** Item 6 of the Agenda (Documents FCTC/COP/INB-IT/1/4 and FCTC/COP/INB-IT/1/INF.DOC./1) (continued)

**Licensing** (paragraphs 6 to 10) (continued)

Mr SAMUDA (Panama) reported that his Government had legislated against tobacco consumption and its harmful effects on health. With regard to licensing, a register of cigarettes and alcoholic beverages had been drawn up by the Ministry of Economy and Finance, and importers of tobacco products had been listed. Products had to comply with the requirements of the Ministry of Health in order to be shipped and authorized. The Ministry of Health and customs authorities collaborated in order to control imports of tobacco products and their export, transit and shipping.

Mr PETERU (Samoa), speaking on behalf of the Pacific island Parties and referring to paragraph 10(h), said that countries should determine how licensing fees should be used. In addition to supporting programmes linked to raising tobacco awareness, best practices could include funding for sustainable livelihood programmes in poorer communities that engaged in unregulated tobacco activities.

Mr ROWAN (alternate to Mr Guth, European Community) said that several Member States of the European Union already had in place many licensing regimes relating to tobacco control. Licensing was only one of the elements that could be used in the overall control of tobacco products; the protocol should recognize and respect the diverse licensing systems in the different Parties. Measures should be flexible. The European Union was open to other suggestions concerning licensing, in particular on the components of cigarette production such as acetate tow, and agreed that the principles of due diligence and the “know-your-customer” rules should be applied to those involved in the supply chain.

Mr NOOR HISHAM BIN ISMAIL (Malaysia), requested further clarification on paragraphs 10(b) and 10(j), and asked how licence holders would conduct due diligence on their business partners without legal empowerment and whether a standard tobacco-control law would have to impose such a requirement.

Dr AL-BADAH (Saudi Arabia) requested clarification of the terms “major suppliers” and “dealers” in paragraph 10(a). Paragraph 10(h) might be reformulated along the following lines: “all money collected from licensing shall be used by each country in accordance with its national regulations”. In Saudi Arabia all licensing fees were returned to the Ministry of Finance.

Mr AHMADI (Islamic Republic of Iran) said that some of the ideas contained in paragraph 10 were ambitious. It might not be feasible to require all participants in the tobacco business to hold a licence as indicated in paragraph 10(a): for instance in some countries, street vendors had no other way to feed their families than to sell tobacco products. Flexibility in the protocol should reflect

diverse national situations. Paragraph 10(k) emphasized that tobacco licensing was both a fiscal and a health issue, which inferred that licensing fees might be used for health purposes and not simply for enforcing licensing laws as stipulated in paragraph 10(a).

Mr NICOLAS (adviser to Mr Padilla, Philippines) asked whether the term “All participants” in paragraph 10(a) encompassed the transport sector; whether licence fees, would cover only administration, enforcement and information costs, or would also cover other costs; whether a centralized or decentralized body would administer the licences and which entity would conduct the audits and suspend or cancel the licences.

The CHAIRPERSON said that, in his opinion, the objective of the protocol should be to achieve strong, effective results; with some discretion left to each country in deciding how best to achieve them. He invited comments on the “know your customer” and “due diligence” aspects set out in paragraph 7.

Mr MEDEIROS DE CAMPOS RIBEIRO (alternate to Mr Florêncio, Brazil) said that licensing aimed to enable governments to exert pressure on the industry and put in place controls in order to prevent products from entering the illicit market.

Dr LEWIS-FULLER (Jamaica), noting that some countries would find it difficult to license small retailers, said that the know-your-customer rules might provide a mechanism for controlling them instead.

The CHAIRPERSON said that the comments made on licensing, due diligence and know-your-customer rules would be taken into account in developing the Chair’s text.

#### **Tracking and tracing** (paragraphs 13 to 20)

Responding to a question from Dr ABOU ALZAHAB (Syrian Arab Republic), the CHAIRPERSON said it was unlikely that a single body would operate the international tracking and tracing regime referred to in paragraph 16. The intent was to ensure that a system was applied in each Party with similar effects.

Mr URAKAWA (Japan) said that some discretion should be given to Parties in determining the content of the markings and how they appeared on products. The markings used by manufacturers in Japan identified the date, facility, machine, production shift and intended market and made it possible to trace the origin of a product.

Mr JAMA (Kenya) suggested that the words “and effective” should be added after “practical” in paragraph 13. It was not appropriate to apply the word “genuine” to a product that killed millions; that word should therefore be deleted from the first and penultimate sentences in paragraph 16. The words “the illicit market” in the last sentence of paragraph 16 should be replaced by “an intended market of sale”.

Dr AMATSU (Togo), referring to paragraph 20, said that some countries that did not manufacture cigarettes might find it difficult to ensure that all packs, cartons and master cases carried machine-scannable codes, unless technical assistance were made available.

The CHAIRPERSON said that manufacturers would be obliged to label master cases; efforts would be made to establish how far down the manufacturing chain the labelling could extend.

Mr ESCUDERO (alternate to Mr Martabit, Chile) said that his country had positive international cooperation in the tracking of cigarette shipments with Argentina, Panama and Uruguay, and with the European Anti-Fraud Office, resulting in identification from the point of origin to the point of sale of cigarettes. Bar codes on cigarette packets might facilitate international cooperation. The protocol should address the complex issue of export processing zones, since it was very difficult to track and trace shipments of contraband cigarettes when they passed through such zones.

Ms HAOUICHAT (Algeria) stressed that the protocol should take a firm position on the involvement of the tobacco industry and manufacturers in preventing illicit trade, and it should specify the areas in which they could become involved without undermining the objective of reducing tobacco consumption.

Mr KRISHNA (India) said that the Parties in the WHO South-East Asia Region supported the development of an internationally standardized tracking and tracing system that could be applied by all Parties. He requested the Convention Secretariat to provide a full list of indicators for such an internationally applicable system before the next session of the Intergovernmental Negotiating Body.

Mr BERTRAND (Canada) said that Canada was currently implementing a new tobacco-stamping regime to improve product identification and production control. A new stamp with covert and overt identifiers would appear on all tobacco packages destined for the Canadian duty-paid market, and distribution of the stamps would be controlled. Manufacturers were also required to mark all cartons, cases and containers and to identify their intended market. Such controls were practical, feasible and cost effective, and could be adopted by all Parties, and were essential for the development of any tracking and tracing system. A working group might be established to devise international traceability standards which should be outlined in the protocol.

Dr TOESSI (Benin) agreed that tracking and tracing were key elements in preventing illicit trade, and suggested that subregional organizations should become involved in those activities.

Ms SEKOU MADOUGOU (Benin) said that the geographical location of some countries made tracking and tracing difficult. Benin had a port that served some landlocked countries, and goods entering it that were supposedly in transit through Benin could be redirected into the country.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) agreed with the previous speaker on tracking and tracing products across countries. The date of manufacture and expiry, batch number and market authorization should be clearly and openly marked.

Mr BERREDO MENEZES (Brazil), supporting the comments made by Canada, said that implementation of a tracking and tracing system should be carried out by the government of the Party concerned, without any interference from the tobacco industry and supported by international cooperation. In June 2007, Brazil had approved a federal law that required tobacco manufacturers to install equipment to control output. The equipment should enable the nationwide control and tracing of products, and the identification and suppression of illegal production, imports, and counterfeit products. Tobacco manufacturers had to reimburse the Government for installing and maintaining the system on each production line. Moreover, a fine of 100% of the commercial value of the merchandise produced could be levied if implementation of the system had been obstructed by the manufacturer. A tracking and tracing system concerned both law enforcement and tax revenues. International cooperation between the Parties was essential to combat illicit trade in tobacco products.

Mr ESTEGUET (alternate to Mr Nkou, Cameroon) said that his country had already adopted legislation concerning the labelling and marking of packs and carton in accordance with the Convention. However, contrary to the statement in paragraph 18 concerning existing technology,

many countries found it expensive to implement tracking and tracing systems. Moreover, manufacturers were sometimes reluctant to label packages. An internationally standardized tracking and tracing system would oblige producers to use accepted markings and codes.

Mr ROWAN (alternate to Mr Guth, European Community) said that it was essential to be able to identify the source of the diversion onto the illicit market. Accordingly, the protocol should contain strong provisions on tracking and tracing. Tax stamps, as a means of controlling cigarettes, were effective at the national level only. A tracking and tracing system should be implemented at the international level in order to tackle illicit trade.

Ms ALI-HIGO (Djibouti) welcomed the proposals to develop effective and affordable methods for tracking and tracing. She endorsed the comments of the European Community regarding the importance of identifying the sources of illicit markets. International cooperation and an information network were essential to tracing. Furthermore, paragraph 16 should be developed so that the provisions on tracking and tracing forced the tobacco industry to accept its responsibilities, especially in developing countries. She supported the suggestion by Canada to establish a working group to develop paragraph 16.

Mr MOUSSA (Niger) emphasized that an international tracking and tracing system would be effective if already established at the national level, and well-resourced. National and international systems should complement each other. Some Parties did not have the capacity to control their extensive borders, and those implementation issues should be taken into account.

Mr SCHIAFFINO (alternate to Mr Artucio Rodríguez, Uruguay) said that it was important to have details on the machinery to manufacture cigarettes, and on buyers, sellers and types of market.

Mr ZHANG Xiulian (China) said that China would support the introduction of non-removable, covert and overt codes on the packs, cartons and master cases of tobacco products. Such action would facilitate tracking, tracing and identification of the products, and promote international cooperation in combating illicit trade.

Mr CUNNINGHAM (Mauritius) supported the proposal to establish an international tracking and tracing system and endorsed the suggestion by Canada and others that a working group should develop the international specifications. In Mauritius, a high-security bar code, tracking and tracing system would be introduced on 1 July 2008 and help to identify smuggled and counterfeit cigarettes. The national system would be modified, as necessary, once the international system for tracking and tracing had been developed.

Mr GÖRÜN (alternate to Mr Çelik, Turkey) said that each tax stamp should be used only once. Tracking and tracing should include a covert code and an alpha or numeric code should be printed on the packet. The customer could then check the authenticity of the product through a call centre or web page.

The CHAIRPERSON, summing up the discussions, said that he had noted strong support for the principle of a practical tracking and tracing system, but that more discussion was required on its application, in particular in developing countries. Building on national systems, it should identify the origin of the products, the manufacturer, the first customer, and the source of the diversion from legal trade. All Parties should benefit. The information would be most effective if linked to that kept by manufacturers on customers.

Dr BEKBASAROVA (Kyrgyzstan) said that it might be difficult for developing countries to introduce provisions on tracking and tracing, notably in decoding and in monitoring shipments across

national borders. The provisions should emphasize cooperation between countries. In Kyrgyzstan, a health warning across 40% of the surface of cigarette packets would be introduced from 1 April 2008. The words “sale is authorized in the Kyrgyz Republic” would also be printed on the packet, together with a list of countries involved in the manufacture.

The CHAIRPERSON, responding to a question from Ms ALI-HIGO (Djibouti), said that the protocol should be applied by as many Parties as possible. Pressure could be put on non-Parties, for example, through the obligation placed on the manufacturer to mark tobacco products for tracking and tracing. However, further consideration could be given to international tracking and tracing provisions.

Mrs AZIZAH BINTI IDRIS (Malaysia) supported the introduction of a tracking and tracing regime. The tax stamps and security ink currently used in Malaysia were not sufficient to track the movements of tobacco products accurately, and often small companies did not have the systems required.

#### **Record-keeping** (paragraphs 21 to 24)

Dr ABOU ALZAHAB (Syrian Arab Republic) said that paragraphs 21 and 22 should make reference to keeping records on tobacco growing. Some countries might have only limited access to computerized records. A single standard format for record-keeping should be used by both the industry and tobacco growers. The computerized data referred to in paragraph 23 should be maintained, for legal purposes, for not less than 10 years.

Mr NICOLAS (adviser to Mr Padilla, Philippines) said that record-keeping was a means of monitoring the inventory of tobacco products. He pointed out that legislation in the Philippines required that computerized data be kept for a maximum three years.

Mr URAKAWA (Japan) said that Japanese law required businesses to keep important records such as accounts for 10 years. If the protocol were to require the tobacco industry to keep records for a longer period, it would be unlikely to meet with public support in Japan. The provisions should not conflict with the freedom of business enshrined in Japan’s Constitution. Some businesses dealing with tobacco products were registered or licensed as an individual and consideration should be given as to whether they should collect and possess personal data.

The provisions requiring computerized business records, and reporting exchanges of information between the Parties required maximum flexibility. The exchange of information through existing international institutions would be preferable to adoption of a new internationally standardized system.

Mr KRISHNA (India) said that the Parties in the WHO South-East Asia Region would support the provisions concerning record-keeping. Small manufacturers might not be able to comply immediately with a requirement for real-time access to information, but all Parties should develop regulatory mechanisms to that end.

Speaking as the representative of India, he said that the sharing of information between Parties should be considered under the section on international cooperation, rather than under record-keeping.

Dr TOESSI (Benin) said that manufacturers should be required to disclose information in the event of an investigation.

Ms LIKIBI-BOHO (Congo) suggested that the word “single” should be deleted from paragraph 21 to allow information to be taken from more than one source in cases of suspected fraud.

Mr MOUSSA (Niger) said that the wording in paragraph 21 should reflect the obligation of businesses to maintain records. For countries without the means to keep computerized records, other methods of record-keeping should be considered.

Mr NAVARRETE (Chile) said that record-keeping should be mandatory for those involved in the supply chain, such as agents and representatives.

Mr MEDEIROS DE CAMPOS RIBEIRO (alternate to Mr Florêncio, Brazil) said that Brazil had a system that provided real-time access to information from manufacturing to the sale of products; Brazil would be pleased to share that experience. The protocol must contain detailed provisions for record-keeping that included production and trade.

Mr OTTO (Palau) said that tobacco companies were declaring profits, particularly from poor and developing countries, in billions of dollars, while those same countries counted the costs of health care due to tobacco use, also in billions of dollars; therefore, the strongest provisions were needed concerning record-keeping. Information sharing could be addressed under the section on international cooperation. Provisions to strengthen information sharing with respect to tracking and tracing could also be included within record-keeping. Computerization was intended to make work easier and therefore he supported the wording in paragraphs 20 to 24.

Ms HAOUICHAT (Algeria) said that records were already kept by manufacturers and distributors in Algeria. Regarding the comments made by the representative of Niger, she said that the word “can” might also be replaced with “should” in paragraph 22.

Mr ROWAN (alternate to Mr Guth, European Community) said that the European Union recognized the importance of document retention and record-keeping in combating illicit trade and had direct experience of its usefulness in bringing cases to court. The protocol should contain strong provisions on that subject.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) supported provisions for record-keeping because they measured activity and ensured that the protocols were respected.

Mr SELEMAN BIN SALEH (Democratic Republic of the Congo) added that all those involved in the tobacco trade, including the manufacturers of tobacco filters and suppliers of acetate tow, should be licensed and obliged to keep records and information enhanced traceability.

Mr AL-JEHANI (Saudi Arabia) said that the time limit provided for in paragraph 23 should be extended from five to 10 years.

Mr OLIVER (Canada) supported the inclusion of practical record-keeping measures in the protocol, for verification of compliance in the tobacco industry, and for use in criminal investigations. Arrangements for sharing information could be included in the section on international cooperation.

Dr LEWIS-FULLER (Jamaica) said that the importance of record-keeping should require back up records to be kept in a different location.

The CHAIRPERSON said that the views expressed had emphasized that adequate records should be kept, in particular for investigations. Further discussion was required on the nature of those records and the best way to keep them.

