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Revised Chairperson’s text on a protocol on illicit trade in tobacco products, and general debate

Expert review on a possible ban on Internet sales of tobacco products

Note from the Secretariat

1. At its second session (20–25 October 2008, Geneva), the Intergovernmental Negotiating Body requested the Chairperson and the Convention Secretariat to make arrangements for expert reviews on a number of elements in the Chairperson’s text.

2. Following this request, the Convention Secretariat, in consultation with the Chairperson, identified experts in the relevant areas to draft technical documents. All expert documents underwent extensive peer review, which in one case included an expert meeting.

3. At its meeting on 5 February 2009, the Bureau of the Intergovernmental Negotiating Body reviewed the progress made in the preparation of expert reviews.

4. The expert review on the legal ramifications of a possible ban on Internet sales of tobacco products (with a particular focus on international trade law, in line with the discussions at the second session of the Intergovernmental Negotiating Body) is attached as Annex 1. As complementary information, the Convention Secretariat commissioned an overview of entities potentially involved in Internet sales of tobacco products (Annex 2). The two reviews are herewith submitted to the Intergovernmental Negotiating Body for information.
ANNEX 1

LEGAL RAMIFICATIONS OF A POSSIBLE BAN ON SALES OF TOBACCO PRODUCTS VIA THE INTERNET

I. Introduction

1. The purpose of a ban on Internet sales of tobacco products is to prevent both legal and illegal sales of tobacco products through offers and payment on the Internet, which has no territorial limitations. It is assumed that the measure would include a ban on advertising, offers for sale to consumers, orders by consumers and payments for all tobacco products. It is assumed that the measure would not cover sales through conventional channels. It is further assumed that the ban would be imposed on all sales, whether foreign or domestic, and that Members and non-Members of the World Trade Organization (WTO) would be treated in the same way. This review focuses on electronic commerce between retail suppliers and consumers.

2. A legal ban on Internet sales of tobacco products implemented by WTO Members would be a particular governmental measure. As the features of such a measure are not currently known, this assessment is necessarily of a general nature.

3. The measure would potentially affect the General Agreement on Tariffs and Trade (GATT 1994) and the General Agreement on Trade in Services (GATS). The Agreement on Agriculture (AoA), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) would not be affected by the measure. WTO Members, in particular non-Parties to the WHO Framework Convention on Tobacco Control (FCTC), might challenge the measure under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO, irrespective of whether they are Party to the WHO FCTC and a future protocol.

4. The paper does not address the potential implications of regional and bilateral trade agreements or the laws of Internet and communications and of freedom of information and other pertinent human rights. The paper also does not address technical challenges to enforcing the ban.

5. The paper focuses on the consistency of the articles of GATT 1994 and GATS that were found to be relevant to the proposed ban on Internet sales of tobacco products. The paper casts light on the obligation of transparency under WTO rules and envisages the waiver option according to Article IX:3 and 4 of the agreement establishing the WTO.
II. General Agreement on Tariffs and Trade (GATT 1994)

6. Prohibition of the commercialization of tobacco products on the Internet is related to the GATT 1994 to the extent that tobacco products are physical goods. They are agricultural products subject to the Agreement under the Harmonized Commodity Description and Coding Systems.

7. Trade-related regulation of tobacco products is therefore subject to GATT 1994 and related instruments. A ban on selling tobacco products via the Internet might affect the principles of non-discrimination (Articles I and III) and might represent a measure with effects similar to those of a quantitative restriction (Article XI). If these principles are violated, the measures might be justified under the general exceptions (Article XX).

Non-discrimination (Articles I and III)

8. The international trading system is based on two constitutional principles that are expressions or variations of the equal treatment or nondiscrimination: “most favoured nation”, which ensures that Members grant equal treatment to imported or exported products from other countries to a “like product” from other WTO Members; and “national treatment”, which secures no less favourable treatment of imported products than that accorded to domestic products.

9. A ban on Internet sales of tobacco products, by its very nature, is bound to apply to offers from the territory of any Member, including within Member States. It would be difficult to contemplate a system that allowed Internet sales to consumers by some but not by other sources. Any differentiation would undermine the purpose of the measure. In fact, the ban would be effective only if domestic and foreign sources within a particular region of the world are included. No unequal or less favourable treatment among different Internet operators is anticipated for Internet sales operations from abroad and within Member States. A complete ban on Internet sales would therefore not affect the “most favoured nation” and “national treatment” obligations of WTO Members. A ban on all Internet sales of tobacco products, affecting domestic and foreign products and suppliers alike, would not be in breach of Article III of GATT 1994.

