

Report of the Intergovernmental Negotiating Body to the Third session of the Conference of the Parties on the progress of its work

BACKGROUND

1. This report summarizes the progress made by the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products between the second (30 June – 6 July 2007, Bangkok) and third session (17–22 November 2008, Durban, South Africa) of the Conference of the Parties.
2. At its second session, the Conference of the Parties decided,¹ in accordance with Rule 25 of its Rules of Procedure, to establish an Intergovernmental Negotiating Body open to all Parties to draft and negotiate a protocol on illicit trade in tobacco products that would build upon and complement the provisions of Article 15 of the WHO Framework Convention on Tobacco Control. The Conference recognized that the template for a protocol on illicit trade² as proposed by the expert group convened in accordance with decision FCTC/COP1(16), established a basis for initiating the negotiations by the Intergovernmental Negotiating Body.
3. The Conference further decided that the Intergovernmental Negotiating Body would hold its first session in Geneva in early 2008 and a second session preferably immediately before the third session of the Conference of the Parties, or at another time to be decided by the Bureau of the Conference of the Parties. According to the decision, the Intergovernmental Negotiating Body would report to the third session of the Conference of the Parties on the progress of its work.
4. The Conference also decided that the Intergovernmental Negotiating Body would hold at least one further session in the period between the third and fourth sessions of the Conference of the Parties

¹ Decision FCTC/COP2(12).

² Annex to document A/FCTC/COP2/9.

and that it would submit the text of a draft protocol on illicit trade in tobacco products to the fourth session of the Conference of the Parties for its consideration, in accordance with Article 33.3 of the WHO Framework Convention, unless this timeline is revised by the Conference of the Parties at its third session.

THE WORK OF THE INTERGOVERNMENTAL NEGOTIATING BODY

5. To date, two sessions of the Intergovernmental Negotiating Body have been held, with further work having been conducted in the intersessional period.

FIRST SESSION OF THE INTERGOVERNMENTAL NEGOTIATING BODY

6. The first session of the Intergovernmental Negotiating Body was held in Geneva from 11–15 February 2008. It was attended by representatives of 132 Parties, as well as 20 States non-Parties, three intergovernmental organizations and nine nongovernmental organizations accredited as observers to the Conference of the Parties.

7. The Intergovernmental Negotiating Body elected Mr I. Walton-George (European Community) as its Chairperson. Representatives of Oman (Dr J. Al-Lawati), Mexico (Dr E. Jaramillo), India (Mr P. Krishna),¹ Ghana (Mrs L. Asiedu) and the Federated States of Micronesia (Mr J. Martin) were elected as Vice-Chairpersons.

8. Following the high-level segment of the debate, the Intergovernmental Negotiating Body discussed in detail the objectives, scope and an outline for a protocol. The Intergovernmental Negotiating Body also reviewed specific areas and proposals outlined in the template for a protocol prepared by the expert group. The Convention Secretariat had earlier made available comments received from Parties and observers on the template. During the discussions, the Parties also referred to the Convention Secretariat's note on "Existing agreements and arrangements relevant to the objective of the Intergovernmental Negotiating Body."² Finally, the delegates discussed the process and method for future drafting and negotiations.

9. Before the closure of the first session, the Chairperson prepared and presented a document³ on the drafting and negotiation of a protocol, which recorded his views and summary of the overall content of the discussions.

10. According to the Chair, there was a general consensus on the need for a protocol on illicit trade in tobacco products with strong obligations. The delegations reaffirmed the need for drafting a comprehensive set of provisions to secure the supply chain of tobacco products. It was agreed that obligations to secure the supply chain would range from licensing, anti-money laundering provisions, tracking and tracing, and record-keeping, to additional security and preventive measures. It was agreed that the protocol would need to incorporate provisions of enhanced law enforcement capacity, minimum standards for offences, and strong sanctions and penalties, for effective deterrent measures.

¹ Replaced by Dr G. Balachandhran as from 19 October 2008.

² Document FCTC/COP/INB-IT/1/INF.DOC./1.

³ Document FCTC/COP/INB-IT/1/7.

The delegations also stressed the need for clear provisions on search, confiscation and seizures; destruction and disposal; proceeds of crime; and seizure of assets.

11. The Chairperson also noted that there was recognition that international cooperation in matters of information sharing, technical assistance and cooperation in scientific, technical and technological matters, investigation and prosecution of offences, and training and mutual legal and administrative assistance are essential elements of a protocol on illicit trade. Some delegations were of the view that a cautious approach would be needed on matters relating to mutual legal assistance and extradition. It was agreed that relevant provisions in extant treaties and other international agreements should also be kept in mind while drafting the protocol.

INTERSESSIONAL WORK

12. As mandated by the Conference of the Parties, the Chairperson began drafting the Chairperson's text following the first session. He informed the Bureau of the Conference of the Parties at its meeting on 23–24 April 2008 about progress made in drafting of the text, for which he had relied on the support of the Convention Secretariat and other experts.

13. At the same meeting, the Bureau reviewed a proposal for the date and venue of the second session of the Intergovernmental Negotiating Body, prepared by the Convention Secretariat in light of the delegates' comments during the first session. The Bureau decided that the second session would be held in Geneva from 20–25 October 2008.