**Security and preventive measures** (paragraphs 25 and 26)

Mr AL-JEHANI (Saudi Arabia) said that civil penalties should be levied on manufacturers that failed to control the supply chain with a possible boycott on imports from the manufacturer or country concerned.

Dr TOESSI (Benin) said that dissuasive measures might go further, for example by closing down the factory, or suspending its activities.

Dr AMATSU (Togo), supporting the suggestion by Benin, said that criminal sanctions might be considered in cases of repeat offences.

Ms ALI-HIGO (Djibouti) said that the phrase “*invité à surveiller*” in paragraph 25 of the French text should be made more prescriptive. Furthermore, the paragraph made reference to tobacco-related products being “diverted during transport” although counterfeiting and illicit commerce were sometimes organized at the manufacturing stage.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) stressed that security and prevention measures should cover the manufacturer and other participants in the supply chain, in particular the transporter.

Mr ESCUDERO (alternate to Mr Martabit, Chile) said that since 2004, Chile had reduced smuggling by the requirement that exporters should pay a deposit on merchandise, returnable following certified export.

Mr ESTEGUET (alternate to Mr Nkou, Cameroon) said that the proposed security and preventive measures could also be applied to the transporters and smugglers.

Mr MOUSSA (Niger) agreed with the proposal to strengthen sanctions on manufacturers whose goods were regularly seized.

Ms MATSAU (South Africa) stressed that licensing, record-keeping, and security and preventive measures were interconnected; the protocol had to set out stringent, punitive measures in order to tackle illicit trade. In South Africa, factories involved in the illicit manufacture of tobacco products had already been closed down.

Mr JAMA (Kenya) endorsed the comments of the previous speaker, stressing the need for punitive measures.

Mr URAKAWA (Japan) said that Japan did not support the provisions. To impose all of the liabilities for control of the supply chain on tobacco manufacturers might be inconsistent with the principles of Japanese civil and criminal law.

Dr AL-HALWACHI (Bahrain) noted that paragraphs 25 and 26 referred only to sanctions to be imposed on manufacturers. There should also be penalties for smuggling.

The CHAIRPERSON said that it was important to distinguish between criminal sanctions for the offence of smuggling, and penalties for negligence or lack of due diligence.

Mr BARRY (Guinea) supported the inclusion of provisions on security and preventive measures, and suggested strengthened wording. There should be criminal sanctions including fines and imprisonment, as well as administrative sanctions such as the seizure and confiscation of merchandise.

Mr TAGOE (Ghana) endorsed the comments of the previous speaker. Criminal sanctions should be imposed for illicit trading, including smuggling.

Ms LIKIBI-BOHO (Congo) said that the transporter also had an obligation to verify the nature of the merchandise being transported.

Dr LEWIS-FULLER (Jamaica) said that the penalty should be proportionate to the value or size of the shipment, and that criminal action should be taken against the smugglers. The destruction and disposal of smuggled goods should also be dealt with.

Mr KRISHNA (India) said that the Parties in the WHO South-East Asia Region supported the suggested provision relating to security and preventive measures.

Speaking on behalf of his own delegation and referring to paragraph 26, he said that it was not clear how the civil penalties could be effectively applied to manufacturers operating from territories outside the jurisdiction of the Parties concerned. The protocol must identify mechanisms whereby transnational offenders could be penalized. Issues of international civil liability must be dealt with in that section.

Mr NOOR HISHAM BIN ISMAIL (Malaysia) asked whether civil penalties should be applied in instances where no merchandise had been seized but manufacturers were unable to account for their supplies.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that the measures should also cover tobacco growers.

Mr NICOLAS (adviser to Mr Padilla, Philippines) said that paragraphs 25 and 26 focused on manufacturers. What penalties would be imposed on importers, transit operators and other participants in the supply chain? The protocol might also provide for physical inspection, by the customs authorities, of all tobacco products being imported, exported or in transit.

Mr OTTO (Palau) said that the Pacific island Parties supported the inclusion of paragraphs 25 and 26 and believed that offences associated with failure to secure the supply chain should be criminalized.

Mr MOHAMEDOUN (Mali) suggested that the word “civil” should be deleted from paragraph 26; the Party concerned could decide whether civil, criminal or administrative penalties would be imposed.

Dr AL-BADAH (Saudi Arabia) suggested that, in the interests of clarity, the term “supply chain” could be defined and the stages from tobacco growing to consumption listed.

In response to a request for clarification from Ms AZIZAH BINTI IDRIS (Malaysia), the CHAIRPERSON said that efforts would be made to establish an international system that would apply to all manufacturers irrespective of the jurisdiction in which the products were seized.

**Internet sales** (paragraphs 27 and 28)

Dr AL-BADAH (Saudi Arabia) said that the sale of cigarettes and other tobacco products over the Internet, including mail orders, was a pernicious phenomenon unfolding in the developing world and one for which States had a tremendous responsibility. There was no register to record accidents or problems resulting from those sales and greater accountability should be advocated. The distribution network for imported tobacco products could be monitored and controlled.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that the sale of tobacco products through the Internet should be prohibited since it could encourage young people to take up smoking.

Mr NICOLAS (alternate to Mr Padilla, Philippines) said that Internet sales of cigarettes reduced tax revenues and could constitute a source of illicit trade; they should, therefore, be restricted. If the protocol made reference to Internet sales, it should also include a provision relating to duty-free sales.

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that Internet sales should be controlled by regulating distribution and delivery services. It would be too complex and difficult to curb trade on the Internet.

Ms ALI-HIGO (Djibouti) favoured prohibition of Internet sales rather than legislation to regulate them. Internet sales could be used to bypass prohibition of illicit trade.

Mr ZHANG Xiulian (China) said that Internet sales posed problems for licensing and taxation systems, and should be completely prohibited. The protocol should also contain provisions strengthening the regulation of cigarette and vending machines.

Dr ANIBUEZE (Nigeria) supported the inclusion of a section on Internet sales, although so-called "cash economies" were less affected. He endorsed the suggestion that regulation of duty-free sales should be included in the protocol.

Mr URAKAWA (Japan) said that Japan did not support the proposed provisions on Internet sales because even if distributors had a licence and paid any applicable tax, the licence would not prevent illicit trade if the customs authorities in the importing countries could not ensure collection of the tariff.

Mr NAVARRETE (Chile) said that prohibiting Internet sales by law would not really affect illicit trade. Logistical and technical methods of control were needed.

Mr OLIVER (Canada) said that in considering banning Internet sales, it was important to bear in mind the work of the working group on Article 13 of the WHO Framework Convention covering advertising, promotion and sponsorship. Consistency of language employed should be ensured between that group and the Intergovernmental Negotiating Body.

Mr IN'T VELT (alternate to Mr Draijer, Netherlands) said that in the previous week, representatives of some 140 countries had attended a meeting organized by the World Customs Organization in Dubai, United Arab Emirates, to discuss the problem of counterfeiting and piracy. Internet sales had been discussed. Representatives of search engine and auction web sites had reviewed technical methods to discourage illegal sales over the Internet.

Mr SAN MARTÍN (Paraguay) said that research teams in his country had identified web pages offering vast quantities of illicit tobacco products. Internet sales presented a serious problem and should be dealt with vigorously.

Mr MALOBOKA (Namibia) said that Internet sales were difficult to control and monitor and could encourage minors to take up cigarette smoking; therefore they should be prohibited.

(For continuation of the discussion, see summary record of the fourth meeting, section 2.)

**The meeting rose at 18:00.**

## **FOURTH MEETING**

**Wednesday, 13 February 2008, at 10:25**

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

### **1. OFFICERS AND CREDENTIALS** (continued from the second meeting, section 1)

The CHAIRPERSON, referring to document FCTC/COP/INB-IT/1/5, recalled Rule 28 of the Rules of Procedure of the Conference of the Parties, which indicated that the Officers of the Intergovernmental Negotiating Body should be referred to as the Chairperson and Vice-Chairpersons. Since the Bureau had reviewed the report on credentials contained in document FCTC/COP/INB-IT/1/6, formal credentials had been received from Barbados and Qatar. As it had not been feasible to reconvene the Bureau, he himself had examined those two sets of credentials and found them to be in conformity with the Rules of Procedure of the Conference of the Parties. In the absence of any objection, he would take it that the meeting agreed to the procedure followed and approve the report on credentials, which would be amended accordingly.

**It was so agreed.**

(For continuation of the discussion on credentials, see summary record of the eighth meeting, section 1.)

### **2. DRAFTING AND NEGOTIATION OF A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS:** Item 6 of the Agenda (Documents FCTC/COP/INB-IT/1/4 and FCTC/COP/INB-IT/1/INF.DOC./1) (continued)

**Internet sales** (paragraphs 27 and 28) (continued)

Ms BAQUERIZO GUZMÁN (Ecuador), speaking as the coordinator of the Parties in the Group of Latin American and Caribbean States, said that it was important to ensure coherence between Article 13 of the WHO Framework Convention on tobacco advertising, promotion and sponsorship and the current provisions to combat illicit trade over the Internet. The delivery and transport of tobacco products bought over the Internet should also be taken up in the protocol and consideration given to prohibiting the sale of tobacco to minors.

Ms NGAPOKO SHORT (Cook Islands) said that the Pacific island Parties supported the inclusion of provisions relating to Internet sales, and restrictions should also be applied to the sale of tobacco products by mail order, particularly to young people.

Dr AYOUB (Jordan) said that Internet sales of tobacco products should be prohibited since they encouraged sales to minors and the sale of poor-quality products. She recalled that Article 16 of the Framework Convention prohibited sales to minors.

Mr ROWAN (alternate to Mr Guth, European Community) said that the Internet was often used to place cigarettes onto the illicit market, and it had become a growing area of fraud. Since numerous

legal aspects needed to be explored, the subject might be considered by a working group. Duplication of the work carried out in connection with Article 13 of the Framework Convention should be avoided.

Dr HENG Lim Try (Cambodia) strongly supported a prohibition on Internet sales of tobacco products. Tobacco products advertised on the Internet could influence young people to smoke.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) said that Internet sales might make it more difficult to identify the parties involved in a transaction, although tobacco taxes should be clearly set out in national legislation. In any event taxes levied on tobacco products were indirect, taxing consumption rather than sales. Although he would support a prohibition on Internet sales of tobacco products, good tracking and tracing measures should enable customs authorities to ascertain the origin and destination of the products. The last sentence in paragraph 27 and the whole of paragraph 28 were superfluous since, under the terms of the protocol, all tobacco sales, including Internet sales, were to be licensed.

Ms DE SILVA (Sri Lanka) said that in 2006 her country had prohibited any type of tobacco advertising through any media but was unable to control the content of web sites located in other jurisdictions. Consideration should be given to banning all sales and advertising of tobacco products over the Internet.

Mr MOHAMED (Maldives) endorsed the comments of the previous speaker. His country had enacted legislation calling for a total ban on advertising sales of tobacco products over the Internet. The purpose of Article 13 of the Framework Convention was to achieve a comprehensive ban on tobacco advertising, promotion and sponsorship. A total ban on tobacco sales over the Internet could be reinforced by mechanisms to control delivery and supply. It would be difficult to control direct local delivery by businesses, but it should be possible to control deliveries by mail.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that the difficulties inherent in controlling sales over the Internet should not be used as an excuse to permit them: the technical means to prohibit Internet sales of tobacco products should be found.

Mr AL-JEHANI (Saudi Arabia) said that Internet sales of tobacco products should be controlled, and highlighted safety concerns for the ingredients of products sold over the Internet. The access of minors to tobacco products over the Internet was also a concern.

The CHAIRPERSON said that strong views had been expressed on the need to take control of Internet sales, and the technical means to be used. A working group might be established at the next session of the Intergovernmental Negotiating Body to consider the issue further.

#### **Enhanced law enforcement capacity** (paragraphs 29 to 53)

The CHAIRPERSON said that enhanced law enforcement capacity was an extensive topic, and had been broken down into a number of sections for ease of discussion. He would take up each section in turn, and invited comments on paragraphs 29 to 31.

Mr WALTER (alternate to Ms Marshall, Australia) expressed concern about the involvement of organized criminal groups in the illicit trade in tobacco. Criminalization could be useful in supporting a regulatory regime; consideration should also be given to other types of sanctions in order to develop a system that could be enforced effectively. It was critical to open dialogue with bodies such as the Conference of the Parties to the United Nations Convention against Transnational Organized Crime,

the Financial Action Task Force and the United Nations Commission on Crime Prevention and Criminal Justice in order to ensure that the protocol did not duplicate instruments already in force.

Ms BAQUERIZO GUZMÁN (Ecuador), speaking as the coordinator of the Parties of the Group of Latin American and Caribbean States, welcomed the provisions on enhanced law enforcement capacity. She emphasized the need for adequate resources, international cooperation, technical assistance and capacity building in order to assist in law enforcement.

Ms ALI-HIGO (Djibouti) said that developing countries sometimes lacked the technical capacities required to collaborate with States and international tracing services. The illicit trade in tobacco products should be combated with the same degree of support as the illicit trade in arms and pharmaceutical products, in order to prevent developing countries from becoming a weak link in the chain.

Mr DLAMINI (Swaziland) said that it was essential to not lose sight of the provisions of the Framework Convention itself. The greatest barrier to control of illicit trade in tobacco was the opposition of the tobacco industry and its allies; enhanced institutional capacity would be required to overcome their strategies.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that the protocol should reflect the fact that, in some countries, customs authorities were not the only authority involved in combating the illicit trade in tobacco products.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) said that provisions on enhanced law enforcement capacity were essential. He agreed that other authorities, including health services, were involved in combating the illicit tobacco trade. Paragraph 29(a) should also refer to national investigations, since illicit trade began at the national level. He proposed that a new paragraph 29(e) should be added on maintaining and sharing databases with other services. Administrative resources should be listed in the first sentence of paragraph 30. The first sentence of paragraph 31 could include a reference to all the other services involved.

Mr MOUSSA (Niger) emphasized enhanced law enforcement capacity, particularly if it was accompanied by technical and financial assistance to facilitate implementation. Mention should also be made of political will: political interference could prevent laws from being carried out effectively. He suggested that the paragraphs on law enforcement capacity should take account of that idea.

Mr OTTO (Palau) said that the tobacco industry targeted the Pacific island States because of their many areas of vulnerability including customs and law enforcement. Strengthened international cooperation in those areas was essential to prevent those countries from becoming the weak links in illicit trade. The words "large scale" should be deleted from paragraph 29, because all illicit trade affected his region.

Dr TOESSI (Benin), supporting the statement made by the representative of the Democratic Republic of the Congo, said that law enforcement deserved particular attention in Africa. Benin was strengthening the activities of customs authorities and the police. It would be useful to involve civil society and introduce freephone numbers for members of the public to provide information on the location of illicit products.

Mr KRISHNA (India) said that the Parties in the WHO South-East Asia Region recognized that capacity building of the enforcement agencies was critical to any protocol on illicit trade. Such efforts must be supported through national and international resources in order to ensure that countries with limited resources were not constrained. Paragraph 31 should be amended to include wording to that

effect. Offences, sanctions, penalties and other enforcement procedures at the international level, as in a number of United Nations conventions, should be included.

Dr KANGOYE (Burkina Faso) expressed strong support for the provisions. In developing countries it was often difficult to implement laws because of inadequate human, financial and technical resources. He supported the proposal by the Democratic Republic of the Congo to add, in paragraph 29, a reference to other services. Financial assistance should be given to low-income countries in implementing the protocol.

