



WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL

**Conference of the Parties to the
WHO Framework Convention
on Tobacco Control**

Fifth session
Seoul, Republic of Korea, 12–17 November 2012

**FCTC/COP/5/INF.DOC./4
23 August 2012**

Draft protocol to eliminate illicit trade in tobacco products: procedural matters

INTRODUCTION

1. The present document contains basic information concerning the adoption and signature of the Protocol to eliminate illicit trade in tobacco products (Protocol), and an indication of actions that Parties to the WHO Framework Convention on Tobacco Control (WHO FCTC) may wish to consider taking in order to become Parties to the Protocol.¹

ADOPTION OF THE PROTOCOL

2. The proposed text of the Protocol has been submitted to the fifth session of the Conference of the Parties (COP) for consideration in accordance with Article 33 of the WHO FCTC (*Protocols*).² The relevant paragraphs of Article 33 read as follows:

2. The Conference of the Parties may adopt protocols to this Convention. In adopting these protocols every effort shall be made to reach consensus. If all efforts at consensus have been exhausted, and no agreement reached, the protocol shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For the purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote. ...

4. Only Parties to the Convention may be parties to a protocol. ...

¹ This document was prepared by the Convention Secretariat after a review of recent treaty practice, including the document prepared with a similar purpose prior to the adoption of the WHO FCTC in 2003 (document A56/INF.DOC./2 of 15 April 2003).

² See document FCTC/COP/5/6.

6. *The requirements for entry into force of any protocol shall be established by that instrument.*

3. The COP would adopt the Protocol by means of a decision to this effect. A draft decision will be made available prior to the fifth session of the COP.

4. As provided for in Article 33.2 of the Convention, adoption of the Protocol requires a three-quarters majority vote of the Parties present and voting. Adoption of the text by consensus automatically fulfils this requirement.

5. Adoption of the Protocol by the COP does not require Parties to produce full powers. The credentials to be submitted in accordance with Rule 18 of the Rules of Procedure of the COP are sufficient to enable delegations that may exercise the right to vote to participate in the adoption.

6. The text as adopted by the COP is the text that shall be deposited with the Secretary-General of the United Nations and opened for signature.

DEPOSIT OF THE PROTOCOL

7. The Protocol shall be deposited with the Secretary-General of the United Nations (Article 46 of the proposed text of the Protocol). The necessary contacts have been established with the Treaty Section of the Office of Legal Affairs of the United Nations (UN Treaty Section), which discharges the depositary functions of the Secretary-General.

8. The depositary of a treaty is the custodian of the treaty and carries out the functions specified in Article 77 of the United Nations Convention on the Law of Treaties (“Vienna Convention on the Law of Treaties (1969)”). The Secretary-General, as depositary, accepts notifications and documents related to treaties deposited with the Secretary-General, examines whether all formal requirements are met, deposits them, registers them subject to Article 102 of the Charter of the United Nations and notifies all relevant acts to the parties concerned.¹

9. In particular, the depositary will be responsible for preparing the original of the treaty in all authentic languages on the basis of the adopted Protocol. The original of the treaty will be opened for signature and will remain in the custody of the depositary. The UN Treaty Section shall also prepare certified true copies¹ of the Protocol in all authentic languages to be made available to all States and regional economic integration organizations that may become Parties, including on its web site at <http://treaties.un.org>. Moreover, the depositary shall receive signatures, together with any instruments, notifications and communications related to the Protocol, and shall notify all interested parties accordingly.

SIGNATURE OF THE PROTOCOL

10. In accordance with its Article 43, the Protocol shall be open for signature by all Parties to the WHO FCTC at WHO headquarters in Geneva and thereafter at United Nations Headquarters in New York. The dates for the signature periods in both places are yet to be determined.

¹ Glossary. In: *Treaty handbook*. United Nations, 2006:55–65. Available at: http://treaties.un.org/pages/Publications.aspx?pathpub=Publication/TH/Page1_en.xml.

11. Parties are invited to consider that the UN Treaty Section has proposed that a period of approximately four to six weeks should elapse between adoption and opening for signature of the Protocol. The reason for such a request is that the UN Treaty Section, as noted in the preceding section, is responsible for preparing both the original text of the Protocol and certified true copies. This operation requires care and time and must be based on the final version of the text of the Protocol. Parties are invited to consider this recommendation by the UN Treaty Section to allow the time necessary for careful preparation of the aforementioned texts.