14. The Chairperson's text¹ was released in six official languages of the Conference of the Parties in August 2008. It consists of five main sections: introduction; a section containing the main substantive obligations; international cooperation; institutional arrangements; and final clauses. The "substantive section" includes, inter alia, general obligations, provisions on the supply chain control, such as licensing, customer identification and verification and tracking and tracing, as well as on enforcement, such as offences, sanctions and confiscation and seizure.

15. In drafting, the Chairperson aimed at ensuring consistency with the provisions of the parent treaty, the Framework Convention. The discussions during the first session and the Chairperson's notes on its outcomes served as an important basis for the text. Existing international agreements have also been reviewed and, where appropriate, reflected in the draft.

SECOND SESSION

16. In accordance with decision FCTC/COP2(12) and the decision taken by the Bureau of the Conference of the Parties, the second session of the Intergovernmental Negotiating Body was held in Geneva from 20–25 October 2008. It was attended by representatives of 133 Parties, as well as 16 States non-Parties, two intergovernmental organizations and nine nongovernmental organizations accredited as observers to the Conference of the Parties.

¹ Document FCTC/COP/INB-IT/2/3.

17. The Chairperson's text was accepted as the basis for negotiations. Particular issues were raised about the scope and the title of the protocol. It was also requested that the text includes references to the primacy of public health objective and to the linkage between illicit trade and the tobacco industry.

18. The Intergovernmental Negotiating Body examined the Chairperson's text through Plenary, Committee and working group deliberations, with a particular focus on substantive parts and the preamble. Committee A, under the chairmanship of Mrs M.K. Matsau (South Africa), was requested to review Part III (*Supply chain control*) and several sections of Part IV (*Enforcement*),¹ while Committee B, under the chairmanship of Mr M. Navarrete (Chile), worked on Part V (*International cooperation*) and the remaining sections of Part IV;² the working group chaired by Dr H. Friza (Austria) reviewed the scope of the protocol. Other parts of the Chairperson's text, such as the general obligations and the institutional and financial matters were discussed in principle recognizing the need for more detailed discussions in the future.

19. The Intergovernmental Negotiating Body requested the Chairperson and the Convention Secretariat to make arrangements for prioritized expert reviews (including technical reports) and legal advice on a number of elements of the Chairperson's text, such as the feasibility and effectiveness of an international system for tracking and tracing, particularly for lower-resource countries, the treatment of sales of tobacco products via the internet, the relationship between illicit trade and duty free sales as well as the relationship of the protocol with other related international instruments. Other areas mentioned for such reviews and advice were customer identification and verification, security and preventive measures and the scope of the protocol with particular regard to key inputs and manufacturing equipment.

20. The Intergovernmental Negotiating Body endorsed the proposal of the Chairperson that its third session can be held from 28 June to 5 July 2009 in Geneva. The Intergovernmental Negotiating Body also requested the Chairperson to elaborate a revised Chairperson's text for consideration at its third session, taking into account the discussions and proposals made at the second session including the texts and opinions submitted by its Committees and the Working Group, and the results of the expert reviews and legal advice obtained. The Intergovernmental Negotiating Body noted that the Chairperson will be supported by the Convention Secretariat, the Bureau and experts, as necessary, during this process.

21. Further, the Intergovernmental Negotiating Body requested that the revised Chairperson's text and the expert reviews are released in good time to allow Parties to examine them before the next round of negotiations and that regional consultation meetings be held prior to the third session.

22. The Intergovernmental Negotiating Body also requested that the Chairperson and the Convention Secretariat establish coordination with the Secretariat of the United Nations Convention Against Transnational Organized Crime and the Secretariats of other relevant treaties.

23. The Intergovernmental Negotiating Body would like to bring the following matters to the attention of the Conference of the Parties.

¹ Namely, *Search of premises and seizure of evidence, Confiscation and seizure, Seizure payments, Destruction and Special investigative techniques.*

² Namely, *Offences, Liability of legal persons and Sanctions.*

24. **Officers of the Intergovernmental Negotiating Body.** The Rules of Procedure of the Conference of the Parties, which also apply to the Intergovernmental Negotiating Body, leave ambiguity regarding the term of office of its officers. Rule 28.1 deals with the election and term of office of the Chairperson and other officers of subsidiary bodies and provides, inter alia, that “Officers shall not serve for more than two consecutive terms”. Rule 28 does not define the word “terms”. In this regard, WHO’s Legal Counsel provided possible interpretations in a note to the INB.¹ The Intergovernmental Negotiating Body recommends that the Conference of the Parties clarify its intentions in adopting the formulation of Rule 28, or that it amends that Rule accordingly.

25. **Timeline and resources for the work of the Intergovernmental Negotiating Body.** Given the complexity and scope of the subject matters of the protocol, there is a possibility that the Intergovernmental Negotiating Body would not be able to finalize its work at its third session and within the time frame as envisaged by the Conference in its decision FCTC/COP2(12). Steps are being taken to minimize this possibility; however, the Intergovernmental Negotiating Body would like to seek guidance of the Conference of the Parties on an extended time schedule in case it becomes necessary.

26. The Intergovernmental Negotiating Body also requested the Conference to consider allocating additional resources for completion of its work, including the preparation of expert reviews, convening regional consultations, the proposed extension of the third session from six to eight working days and also possible follow-up work after the third session, if necessary

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¹ Document FCTC/COP/INB-IT/2/INF.DOC/1.