

Conference of the Parties

Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products

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Informal working group on the draft protocol to eliminate illicit trade in tobacco products

Outcome of the two meetings of the working group

1. The Conference of the Parties (COP) at its fourth session (Punta del Este, Uruguay, 15–20 November 2010) acknowledged the progress made by the Intergovernmental Negotiating Body (INB) on a Protocol on Illicit Trade in Tobacco Products during the four sessions of the INB that had been held up to that point. The COP extended the mandate of the INB to a final session to be held in early 2012.¹ The INB was requested to submit the text of a draft protocol to eliminate illicit trade in tobacco products for consideration by the COP at its fifth session.
2. The COP also decided to establish an informal working group to work prior to the final session of the INB. Since the workplan and budget of the COP for 2010–2011 did not allocate a budget to this group, the European Union generously proposed to provide substantial funding to the Convention Secretariat to support the convening of the group.
3. The COP mandated the informal working group as follows:
 - develop possible text for those articles in Part III (Supply Chain Control) of the draft protocol² that have not yet been agreed;

¹ See decision FCTC/COP4(11).

² Document FCTC/COP4/5, *Draft protocol to eliminate illicit trade in tobacco products*. Available in the six official languages of the COP at <http://www.who.int/fctc/publications/en/>.

- make proposals with regard to the method of financing of the protocol, currently referred to in Article 35 of the draft protocol;
- make proposals with regard to the question of whether the provisions on mutual legal assistance and extradition (currently referred to in Articles 30–32 of the draft protocol) need to be retained in the draft protocol;
- make proposals with regard to the question of how to cover the issue of protection of personal data in the draft protocol; and
- make proposals with regard to the question of how the text of the draft protocol, and its implementation, can best complement existing relevant agreements and arrangements, including the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, in order to maximize synergy and to avoid duplication. This should involve discussions with the United Nations Office on Drugs and Crime, the World Customs Organization and other relevant international bodies. Within this, a particular issue is where the global information sharing focal point should be organizationally located.

4. The informal working group held two meetings (Geneva, 4–8 July and 19–23 September 2011). It was comprised of representatives of 30 Parties (five Parties per WHO region)¹ and was chaired by Dr Nuntavarn Vichit-Vadakan (Thailand). Representatives of States non-Parties,² intergovernmental organizations³ and nongovernmental organizations⁴ accredited as observers to the COP and with specific expertise in the matters under the mandate of the working group also participated in the meetings.

PROPOSALS BY THE INFORMAL WORKING GROUP TO THE INB

1. Develop possible text for those articles in Part III (Supply Chain Control) of the draft protocol that have not yet been agreed

In accordance with the mandate established by the COP, the informal working group developed possible text for those articles in Part III (Supply Chain Control) of the draft protocol that have not yet been agreed. The working group's proposals for Article 5 (*Licence, equivalent approval or control*

¹ Algeria, Kenya, Nigeria, Senegal and Swaziland from the African Region; Brazil, Canada, Mexico, Nicaragua and Panama from the Region of the Americas; Bhutan, India, Maldives, Nepal and Thailand from the South-East Asia Region; the European Union, Georgia (for the first meeting)/Israel (for the second meeting), Poland, Russian Federation and Turkey from the European Region; Egypt, Islamic Republic of Iran, Pakistan, Saudi Arabia and United Arab Emirates from the Eastern Mediterranean Region; and Australia, China, Cook Islands, Japan and Mongolia from the Western Pacific Region.

² Dominican Republic, Eritrea, Malawi, United States of America, Uzbekistan and Zimbabwe.

³ The United Nations Office on Drugs and Crime, the World Customs Organization and the World Trade Organization.

⁴ Corporate Accountability International, the European Network for Smoking and Tobacco Prevention, the Framework Convention Alliance, the International Union against Tuberculosis and Lung Disease, and the Union for International Cancer Control.

system), Article 6 (*Due diligence*), Article 8 (*Record-keeping*), Article 9 (*Security and preventive measures*), Article 10 (*Sale by Internet, telecommunication or any other evolving technology*), Article 11 (*Free zones and international transit*) and Article 11bis (*Duty free sales*)¹ are contained in the Annex to this document.

In addition, in order to reach consensus on the text of the articles in Part III, the working group agreed to include new provisions – namely a new paragraph 2 of Article 11bis, and a new paragraph 5 of Article 5 – which require the Meeting of the Parties (MOP) to consider appropriate action in respect of duty free sales and key inputs, respectively, after having performed evidence-based research five years after the entry into force of the protocol. These provisions are also included in the Annex.