12. Parties are invited to consider the following proposed dates for the opening for signature: Geneva, 10–11 January 2013; and New York, 12 January 2013 to 9 January 2014.

13. Under international law, the only three authorities that may sign treaties without further formalities are heads of State, heads of Government, and ministers of foreign affairs. Any other authority, including ministers other than the minister of foreign affairs, would need to submit full powers¹ in order to sign the Protocol.² This is a legal requirement reflected in Article 7 of the Vienna Convention on the Law of Treaties (1969). Therefore, ministers of health would also need to produce full powers. Full powers must be issued and signed by one of the aforementioned three authorities, and must be submitted to the UN Treaty Section in advance of the date of signature for purposes of verification. Further details concerning the time and venue for the signature of the Protocol, the submission of full powers and other formal requirements, will be communicated to Parties to the WHO FCTC in sufficient time before the date of opening for signature.

14. The signature of a treaty, such as the Protocol, which is subject to ratification, acceptance, approval, formal confirmation or accession, does not establish the signatory as a Party to that treaty. Signature in this case is rather an act expressing political approval of the treaty concerned, and raises an expectation that the signatory will in due course take the appropriate domestic actions to become a contracting party. Signature does, however, produce some limited rights and obligations even before the treaty enters into force. For example, a signatory has the right to receive notifications by the depositary concerning the treaty. Conversely, a signatory is under an obligation to refrain from acts which would defeat the object and purpose of the treaty, until it shall have made its intention clear not to become a party to the treaty (Article 18 of the Vienna Convention on the Law of Treaties (1969)).

RATIFICATION, ACCEPTANCE, APPROVAL, FORMAL CONFIRMATION OR ACCESSION

15. Pursuant to its Article 44.1, the Protocol is subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations that are Party to the WHO FCTC. The foregoing formulation is in line with standard language that may be found in numerous United Nations treaties.

¹ Article 2.1(c) of the Vienna Convention on the Law of Treaties (1969) defines “full powers” as “a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty”.

² *Treaty handbook*. United Nations, 2006. Sections 3.2.1 and 3.2.2. Available at: http://treaties.un.org/pages/Publications.aspx?pathpub=Publication/TH/Page1_en.xml.

16. Ratification, acceptance and approval¹ are international acts by which States which have already signed the Protocol establish on the international level their consent to be bound by it.² It should be noted that some States use the term “ratification” to designate the internal procedure required under their respective constitutional systems to become Parties to a treaty; for example, authorization by parliament. However, “ratification” as used in the present document refers only to an act performed by a State on the international level to establish its consent to be bound by a treaty. In the case of the Protocol, an instrument of ratification establishes the consent of a State to be bound by the Protocol upon its deposit with the Secretary-General of the United Nations. “Acceptance” and “approval” have the same international legal effects as ratification. Signature subject to acceptance or approval was introduced into treaty practice in order to provide a government with a further opportunity to examine a treaty when it is not necessarily obliged to submit it to a particular constitutional procedure for obtaining ratification.

17. Formal confirmation is the equivalent of ratification for international organizations. This terminology was introduced by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).³ Some United Nations conventions require international organizations to express their consent to be bound through acts of formal confirmation, whereas others do not distinguish between States and international organizations in this respect. The WHO FCTC and the proposed text of the Protocol draw such a distinction between States and regional economic integration organizations⁴ by providing in Article 35.1 (WHO FCTC) and Article 44.1 (proposed text of the Protocol) that they are “subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations”.

18. The Protocol shall, in accordance with its Article 44.1, be open for accession from the day after the date on which it is closed for signature. Accession is equally an international act by which a State or an international organization, which has not signed a treaty, establishes on the international level its consent to be bound by it.⁵

19. Instruments of ratification, acceptance, approval, formal confirmation or accession must be submitted to the depositary (i.e. the UN Treaty Section) for deposit.⁶

20. The Protocol will enter into force on the 90th day after receipt of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession, as stipulated in Article 45 of the proposed text of the Protocol.

¹ Article 2.1(b) of the Vienna Convention on the Law of Treaties (1969): “‘ratification’, ‘acceptance’, ‘approval’ and ‘accession’ mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty”.