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1 Tobacco products were considered under the GATT and WTO dispute settlement mechanism in the following cases: Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, WT/DS10/R-37S/200; Dominican Republic – Measures Affecting the Importation of Cigarettes, WT/DS300 and DS302; Peru – Taxes on Cigarettes (WT/DS227).


3 The “most favoured nation” principle, stipulated in Article I:1 of GATT 1994, requires that the measures affecting import or export trade are applied uniformly for “like” products from all Members. Thus, a WTO Member cannot treat imported or exported goods from a country differently from “like” imported or exported products from another WTO Member with respect to measures that either liberalize or restrict trade.

4 The “national treatment” principle requires WTO Members to treat imported products no less favourably than “like” domestic products, especially with regard to internal taxation and domestic regulations, in order to avoid protection of domestic production. Article III:4 of GATT 1994 applies to regulations other than taxation and establishes that Members must not enact laws or regulations affecting internal sales that confer treatment no less favourable than that accorded to “like” products of national origin.

10. When Internet sales are compared with conventional channels of commerce and sale, however, allowing conventional sales to adults but banning Internet sales in general would represent potential discrimination between like products. The situation would not affect the “most favoured nation” principle, as all foreign products would be treated alike; however, it might affect “national treatment”, as it could be argued that foreign products are treated less favourably than domestic products, which would contravene Article III:4 of GATT 1994.

11. A measure banning Internet sales of tobacco products would probably be considered as affecting internal sales, offers for sale and the purchase of such products, as it would reduce the means through which the products can be sold in a country and would potentially result in a reduction in the quantity of products sold.

12. The crucial point is thus whether the ban would place foreign Internet operations at a disadvantage in relation to conventional domestic operations selling like products. GATT 1994 law addresses the treatment of products only, and not of producers or sales agents. As a company specializing in selling tobacco products per se is not entitled to equal treatment under GATT 1994, it cannot be argued that conventional companies and Internet companies selling tobacco are not treated alike. The treatment of service providers arises under GATS, discussed below.

13. To the extent that original foreign products can be offered on less favourable terms through conventional channels (shops and other outlets), foreign products are not to be accorded treatment less favourable than domestic products sold through the same commercial channels. If foreign products are sold predominantly on the Internet and not through conventional channels, discrimination may arise. With respect to branded and original products, this would be unlikely. Tobacco companies sell their products through a range of outlets, not limited to Internet sales. The ban would not affect competition among different products, as they all can be sold by conventional commercial channels.

14. If tobacco products can be sold through conventional outlets without discrimination according to their origin, a ban on Internet sales would, therefore, in our view, be consistent with the requirements of Article III:4. The assessment will depend on the context of the measure and the individual case. Cases in which the ban substantially limits operations with respect to particular brands might constitute a violation of Article III:4. A total ban on illicit counterfeits would not be a violation, however, as their sale is banned.

Quantitative restriction on trade (Article XI)

15. Article XI of GATT 1994 not only prohibits formal and explicit quantitative restrictions but also other measures with similar effects. With regard to whether the ban on Internet sales would amount to such a measure, it can be argued that it would represent a restriction on export and import, as it would prevent persons from efficiently selling and ordering products and from making use of competitive offers and requests abroad. As GATT 1994 also covers, in Article III:4, modalities of sales, the measure could also be considered a restriction incompatible with Article XI. As WTO panels and the WTO Appellate Body do not analyse quantitative trade flows and de minimis arguments are not admitted, it would be sufficient to demonstrate that the ban would potentially inhibit market access for products covered by the General Agreement.
16. As application of Articles XI and III is mutually exclusive, the analysis would focus on Article XI. It is therefore safe to assume that the ban would be inconsistent with Article XI and therefore would depend on justification under the general exemptions of Article XX.

Recourse to general exceptions (Article XX)

17. The aim of the General Agreement and WTO law is to raise standards of living and ensure full employment commensurate with the objectives of sustainable development. WTO law does not prevent Members from pursuing other legitimate policy goals, and the exemptions in Article XX define the criteria and conditions under which a specific measure not compatible with other provisions of the Agreement might be justified and operated.