2. Make a proposal with regard to the method of financing of the protocol, currently referred to in Article 35 of the draft protocol

The informal working group made the following general observations:

- all decisions regarding the method of financing of the protocol should be first considered by the COP at its fifth session, prior to consideration by the MOP at its first session;
- regarding the period prior to the entry into force of the protocol, the group agreed that the COP should finance and support necessary activities. The Convention Secretariat should consider ways to reduce costs for meetings by making use of technology, where feasible, and of appropriate regional mechanisms;
- the first session of the MOP, which would be held in conjunction with a session of the COP, should be financed by the COP, governed by the administrative policies for travel support applicable to the COP.²

The working group requested the Convention Secretariat to update the anticipated budget for costs for the period prior to entry into force, taking into account, inter alia, possible cost savings, and make it available for consideration by the INB at its final session.

Regarding the question of how the protocol should be financed following its entry into force, the working group suggested that the INB at its final session could consider the following possibilities with a view to making recommendations to the COP:

- all Parties to the WHO FCTC would finance the protocol; or
- only Parties to the protocol would finance the protocol; or
- all Parties to the WHO FCTC would finance the protocol for a period of five years after its entry into force; the COP would decide on the financing mechanism for the period thereafter.

¹ Article 11bis will be renumbered as an article in its own right in the final text of the draft protocol presented to the COP.

² See decision FCTC/COP4(21).

3. Make a proposal with regard to the question of whether the provisions on mutual legal assistance and extradition (currently referred to in Articles 30–32 of the draft protocol) should be retained in the draft protocol

The informal working group agreed that provisions on mutual legal assistance and extradition should be included in the draft protocol. However, this agreement was, for a number of Parties, subject to the provisions in the draft protocol conforming as closely as possible to Articles 16 and 18 as well as other relevant articles of the United Nations Convention against Transnational Organized Crime (UNTOC).

Additional suggestions:

On the understanding that the suggestions below may not fall strictly within the mandate of the working group, some Parties considered it useful to bring certain issues to the attention of the INB. At the invitation of the Chair of the working group, those Parties identified matters for possible consideration in the draft provisions on mutual legal assistance and extradition:

- (i) mutual legal assistance and extradition should not include the criteria for an “organized criminal group” as defined in Article 2(a) of UNTOC;
- (ii) Parties should be able to notify that they will not use the draft protocol as the legal basis for extradition (along the lines of Article 16.5 of UNTOC), and that any request for extradition should be subject to their domestic law; and
- (iii) given the difficulty of arriving at a consensus regarding the threshold penalties for extradition [and/or mutual legal assistance], one suggestion was that Parties could be permitted to notify that they will extradite [and/or afford mutual legal assistance] only in cases in which the wanted person [or suspect] would be subject to the penalty cited in Article 2(b) of UNTOC¹ or a stipulated lesser penalty.²

4. Make a proposal as to how to cover the issue of protection of personal data in the draft protocol

With regard to the protection of personal data, the informal working group agreed to add a new article to the draft protocol.

The group proposes the following new provision:

“Protection of personal data

Parties shall protect personal data of individuals regardless of nationality or residence in line with existing international standards, such as the United Nations guidelines for the regulation of computerized personal data files, and subject to national and/or domestic law regarding the protection of personal data when implementing this protocol.”

¹ “Maximum deprivation of liberty of at least four years or a more serious penalty”.

² Such an additional notification mechanism is not included in UNTOC.

- 5. Make proposals with regard to the question of how the text of the draft protocol, and its implementation, can best complement existing relevant agreements and arrangements, including the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, in order to maximize synergy and to avoid duplication. This should involve discussions with the United Nations Office on Drugs and Crime, the World Customs Organization and other relevant international bodies. Within this, a particular issue is where the global information sharing focal point should be organizationally located.**

The informal working group agreed that the Convention Secretariat should be requested to make the best possible use of existing resources and arrangements. This should involve close collaboration with intergovernmental agencies and other entities with specific expertise in matters relating to the implementation of the protocol, including the World Customs Organization and the United Nations Office on Drugs and Crime, through key forums such as the Commission on Crime Prevention and Criminal Justice, the Conference of the Parties of UNTOC and the Conference of the States Parties of the United Nations Convention against Corruption.

To facilitate the discussions of Parties during the final session of the INB, the working group requested the Secretariat to prepare a document outlining possible options for collaboration with relevant agencies.

Regarding the question of the organizational location of the global information sharing focal point, the informal working group noted that this matter was addressed in Article 7 of the draft protocol.