Ms MATEL (Cameroon) endorsed the provisions of the future protocol, although resources were needed to ensure that developing countries were not prevented from implementing it. The protocol must be strong and provide for international cooperation, capacity building in the long term, and training.

Mr JAMA (Kenya) supported provisions to deal with illicit trade. The word “complex international investigations” should be replaced by “effective international investigation” in paragraph 29(a). The phrase “adequate police, customs and regulatory resources” in paragraph 30 should be replaced with “adequate enforcement agents and regulatory services” in order to ensure their effective coordination.

Mr TAGOE (Ghana) said that in paragraphs 29, 30 and 31 the emphasis was on the security services, such as the police and customs. However, measures to combat illicit trade should include efforts to raise the public’s awareness of enforcement measures and encourage informants to expose undercover businesses.

Dr HENG Lim Try (Cambodia) expressed appreciation for the provisions concerning enhanced law enforcement capacity. Non-States Parties should be encouraged to consider developing government regulations to control and manage illicit trade.

Mr SAMUDA (Panama) said that customs activities might be expanded to include shipping and transit of tobacco products, for which the experience of the World Customs Organization might be useful.

Mr MALOBOKA (Namibia) said that effective control and enforcement of laws should include inter-regional tracking and tracing mechanisms, and incentives for informants. Collaboration with nongovernmental organizations, cooperation with neighbouring countries in tracking and tracing and staff training should all be promoted.

Ms MATSAU (South Africa) said that, for the purposes of clarity, in the first sentence of paragraph 29, the word “illicit” should be deleted from before “tobacco products”, and inserted before “manufacturing”.

Mr NDAO (alternate to Mr Mbaye, Senegal) said that paragraph 29(c), would require developing countries to be given assistance in capacity building and access to state-of-the-art detection and surveillance technologies.

Dr AL-ANGARI (Saudi Arabia) expressed support for paragraphs 29, 30 and 31. Saudi Arabia’s customs authorities played a significant role in combating smuggling and controlling its borders.

Mr AL-HARBI (Saudi Arabia), contributing the views of the Saudi Arabian customs services, expressed support for paragraph 29 and emphasized the need for sufficient financial resources, trained

officers and analytical resources. In Saudi Arabia, those who committed the offence of illicit trade were heavily sanctioned.

Mr JAYAGOBİ A/L NARAYANAN (Malaysia) said that paragraphs 29(a) to (d) bore a resemblance to the Framework of Standards to Secure and Facilitate Global Trade launched by the World Customs Organization in 2005. In designing the protocol, it would be useful to consider diagnostic studies and the feasibility of enforcing those Standards.

Mr ROWAN (alternate to Mr Guth, European Community) said that the European Union emphasized that customs and other law enforcement authorities should be adequately resourced in order to combat illicit trade in tobacco products and related organized crime. Any protocol should recognize that the structures of law enforcement authorities varied among Parties. International cooperation between those authorities was essential.

The CHAIRPERSON noted strong support for adequate law enforcement measures; that different bodies would be involved in different countries; and that there should be no duplication with existing instruments. Adequate resources were essential.

#### **Offences** (paragraphs 32 to 34)

Ms MATSAU (South Africa) said that the words “committed intentionally” in paragraph 33 created a loophole that the tobacco industry would exploit. The text placed the burden of proof of intent on governments, which was unfair and unrealistic. The word “intentionally” should be deleted as none of the offences outlined in the paragraphs could be committed unintentionally.

Ms BAQUERIZO GUZMÁN (Ecuador), speaking as the coordinator of the Parties in the Group of Latin American and Caribbean States, said that the word “offences” might be replaced with “illicit conduct” to enable each State to adjust with its national legislation. The last sentence of paragraph 33 might be amended as follows: “... to consider adopting legislative, administrative and any other measures in order to sanction the actions listed below:”. The provisions on money laundering might also be included in the section.

Dr ABOU ALZAHAB (Syrian Arab Republic) suggested that paragraph 33(a) might be broken down further into two subparagraphs, to read along the following lines: 33(a)(i) “growing, selling, buying or offering for sale or exporting tobacco leaves without a licence”, and 33(a)(ii) “manufacturing, selling, buying, offering for sale, exporting or importing tobacco products without a licence”.

Mr OKUMA (alternate to Mr Tagaya, Japan) said that it was difficult to reach an uniformly acceptable definition of illicit trade. Concrete regulatory measures could limit the number of Contracting Parties as well as the effectiveness of the protocol. Each Party should be permitted some discretion in determining its own regulatory framework. Two categories of offence were listed in paragraph 33: the first, violation of regulations, should not be defined uniformly as a criminal offence but should be interpreted, as appropriate, within individual jurisdictions. With regard to the second category, crimes such as smuggling, counterfeiting or bribery had already been criminalized under Japanese law.

Mr ONANGA (Congo) said that the licensing body should be indicated in paragraph 33(a), and the body authorizing possession should be specified in paragraph 33(f). The words “stock records” should be added in paragraph 33(c). The word “unauthorized” should be deleted from the beginning of paragraph 33(o), and the words “without prior authorization by the competent body” added at the end; the authorizing body should also be specified.

Mr KRISHNA (India) said that the Parties in the WHO South East-Asia Region would support paragraph 33, subject to the addition of the words “whenever a national law requires such licensing or registration” at the end of paragraph 33(a) and to the amendment of paragraph 33(1) to read “production, possession and sale of counterfeit tobacco products or fiscal stamps”. The word “unauthorized” in paragraphs 33(e) and (f) would have to be interpreted in accordance with national law.

Mr WALTER (alternate to Ms Marshall, Australia) said that inclusion in the protocol of the offences listed in paragraph 33 should be deferred until details of the licensing scheme had been worked out. Australia reserved its position on criminalization as an effective remedy. Administrative remedies, such as infringement notices, licence cancellation, and civil penalty provisions should be considered. The decision to criminalize a particular conduct should be taken because it was in the public interest to do so. Consideration should be given to the nature of the conduct concerned; how such conduct was dealt with in other circumstances under national law; the use of law enforcement in investigating it; the penalties appropriate to deterrence; and ease of collecting evidence. His delegation could assist in identifying those offences where the potential existed for duplication with other intergovernmental instruments such as the United Nations Convention against Corruption.

Ms ALI-HIGO (Djibouti) suggested that the raising of consumers’ awareness with other international instruments such as the United Nations Convention against Corruption might be added to the objectives listed in the first sentence of paragraph 33 and a communication strategy developed to promote it. She supported the proposal by South Africa to delete the word “intentionally” from the paragraph.

Mr MOHAMED DEIDA (Mauritania), said that in Africa in particular minors were used by organized gangs to conduct illicit trade, and provisions to protect them should therefore be incorporated in the text.

Mr NDAO (alternate to Mr Mbaye, Senegal) supported the views of Parties that had stated that paragraph 33 should only deal with offences that were not already codified in national law, and related to illicit trade in tobacco products, hence paragraphs 33(i) and (p).

Mrs CARTER TAYLOR (Barbados) agreed that it was not necessary to include the words “when committed intentionally” in paragraph 33. The offences listed should not be strict or absolute liability offences, and should consist of two elements, namely *mens rea* and *actus reus*. If provisions on criminal offences were to be retained in the text, the burden of proof of intention should fall to the Crown or State.

Mr OTTO (Palau), speaking on behalf of the Pacific island Parties, pointed out that tobacco was a legal trade product, albeit one that could cause death, and he agreed that activities concerning tobacco that fell outside existing laws should be classed as a criminal offence.

Mr WALTER (alternate to Ms Marshall, Australia), associating himself with the statement made by the representative of Barbados, expressed concerns regarding the inclusion of strict or absolute liability offences. There were other mechanisms to deal with issues of proof.

Mr BARRY (Guinea) said that the use of the terms “offences” and “violations” in paragraph 32 could be ambiguous. Under criminal law in Guinea, a violation was any breach of the law and an offence was a type of violation punishable by a custodial sentence. The word “violation” should be retained and States given the prerogative to legislate as they saw fit.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) said that, in paragraph 33(j), reference should be made to “tobacco” rather than to “tobacco products”. He suggested new paragraphs concerning, respectively, the use of improperly labelled packages, and the sale of tobacco to or by minors.

Dr GAO Xingzhi (alternate to Mr Zhang Xiulian, China) observed that some of the criminal offences listed in paragraph 33, such as the failure to maintain records, did not refer specifically to tobacco products or cover all criminal activities relating to tobacco products. The definition of illicit tobacco trade offences should be determined by the States Parties themselves, since it was impossible to establish a universal definition of criminal offences in the protocol. The term “tobacco products” in the protocol should include products related to production, such as raw leaves, equipment and other inputs. Accordingly, the title of the protocol might be changed to “Protocol on Illicit Trade in Tobacco Products and the Specialized Supplies for Tobacco Production”.

Dr AMATSU (Togo) endorsed the list of offences given in paragraph 33, while noting the existence in African countries of others, such as action by a licenced trader to include illegal counterfeit goods in consignments, and the granting of false or forged licences.

Mr ROWAN (alternate to Mr Guth, European Community) noted that the Parties in the European Union considered that a comprehensive listing of offences was fundamental to effective law enforcement. Both administrative and criminal legislation already existed within the European Union’s Member States in respect of the majority of violations listed in paragraph 33. The establishment of the violations as offences was a matter of national sovereignty, but consideration should be given to setting a minimum standard in the protocol. Any proposal to criminalize conduct should be adjustable with national legislations.

Mr MOUSSA (Niger) strongly supported the section on offences. However, it was not clear whether paragraph 33(a) was intended to cover all those growing tobacco without a licence, even small-scale farmers and whether small retailers who bought small quantities of raw leaf tobacco to be processed locally would be committing offences under paragraph 33(b). The forging of accounts should be listed as an offence. Major offences in the area of illicit trade should be defined, and provided for in national legislation.

Mr AL-JEHANI (Saudi Arabia) expressed support for paragraphs 32 to 34. The term “fraud” might be defined for the purposes of customs/in the context of customs. The sale of seeds and plants should be included in paragraph 33(a), and paragraph 33(h) should also cover the submission of incomplete information. Referring to paragraph 34, he said that national legislation must be taken into account.

Mr NICOLAS (adviser to Mr Padilla, Philippines) requested clarification of the term “safe havens” in paragraph 32. In paragraph 34, he had some difficulty with the references to “conspirators, organizers, abettors or facilitators”. It might be preferable to refer to accessories and accomplices. He also had some concerns regarding the references to “... conspiring or attempting to commit an offence ...” since in his jurisdiction acts of conspiracy, when not coupled with an overt act, were not considered a crime. Having noted that paragraph 33 should be based on domestic legislation, he sought clarification as to whether all potential growers of tobacco would have to be licenced. He urged caution with respect to paragraph 33(b), as tobacco was still a legal product. The protocol might refer to existing legislation in countries, such as laws on monopolies and cartels, and anti-trust legislation.

The CHAIRPERSON said that the term “safe havens” was intended to express, as far as possible, that the legislation should apply internationally and, as such, comprehensively. He agreed that the wording “... conspirators, organizers, abettors and facilitators” should be looked at more

carefully. The reference to “licence” in paragraph 33(a) had been incorporated in order to link the paragraph with other sections of the template document.

There seemed to be general agreement regarding the need for effective deterrents. The protocol should contain the widest possible range of deterrents leading to penalization, without causing serious difficulties for the legislation of particular systems or countries.

Responding to a request from Mr NOOR HISHAM BIN ISMAIL (Malaysia) for further clarification of the word “organizer” in paragraph 34, he said that the term was intended to cover those trying to facilitate and organize illegal or illicit acts.

### **Sanctions and penalties** (paragraphs 35 and 36)

Ms ALI-HIGO (Djibouti) requested clarification of the term “restitution” in paragraph 35, and suggested that reference might also be made to the whole of Article 15.4 of the WHO Framework Convention, and in particular to Article 15.4(c), in paragraph 36.

The CHAIRPERSON said that in his understanding “restitution” was the act, by the perpetrator, of giving back ill-gotten gains.

Mr PADILLA (Philippines) said that, in order to address the situation following a conviction, the following wording might be added in paragraph 35: “As far as practicable, no commutation of sentence, pardon, parole, amnesty or reprieve should be granted to an offender.”

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, emphasized that sanctions and penalties for the proper implementation of the template’s other provisions. As proceedings could be civil as well as criminal, he suggested that the last sentence in paragraph 36 should be amended to read: “... using such information at the appropriate stages of sentencing or imposition of penalty in criminal or any other proceedings ...”.

Ms BAQUERIZO GUZMÁN (Ecuador), speaking as the coordinator of Parties in the Group of Latin American and Caribbean States, reiterated her suggestion to replace the term “offences” with “illicit conduct” where appropriate in paragraphs 32 to 53 of the document. In the description in paragraph 35, a limited variety of penalties was listed, whereas paragraph 36 referred to “criminal and/or other remedies”. Each State should have the sovereign right to determine the type of sanctions to be imposed.

Mr TAGOE (Ghana) said that the penalties might include the seizure of all instruments used in the perpetration of the crime.

Dr AMATSU (Togo) requested clarification of the terms “probation” and “restitution”. The sanctions should also include loss of the right to import and the closure of manufacturing plants. Each Party should have the right to determine the sanctions to be imposed.

The CHAIRPERSON said that probation was usually a court decision to put an offender on a suspended jail sentence for a certain period. The Legal Counsel would provide further information in due course.

Mr WALTER (alternate to Ms Marshall, Australia) said that Australia would reserve its position on penalties and sanctions until the exact regulatory scheme was clear. Australia favoured a wide range of penalties and remedies, not simply criminal sanctions. The seriousness of the conduct and incentives should be taken into account. In paragraph 36, the wording “Parties may also wish to consider adopting measures that take into consideration any previous conviction of an alleged

offender ...” was unclear. Australia would have reservations about any measure obligating States to use prior convictions during criminal proceedings prior to sentencing.

Mr NOOR HISHAM BIN ISMAIL (Malaysia) said that in Malaysia sentencing took into consideration previous convictions. The criminal proceedings did not. Therefore, he sought clarification of the wording in paragraph 36.

Mr ROWAN (alternate to Mr Guth, European Community), recalling Article 15.4(b) of the WHO Framework Convention, said that the European Community and its Member States already had in place a range of robust measures to deter and penalize the illicit trade in tobacco products. Although a minimum standard of sanctions and penalties might be explored for inclusion in the Chairperson’s text, the establishment of criminal and/or other remedies had to take into account the national legislative requirements of individual countries.

Ms ROOPCHAND (Trinidad and Tobago) said that as the tobacco manufacturers themselves were involved in illicit trade, the words “revocation or suspension of licence” should be included as one of the penalties mentioned in paragraph 35.

Mr PADILLA (Philippines) said that the last sentence in paragraph 36 should refer to “any previous similar conviction”.

Ms ALI-HIGO (Djibouti) said that the penalties listed in paragraph 35 should cover all participants in illicit trade and should include closure and suspension of licence.

Mr AL-HARBI (Saudi Arabia) said that exposing the culprits to public stigmatization might be considered.

Mr TSHIMANGA (Democratic Republic of the Congo) said that in criminal matters, sanctions and penalties were the same thing and therefore the title of the section appeared repetitive.

Dr MAHGOUN (Sudan) agreed that illicit trade should be strongly penalized. The penalties in paragraph 35 should also be imposed in respect of associated offences such as manufacturing or printing equipment and as listed in paragraph 37.