18. A ban on Internet sales would seem to have a twofold purpose. First, it would make it impossible for minors to use the Internet to procure tobacco and would support enforcement of access restrictions for minors in conventional outlets, e.g. the prohibition on selling tobacco and alcoholic beverages to persons below a certain age. This purpose is related to the protection of public health. Secondly, the ban would limit the trafficking and counterfeiting of tobacco products such as cigarettes, which are some of the most widely illegally traded products. The measure would protect intellectual property rights, in particular trade marks from illegal trade and counterfeiting. Thus, operation of the ban would protect human life and health and enforce trade mark law. According to Article XX of GATT 1994, both justifications are subject to a necessity test.

(a) Protection of human life and health

19. A ban on Internet sales on the basis of the FCTC is clearly motivated by protection of human life and health. The impact of smoking on life and health is well established and has been recognized in WTO jurisprudence. There is a sufficient association between selling tobacco products on the Internet – either originating inside the country that imposes the ban or outside it – and increasing numbers of smokers, with the consequent increase in health problems and deaths.

(b) Customs enforcement and intellectual property protection

20. Article XX(d) allows Members to adopt measures which, inter alia, support customs enforcement and the protection of intellectual property rights, provided that the laws supported by such measures are not themselves incompatible with WTO law. Both the enforcement of border measures and the protection of intellectual property accord with policies required by the TRIPs. In addition, Members may invoke fiscal reasons, although this is not explicitly stated in Article XX(d), as the measure also serves to combat tax evasion. It would be necessary to show a sufficient link between a ban on Internet sales and combating counterfeiting, illicit trade or tax evasion, with the maintenance of higher prices and a consequent reduction in tobacco consumption and health problems.

2 Progressive liberalization of international trade and trade regulation are the main means for achieving the goals set forth in the preamble.
4 Appellate Body Report, United States – Shrimp, paragraph 133.
(c) Necessity

21. The main problem associated with a ban on Internet sales of tobacco products is whether a ban that applies to specific forms of distribution and not others is a necessary and the least trade-restrictive means for protecting minors from starting to smoke. As the measure does not exclude access by other means, the objection might be raised that the measure does not pass the necessity test of WTO law.

22. A measure will comply with the necessity test of Article XX(b) if it has basically the following characteristics: (i) it pursues a specific objective that aims to provide a determined level of health protection; (ii) the measure effectively contributes to the achievement of the objective pursued; (iii) it is the least trade-restrictive measure available; and (iv) there are no other less restrictive measures available to reach the same objective. In addition, it must be noted that the WTO Panel can ask for a technical opinion of WHO to take into consideration its health arguments, in particular concerning the impacts of cigarette use and consumption.2

23. The measure under consideration fulfils the first requirement of having the specific objective of providing a determined level of health protection, as its aim is to reduce tobacco consumption and tobacco-caused deaths and diseases, especially among young people, who are frequent users of the Internet and easily influenced by it (GATT 1994, Article XXb). Another aim is to combat illicit trade and tax evasion and to enforce customs laws and protect intellectual property rights (Article XXd).

24. The critical point is whether the ban would represent the least trade-restrictive measure, in the absence of a viable alternative that would achieve the same goals less intrusively. It might be argued that a total ban on Internet sales would be excessive and that less intrusive means should be sought to prevent minors from buying via the Internet, such as technical means (access code) or restrictions on Internet payments (credit cards). It would be necessary to demonstrate that such restrictions are not practicable, as it would be impossible to monitor access by minors to accounts and passwords reserved for adults. It would also be necessary to show that a ban limited to minors is not suitable and would undermine the overall purpose of the measure. Likewise, evidence would be required that the ban is effective against counterfeiting and illegal trafficking of tobacco products.

25. It would further be necessary to show that there are no less intrusive measures to protect minors against the consumption of tobacco and to protect licit trade. It is up to the claimant to demonstrate

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1 In Brazil – Retreated Tyres, the Appellate Body based the necessity analysis on two principles: WTO Members have the right to determine the level of protection that they consider appropriate in a given context in order to determine (i) whether a measure is important to protect health and (ii) the contribution the measure makes to achievement of its objective (whether there is "a genuine relationship of ends and means between the objective pursued and the measure at issue"). The Appellate Body found that “the contribution of the measure has to be weighted against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it”. See: Appellate Body Report, Brazil – Retreated Tyres, WT/DS332 paragraph 210. A similar conclusion was reached by the Appellate Body in the European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS134/R/AB paragraph 168.