ANNEX

DRAFTING PROPOSALS BY THE INFORMAL WORKING GROUP

Article 5

Licence, equivalent approval or control system

1. To achieve the objectives of the WHO Framework Convention on Tobacco Control and with a view to eliminating illicit trade in tobacco products and manufacturing equipment, each Party shall prohibit the conduct of any of the following activities by any legal or natural person except pursuant to a licence or equivalent approval (hereafter “licence”) granted, or control system implemented, by a competent national authority in accordance with national law:

- (a) manufacture of tobacco products and manufacturing equipment; and
- (b) import or export of tobacco products and manufacturing equipment.

2. Each Party shall endeavour to license, to the extent considered appropriate, and when the following activities are not prohibited by national legislation, any legal or natural person engaged in:

- (a) retailing of tobacco products;
- (b) growing of tobacco, except for traditional small-scale growers, farmers and producers;
- (c) transporting commercial quantities of tobacco products or manufacturing equipment; and
- (d) wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment.

3. With a view to ensuring an effective licensing system, each Party shall:

(a) establish or designate a competent national authority or authorities to issue, renew, suspend, revoke and/or cancel licences, subject to the provisions of this Protocol, and in accordance with its national legislation, to conduct the activities specified in paragraph 1 of this Article;

(b) require that each application for a licence contains all the requisite information about the applicant, which should include, where applicable:

(i) where the applicant is a natural person, information regarding his or her identity, including full name, trade name, business registration number (if any), applicable tax registration numbers (if any) and any other information to allow identification to take place;

(ii) when the applicant is a legal person, information regarding its identity, including full legal name, trade name, business registration number, date and place of incorporation, location of corporate headquarters, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names

of its directors and of any designated representatives, including any other information to allow identification to take place;

(iii) precise business location of the manufacturing unit(s), warehouse location and production capacity of the business run by the applicant;

(iv) details of the tobacco products and manufacturing equipment covered by the application, such as product description, name, registered trade mark if any, design, brand, model or make and serial number of the manufacturing equipment;

(v) description of where manufacturing equipment will be installed and used;

(vi) documentation or a declaration regarding any criminal records;

(vii) complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details; and

(viii) a description of the intended use and intended market of sale of the tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand;

(c) monitor and collect, where applicable, any licence fees that may be levied and consider using them in effective administration and enforcement of the licensing system or for public health or any other related activity in accordance with national laws;

(d) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;

(e) undertake measures such as periodic review, renewal, inspection or audit of licences where appropriate;

(f) establish, where appropriate, a time frame for expiration of licences and subsequent requisite reapplication or updating of application information;

(g) oblige any licensed legal or natural person to inform the competent national authority in advance of any change of location of their business or any significant change in information relevant to the activities as licensed;

(h) oblige any licensed legal or natural person to inform the competent national authority, for appropriate action, of any acquisition or disposal of manufacturing equipment;

(i) ensure that the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the competent national authority.

4. Each Party shall ensure that no licence shall be assigned and/or transferred without receipt from the proposed licensee of the appropriate information contained in paragraph 3 of this Article, and without prior approval from the designated competent national authority.

5. Five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain whether any key inputs exist

that are essential to the manufacture of tobacco products, are identifiable and can be subject to an effective control mechanism. On the basis of such research, the Meeting of the Parties shall consider appropriate action.

Article 6

Due diligence

1. Each Party shall require, in accordance with its national law or legally binding and enforceable agreements, that all natural and legal persons engaged in the supply chain (*needs definition*) of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products to:

- (a) conduct due diligence before the commencement of and during the course of, a business relationship;
- (b) monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use; and
- (c) report to the designated competent national authorities any evidence that the customer is engaged in activities in contravention of its obligations deriving from this Protocol.

2. Due diligence pursuant to paragraph 1 of this Article shall, as appropriate, and in accordance with its national laws or legally binding and enforceable agreements, include, among others, requirements for customer identification, such as obtaining and updating information relating to the following:

- (a) establishing that the legal or natural person holds a licence in accordance with Article 5;
- (b) when the customer is a natural person, information regarding his or her identity, including full name, business registration number (if any), applicable tax registration numbers and verification of his or her official identification;
- (c) when the customer is a legal person, information regarding its identity, including full name, business registration number, date and place of incorporation, corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, complete names of its directors and any designated legal representatives, including the representatives' complete names and verification of their official identification;
- (d) a description of the intended use and intended market of sale of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and
- (e) a description of the location where manufacturing equipment for use in the manufacture of tobacco products will be installed and used.

2bis Due diligence pursuant to paragraph 1 of this Article may include requirements for customer identification, such as obtaining and updating information relating to the following:

- (a) documentation or a declaration regarding any criminal records; and

- (b) identification of the bank accounts intended to be used in transactions.

3. Each Party shall, on the basis of the information reported in paragraph 1(c), take all necessary measures to ensure compliance with the obligations deriving from this Protocol, which may include the designation of a customer within the jurisdiction of the Party to become a blocked customer as defined by national law.