Dr GAO Xingzhi (alternate to Mr Zhang Xiulian, China) said that paragraph 35 should refer to categories of sanctions rather than to specific penalties. The final sentence of that paragraph might be amended to read: “According to the circumstances and gravity of the specific offence, civil, administrative or criminal sanctions will be applied”.

Mr MOHAMED DEIDA (Mauritania) said that if a customs declaration with respect to imported products were not submitted, the products could be deemed to have entered the country fraudulently and seized automatically by the customs authorities and destroyed. The persons bringing the merchandise into the country would be subject to penal sanctions. There appeared to be duplication in the subsections concerning sanctions and penalties, and search, confiscation and seizure.

Dr LEWIS-FULLER (Jamaica) recommended that increased penalties for customs personnel found to be complicit in illicit trade, including tobacco products and equipment.

Mr NAVARRETE (Chile) said that the penalties set out in paragraph 35 should be extended to include penalties against the legal entities involved in the illicit trade in tobacco products, such as dissolution of the company and annulment of contracts.

The CHAIRPERSON said that the issue of penalties was particularly difficult. The protocol should at least include a minimum standard. As pointed out, in most court systems it was not possible to make reference to previous convictions. In drafting a text, careful consideration would be given to the discussions.

**Search, confiscation and seizure** (paragraphs 37 and 38)

The CHAIRPERSON said that, as legislation in most countries already gave customs and law enforcement officials search and seizure powers, he would take it that representatives could agree, in principle, to the inclusion of relevant provisions in the protocol.

Mr ESTEGUET (alternate to Mr Nkou, Cameroon) said that seized and confiscated products should be destroyed in order to prevent their re-introduction onto the illicit market.

Mr MOHAMED DEIDA (Mauritania) reiterated that confiscation should be considered in the section on sanctions and penalties. In legal terms, search and seizure were procedures.

Mr WALTER (alternate to Ms Marshall, Australia) expressed concern that paragraphs 37 and 38 conflated different concepts. In Australia, seizure for evidential purposes was generally understood to be the temporary deprivation of property, with the property usually returned to its lawful owner. Forfeiture was the permanent deprivation of property that was unlawful for a person to possess. Confiscation involved the permanent deprivation of property used in connection with a criminal offence and might be more appropriately included in section 5 on proceeds of crime and seizure of assets.

Mr ROWAN (alternate to Mr Guth, European Community) said that all customs and other law enforcement authorities should have the legal basis to search for, seize and confiscate contraband and counterfeit tobacco products, including the tools of the trade and evidence, in accordance with their national legislation. A minimum set of standard measures might be considered for inclusion in the Chairperson's text. However, appropriate flexibility should enable Parties to determine possibilities under their national legislation.

Mr KRISHNA (India) said that the Parties in the WHO South-East Asia Region strongly endorsed provisions relating to search, confiscation and seizure. The protocol should reflect that the search for evidence could be authorized with or without a warrant, depending on national law. The term "property" should be defined, to cover elements used in the offence or include other property belonging to the offender.

**The meeting rose at 12:55.**

## **FIFTH MEETING**

**Wednesday, 13 February 2008, at 15:15**

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

**DRAFTING AND NEGOTIATION OF A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS:** Item 6 of the Agenda (Documents FCTC/COP/INB-IT/1/4 and FCTC/COP/INB-IT/1/INF.DOC./1) (continued)

**Search, confiscation and seizure** (paragraphs 37 and 38) (continued)

The CHAIRPERSON said that the discussion on search, confiscation and seizure had revealed the need for separate provisions in the protocol to deal with search powers, powers that led to the seizure of documents, and seizure and confiscation of means of transport and machinery.

**Destruction and disposal** (paragraphs 39 to 42)

Mrs SEKOU MADOUGOU (Benin), referring to paragraph 39, agreed that seizures of illicitly traded tobacco must not re-enter into circulation. Samples could, however, be made available to law enforcement bodies for training purposes. Paragraph 39 mentioned depriving “the criminal element” of ready access to property. She would prefer another term, such as “offenders” following seizure of a product, market prices must be carefully monitored, as manufacturers might increase prices to consumers when market supply was reduced. The protocol should recommend relevant counter-measures.

The protocol’s aim was to protect people’s health. The involvement of environmental protection services and respect for national legislation should be an obligation and not simply an option as suggested in paragraph 40. Parties in the WHO African Region favoured immediate destruction of seized tobacco products and manufacturing equipment and did not agree with the mention in paragraph 41 that such items might be resold. In addition, penalties should be imposed upon offenders. She queried the inclusion of the phrase “as Parties should not be involved in the distribution and resale of tobacco products given the public health risks”. She also requested clarification as to why “flexible” obligations should be included in the protocol, as suggested in paragraph 42.

Ms QUIGLY (alternate to Ms Marshall, Australia) said that her country opposed inclusion of the provisions concerning destruction and disposal. That issue was covered in Article 15, paragraph 4(c), of the WHO Framework Convention, which gave clear preference to destruction of confiscated property yet allowed for alternative arrangements, such as use for law enforcement training. Manufacturers were unlikely to purchase cigarettes unless they gained some economic benefit. That would implicate Parties in supporting the manufacture and distribution of tobacco products and contradict the aims of the Convention and the protocol. The measure might entail health risks and liability if the tobacco products were later found to include harmful ingredients beyond the usual content. Such a provision might also generate opportunities for the corruption of government officials.

Mr MEDEIROS DE CAMPOS RIBEIRO (alternate to Mr Florêncio, Brazil) supported the economic penalization of the manufacturer and destruction of the products. The manufacturers would

have to account for their operations. Any involvement in illegal activity by the tobacco industry should result in penalties such as fines, or loss of a licence for the manufacture or marketing of the product.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that the protocol should distinguish between tobacco products and the equipment used in illicit trade. In addition to the ideas outlined in paragraphs 39 to 42, a third option might be envisaged. In many countries, drugs were seized and were auctioned off and the proceeds applied to programmes to combat drug trafficking.

Dr LEWIS-FULLER (Jamaica) said that, like the representative of Australia, she considered that Article 15, paragraph 4(c), of the WHO Framework Convention should be adhered to in the disposal of seized tobacco products or equipment or property related to illicit tobacco trade. Ideas such as reinvesting the proceeds from the sale of seized property and resale to the manufacturers, conflicted with Article 15 and were morally perverse. They should not be entertained.

Mr OTTO (Palau) said that the Parties of the Pacific island States supported the comments made by Australia and Jamaica. The protocol should ban forms of disposal such as the sale of seized tobacco products back to the manufacturer, and thereby require governments that had authorized those practices to amend their legislation. Representatives were supposed to be negotiating an international instrument that would make their countries' populations healthier.

Mr KRISHNA (India) said that the Parties in the WHO South-East Asia Region supported the provisions on destruction and disposal. The options in paragraph 42 for the disposal of confiscated property should be retained. The final phrase ending, "for training and enhancing law enforcement capacity", should be supplemented by the words "or for supporting other activities mandated by this protocol". The assets generated by confiscation could then be used to meet many of the protocol's objectives.

Mr MOHAMED DEIDA (Mauritania) said that any product of illicit trade could be defined as counterfeit and, accordingly, harmful. Production outside lawful circuits created economic problems for the country concerned, and those goods should be destroyed. The protocol should include the phrase "immediate destruction at the expense of the person who brought the product into the country".

Ms ALI-HIGO (Djibouti) reiterated that the priority of the protocol was protecting the health of populations, not the revenue from confiscated cigarettes. She favoured destruction of confiscated goods, including tobacco products and their means of production, with costs borne by the offenders. Severe penalties should be applied to transporters. Samples retained for training in law enforcement must be carefully controlled.

Dr SAN MARTÍN (Paraguay) said that paragraph 42 should indicate that sales of illegal products were against the spirit of the Convention. If taxes were not high enough, it remained profitable for criminals to repurchase and reintroduce products into the market. He favoured destruction of the products.

Mr MBUYU MUTEBA (Democratic Republic of the Congo), referring to paragraph 39, said that confiscated tobacco products must be destroyed. If the State was to resell them, what licensing would arise? Any fines paid should be used for customs, law enforcement, health services and preventive measures. The victims of illicit tobacco products were addicts who needed health care and that required financial resources.

Mr TSHIMANGA (Democratic Republic of the Congo) said that the phrase "the criminal element" was preferable to "offenders". Under his country's legal system, offenders were those who committed petty infractions, such as traffic violations.

Ms ROOPCHAND (Trinidad and Tobago) supported the remarks made by Jamaica, Palau and others concerning the resale of confiscated products: that option must not be entertained. The cost of destruction should be borne by the offending party, and the protocol should include strong provisions to that effect.

Mr ROWAN (alternate to Mr Guth, European Community) said that some Member States of the European Union had in the past sold seized cigarettes; the cigarettes had re-entered the market and been seized again; in one instance, the same cigarettes had been seized three times in three different countries. Criminal organizations were using front companies to bid above the price at auction and subsequently smuggle the cigarettes back in, making enormous profits. Although the Member States in question made profits from those sales, they were funding organized crime. The European Union's policy was to destroy confiscated tobacco products. It also supported the destruction of confiscated manufacturing equipment as proposed in paragraph 42.

Dr ABOU ALZAHAB (Syrian Arab Republic) favoured destruction of seized products with costs borne by those responsible for their production. The protocol should request WHO to provide technical guidelines on environmentally safe methods of destruction. Destruction should not be envisaged for transport equipment diverted for the purposes of illicit trade.

Mr OLIVER (Canada) said that *immediate* destruction of tobacco products and manufacturing equipment would present problems in his country, where the policy was destruction unless they were used for law enforcement purposes, such as training and support for complex investigations. Other equipment, such as conveyances, whose use was not otherwise unlawful, might be dealt with in accordance with national law. Article 15, paragraph 4(c) of the WHO Framework Convention offered such flexibility.

Mrs SEKOU MADOUGOU (Benin) said that in African countries like her own where the civil law prevailed, individuals who engaged in illicit trade were known as offenders. The Bureau could be trusted, however, to find the appropriate terms for inclusion in the protocol.

Dr AL LAWATI (Oman), noting that Article 15, paragraph 4(c), of the WHO Framework Convention clearly stipulated that all confiscated equipment should be destroyed, asked whether it was in fact feasible for countries to sell confiscated goods. His country favoured the destruction of all products except for samples to be used for training and other purposes.

Mr SOLOMON (Office of the Legal Counsel) drew attention to the final phrase in Article 15, paragraph 4(c), of the WHO Framework Convention: "or disposed of in accordance with national law". The phrase "disposed of" could be read to mean that any option, other than destruction, and provided for in national law, was a viable alternative.

Mr AL-JEHANI (Saudi Arabia) said that destruction should be considered together with sanctions and penalties, as in the customs services of the Gulf States. Samples of seized assets could be used for training purposes, which was the practice in Saudi Arabia. In paragraph 41, the first option, of outright destruction of products should be retained.

Mr JAYAGOBI AL NARAYANAN (Malaysia) said that Malaysia had recently made large seizures of cigarettes and the ships transporting them. If the prosecution of those court cases failed and the goods perished in the interim, the authorities would face huge liability claims. The protocol should take into consideration exceptional situations, including disposal by re-exportation to the contesting party.

Mr MOHAMEDOUN (Mali) said that the word "disposal" should be understood to mean destruction or elimination. Law enforcement services should be informed first so that products may be used for training purposes.

**Proceeds of crime and seizure of assets** (paragraphs 43 to 47)

The CHAIRPERSON invited delegates to consider paragraphs 43 to 47 of the template for the protocol, while keeping in mind paragraphs 11 and 12, under general obligations, on anti-money laundering provisions.

Dr XU Yu (alternate to Mr Zhang Xiulian, China) agreed in principle with the section on proceeds of crime and seizure of assets. China had some concerns about the paragraph 45(e): his country did not have a civil forfeiture or independent confiscation system and incorporation of a rule creating reverse burden of proof into its legal system might raise issues of self-incrimination. China also had concerns about paragraph 46, which created a single system entailing recognition and enforcement of foreign confiscation orders, although indirect proceedings to give effect to confiscation orders also existed. The arrangements established in treaties such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime should be carefully considered. On paragraph 47, China was not convinced that the protocol needed to define a unified system of asset sharing. Several different systems existed, but that would not necessarily prevent international cooperation on asset sharing.

The interests of bona fide third parties should be taken into account when measures were adopted to confiscate and forfeit the proceeds of crime and other assets.

Mr KRISHNA (India) emphasized giving force to the recommendations of the Financial Action Task Force. He supported the proposal made earlier by Australia to open dialogue with that body in order to avoid duplication and to ensure that mandates were complementary.

Dr NZEYIMANA (Rwanda) said that subparagraph 45(d) should be revised in respect of the phrase at the beginning of the list, "... establishing criminal offences for:". Measures to counter money laundering should be clearly outlined in the protocol. Control of money laundering necessitated the transfer of technical capacity to developing countries and that should be provided in the protocol. Counterfeiting and contraband had spread, especially in Africa, precisely where control mechanisms were weak. Proceeds from illicit trade and money laundering were often invested in countries that were not bound by the WHO Framework Convention. The protocol should establish strategies for combating such practices. Lastly, on prosecution of criminals and their offences, the protocol should identify varied forms of collaboration in the pursuit of offenders, using legal terminology already established within the United Nations system.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that the question of proceeds of crime should be left to national legislation. The phrase "as appropriate" in Article 15, paragraph 4(e), of the WHO Framework Convention meant that the confiscation of the proceeds of crime was not mandatory.

Mr AL-HARBI (Saudi Arabia) said that his country had successfully applied the recommendations of the Financial Action Task Force. He had no reservations about the text under discussion but would like a reference to the Task Force recommendations in order to improve coverage of issues related to combating money laundering. Lastly, he proposed that the words "in accordance with national legislation" be inserted at the end of subparagraph 45(d).

Mr URAKAWA (Japan), referring to paragraph 12 of the template, said that prevention of money laundering could be ensured by customer profile management through supply chain management. Domestic measures had already been implemented in Japan pursuant to legislation on organized crime, control of crime proceeds and prevention of their transfer. Provisions aimed at limiting financial transactions, as described in paragraph 12 were disproportionate and should be included only as examples.

Ms MEJÍA DE RIVERA (alternate to Mr Urbizo, Honduras) said that measures to combat money laundering were clearly laid down in regulations adopted in her country in 1997 that included references to illicit trade in tobacco products and its financing.

Mr MOHAMED DEIDA (Mauritania) pointed out that money laundering was used not solely for tobacco products but for many other illicit products as well. Subparagraph 45(e) spoke of creating a reverse onus obligation, yet many countries already had provisions to that effect. Paragraph 45 should appeal to all countries to adopt general provisions against money laundering, as domestic legislation would be ineffective without international cooperation to that effect.

Dr ISARA SARNTISART (alternate to Mr Sihasak Phuangketkeow, Thailand) said that paragraph 45 would be clearer if subparagraphs (a), (d), (e) and (f), on provisions against money laundering were separated from subparagraphs (b) and (c), which related to the establishment of criminal offences.

Mr MEDEIROS DE CAMPOS RIBEIRO (alternate to Mr Florêncio, Brazil) suggested that a working group be created to ensure better coverage in the protocol of the complex issue of money laundering and its implications for combating illicit trade. He drew attention to the numerous international instruments on the issue, including the United Nations Convention against Transnational Organized Crime (Palermo Convention), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) and the recommendations of the Financial Action Task Force.