2 In the Panel Report, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (WT/DS10/ R-37S/200), adopted on 7 November 1990, the Panel found that even if the measure is inconsistent with Article III:4, “such inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes”. In this case, the Panel asked for a technical opinion from WHO and took into consideration the health impacts of cigarette use and consumption, stating that: “The Panel noted the view expressed by WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on the advertisement could therefore curb such demand” (idem, paragraph 78).
less intrusive options that would achieve the goals of the measure defined. It would be necessary to demonstrate that the ban on advertising and the provision of information and education on the one hand, and border inspections, inspections of postal services and other means available to customs and the police on the other hand cannot achieve the goal equally efficiently.

26. Within pertinent WTO law, the objective of the ban should be to prevent minors from taking up smoking in the first place and to prevent them from circumventing restrictions imposed on conventional commercial channels. Without a ban on Internet sales, these restrictions would be easily undermined.

27. A ban on Internet sales would have to meet the requirements of the chapeau of Article XX. As the measure would apply ergo omnes by definition, it would not amount to arbitrary or unjustifiable discrimination. It would apply equally to all tobacco producers, of whatever origin; therefore, it would not discriminate against foreign products or producers and would apply to all countries alike. Enforcement of measures would not differ according to the country of the seller, as enforcement – except for international judicial assistance – is limited to domestic sellers and consumers.

28. The question might be raised of whether a ban that meets all the other conditions of Article XX would be a disguised restriction of trade. The criterion implies that the primary aim of the measure is to protect conventional domestic outlets. This view must be addressed in terms of both motivation and effects. It would not be difficult to demonstrate that the measure would pursue legitimate policy goals. From the point of view of effects, it would be necessary to demonstrate that the ban would not substantially increase turnover and sales in conventional outlets. If that were the case, the effectiveness of the ban would be in doubt, as it must be assumed that minors have alternative routes of access to tobacco. It would be useful to obtain evidence for this contention.

III. The General Agreement on Trade in Services (GATS)

29. Sale of goods, services or digital products via the Internet is an integral part of “electronic commerce”, which encompasses the production, distribution, marketing, sale or delivery of goods and services by electronic means. There is no binding decision on the applicability of WTO rules concerning the electronic delivery of services within the WTO Working Program. It is generally agreed that this falls within the scope of the GATS, because it applies to all services, regardless of the means by which they are delivered, as well as to electronically conducted distribution services comprising the wholesale or retail sale of goods. The GATS is applicable to all services, except those “supplied in the exercise of governmental authority” and certain sectors that are expressly excluded, in particular liner shipping and air transport services.

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1 Appellate Body Report Brazil – Retreated Tyres, WT/DS332 paragraph 156.
2 This term is used solely for the purposes of the WTO Working Program.
3 Services that are supplied neither on a commercial basis nor in competition with other suppliers, such as social security schemes and other public services, such as health or education that are provided under non-market conditions.
30. WTO jurisprudence confirmed that the GATS is technologically neutral, in the sense that it does not contain any provisions that distinguish between different technological means through which a service may be supplied.\(^1\)

**Scope of the GATS**

31. The agreement applies to all measures by WTO Members that affect trade in services (GATS Article I:1).\(^2\) Therefore, if the ban is to be imposed by the regulatory bodies of WTO Members, it would be qualified as a measure by a Member. The same article defines “supply of a service” to include the production, distribution, marketing, sale and delivery of a service.

32. According to GATS Article XVIII, measures by Members affecting trade in services include measures in respect of the purchase, payment or use of a service. It is unclear whether the GATS applies to the sale of goods or is limited to services *in sensu stricto*. The two are difficult to distinguish in electronic commerce, as the selling of goods over the Internet is considered to be a form of distribution service in its own right, characterized by features and modes that emphasize the business model and the act of selling independently of the object traded. We thus conclude that a potential ban on sale of tobacco products would qualify as a measure affecting trade in services.

