

Our reference
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Your reference
A91550

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Dear Hannah and David

Application for authorisation - A91550

Thank you for your letter dated 3 May 2017.

This submission is made on behalf of the Applicants.

1 Executive summary

- 1.1 The Applicants restate the matters raised in their submission of 15 March 2017.
- 1.2 With the exception of the submission by Cancer Council Western Australia, the Applicants note that no interested party submissions have been made objecting to the revised approach proposed by the Applicants in their 15 March 2017 submission.
- 1.3 In particular, no concerns or objections to the revised approach have been raised by any of the State, Territory or local government agencies responsible for targeting the supply of illicit tobacco at the retail level of the supply chain, which is the level of the supply chain at which the Applicants' boycott conduct would operate. Similarly, no retailer group or individual retailer (ie. those who are potentially most affected by the proposed conduct) has objected to the Applicants' revised approach.
- 1.4 The Applicants' comments on the two interested party submissions received are provided under headings 2 and 3 of this submission.
- 1.5 Answers to questions asked by the Commission in its letter dated 3 May 2017 are provided under headings 4, 5 and 6 of this submission.

2 Response to submission by the Department of Immigration and Border Protection (DIBP)

2.1 In the submission made by the DIBP dated 28 April 2017, it confirmed that responsibility for front-line enforcement against illicit tobacco is shared between a number of Commonwealth, State and Territory authorities and that it is State and Territory authorities that are responsible for regulation and law enforcement matters relevant to tobacco sold from retail outlets, including illicit tobacco.

Proposed conduct will not impact on activities of DIBP and no objection from State, Territory or local government

2.2 The Applicants note that:

- (a) the DIBP stated in its 4 November 2016 submission that the proposed conduct does not impact directly on border controls, legislation or activities and this position has not changed in the DIBP's 28 April 2017 submission;
- (b) State and Territory authorities are responsible for regulation and law enforcement matters relevant to tobacco sold from retail outlets, including illicit tobacco; and
- (c) no concerns or objections to the revised approach set out in the Applicants' 15 March 2017 submission have been raised by any State, Territory or local government agencies responsible for targeting the supply of illicit tobacco at the retail level of the supply chain.

2.3 If authorised, the proposed boycott conduct of the Applicants would enable them to jointly exercise their contractual rights to cease supply to retailers and wholesalers that supply illicit tobacco. Given the significance of the brands sold by the Applicants in the market, the conduct for which authorisation is sought would materially impact on the willingness of tobacco retailers to engage in the supply of illicit tobacco to consumers.

2.4 The Applicants acknowledge and appreciate the cooperation between agencies that occurs and will continue to occur with respect to illicit tobacco. The proposed boycott by the Applicants will be performed in a manner that includes informing the DIBP (and other relevant agencies) of any proposed boycott of a retailer or wholesaler. Neither the DIBP, nor any other agency, has raised any objections or concerns about this transparency measure or that this type of communication would contravene Article 5.3 of the FCTC.

2.5 The Applicants are not seeking to influence tobacco control policies. Rather, they are seeking authorisation to jointly exercise their contractual rights. The proposed conduct should not be miscategorised as regulatory enforcement action or an attempt to influence public health policy.

- 2.6 It is also relevant to note that the terms of the FCTC's 'Protocol to Eliminate Illicit Trade in Tobacco Products' further demonstrate that relevant agencies or departments would in no way be restricted from making requests of the Applicants to not take action with respect to a particular retailer. Indeed, this protocol expressly acknowledges the need for interaction between relevant government agencies and the tobacco industry for the purposes of combatting illicit trade.¹

Uncertain prospect of legislative reform

- 2.7 The Applicants welcome legislative reform that would materially improve the prosecution of those who import and supply illicit tobacco in Australia and wish to confirm that the proposed conduct:
- (a) is designed to enable the Applicants to jointly enforce private contractual rights that they are already able to exercise independently of each other; and
 - (b) should not be miscategorised as regulatory enforcement action or an attempt to influence public health policy.
- 2.8 At the pre-decision conference held on 13 February 2017, the Assistant Director of the Trade and Customs Branch of the DIBP said that the DIBP hoped to be in a position to share further detail about planned legislative reforms in the next round of consultation.²
- 2.9 The DIBP's 28 April 2017 submission states that the proposed amendments are still under development. Moreover, the DIBP's submission clarifies that these amendments are aimed at resolving "proof of origin" issues, introducing a new smuggling offence and increasing penalties for tobacco offences.
- 2.10 The Applicants' respond to the DIBP's comments on legislative reform as follows:
- (a) the proposed amendments are still under development;
 - (b) no detail is known about the proposed legislative amendments, nor has any Bill been introduced to Parliament; and
 - (c) the general description provided by the DIBP about the proposed amendments indicates that they would be focussed on enforcement at the border, not at the retail level.
- 2.11 While the draft determination commented that planned legislative reform may further reduce the effectiveness of the proposed conduct, the DIBP's submission indicates that the amendments are focussed at the border and not at a retail level. For that reason, the Applicants do not consider that it is appropriate for the Commission to assign any

¹ See Article 8.13 of the WHO FCTC *Protocol to Eliminate Illicit Trade in Tobacco Products* (2013).