Mr WALTER (alternate to Ms Marshall, Australia) said that depriving criminals of their ill-gotten gains was important in the fight against serious crime. Paragraphs 43 to 47 of the template merged related concepts that should be separated, namely money laundering, confiscation of the proceeds of crime, international cooperation for confiscation purposes and asset sharing. A wide range of obligations was laid down in other instruments, such as the United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. States should be encouraged to implement the 40 recommendations on money laundering and the nine special recommendations on terrorist financing adopted by the Financial Action Task Force. That body's work on trade-based money laundering had clear implications for illicit trade in tobacco products. The Intergovernmental Negotiating Body's work would benefit greatly from opening dialogue with the Commission on Crime Prevention and Criminal Justice, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, and the Conference of the States Parties to the United Nations Convention against Corruption and the Financial Action Task Force.

Mr ROWAN (alternate to Mr Guth, European Community) said that asset confiscation was essential to the protocol. Customs and law enforcement authorities in the European Union had powers to detain and seize criminal cash at points of both import and export. International cooperation and use of existing legislation and agreements should be promoted. Those international protocols should be considered in drafting the protocol, to avoid duplication. Many criminal organizations used money laundering to hide their illicit profits, including those from cigarette smuggling. The European Union sought strong provisions in the protocol on proceeds of crime, seizure of assets and money laundering. Existing legislation and initiatives such as the Financial Action Task Force must be taken into account. The principle of "know your customer" in relation to cash payments for tobacco products should be included among the provisions against money laundering. The European Union would consider control measures on cash payments for tobacco products, such as how and where the payments were made, excluding offshore havens. Storage and distribution should also be covered in the protocol.

Dr AL LAWATI (Oman) pointed out that, according to subparagraph 45(e), the offender was obliged to prove that his or her property was not the proceeds of crime. That laid the burden of proof on the suspect, not on the accuser, creating a conflict.

Mr AL-HARBI (Saudi Arabia) said that in the case of money laundering, which was intended to hide the source of revenue, the burden of proof was not on the authorities but rather on the individual or entity, who was responsible for disclosing the source of that revenue.

Mr TSHIMANGA (Democratic Republic of the Congo) pointed out that reversing the burden of proof infringed the human rights suspects. A serious contradiction was to be found in the phrase “once it has been established the offender engaged in...”, as that implied that the individual had already been prosecuted and his or her guilt established.

The CHAIRPERSON said that the burden of proof was clearly a sensitive issue. He noted a clear desire to avoid duplication of existing international instruments, and to consult with other relevant institutions and to restructure certain elements. Strong provisions must be included on money laundering activities and seizure of assets and proceeds of crime.

#### **Special enforcement techniques (paragraphs 48 to 50)**

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) drew attention to subparagraph 48(a) and to the use of electronic surveillance. She asked whether any other international instrument contained similar provisions and whether such measures ran counter to the presumption of innocence in criminal prosecution and the right to privacy.

Mr SOLOMON (Office of the Legal Counsel) said that paragraph 48 simply described existing techniques, including electronic surveillance. The paragraph was not prescriptive. If it were to be considered a prescriptive element, it would raise a great many issues, including that raised by Ecuador.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that, in view of that explanation and of the more general reference to electronic surveillance in paragraph 50, she would prefer that subparagraph 48(a) refer simply to the use of electronic surveillance, without mentioning specific purpose. Regular electronic surveillance with the aim of identifying illicit trade was acceptable, but targeting specific individuals or activities might infringe on the presumption of innocence and the right to privacy.

Mr WALTER (alternate to Ms Marshall, Australia) said that Australia supported the allocation of resources to law enforcement and the use of appropriate powers by law enforcement agencies. However, given the intrusive nature of the powers described in paragraphs 48 and 50, each party should have wide discretion in determining when the use of such powers was appropriate and the circumstances under which the powers should be available. Regarding the comment by Ecuador, he pointed out that Article 20 of the United Nations Convention against Transnational Organized Crime referred to the use of special investigative techniques, including electronic surveillance.

Mr OKUMA (alternate to Mr Tagaya, Japan) supported those remarks. The measures for law enforcement should be left to the discretion of each country. Japan saw little need for the provisions under consideration.

Dr XU Yu (alternate to Mr Zhang Xiulian, China) said the title of the section, “Special enforcement techniques”, was at variance with related provisions in other instruments such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, which referred to “special investigative techniques”. Electronic

surveillance and other special methods should be used only for the investigation and prosecution of illicit trade in tobacco products. Use of those methods for law enforcement would be quite a different matter.

Mr OTTO (Palau) agreed that there was a disparity between the references to “special enforcement techniques”, and to “special investigative techniques”. The disparities should be clarified.

Mr GONZÁLEZ GARCÍA (alternate to Mr March Pujol, Spain) said that the final sentence of paragraph 49 appeared superfluous. It stated that “Many jurisdictions require judicial authorization”; however, it was unlikely that techniques such as electronic surveillance could be used anywhere without judicial authorization.

Ms ALI-HIGO (Djibouti) said that, as a developing country in a geo-strategically sensitive position, international cooperation might be needed to promote the use of techniques such as sophisticated electronic systems.

Mr ROWAN (alternate to Mr Guth, European Community) said that special enforcement techniques had been effective for obtaining evidence and dismantling organized crime networks. The disruption of organized crime fully justified their use, but they should be used in a proportionate manner.

Mr KRISHNA (India) said that special enforcement techniques such as electronic surveillance were effective in combating illicit trade in India by customs authorities, but other agencies did not necessarily have such powers. Provisions on controlled delivery should not be an obligation under the protocol, but they must flexibly accommodate national legislation and be made explicit so as not to amount to abetting smuggling.

Dr SAMARN FUTRAKUL (alternate to Mr Sihasak Phuangketkeow, Thailand) said that his country supported the section on special enforcement techniques but emphasized that their use must not violate the principles of human rights.

Mr PADILLA (Philippines) suggested that a fairly general formulation on enforcement techniques should be used, such as “In accordance with their national law, Parties may employ whatever special enforcement techniques that may be necessary in combating organized crime and illicit trade in tobacco products”.

#### **Jurisdiction** (paragraphs 51 to 53)

Mr WALTER (alternate to Ms Marshall, Australia) said that the general principles outlined in the template were fairly standard content for international instruments, but consideration might be given to the language used in article 42 of the United Nations Convention against Corruption, a recent comprehensive provision on jurisdiction.

Mr KRISHNA (India), referring to paragraph 53, said that India recognized that in many countries domestic law did not permit the extradition of nationals. In such cases, the protocol should mandate “*aut dedere aut judicare*”, for either extradition or prosecution within that country’s jurisdiction.

Dr XU Yu (alternate to Mr Zhang Xiulian, China) supported those comments. Paragraph 53 brought together two separate notions, the first being that countries should establish their jurisdiction over offences only when the alleged offender was present on their territory, and the second, that nationality constituted grounds for refusal to extradite. In China, nationality was mandatory grounds

for refusing extradition requests. As Australia had suggested, wording from the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, particularly Article 44, paragraph 11 of the latter, might be included, as those instruments established a good balance between the capacity to extradite nationals, as in countries with common law, and the prohibition thereof, as in many others.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) suggested that paragraph 53 include a call for the signature of bilateral and multilateral agreements on extradition so as to cover the situation of countries like her own, in which the constitution prohibited the extradition of nationals.

Mr OKUMA (alternate to Mr Tagaya, Japan) said that the definition of jurisdiction in subparagraph 52(d) was too broad and should be deleted.

Mr TAGOE (Ghana), referring to paragraph 53 on extradition, emphasized international cooperation. All Parties to the protocol should be obliged to enter into extradition treaties among themselves in order to ensure the punishment of perpetrators of offences under the protocol.

Mr ROWAN (alternate to Mr Guth, European Community) said that organized crime deliberately exploited jurisdictional gaps to avoid prosecution and conceal criminal assets. The protocol could urge Parties to find solutions, including legal cooperation. The jurisdiction issues might go beyond the scope of the protocol and required a cautious approach.

Mr TSHIMANGA (Democratic Republic of the Congo) proposed an editorial amendment to the French text of paragraph 51. He explained that in his country a special legal instrument was needed in order to carry out sentences handed down abroad.

Mr OTTO (Palau) said that at one time his country had wished to sue the tobacco industry for the harm it had done but it did not have jurisdiction. If the protocol was to be effective, all Parties should commit to solving the problems of jurisdictional gaps.

The CHAIRPERSON said that all the comments made would be taken into account. Existing conventions would be scrutinized but, since the protocol was specifically on combating illicit trade, it might be worthwhile to try to break new ground. A new text would be put forward for detailed consideration at the next session of the Intergovernmental Negotiating Body.

Ms MATSAU (South Africa), speaking on a point of order, recalled that from the outset of work on the WHO Framework Convention, a decision had been taken to ensure gender balance. Sadly, women were still under-represented on the Bureau and particularly within the delegations present. She also referred to current attitudes reflected in the meeting's use of language. If women were more actively profiled and promoted within the Convention's work, progress might be made more effectively and more rapidly.

**The meeting rose at 17:15.**

## **SIXTH MEETING**

**Thursday, 14 February 2008, at 11:20**

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

**DRAFTING AND NEGOTIATION OF A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS:** Item 6 of the Agenda (Documents FCTC/COP/INB-IT/1/4 and FCTC/COP/INB-IT/1/INF.DOC./1) (continued)

### **International cooperation**

#### **Information sharing** (paragraphs 54 to 62)

The CHAIRPERSON invited comments on paragraphs 54 to 57 of the template documents on statistical trade data. Parties were already committed to the exchange of information under Article 21 of the Framework Convention. Parties might focus on building data collection and analysis capacity and the technical means to exchange information.

Mr ESTEGUET (alternate to Mr Nkou, Cameroon) endorsed the statement set out in paragraph 54 that law enforcement and customs communities should have timely, comprehensive and reliable access to information. First, Parties should strengthen their links with existing bodies such as the World Customs Organization and the European Anti-Fraud Office. Secondly, they should reinforce existing specialist organizations, or create new ones, to process data on illicit trade. Regional bodies should be set up to provide accessible central repositories for all data.

Capacity building was essential for developing countries in the areas of data collection, compilation and analysis. Confidentiality clauses often hampered the exchange of information with developed countries.

Dr SERI HONGYOK (alternate to Mr Sihasak Phuangketkeow, Thailand) said that international cooperation was vital, as the perpetrators of illicit trade in tobacco products were well organized and well funded. Thailand had shared both sensitive and nonsensitive information with many other countries, and called upon other Parties to do the same.

Dr KIANGI (United Republic of Tanzania) said that the information shared by Parties could provide evidence for raising public awareness, advocacy, community mobilization and programming. Referring to paragraph 56, he asked whether “routinely available” data could be equated with their accessibility, and whether the phrase “common statistical tools and formats” implied the use of a specific statistical software package.

The CHAIRPERSON said that the phrase “routinely available” merely indicated that many Parties already collected the information concerned for customs or other national purposes. Whether those data were also accessible depended on the way they were stored – an issue which required further discussion.

Dr FRASER (Qatar) said that her country was strengthening its information systems in order to facilitate the exchange of data with regional and international bodies, and to comply with clear

requests for information from WHO. She noted that a later meeting was to discuss the possible format of such information.

At present, information on different aspects of illicit trade in tobacco products still required a greater degree of cooperation between different government departments. Recommendations on information sharing issued by WHO would be very useful to public health departments.

Dr TOESSI (alternate to Ms Sekou Madougou, Benin) said that a paragraph should be introduced obliging Parties to make the data elements referred to in paragraph 56 available. Statistical data should be harmonized for ease of processing and comparison of national trends.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) agreed with previous speakers that statistics were often not accessible, or not available in the form required by international organizations. Developing countries needed directives on the presentation of statistics which required capacity-building, training and other support, and domestic laws to ensure accessibility. His country had made it compulsory to register economic stakeholders in the tobacco trade and to issue and obtain import, export and manufacturing licences so that databases could be transmitted to the Conference of the Parties and other bodies. Such measures should be compulsory.

Transit data should be included under paragraph 55(a) as some products that were supposedly “in transit” through a country were, in fact, returned and illicitly traded there.

The protocol should also cover agricultural production of tobacco. Hence provisions on production, distribution and sale would begin with the tobacco plant itself.

Mr OTTO (Palau) said that the Pacific island Parties needed assistance with capacity building in the areas of statistics and data collection, collation and analysis. If WHO itself had problems identifying common features in statistics obtained from different regions or agencies, it was not surprising that developing countries found it so difficult.

In paragraph 59(a), the phrase “including duty-free sales” should be added after “tax-free sales”, since duty-free sales were a common way for the tobacco industry to avoid paying tax on its products.

He had been surprised to read in paragraph 56 that many data elements were “routinely available” as his country had not been able to access such information. Parties should ensure that data were accessible, and easy to use with greater awareness of countries which needed to build their capacities.

The CHAIRPERSON said that much of the available information came from trade statistics or customs services. It was important to ensure that it was accessible as well as available.

Mr ABOU ALZAHAB (Syrian Arab Republic) said that the agricultural production data referred to in paragraph 55(c) might include, for example, the number of hectares on which tobacco was grown. A harmonized software package or format should be adopted for the collection and exchange of statistics at the national, regional and international level.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador), speaking on behalf of the Parties of the Latin American and Caribbean Group, emphasized international cooperation. The principles of confidentiality, privacy and protection should also be enshrined in the future protocol.

Further information requested should supplement, but not duplicate, the reports provided for under Article 21 of the Framework Convention, and the protocol should make that clear. The Intergovernmental Negotiating Body should consider setting up a subgroup at its second session in order to examine the issue of information sharing.

Mr AL-HARBI (alternate to Dr Al-Badah, Saudi Arabia) said that a new subparagraph should be added to paragraph 55, stating that tobacco products should not be sold in tax-free or duty-free zones or on aircraft, since they might be smuggled or resold illicitly.

Mr AL-JEHANI (alternate to Dr Al-Badah, Saudi Arabia) said that all countries could benefit from information-sharing agreements, such as the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (Nairobi Convention), and from the work of the regional offices of the World Customs Organization, which facilitated the exchange of information to combat smuggling.

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that if paragraph 55(f) was intended to provide data on import and export licences, a comma was required after the word “licences”. However, if the paragraph was intended to provide information on specific transactions which might prove to be illicit, it belonged in paragraph 59 which dealt with operational data sharing. Turning to paragraph 56, he said that a working group should be set up to decide on the statistical tools and formats that could be used by all Parties.

Mr OKUMA (alternate to Mr Tagaya, Japan) said that the basic rules and procedures for information sharing were already fully covered by Article 21 of the Framework Convention. Some of the information listed in paragraph 55 of the template was not in the public domain in his country.

Mr GÖRÜN (alternate to Mr Çelik, Turkey) noted that tobacco data might include sensitive commercial information. Data protection and confidentiality must be fully respected.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that the phrase “tobacco data” in paragraph 55(a) should be replaced by “data on tobacco products”. Paragraph 55(c) should state that ministries of agriculture should grant permission for the planting of all tobacco crops and collect statistics on tobacco yields per hectare.

Mr ROWAN (alternate to Mr Guth, European Community) said that a current investigation illustrated the value of international cooperation, a case of illicit trade involving 800 million cigarettes, liable for 100 million euros in customs duties. The cigarettes had been manufactured in a European Union Member State and transported in turn to Uruguay, Chile and the United States of America, before being returned for illicit sale close to their place of manufacture. For most of that journey, they had been transported legally; only at the end had they been falsely labelled as part of a consignment of wooden furniture. The case had been detected thanks to the swift and efficient response of the countries involved.