33. The sale of tobacco products by distant communication (in particular Internet connections, telecommunications or postal or delivery services) constitutes “mode 1” or “cross-border” supply of services in accordance with GATS Article I:2(a). As it is particularly difficult to distinguish between supply under mode 1 (cross-border) and mode 2 (consumption abroad), however, it could be argued that sales on the Internet constitute mode 2 as well.\(^3\) International electronic sales of tobacco essentially correspond to modes 1 and 2, without excluding modes 3 (commercial presence) and 4 (presence of natural persons).

34. On the basis of the Service Sectoral Classification List, sales of tobacco on the Internet would fall within the distribution services sector, which has four subsectors.\(^4\) If a ban required by the Protocol was limited to the Internet sale of tobacco products by retailers only (and not wholesalers), the ban would affect the subsector of retailing services. Potential violation of the GATS would therefore primarily concern those Members that have commitments under mode 1 within the retailing service subsector, either to provide full market access (by inscribing “None” in the respective column of its schedule) or to impose certain limitations but not restrict market access entirely. Some Members with commitments have defined the scope of retail services covered by their commitment to exclude

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1 The GATS was applied without hesitation to e-commerce in the United States – Gambling case, which confirmed its application to electronic cross-border delivery of services. See: Panel Report, United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services (hereinafter referred to as United States – Gambling), WT/DS285/R, as of 10 November 2004.

2 The GATS defines a “measure” as any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form (Article XXVIII (b)).


4 In the Services Sectoral Classification List (MTN.GNS/W/120) drawn up at the Uruguay Round and largely based on the United Nations Provisional Central Product Classification, the distribution sector is defined as four major services: commission agents’ services, wholesale trade services, retailing services and franchising.
sensitive or controlled products, whereas others have not. If the latter Members ban Internet sales of tobacco products, they would risk violating specific GATS commitments, in particular the market access obligation. According to GATS Article XVI, in sectors with market access commitments, Members are not allowed to maintain either of the quantitative restrictions enumerated therein, unless otherwise specified in their schedule.¹

35. In addition, and in accordance with the principle of technological neutrality, whenever a Member is committed to full market access, prohibition of any means of delivery would represent a limitation on market access for each mode of supply. Banning Internet sales, irrespective of the possibility of supplying the service by other means, would be a violation of Article XVI for a Member that made a full market commitment in the relevant service sector.²

36. Violation of the national treatment obligation, assuming that the ban applies to both domestic and foreign suppliers, would not seem to be an issue. Nevertheless, the possibility of de facto violation exists, depending on how domestic suppliers are treated, in particular those selling through conventional means that do not require physical proximity between consumers and suppliers (for example, telecommunication or postal or delivery services).

Recourse to General Exceptions (Article XIV)

37. If a ban by a WTO Member is found to violate market access (or national treatment obligations) within the GATS, it may be justified by the general exceptions provided in Article XIV.

(a) Protection of public health

38. The motivation is similar to that for GATT 1994 and might be invoked to justify specific restrictions of commitments made.

(b) Securing compliance with domestic law

39. The rationale of Article XIV(c) is similar to that of GATT 1994 Article XX(d) but differs in detail. The provision does not explicitly mention the protection of intellectual property rights but does address the prevention of deceptive and fraudulent practices and the imposition or collection of taxes. The provision does not include an exclusive list and thus allows the invocation of additional motives.

(c) Necessity

40. The method for assessing necessity is basically similar to that for GATT 1994. In services, panels and the Appellate Body in particular weigh and balance a number of factors to establish

¹ Although the measure in question is not among those mentioned in this article, both the panel and the Appellate Body in United States – Gambling held that a complete prohibition of gambling services via the Internet could be seen as a quantitative restriction, i.e. it could have a same effect as a “zero quota”. See Panel Report United States – Gambling, paragraph 6.332.

whether a WTO-consistent or a less WTO-inconsistent alternative measure exists or is reasonably available.¹

(d) Chapeau

41. Whether a measure is compatible with the chapeau of Article XIV is assessed essentially in the same way as in GATT 1994 Article XX. The purpose of chapeau is to examine the manner in which the measure is applied and thus prevent abuse of the exceptions set out in Article XIV. In the scarce WTO jurisprudence on this issue, a so-called “consistency” standard was applied. Thus, restrictions on the supply of services must be applicable in a consistent manner for domestic and foreign service suppliers in order to satisfy the requirements of the chapeau of Article XIV.²

IV. Transparency

42. A ban on Internet sales should also respond to the criteria of transparency of GATT 1994 Article X, GATS Article III and TRIPs Article 63. GATT 1994 Article X:1 in particular mentions the requirement to duly publish restrictions that would affect the sale of products. A domestic ban on Internet sales would therefore have to be properly published. The agreements do not prescribe particular forms or methods of law and leave the matter to the requirements of Members’ constitutional law.