Article 8

Record-keeping

1. Each Party shall require, as appropriate, that all natural and legal persons engaged in the supply chain (*needs definition*) of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products maintain complete and accurate records of all relevant transactions. Such records must allow for the full accountability of materials used in the production of their tobacco products.

2. Each Party shall, as appropriate, require persons licensed in accordance with Article 5 to provide, on request, the following information to the designated competent authorities:

- (a) general information on market volumes, trends, forecasts and other relevant information; and
- (b) the quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock, in tax and customs warehouses under the regime of transit or transshipment or duty suspension as of the date of the request.

3. With respect to tobacco products and manufacturing equipment sold or manufactured on the territory of the Party for export, or subject to duty-suspended movement in transit or transshipment on the territory of the Party, each Party shall, as appropriate, require that persons licensed in accordance with Article 5, provide, on request, to the designated competent authorities in the country of departure (electronically, where the infrastructure exists) at the time of departure from their control with the following information:

- (a) the date of shipment from the last point of physical control of the products;
- (b) the details concerning the products shipped (including brand, amount, warehouse);
- (c) the intended shipping routes and destination;
- (d) the identity of the natural or legal person(s) to whom the products are being shipped;
- (e) the mode of transportation, including the identity of the transporter;
- (f) the expected date of arrival of the shipment at the intended shipping destination; and
- (g) intended market of retail sale or use.

4. If feasible, each Party shall require that retailers and tobacco growers, except for traditional growers working on a non-commercial basis, maintain complete and accurate records of all relevant transactions in which they engage, in accordance with its national laws and regulations.
5. For the purposes of implementing paragraph 1 of this Article, each Party shall adopt effective legislative, executive, administrative or other measures to require that all records are:
 - (a) maintained for a period of at least four years;
 - (b) made available to the designated competent authorities; and
 - (c) maintained in a format, as required by the designated competent authorities.
6. Each Party shall, as appropriate and subject to national laws, establish a system for sharing details contained in all records kept in accordance with this Article with other Parties.¹
7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved systems for record-keeping.¹

Article 9

Security and preventive measures

1. Each Party shall, where appropriate and in accordance with its national laws or legally binding and enforceable agreements, require that all natural and legal persons subject to Article 5 take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, among others:
 - (a) reporting to the designated competent national authorities:
 - (i) the cross-border transfer of cash in amounts stipulated in national laws or regulations or of cross-border payments in kind; and
 - (ii) all “suspicious transactions”;
 - (b) supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use.
2. Each Party shall, where appropriate and in accordance with its national laws or legally binding and enforceable agreements, require that payments for transactions carried out by natural or legal persons subject to Article 5 be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system.

¹ This paragraph was agreed in Committee A at the third session of the Intergovernmental Negotiating Body.

2bis A Party may require that payments carried out by natural or legal persons subject to Article 5 for materials used for the manufacture of tobacco products in its jurisdiction be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system.

3. Each Party shall ensure that any contravention of the requirements of this Article is subject to appropriate criminal, civil or administrative procedures and effective, proportionate and dissuasive sanctions including, as appropriate, suspension or cancellation of a licence. (*Placement of this paragraph needs further discussion*)

Article 10

Sale by Internet, telecommunication or any other evolving technology

1. Each Party shall require that all legal and natural persons engaged in any transaction with regard to tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale comply with all relevant obligations covered by this Protocol.

2. Each Party shall consider banning retail sales of tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale.

Article 11

Free zones¹ and international transit

1. Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective controls on all manufacturing of, and transactions in, tobacco and tobacco products, in free zones, by use of all relevant measures as provided in this Protocol.

2. In addition, the intermingling of tobacco products with non-tobacco products in a single container or any other such similar transportation unit at the time of removal from free zones shall be prohibited.

3. Each Party shall, in accordance with national law, adopt and apply control and verification measures to the international transit or transshipment, within its territory, of tobacco products and manufacturing equipment in conformity with the provisions of this Protocol in order to prevent illicit trade in such products.

¹ “Free zones” means a part of the territory of a contracting Party where any goods introduced are generally regarded, in so far as import duties and taxes are concerned, as being outside the Customs territory (Revised Kyoto Convention, Specific Annex D, Chapter 2: Free Zones).

Article 11bis

Duty free sales

1. Each Party shall implement effective measures to subject any duty free sales to all relevant provisions of this protocol, taking into consideration Article 6 of the WHO FCTC.
2. Five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain the extent of illicit trade in tobacco products related to duty free sales of such products. On the basis of such research, the Meeting of the Parties shall consider appropriate action.

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