With reference to the provision of trade data, the protocol should take due account of reporting under the Framework Convention and the national reports submitted to the World Customs Organization. Duplication should be avoided. He requested details of the proposed relationship between reporting under the Framework Convention and reporting under the protocol, including financial assessment of the latter.

Ms NGAPOKO SHORT (Cook Islands) proposed the addition of two further categories of data to the list in paragraph 55, namely: “Persons or entities involved in illicit trade and their methods and means” and “Information regarding measures taken to address illicit trade, both successes and failures”. The information should be communicated to the Framework Convention Secretariat or another designated body, and made public, subject to data-protection and confidentiality constraints.

The CHAIRPERSON invited comments on paragraphs 58 to 60 of the template document on operational investigation data and on paragraphs 61 and 62 on operational data protection and safeguards.

Mr NDAO (alternate to Mr Mbaye, Senegal) said that the “competent authorities” referred to in paragraphs 58 and 59 should encompass all authorities that carried out investigations which might yield valuable information: therefore, the phrase should be replaced by “services directly or indirectly

involved in combating illicit trade in tobacco”. Tobacco growers should be included in the list in paragraph 59(a).

Turning to paragraph 60, he suggested that a network of national focal points should be created, as had been done in respect of the International Health Regulations (2005). Each focal point would have coded access to the global database on illicit trade in tobacco. Authorized institutions would be involved in the collection and exchange of information.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that the phrases “farming and farmers” and “tobacco growing and tobacco growers” should be added in paragraph 59, subparagraphs (a), (b), (d) and (e).

Ms ALI-HIGO (Djibouti) emphasized that information must flow both ways, with countries both receiving and providing information. The list in paragraph 59(a) should include agencies and advisors which represented the tobacco industry.

Mr ROWAN (alternate to Mr Guth, European Community) emphasized the sharing of information between customs and other law-enforcement agencies. The protocol should encourage international agreements governing such information sharing, as provided for in Article 15(6) of the Framework Convention. Confidentiality and data protection were already covered in Article 21(4) of the Framework Convention. However, a provision should be added calling upon Parties to adopt the highest possible level of data protection.

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that the protocol should reflect the fact that, at present, most information sharing occurred under existing bilateral and multilateral agreements. He approved of the proposed provisions on data protection and safeguards in paragraphs 61 and 62.

Dr AL-ANGARI (Saudi Arabia) suggested that Parties benefit from the involvement of the International Criminal Police Organization (INTERPOL) in investigations and prosecutions.

The CHAIRPERSON said that the protocol should avoid duplication with other relevant instruments.

Mr OTTO (Palau), speaking on behalf of the Pacific island Parties, requested that the phrase “manufacturing, tax-paid and tax-free sales, including duty-free sales” be inserted before “of tobacco products” in paragraph 59(e).

Dr LEWIS-FULLER (Jamaica) emphasized data collection and data sharing, and the need to maintain privacy. It would be useful to receive an analysis of how customs matters were handled under current international legislation.

The CHAIRPERSON said that such an analysis might be conducted with the assistance of the World Customs Organization.

Mr PETERU (Samoa), speaking on behalf of the Pacific island Parties and referring to paragraph 58, asked what was meant by “competent” authorities notably regarding technologies required to share information with other national authorities.

The CHAIRPERSON said that the term “competent authorities” meant law-enforcement or customs officials and any other agencies involved in combating illicit trade. It was intended broadly.

Mr JAYAGOBI A/L NARAYANAN (alternate to Mr Noor Hisham bin Ismail, Malaysia) said that international cooperation was essential to manage a framework of standards for the conduct of secure trade and international tracking and tracing. The protocol should reflect the relevant practices of the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (1977) and other World Customs Organization conventions, including the Johannesburg Convention. Finally, strong national legislation would be required to authorize international cooperation. The protocol might also build on the experiences of “Project Crocodile”, a tracking scheme run by 16 customs administrations in the Asia-Pacific region to prevent customs fraud.

The CHAIRPERSON said that the protocol would provide a framework which would take due account of current cooperation agreements and activities and enable them to continue.

**Technical assistance and cooperation in scientific, technical and technological matters**  
(paragraphs 63 to 65)

Ms ALI-HIGO (Djibouti) said that the political aspects of technical assistance and cooperation should be included in that section and it should be ensured that trade and political organizations such as the Common Market for Eastern and Southern Africa were familiar with, and took account of, the protocol.

Her country supplied information to international authorities regarding their illicit products. The final destination of those was often unclear. Legal guidance would be useful in determining responsibilities for the destruction of such goods.

Dr KANGOYE (Burkina Faso) said that technical cooperation was also covered by Article 22 of the Framework Convention. Paragraph 63 should make it clear that technical assistance was required in order to develop national capacity. Paragraphs 64 and 65 should refer to all the services combating illicit trafficking not just law-enforcement authorities. The main barriers to data collection for trade in tobacco products were the costs and the lack of capacity.

Mr ROWAN (alternate to Mr Guth, European Community) said that the European Union recognized the importance of sharing technology, building capacity and creating a sense of ownership of policies among partner countries in order to combat illicit trade. Technical cooperation was linked with training, and both could be covered together in the future Chairperson’s text.

Dr FRASER (Qatar), referring to paragraph 65, said that the WHO regional offices would need resources to provide for capacity building assistance. The goal was a reliable system for reporting illicit trade with a secure computer network. Initially, it might be paper-based for those countries without the computer technology.

Dr AYOUB (alternate to Dr Burayzat, Jordan) asked whether the reference to “forensic analysis” in paragraph 63 meant fingerprinting, or some other technique.

The CHAIRPERSON said that the paragraph referred to specialized techniques for the collection of information, to be clarified.

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, emphasized that intelligence collection and electronic surveillance required adequate capacity and resources. The protocol should perhaps oblige Parties to devise regional mechanisms for the provision of such technical assistance.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) endorsed the views expressed by the delegate of Burkina Faso on technical cooperation. There was no laboratory in his country, or anywhere in the region, capable of testing and measuring the contents of tobacco products. The plans to set up a national laboratory required technical assistance which had been requested from WHO. The protocol should state clearly what kind of technical assistance would be provided, and by whom.

Mr OKUMA (alternate to Mr Tagaya, Japan) said that scientific and technical cooperation was a matter for the relevant international agencies and national authorities. The chosen methods of data sharing, including a standardized database, must be technically feasible.

Ms JOHN (Framework Convention Alliance on Tobacco Control), speaking at the invitation of the CHAIRPERSON, welcomed the Parties' endorsement of the need for strong provisions on scientific and technical cooperation in the protocol. Effective action to combat illicit trade across national borders would require technology and expertise in tracking and tracing, law enforcement and the managing and sharing of information. The inclusion of strong provisions on technical assistance in the protocol was in the interests of all Parties.

#### **Cooperation in respect of investigation and prosecution of offences (paragraphs 66 and 67)**

Mr WALTER (alternate to Ms Marshall, Australia) asked how the proposed provisions differed from those relating to information sharing and technical assistance, as well as Article 22 of the Framework Convention. If those provisions were intended to apply only to criminal investigations and prosecutions, similar provisions already existed in the United Nations Convention against Transnational Organized Crime (2000), as well as in other instruments.

The CHAIRPERSON said that the protocol was intended to create a general framework covering the collection and management of data and promote cooperation in investigations. A basis in international law was already available in part. At present, the same concepts were repeated in several sections of the template. That would be restructured for the Chairperson's text for submission to the second session of the Intergovernmental Negotiating Body.

Mr PETERU (Samoa), speaking on behalf of the Pacific island Parties, supported the proposed provisions, which highlighted the need for capacity building and synergies in the fields of public health, revenue and customs authorities.

Mr NAVARRETE (Chile) recommended exchange of information on court cases of illicit trade in different countries. Jurisprudence in that area was more highly developed in some countries than others. It was the court which ultimately decided whether a person was guilty of illicit trade or not. For instance, what value had been placed on the evidence submitted, which arguments and investigations by tax authorities had been accepted by the court, and which approaches could usefully be adopted by other countries. Such exchanges would form valuable international cooperation.

Mr LATONA (alternate to Mr Cunningham, Mauritius), referring to paragraph 66, said that customs and other enforcement authorities should be encouraged to sign mutual agreements for administrative assistance, as recommended in the Johannesburg Convention. Without such an agreement, evidence obtained from customs authorities in other countries might not be admissible in national courts.

Dr 'AKE (Tonga) agreed with the representative of Chile that it would be useful to share information on investigations and prosecutions of cases of illicit trade: a law was ineffective if there were flaws in the evidence or the way the case was prosecuted.

**Cooperation in training** (paragraphs 68 and 69)

Dr KIANGI (United Republic of Tanzania), speaking on behalf of the Parties in the WHO African Region, said that the title “Cooperation in training” was too narrow in scope and should be replaced by “Cooperation in capacity building”. Capacity building, technology transfer and multisectoral partnerships were essential. Training fostered cooperation between Parties and participants working to control illicit trade at every level.

Mr KRISHNA (India) said that cooperation in training improved skill sets and the operational knowledge of enforcement agencies. Working groups on capacity building might identify regional resource centres open to all Parties and schedule skill enhancement activities. Considerable resource mobilization would be required.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that the Parties in the Region of the Americas had already stated, and her country wished to reiterate, that specialized agencies should be included in relevant areas of capacity creation.

Mr ROWAN (alternate to Mr Guth, European Community) linked cooperation in training with technical assistance. The discussion should focus on the substance of cooperation as it was premature to consider details or a time frame for training. The Chairperson’s text should take due account of the work done by other international organizations.

Mr ESTEGUET (alternate to Mr Nkou, Cameroon) said that the time frame for training activities referred to in paragraph 69 should be clearly specified in the protocol.

Ms ALI-HIGO (Djibouti) said that training was the best way to ensure that the tools created by the information-sharing process were used. A working group should be set up to develop data collection tools, which would be required for training purposes. As previous speakers had said, the technical capacity of developing countries was weak. A time frame for activities would also be required.

The CHAIRPERSON said that the protocol was intended to produce specific proposals. Parties clearly considered training very important. The Intergovernmental Negotiating Body should identify training issues so that the protocol achieved tangible results.

**Mutual legal and administrative assistance** (paragraphs 70 to 74)

The CHAIRPERSON drew delegates’ attention to the statement in paragraph 72 that the provisions of the protocol did not affect obligations under any other treaty which governed mutual legal assistance.

Mr WALTER (alternate to Ms Marshall, Australia) expressed concern about the risk of duplicating the comprehensive provisions of the United Nations Convention against Transnational Organized Crime (2000). The Conference of the Parties to that Convention and its secretariat, the United Nations Office on Drugs and Crime (UNODC), were a significant source of technical and mutual legal assistance, in international cooperation to combat crime. Article 18(13) of the Convention and Article 46(13) of the United Nations Convention against Corruption (2003) stipulated that a central authority should be designated for mutual assistance. UNODC maintained a register of central authorities.

Mr BERREDO MENEZES (Brazil) said that a strong network of mutual legal assistance would be required to combat illicit trade in tobacco products. Organized crime could operate in rural areas or cities. The protocol should exclude restrictive provisions such as those in paragraph 72 which allowed a Party to decline the rendering of mutual legal assistance on the grounds of the absence of dual criminality or did not affect obligations under any other treaty on mutual legal assistance. In any case, the rendering of mutual legal assistance was already provided for in the United Nations Convention against Transnational Organized Crime (2000) and the United Nations Convention against Corruption (2003). The protocol could benefit from groups such as the Financial Action Task Force on Money Laundering. A working group should be set up to discuss mutual legal assistance.

Ms LEE Sau Kong (alternate to Mr Zhang Xiulian, China) said that the protocol should retain the proposed provision recognizing the ability of a Party to decline the rendering of mutual legal assistance on the grounds of the absence of dual criminality. It should be clearly stated that mutual legal assistance was provided subject to any relevant provisions of domestic legislation. For example, in the Hong Kong Special Administrative Region of China, mutual legal assistance was provided only in respect of offences which incurred penalties of a specified severity. The offences suggested in paragraph 33 of the template were extremely varied, and therefore domestic legal thresholds should be taken into account in determining whether mutual legal assistance was appropriate.

In respect of paragraph 73, the protocol should allow for the designation of more than one central authority, where necessary, and provide for regional legal systems. A Party with a number of legal systems in force should be able to lodge a declaration or reservation to the protocol in respect of one legal system, without prejudice to the others – if reservations or declarations were to be allowed.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) did not support the proposed provision recognizing the right to decline to provide mutual legal assistance as that ran counter to the spirit of international cooperation. Parties should commit to mutual legal assistance wherever possible, except in cases provided for by national legislation.

She asked whether it would be possible to lodge reservations or declarations to the future protocol.

Mr OTTO (Palau), speaking on behalf of the Pacific island Parties, agreed that efforts should be made to harmonize the provisions of the protocol and the various existing international instruments. The statement in paragraph 72 regarding obligations in the area of mutual legal assistance should be replaced by a clear commitment to maintaining the priority of public health in the event of any conflict between the protocol and any other treaty.

Mr ROWAN (alternate to Mr Guth, European Community) said that the protocol should encourage Parties to accede to other relevant international instruments and to conclude mutual legal assistance agreements with other countries. The protocol's provisions should not affect a Party's existing obligations in the area of mutual legal assistance. He supported the proposed provisions on the designation of a central authority to coordinate mutual legal assistance as set out in paragraph 74.

Ms ALI-HIGO (Djibouti) said that the provisions on mutual legal and administrative assistance could strengthen cooperation, particularly between Parties where such assistance was still rare. She supported the suggestion to set up a working group on such mutual assistance. There was no need for a provision recognizing a Party's ability to decline the rendering of mutual legal assistance.

Dr TOESSI (alternate to Ms Sekou Madougou, Benin) recalled that a network of legal experts had been set up in the African Region and could be included within the mutual legal and administrative assistance.

Mr MEDEIROS DE CAMPOS RIBEIRO (alternate to Mr Florêncio, Brazil) said that the working group which he had proposed was intended to deal with all international cooperation and assistance, not merely mutual legal assistance. The protocol could set new standards, since many more States were participating in its drafting than had been the case with related international instruments.

The CHAIRPERSON noted that valuable provisions from existing conventions could be reproduced in the protocol, despite the risk of duplication, since the signatories of the protocol would not necessarily be party to those other instruments.

Dr 'AKE (Tonga), while agreeing with the Chairperson's statement, recalled agreement that the Framework Convention, as a public health treaty, should take precedence over economic and trade treaties.

Dr LEWIS-FULLER (Jamaica) endorsed the view that the public health perspective was paramount. Relevant elements from other instruments should be included in order to create a comprehensive independent protocol. An overview of relevant and international agreements would be helpful.

The CHAIRPERSON said that he would make a careful study of existing agreements and conventions before the second session of the Intergovernmental Negotiating Body.

#### **Extradition** (paragraphs 75 to 77)

Mr WALTER (alternate to Ms Marshall, Australia) said that, in respect of extradition, he also had concerns about duplication with the United Nations Convention against Transnational Organized Crime.

Ms LEE Sau Kong (alternate to Mr Zhang Xiulian, China) said that the protocol must take into account the existing national legislation on extradition.

Mr ISARA SARNTISART (alternate to Mr Sihasak Phuangketkeow, Thailand) suggested that the protocol should list extraditable offences to which end the phrase "as prescribed in this protocol" could be added after the words "a defined set of offences" in paragraph 76.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that she found the question of extradition problematic; it might be included in the protocol as an option. Parties should be free to allow extradition or not, as their national legislation dictated.