² *Treaty handbook*. United Nations, 2006. Section 3.3.1. Available at: http://treaties.un.org/pages/Publications.aspx?pathpub=Publication/TH/Page1_en.xml.

³ Article 2.1(b *bis*) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

⁴ As defined in Article 1(b) of the WHO FCTC.

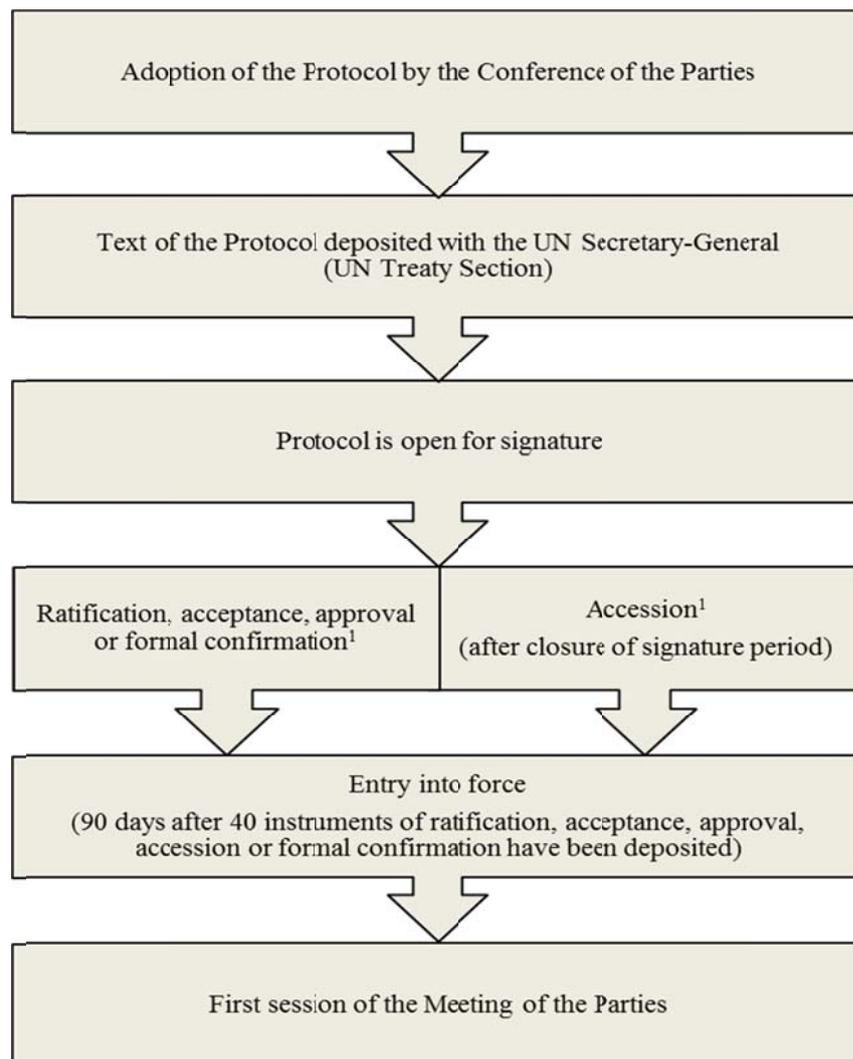
⁵ *Treaty handbook*. United Nations, 2006. Section 3.3.4. Available at: http://treaties.un.org/pages/Publications.aspx?pathpub=Publication/TH/Page1_en.xml.

⁶ *Treaty handbook*. United Nations, 2006. Section 3.3.5. Available at: http://treaties.un.org/pages/Publications.aspx?pathpub=Publication/TH/Page1_en.xml.

21. In accordance with Article 33.1 of the proposed text of the Protocol, the first session of the Meeting of the Parties, the Protocol's governing body, shall be convened immediately before or immediately after the next regular session of the COP following the entry into force of the Protocol.

22. The steps to be taken by Parties to the WHO FCTC in the period between adoption and entry into force of the Protocol are summarized in the figure below.

Procedural steps from the adoption of the Protocol to the first session of the Meeting of the Parties



¹ Including depositing instruments of ratification, acceptance, approval, formal confirmation or accession with the UN Treaty Section.