V. The waiver option

43. According to Article IX:3 and 4 of the agreement establishing the WTO, Members may decide to waive an obligation imposed by WTO agreements. Thus, the alternative is designed to bring legal security and settle potential issues.

44. In practice, a waiver is subject to adoption by consensus. The Ministerial Conference defines its initial duration. Waivers longer than one year are subject to review, but they may be extended. Waivers offer a basis for exceptions that may last for some time. Examples include that for Kimberley diamonds and that implementing the Doha Declaration on Public Health. Waivers may serve as a basis for amending treaties, as seen in the revision of TRIPs Article 31(b).

45. The waiver option is available if a settlement is sought on the basis of negotiations and coordination, outside the formal agenda of multilateral trade negotiations. It is suitable if the lawfulness of a ban of tobacco sales remains controversial and formal dispute settlement under the Understanding on Rules and Procedures Governing the Settlement of Disputes is not pursued in due course.

¹ In United States – Gambling, two non-exclusive factors were established to be relevant in most cases in order to determine whether the measure withstood the necessity test: (a) the contribution of the measure to realization of the ends pursued by it and (b) the restrictive impact of the measure on international commerce. See: Appellate Body Report, United States – Gambling, paragraphs 306–311.

VI. Conclusion

46. Implementation of a legally binding ban on Internet sales for tobacco products to consumers by a Party to the FCTC, pursuant to a mandatory protocol, could be compatible with WTO obligations, provided that a number of conditions are met. In particular, if the domestic measure applies to all Internet sales operations, both domestic and foreign, it is compatible with GATT 1994 Article I and, arguably, Article III. The measure could be challenged under Article XI as a quantitative import and export restriction, but it could be justified under the general exceptions of Article XX(b) and (d). It would be subject to the GATS when obligations other than most-favoured nation treatment and transparency depend on commitments made by individual Members. Exceptions apply, as for GATT 1994. All measures introducing a ban must comply with the transparency requirements of WTO.

47. Analysis of the implications of a legally binding ban on Internet sales of tobacco through domestic measures by Parties to the Protocol shows the importance of proper motivation. The banning of specific channels of commerce but not others would raise concern in WTO law, which could be overcome only if it can be shown that the ban is necessary in order to protect minors from smoking and to secure the limitation imposed on selling tobacco to minors in conventional outlets. Another important motivation is combating counterfeiting and tax evasion.

48. Public health motivations could also be taken into account in dispute settlement by WTO panels and the Appellate Body. The possibility that the ban might involve the WTO dispute settlement mechanism for WTO Members who are not Parties to the Protocol cannot be excluded. This eventuality could, however, be avoided by seeking a waiver under WTO law.
ANNEX 2

ENTITIES POTENTIALLY INVOLVED IN
INTERNET SALES OF TOBACCO PRODUCTS

1. In general terms, a ban on Internet sales of tobacco products could follow the approach set out in the “Guidelines for implementation of Article 13 (Tobacco advertising, promotion and sponsorship) of the WHO Framework Convention on Tobacco Control”, adopted by the Conference of the Parties to the WHO FCTC in November 2008. In particular, a ban could be framed so that it applies to various responsible entities, which have different forms of involvement in Internet sales of tobacco products and which could be made subject to different forms of control.

2. In relation to a ban on Internet sales of tobacco products, five categories of responsible entities can be identified. Four closely resemble categories in the Article 13 Guidelines, but the fifth is another type, namely persons involved in payments for Internet sales of tobacco products. In practice, the most effective categories on which to focus might be the first, second and fifth.

3. The first category could comprise “all entities offering tobacco products for Internet sale”, which could be banned from engaging in such sales. This category would include tobacco industry and retail entities. As in the Article 13 Guidelines, primary responsibility would lie with tobacco product manufacturers, retailers and “their agents and associations”. It would also include publishers of content and entities that select Internet sales-related content before it is made available to Internet users.