Ms DOS SANTOS SARAIVA (Angola) agreed that extradition should be a matter for national legislation. As an international agreement would be very difficult to enforce, extradition should be addressed at a bilateral or regional level.

Dr AL-ANGARI (Saudi Arabia) suggested that the protocol should refer to the extradition activities of INTERPOL and to existing bilateral, regional and international agreements on extradition.

Mr ROWAN (alternate to Mr Guth, European Community) said that the protocol should encourage Parties to accede to and implement relevant existing instruments. Extradition was a complex issue that might go beyond the scope of the protocol, and therefore caution should be exercised.

Mr OKUMA (alternate to Mr Tagaya, Japan) said that extradition should be used only in cases of serious crimes and illicit trade in tobacco might not be sufficient grounds. Japan preferred that no mention should be made of extradition in the protocol.

### **International institutional framework**

#### **Convention Secretariat (paragraphs 78 and 79) and Committees (paragraphs 80 and 81)**

Dr SAMARN FUTRAKUL (alternate to Mr Sihasak Phuangketkeow, Thailand) supported the proposal to establish permanent committees to provide advice on scientific, technological and implementation matters. The composition of such committees should respect the principles of equitable geographical representation and gender balance.

Dr AL-BADAH (Saudi Arabia) noted that the title “Convention Secretariat” had been used, even though the current discussion was about a protocol to the Framework Convention. He asked whether the technical work of the protocol secretariat would require a separate secretariat. Other protocols would be adopted, on tobacco advertising, for instance, and the Intergovernmental Negotiating Body needed to decide whether a dedicated secretariat was required for each one.

Ms ALI-HIGO (Djibouti) said that the Convention Secretariat should serve as the secretariat for the protocol. The possibility of appointing support committees or commissions could be kept under review.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that any decision regarding the Convention Secretariat should take into account the provisions of Article 24 of the Framework Convention. She was unclear whether committees would be established by the Conference of the Parties.

Mr WALTER (alternate to Ms Marshall, Australia) said that the Framework Convention Secretariat should also service the protocol. Capacity building would be required. It should not expend resources on acquiring skills in the area of criminal justice, the expertise of bodies such as UNODC and the Financial Action Task Force on Money Laundering. There was no need to establish separate committees to the protocol, as implied by the wording of paragraph 80.

Dr ABOU ALZAHAB (Syrian Arab Republic) said that protocols could be serviced by dedicated units within the Framework Convention Secretariat. Consideration should be given to additional costs, including training.

Mr MBUYU MUTEBA (Democratic Republic of the Congo), speaking on behalf of the Parties in the WHO African Region, asked what secretariat arrangements had been made in respect of protocols to other international instruments. There were efficiency gains in having the protocol secretariat as part of the Framework Convention Secretariat, although separate secretariats might be necessary when additional protocols were adopted.

Dr HOZA (Central African Republic) said that urgent issues referring to possible future protocols should be included in the current text.

Mr OLIVER (Canada) agreed with previous speakers that the Convention Secretariat should serve for the protocol. Any decision to establish permanent committees in respect of the protocol should be made by the Conference of the Parties.

Mr PADILLA (Philippines) said that Article 24(3)(g) of the Framework Convention stated explicitly that the permanent secretariat was to perform secretariat functions specified by the Convention and for any of its protocols.

Mr ROWAN (alternate to Mr Guth, European Community) said that the European Union supported the principles set down in Article 24 on the Secretariat. He asked for clarification of the relationship which the Framework Convention Secretariat expected to have with bodies such as the World Customs Organization and WHO's Tobacco Free Initiative.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) asked for clarification from the Office of the Legal Counsel as to whether under Article 24(3)(g) of the Framework Convention the Convention Secretariat would perform functions for the future protocol.

Mr SOLOMON (Office of the Legal Counsel) said that, pursuant to Article 24(3)(g) of the Framework Convention, the Framework Convention Secretariat would indeed act as the secretariat of the future protocol. On the subject of the creation of permanent committees, only the Conference of the Parties was authorized to establish such bodies, although it might take into account any recommendation set out in the protocol. Representatives should bear in mind that not all Parties would accede to the protocol, at least at first, which might have implications for the financing of activities under the protocol.

**Financing of the protocol (financial mechanism) (paragraphs 82 and 83) and Contribution (paragraphs 84 and 85)**

Dr SERI HONGYOK (alternate to Mr Sihasak Phuangketkeow, Thailand) supported the call, in paragraph 82, for an equitable and balanced financing mechanism. A reference to use of financial resources should be included.

Dr AL-BADAH (Saudi Arabia) said that financing the protocol through mandatory contributions might deter some Parties from acceding to it and therefore it might be preferable to refer to voluntary contributions.

Mr PADILLA (Philippines) said that the protocol would be binding only on its signatories. Therefore, only signatories should be expected to contribute to the financing of its activities.

Mr ESCUDERO (alternate to Mr Martabit, Chile) asked for clarification from the Office of the Legal Counsel on the complex financing mechanism. The Framework Convention Secretariat was already funded through voluntary contributions. Funding mechanisms were envisaged for the protocol on illicit trade and other future protocols. Perhaps a simpler method of financing the protocol could be found.

Mr SOLOMON (Office of the Legal Counsel) said that, while a single financing mechanism would be more efficient, it was difficult to organize because not all Parties to the Framework Convention would accede to the protocol. It would then need to be decided whether nonsignatories could, or indeed should, incur financing obligations under such a protocol. Hence the complexities of the financing mechanism.

Ms MATSAU (alternate to Mrs Mtshali, South Africa) asked for details of the possible financing options and the levels of contribution which they might require.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that Article 26 of the Framework Convention, on financial resources, provided a good basis for reaching a consensus on the financing of the protocol. Article 23(4) appeared to cover some of the logistical issues. She sought confirmation that activities under the protocol would be considered as activities of a subsidiary body of the Conference of the Parties.

Mr SOLOMON (Office of the Legal Counsel) said that, in the interests of economy and efficiency, the Intergovernmental Negotiating Body might wish to use the provisions of Parts VIII to XI of the Framework Convention where possible, *mutatis mutandis*. However, the issue of nonsignatories to the protocol would still have to be resolved. The experience gained from the implementation and financing of protocols to other instruments, such as the conventions on the environment which had served as a model for many provisions of the Framework Convention, would also provide useful guidance.

Mr OMAH (Kenya) said that it would assist Parties if resources referred to in paragraph 83 were based on the provisions of Article 26(5), subparagraphs (a) and (b), of the Framework Convention, which called for all available resources to be used for the benefit of all Parties, especially the developing countries and countries in transition.

Ms MATSAU (alternate to Mrs Mtshali, South Africa), referring to paragraph 85, asked whether a Party that made contributions in kind would also have to make financial contributions.

Mr OKUMA (alternate to Mr Tagaya, Japan) said that his country considered that the protocol should be financed from the existing budget of the Framework Convention Secretariat. Activities to combat illicit trade appeared in several articles of the Framework Convention and that framework sufficed.

Dr ANIBUEZE (Nigeria) queried mandatory contributions when the Framework Convention itself was funded by voluntary contributions. He supported comments made by the representatives from Japan and the WHO African Region: no separate financing mechanism was needed.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that mandatory contributions for the financing of the protocol could be imposed under the Framework Convention and could be used for the benefit of signatory Parties, specifically for activities to combat illicit trade. Voluntary contributions could also be made.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) suggested separate budgets for activities under the Framework Convention and the protocol, even though the same Parties were contributing to both. That would clarify contributions for signatories and nonsignatories.

Ms ALI-HIGO (Djibouti) said that mandatory contributions might deter some Parties from acceding to the protocol. The protocol would clearly require its own source of financing and voluntary contributions might be the answer.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) said that, under Article 23 of the Framework Convention, the Conference of the Parties would decide on the funding of its subsidiary bodies. Each Party should make only one mandatory contribution, to be allocated between the Framework Convention and the protocol.

Dr TOESSI (Benin) said that a working group could be set up to identify the resources needed to implement both the Framework Convention and its future protocols.

**Institutions, implementation mechanisms, law-making processes and final clauses (paragraph 86)**

Dr AL-BADAH (Saudi Arabia) said that confusing terminology in paragraph 86 implied that the protocol would have its own Conference of the Parties; a different term might be used.

Mr SOLOMON (Office of the Legal Counsel) said that, under Article 33(5) of the Framework Convention, only signatories to a protocol could take decisions under that protocol. A separate decision-making body would therefore be required; however, it might avoid confusion to call it something other than a Conference of Parties.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador) asked whether Article 30 of the Framework Convention, which stated that no reservations were permitted, would also apply to the protocol. The protocol should follow the same structure wherever possible.

Mr SOLOMON (Office of the Legal Counsel) said that, where provisions of the Convention also applied to the protocols, specific mention of them was made in the text and therefore the ban on reservations laid down in Article 30 would not automatically apply to protocols, since they were not explicitly referred to.

**The meeting rose at 13:10.**

## SEVENTH MEETING

Thursday, 14 February 2008, at 15:15

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

### 1. **DRAFTING AND NEGOTIATION OF A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS:** Item 6 of the Agenda (Documents FCTC/COP/INB-IT/1/4 and FCTC/COP/INB-IT/1/INF.DOC./1) (continued)

**Institutions, implementation mechanisms, law-making processes and final clauses** (paragraph 86) (continued)

Mr DLAMINI (Swaziland), speaking on behalf of the Parties in the African group, said that the final clauses of the template covered the main issues. The protocol should mention the decisions which had led to its drafting, especially Rule 25 of the Rules of Procedure of the Conference of the Parties, and the decision to convene the Intergovernmental Negotiating Body.

Article 30, prohibiting Parties from making reservations to the Framework Convention should also apply to the protocol, withdrawal from which should be considered equivalent to withdrawal from the Convention. The protocol should be open to all Parties, including regional economic integration organizations and the Parties should decide on the period for signature. The provisions governing ratification, acceptance, approval, formal confirmation or accession should be the same, *mutatis mutandis*, as those laid down in Article 35 of the Convention. The procedure for entry into force should also be the same, although the Parties should have the right to choose a different time scale. The depository of the protocol should be the Secretary-General of the United Nations, and the six versions of the text in the official WHO languages should all be considered equally authentic.

Mr AL-HARBI (Saudi Arabia) suggested that in paragraph 86, under “Implementation mechanisms”, section (b) “Compliance monitoring”, the protocol should propose regular publication and wide circulation of newsletters or journals containing reports on aspects of illicit trade in tobacco products, including implementation, statistics and research.

Mr LIBERMAN (Framework Convention Alliance on Tobacco Control), speaking at the invitation of the CHAIRPERSON, said that, although some flexibility might be allowed, Parties should not be exempt from certain provisions. The protocol should contain strong provisions which Parties would be obliged to implement. He emphasized use of existing instruments and close liaison with relevant international entities. However, the political support required for strong action would come principally from the signatories to the protocol; substantive issues should not be avoided by referring matters relating specifically to illicit trade in tobacco to other fora.

Mr JOOSSENS (International Union Against Cancer), speaking at the invitation of the CHAIRPERSON, emphasized that the protocol should cover the illicit trade of all tobacco products, including cigarettes, tobacco for hand-rolling or chewing. Data collection and sharing were essential for analysis of illicit trade and countermeasures. All the key measures in the template should be reproduced in the Chairperson’s text. The protocol should aim to make illicit trade less attractive to the tobacco companies which might facilitate that supply and to criminal organizations. It should include domestic and international measures, accepted standards on tracking and tracing and international cooperation. Tobacco smugglers were flexible and operated quickly, so the protocol must be proactive.

Mr LOM (Observer, United States of America)<sup>1</sup> said that an effective protocol would focus on issues specific to the regulation of tobacco products such as licensing and record-keeping. Great care would be needed to avoid duplication: if language from existing multilateral agreements was reproduced out of context in the protocol, it might create ambiguities and thereby undermine both instruments.

Regarding paragraph 26, Parties might oblige tobacco manufacturers to control the supply chain of their tobacco products. Parties must consider their antitrust and antimonopoly legislation, which was intended to ensure that no single entity controlled both manufacturing and distribution of any product.

Suggestions had aimed to broaden the scope of the protocol by inserting the words “and other law-enforcement authorities”. He suggested instead the phrase “and the customs and tax authorities” since violations of tax laws were subject to a wide range of administrative, civil and criminal penalties.

Mr SINCOVICH (World Customs Organization), speaking at the invitation of the CHAIRPERSON, said that his organization could supply expertise in relevant areas. International agencies would add value and help to prevent duplication, thus ensuring that the future protocol was consistent and effective. He emphasized internationally agreed countermeasures to combat illicit trade and welcomed the opportunity which the protocol represented for customs authorities around the world.

(For continuation of the discussion, see summary record of the eighth meeting, section 2.)

## **2. DATE AND VENUE OF THE SECOND SESSION OF THE INTERGOVERNMENTAL NEGOTIATING BODY ON A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS**

The CHAIRPERSON said that there were two possible time-slots for the second session of the Intergovernmental Negotiating Body, namely the end of August or the end of October 2008. The final decision would be taken by the Bureau of the Conference of the Parties.

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, requested that the Chairperson’s text should be prepared by May 2008 and circulated to Parties. The second session of the Intergovernmental Negotiating Body should be held in October, and the third session of the Conference in November.

Mr MARTIN (Federated States of Micronesia), speaking on behalf of the Parties in the WHO Western Pacific Region, said that several Parties had expressed a preference for August 2008. The Convention Secretariat had indicated that the Chairperson’s text might be available in April or May. According to the rules of procedure, Parties must receive the documents for the session at least 60 days in advance.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador), speaking on behalf of the Parties in the WHO Region of the Americas, said that the second session should be held in October 2008.

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<sup>1</sup> Participating by virtue of Rule 29 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

Dr HELLER (Austria), speaking on behalf of the Parties in the WHO European Region and the European Community, expressed a strong preference for the second session to be held in October, as that would give more time for preparation.

Mr TAGOE (Ghana), speaking on behalf of the Parties in the WHO African Region, and Dr AL LAWATI (Oman), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, requested that the second session should be held in October.

The CHAIRPERSON said that he needed as much time as possible to prepare a revised version of the template. Assuming that the second session of the Intergovernmental Negotiating Body took place at the end of October 2008, the deadline for the finalization of the Chairperson's text would be the end of July 2008, which would allow time for translation into the official languages and submission to Parties within the time limit specified in the Rules of Procedure.

Responding to a question from Mr ESCUDERO (alternate to Mr Navarrete, Chile), he said that the text he was to prepare would be a draft protocol and not merely suggestions and comments, as in the template document.

Dr NIKOGOSIAN (Head of the Framework Convention Secretariat) said that the possible dates for the six-day session were 20–25 October 2008, the Parties' preferred option, or 25–30 August 2008. Those were the only dates on which a venue of the required size was available in Geneva. The Chairperson's text would therefore be distributed to Parties in all official languages by 20 August or 25 June, respectively.

Ms ST LAWRENCE (Canada) recalled that many Parties had called for the second session of the Intergovernmental Negotiating Body to be held immediately before the third session of the Conference thus reducing costs. If the two sessions were held separately, where would the extra funding come from?

Dr NIKOGOSIAN (Head of the Framework Convention Secretariat) said that the third Conference of the Parties would take place in South Africa. After discussion with the South African Government, the Bureau had decided that the second session of the Intergovernmental Negotiating Body should be held separately. The extra costs involved would not necessarily be as high as the US\$ 900 000 included in the budget of the Conference of the Parties (see decision FCTC/COP2(11), Annex 2, footnote), since the Convention Secretariat strived for efficient use of resources. Many Parties would have required a larger delegation if the two meetings had taken place back-to-back. The Convention Secretariat was authorized to raise the extra funds required; it would approach Parties and explore other potential sources of funding.

Mr OKUMA (alternate to Mr Tagaya, Japan) asked for the exact dates of the third Conference of the Parties. The Convention Secretariat should keep to the budget for the second session of the Intergovernmental Negotiating Body, laid down in decision FCTC/COP2(11), and not seek funding elsewhere.

Dr NIKOGOSIAN (Head of the Framework Convention Secretariat) said that the tentative dates for the third Conference of the Parties were 17–22 November in South Africa. However, the final decision would be taken by the Bureau in late April. Decision FCTC/COP2(11) had allocated two alternative budgets for the second session of the Intergovernmental Negotiating Body: one figure applied for back-to-back sessions, and the second, for separate sessions, now applied. In general, the Convention Secretariat was expected to raise funds externally to cover any shortfall in funding.

Ms MATSAU (South Africa) confirmed that the tentative dates for the third Conference of the Parties were 17–22 November, the only dates on which a venue of the size required for a conference of 800 delegates was available in South Africa.

Replying to a question from Mr PADILLA (Philippines), she said that the venue had not yet been finalized. However, it would definitely not be in Cape Town, as originally requested by some Parties, as no venue was available there on the dates fixed for the session.

The CHAIRPERSON thanked the Government of South Africa on behalf of all delegations for its generous offer to host the third session of the Conference of the Parties.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) drew attention to the problems which some delegations experienced in obtaining visas to attend international conferences. He called upon host States to show more flexibility.

The CHAIRPERSON said that WHO was not able to influence the visa policy of a host State. However, delegations could begin to make their visa arrangements based on the provisional dates for the second session of the Intergovernmental Negotiating Body and the third session of the Conference, and that would leave time for WHO to intervene if facilitation proved necessary.

**The meeting rose at 16:10.**

## **EIGHTH MEETING**

**Friday, 15 February 2008, at 10:15**

**Chairperson:** Mr I. WALTON-GEORGE (European Community)

### **1. CREDENTIALS** (continued from the fourth meeting, section 1)

The CHAIRPERSON announced that since the Bureau had last met, formal credentials had been received from countries that had previously submitted provisional credentials: Bangladesh, Guatemala, Mauritius, the Republic of Korea, Saudi Arabia, Senegal, Swaziland and Tonga. Having examined them and found them to be in conformity with the Rules of Procedure of the Conference of the Parties, he recommended that those countries be accepted as having submitted formal credentials.

**It was so agreed.**

### **2. DRAFTING AND NEGOTIATION OF A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS:** Item 6 of the Agenda (Documents FCTC/COP/INB-IT/1/4, FCTC/COP/INB-IT/1/7 and FCTC/COP/INB-IT/1/INF.DOC./1) (continued from the seventh meeting, section 1)

The CHAIRPERSON drew attention to document FCTC/COP/INB-IT/1/7, a note which recorded his personal view of the discussions so far. It was intended as an aide-memoire: a formal Chairperson's text would be submitted in due course and an official summary of the proceedings would be produced by the Convention Secretariat.

Ms BAQUERIZO GUZMÁN (alternate to Ms Merizalde, Ecuador), speaking on behalf of the Parties in the Group of Latin American and Caribbean States, said that the Chairperson's note reflected the views of the Negotiating Body's participants and incorporated all the components needed to make the protocol an effective instrument. Illicit trade in tobacco products fostered criminal activity and led to tax evasion and loss of revenue, but, more importantly, it was harmful to health. The draft protocol should accord with WHO's principles, be consistent with the Framework Convention and avoid duplication. It should protect minors from gaining access to tobacco and from involvement in illicit trade. It should reflect the connection between illicit trade and other Convention topics, such as tobacco advertising and international cooperation, especially the provision of financial, technical and capacity building assistance to developing countries. All forms of illicit conduct and the penalties applicable under existing international instruments should be set out in the text. The draft protocol should be available in sufficient time for national and regional negotiations prior to the next session of the Intergovernmental Negotiating Body.

Mr MOHAMED (Maldives) said that Maldives was a small country with a correspondingly small market, yet tobacco products were imported in many forms. Maldives lacked the resources to monitor and control illegal activities. The protocol would thus be beneficial, although challenging to implement, for developing countries such as his own.

The provisions of the protocol would have to be strong and practical. The differing views expressed in present session had given the impression that some Parties wanted to draft a protocol that would override all other instruments while others, for economic reasons, wanted to weaken the protocol, despite overwhelming evidence of the damage done by the tobacco trade. The Chairpersons text should flexibly take into account that small countries like Maldives might be able to change their legislation more easily than larger countries.

The tobacco industry had left no stone unturned in its quest for profit; similarly, countries seeking to promote the public health agenda should explore all avenues to achieve their aims.

Mr MBUYU MUTEBA (Democratic Republic of the Congo) commended the Chairpersons note. Nevertheless, the words “and it was proposed that this be acknowledged in the introduction of the protocol” in paragraph 6 of document FCTC/COP/INB-IT/1/7 would weaken the text and contradict the aim of restricting the distribution of harmful products. The phrase should therefore be deleted.

Mr BERREDO MENEZES (Brazil), referring to paragraph 18, said that the tracking and tracing regime should be fully controlled by governments, as was already the case in Brazil, although he agreed that national arrangements should also comply with international standards. His Government might have some concerns about including the phrase “Agreements reached between the tobacco industry and government bodies may need to be considered”.

Mr MALOBOKA (Namibia) agreed with the representative of the Democratic Republic of the Congo on the need for the language in paragraph 6 to be reconsidered and brought into line with the strong statement on the harmful nature of both licit and illicit tobacco products.

Mr BERREDO MENEZES (Brazil) endorsed that remark. Furthermore, the protocol should not refer explicitly to licit trade in tobacco products, but should highlight the objective of combating illicit trade as well as the harmful effects to health of the tobacco trade.

Ms ALI-HIGO (Djibouti) agreed with previous speakers. There was no need to mention licit tobacco trade in the protocol, although a reference to the objective of protecting health under “general obligations” might be included.

The CHAIRPERSON thanked all speakers for their useful remarks. He would use all the material gathered during the discussion in preparing the Chairperson’s text for consideration at the second session of the Intergovernmental Negotiating Body. He declared the debate on item 6 of the agenda closed.

### **3. CLOSURE OF THE SESSION:** Item 8 of the Agenda

Dr LASSMANN (Austria), speaking on behalf of the Parties in the WHO European Region and the European Community, said that the session had clarified where positions were identical or very close and where major differences existed. Such differences were unavoidable given the different cultures, legal traditions and administrative approaches of the Parties. The common goal was to make the provisions of article 15 of the WHO Framework Convention more explicit and therefore more detailed. The boundaries of the Convention could be tested, but the limits posed by feasibility, the complexity of the issues and the need to avoid duplication had to be respected. Each provision should strengthen the fight against illicit trade in tobacco products and strike the right balance between precise legal text and flexible approaches. The quality of delegations’ preparations for the second session would depend on the early availability of the Chairperson’s text and of other documents,

including the summary records of the current session. He thanked the Chairperson and all those who had contributed so much to the proceedings.

Mr KRISHNA (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that the steady progress demonstrated the desire of all Parties to conclude the negotiations successfully. Breakthroughs on most of the issues would be detailed in the draft protocol, paying special attention to developing countries. The draft should be circulated by June 2008 at the latest to enable regional groups to finalize their views before the second session of the Intergovernmental Negotiating Body, in October 2008. The countries in his Region strongly supported the provisions and placed on record their national perspectives. The protocol should be strong, a beacon for future measures. Recent medical data had strengthened his country's resolve to tackle the problem through legislative, budgetary and community measures, exemplifying the effective mechanisms that could be used to fight illicit trade. He commended the Chairperson and the Convention Secretariat for their very professional work.

Mr MOHAMEDOUN (Mali), speaking on behalf of the Parties in the WHO African group, thanked the Chairperson for his skilful conduct and the Secretariat for their support. The second session of the Intergovernmental Negotiating Body would produce a consensus document based on productive debates, and to that end, the countries of his Region would like to receive the relevant documentation in good time.

Ms BAQUERIZO GUZMÁN (alternate to the Ms Merizalde, Ecuador), speaking on behalf of the Parties of the Group of Latin American and Caribbean States, congratulated the Chairperson and the Convention Secretariat on the hard work done. The Parties in her region would continue to support that work in the coming months.

Dr AL LAWATI (Oman), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, said that all the details discussed should be reflected in a strong draft protocol that would prevent those engaged in illicit trade from circumventing rules and regulations.

Ms MEJÍA DE RIVERA (alternate to Mr Urbizo, Honduras) said that her country was committed to implementing the WHO Framework Convention and the future protocol through its domestic legislation and tax regulations.

Ms ROOPCHAND (Trinidad and Tobago) said that her country was committed to implementing the WHO Framework Convention in the expectation that the incidence of tobacco-related deaths would be significantly reduced. A strong and practical protocol on illicit trade would help to reduce dependence on tobacco products. The Chairperson's leadership had led to stimulating debates.

Mr LEGUERRIER (Canada) said that illicit trade in tobacco products undermined governmental objectives in the health field, deprived governments of revenues and contributed to the rise in organized crime. The protocol's main objective should be to prevent illicit trade through a set of practical, effective and affordable measures, including licensing, record-keeping, manufacturing controls and product identification. International standards would be needed in order to set up an effective tracking and tracing system. The Chairperson's text should indicate in what form the standards would be issued; perhaps in an annex to the protocol or in guidelines, for example. The protocol should include strong measures on law enforcement and international cooperation. In order to maximize the strength of the protocol, Parties should attend the next session of the Intergovernmental Negotiating Body with a global approach, based on prior consultations with the relevant experts. Given the proposal to hold forthcoming meetings in separate locations, his delegation had concerns about how the process would be funded.

Mr MARTIN (Federated States of Micronesia), speaking on behalf of the Parties in the WHO Western Pacific Region, said that the debates had afforded an opportunity to understand different perspectives and concerns. He thanked the Convention Secretariat and looked forward to continued deliberations.

Dr SAN MARTÍN (Paraguay) said that sharing views with those who had the experience and the capacity to control illicit trade in tobacco products had been gratifying. Illicit trade was an aggressive tumour that attacked the fibre of society, especially in developing countries; he had high hopes that the protocol would provide comprehensive treatment.

Mr ZHANG Xiulian (China) said the session had achieved good results thanks to the welcome efforts of all concerned. His country would continue to support the drafting and negotiation of the protocol.

Mr OKUMA (Japan) said that the protocol must be consistent with existing bilateral and multilateral agreements, domestic laws, and the WHO Framework Convention, which already contained a set of cooperation mechanisms. The technical and fiscal feasibility of introducing information sharing and the legal feasibility of introducing control mechanisms solely for illicit trade in tobacco products should be carefully assessed. The next step would be critical. The Convention Secretariat should request input to the Chairperson's text from relevant international organizations and invite them to the next session. Japan would enhance its coordination with the relevant authorities.

Dr TOESSI (Benin) said that participants had voiced desire for a strong protocol that would enable illicit trade in tobacco products to be eradicated. The African group emphasized strengthened regional and international cooperation and transfer of know-how to countries with limited resources.

Dr LEWIS-FULLER (Jamaica) said that the driving force behind the protocol was public health concerns over the adverse effects of tobacco consumption, which must be stated clearly. The momentum to complete a strong protocol must be maintained.

Mr OTTO (Palau), speaking on behalf of the Parties of the Pacific island States, said that they were economies in transition, but would do what they could, within their means, to achieve a strong protocol that would protect the health of all people from the scourge of tobacco.

Mr GÖRÜN (alternate to Mr Çelik, Turkey) supported the elaboration of a protocol on illicit trade in tobacco products and looked forward to receiving the Chairperson's text.

Mr PADILLA (Philippines) favoured the stronger provisions on illicit trade, encompassing counterfeit as well as legitimate products which had been diverted. The motivation for illicit trade was pure financial gain. However, the goal of combating the proliferation of deadly tobacco products must not be compromised by according absolute powers of surveillance, seizure and confiscation without judicial intervention, or by agreeing to extraditions or criminal convictions without due process. Countries must decide to end illicit trade in tobacco products without violating human rights or intervening in national sovereignty. Nevertheless, the Philippines was committed to having a strong and enforceable protocol.

Mr HISHAM BIN ISMAIL (Malaysia) commented that all participants had recognized that the elimination of all forms of illicit trade in tobacco products was essential. The efforts of the Chairperson and the Convention Secretariat would yield a constructive text in harmony with existing international legal instruments.

Mr ASQUETA (Uruguay) said that tobacco control legislation was due to be passed in Uruguay. With members of the Southern Cone Common Market (Mercosur), his country was undertaking research on illicit trade in tobacco products in the region. The intensive efforts awaiting the Chairperson and the Convention Secretariat would doubtless prove fruitful and Uruguay pledged all its support to the process.

Mr BAKER (New Zealand) said that his country was committed to reducing the disease, suffering and death caused by tobacco products, illicit or otherwise. Perhaps because it was a geographically isolated island nation, it was not at present a major target for the trade in illicit tobacco products, a situation which might not persist, owing to the relatively high tobacco taxes. He looked forward to the Chairperson's text as the next step in developing a strong protocol.

Ms MARSHALL (Australia) said that her country was committed to a strong WHO Framework Convention and to a strong protocol on illicit trade in tobacco products. She thanked the Chairperson, the Convention Secretariat and other delegations for the extremely interesting discussions.

Dr AL-BADAH (Saudi Arabia) expressed confidence that the Chairperson would draft a convincing text. Saudi Arabia would support such efforts and would mobilize resources for work on the document in October 2008.

Mr SINCOVICH (World Customs Organization) said that his organization worked to build capacity and regulatory structures to fight the illegal movement of goods internationally. It would cooperate with the Convention Secretariat to the greatest extent possible to implement the protocol.

Ms MULVEY (Corporate Accountability International), speaking at the invitation of the CHAIRPERSON, said that transnational tobacco corporations had been watching the proceedings closely. As the negotiations moved forward, vigilance would be needed in resisting interference and to ensure that the obligations of Article 5(3) of the WHO Framework Convention were implemented. The protocol presented a critical opportunity to prioritize health over trade and commercial interests.

Dr DOROTHEO (Framework Convention Alliance on Tobacco Control), speaking at the invitation of the CHAIRPERSON, said that broad consensus had been expressed on the need for a strong protocol but the detailed discussions to come might prove more challenging. Much would be at stake in the coming negotiations given that a life was lost to tobacco every six seconds and that significant tax revenue was forgone each day. His organization was ready to provide assistance in the meantime.

Dr NIKOGOSIAN (Head, Convention Secretariat) expressed pleasure that participants were satisfied with the course of the meeting. He thanked his staff, the Chairperson, and WHO's Secretariat's staff who had greatly helped the Convention Secretariat.

The CHAIRPERSON said that the momentum had to be maintained and that the more detailed discussions might prove challenging. All the views gathered would form a draft protocol, a legal document and starting point for the next session. He thanked everyone involved and the delegates whose clear positions had facilitated his task. The next session of the Intergovernmental Negotiating Body would surely produce a robust protocol that would benefit people throughout the world. He declared the first session of the Intergovernmental Negotiating Body closed.

**The meeting rose at 11:45.**

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