4. A second category could be “content hosts”, who control Internet-connected computer servers on which content is stored. These include entities who aggregate content that has been produced by others, without selecting the content before it is made available to Internet users. This category would include, for example, social networking Internet sites. Content hosts could be obliged to remove or disable access to content offering tobacco products for Internet sale once they have received notice of the content.

5. A third category could be “content navigators”, who facilitate the location of content by users of communications services, such as Internet search engines. Content navigators could be obliged to disable access to content offering tobacco products for Internet sale once they have received notice of the content.

6. A fourth category could be “access providers”, who provide end-user access to communications services, such as Internet service providers and mobile telephone companies. Access providers could

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1 Decision FCTC/COP3(12).
2 First report of Committee A, pp. 10–28, paragraph 53.
3 See e.g. Australia’s Interactive Gambling Act 2001 (Cth), which creates offences in relation to the provision of interactive gambling services. It includes an obligation for content hosts to remove access to a service once they have received notice.
be obliged to disable access to content offering tobacco products for Internet sale once they have received notice of the content.1

7. Some laws on broadly similar topics, such as Internet gambling, do not apply to content navigators and access providers. This may be because the laws create a scheme to license entities with primary responsibility for Internet gambling, rather than imposing a complete ban.2 The policy may also follow from a belief that content navigators and access providers can do little to limit the activity. Even if that were true in the past, the continuing development of geolocation techniques in relation to Internet communication means that these entities may well be able to exercise some control.3 Therefore, as in the Article 13 Guidelines, obligations could be placed on content navigators and access providers but limited to “using reasonable efforts to disable access, in light of what is technically possible”.4

8. A fifth category could be “financial entities involved in payments for Internet sales of tobacco products”. They could be obliged not to process payments from such sales and to undertake checks to ensure that payees are not involved in Internet sales of tobacco products. Examples of this approach exist, some being co-regulatory or self-regulatory. One is the Association of Payment Clearing Services, which is the trade association in the United Kingdom for institutions providing payment services.5 It liaises with the Internet Watch Foundation6 to prevent use of card payment services for illegal child abuse images on the Internet.7

9. It is envisaged that the ban would apply equally to entities located within the territory of a Party and those located outside it. The ban would thus be framed so that it applies to “domestic”, “outgoing” and “incoming” Internet sales; it would apply to entities located within the territory of a Party whose activities are available to users within the territory (domestic Internet sales) as well as to entities located within the territory whose activities are available to users outside it (outgoing Internet sales) and to entities located outside the territory whose activities are available to users within it (incoming Internet sales).

10. In some other areas of law, such as defamation, the mere availability of content online within a territory is enough to found jurisdiction, irrespective of where the content originated.8 Equivalent

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1 The United States Unlawful Internet Gambling Enforcement Act (2006), 31 USC §5361–5367 subjects Internet service providers to civil enforcement measures to disable access to gambling web sites or web sites that contain hyperlinks to such sites (§5365). The Australian Interactive Gambling Act 2001 (Cth) also imposes a notice and obligation scheme on access providers.

2 See e.g. Gambling Act 2005 (United Kingdom).

3 Examples of geolocation include digital on-demand audiovisual services, such as the BBC “iPlayer” and Channel Four’s “4oD” on demand service in the United Kingdom, which prevent access to requests from outside the country. See http://www.bbc.co.uk/iplayer/tv, http://www.channel4.com/4od.


5 See http://www.apacs.org.uk.

6 See http://www.iwf.org.uk.

7 Another example is the United States Federal Unlawful Internet Gambling Enforcement Act (2006), 31 USC §5361–5367. This legislation requires that United States financial institutions comply with regulations concerning the identification and blocking of payments to certain recipients (§5364).

8 See e.g. Dow Jones v Gutnick (2002) 210 CLR 575 (Australian High Court).
principles may be applicable to Internet sales of tobacco products. If legislation seeks to cover such foreign-originated Internet sales, however, it should perhaps state that the operation is extra-territorial. This has been done in relation to Internet content in some gambling legislation.¹

11. Although jurisdiction could be established in such ways, it might be difficult to enforce obligations against foreign entities. Thus, multiple strategies of control should be pursued and a variety of responsible entities should be made subject to control, including those located within the territory of a Party. Applying controls to the range of responsible entities set out above could result in a more effective ban against Internet sales of tobacco products.

¹ See e.g. the Australian Interactive Gambling Act 2001 (Cth).