² Pre-decision Conference Minutes, page 8.

significant weight to the proposed amendments in making its final determination or to assume that such amendments will be made law.

- 2.12 The DIBP has already made clear in its 28 April 2017 submission that responsibility for laws applying to retailers and wholesalers is the responsibility of the States and Territories. There is no evidence of impending legislative reform on illicit tobacco by any State or Territory lawmakers.

3 Response to submission by Cancer Council Western Australia (CCWA)

- 3.1 The submission of CCWA dated 6 April 2017 makes a range of claims with respect to Article 5.3 of the FCTC that are inaccurate and fundamentally misconstrue the scope and intent of Article 5.3.
- 3.2 If the interpretation given to Article 5.3 by CCWA were correct, a range of agencies and departments would be in breach of that Article.
- 3.3 Further, the Applicants note that:
- (a) CCWA is not a law enforcement agency or government department;
 - (b) the views expressed by CCWA have not been expressed by any of the Commonwealth law enforcement agencies or departments responsible for illicit tobacco and it is a matter for those agencies and departments, and not CCWA, to determine if any aspect of the proposed conduct may contravene Article 5.3;
 - (c) Article 5.3 is concerned with protecting public health policies with respect to tobacco control from the commercial and other interests of the tobacco industry in accordance with national law. Neither CCWA, nor any other interested party, has provided any scenario or explanation as to how public health policies with respect to tobacco might be affected by the proposed conduct, conduct that the Applicants, with their extensive knowledge of the industry, are confident will meaningfully reduce trade in illicit tobacco by retailers and wholesalers; and
 - (d) contrary to CCWA's assertion that Article 5.3 prohibits or severely curtails engagement on illicit tobacco, Article 8.13 of the FCTC Protocol to Eliminate Illicit Trade in Tobacco Products expressly recognises the need for interaction between the tobacco industry and regulatory agencies for the purposes of combatting illicit trade.
- 3.4 For the reasons given in paragraph 3.3, the Applicants respectfully submit that the arguments put forward by the CCWA should not be given any weight by the Commission in making its final determination.

4 Further information on revised methodology (response to question in first bullet point of Commission's letter dated 3 May 2017)

- 4.1 The Commission has requested further information about the proposed methodology set out in the Applicants' submission dated 15 March 2017 including:
- (a) whether the revised methodology has been utilised by any of the Applicants in their surveillance activities to date and, if so, how effective they have found the approach to be;
 - (b) how the investigation would remain covert, given the proposed use of photographic, video and audio evidence; and
 - (c) the robustness of the proposed revised methodology if evidence gathered in this manner were challenged during a mediation or arbitration process.

- 4.2 We answer each of these questions under the following sub-headings.

Has the revised methodology has been utilised by any of the Applicants in their surveillance activities to date and, if so, how effective they have found the approach to be?

- 4.3 While the Applicants have not cooperated to jointly conduct the proposed methodology, they each conduct their own covert investigative programs that have involved the collection of evidence without a sale or purchase of illicit tobacco occurring. The techniques used vary because State and Territory surveillance laws are not uniform.
- 4.4 Because the Applicants wish to maintain the confidentiality of the techniques they use (or do not use), the techniques summarised below do not identify the Applicant that uses the relevant technique.
- 4.5 One approach involves the provision of sworn statements from accredited private investigators who document their interaction with the salesperson that has attempted to sell illicit tobacco to the private investigator. The statements are made in a manner that is intended to be admissible as evidence in court. Two different private investigators are sent to the relevant retailer on different days. Independent sworn statements from two private investigators create a strong body of evidence against the retailer that can be tested in mediation, arbitration and court proceedings. This technique has been used in sworn statements in proceedings involving counterfeit operations and for the purposes of providing sworn statements when such evidence is requested by law enforcement agencies.
- 4.6 Another approach that has been used in evidence involves covert video surveillance in jurisdictions where such evidence is lawfully permitted to be taken. Only very clear video evidence is used to take action against a retailer found to have been supplying or attempting to supply illicit

tobacco. Contemporaneous notes and statements are also recorded as part of the transaction, together with external photos of the premises.

How would the investigation remain covert, given the proposed use of photographic, video and audio evidence?

- 4.7 Not all of the Applicants have used or will use covert photographic, video or audio evidence. As is discussed in paragraphs 6.4 to 6.7 of the Applicants' submission of 15 March 2017, it may not always be lawful to collect evidence in this way. Where it is not lawful, other techniques can be used including the technique described at paragraph 6.7 of that submission (that is, using sworn statements made by two independent private investigators).
- 4.8 Where photographic, video or audio evidence is collected, it is collected using concealed devices operated by professional and accredited private investigators. Because the quality of such recording devices has dramatically improved, and are used by professionals trained in their use, the recordings are usually very clear and unambiguous.

What is the robustness of the proposed revised methodology if evidence gathered in this manner were challenged during a mediation or arbitration process?

- 4.9 The methods of evidence collection proposed in the Applicants' 15 March 2017 submission have been used to collect evidence that has been allowed into evidence by courts in Australia.
- 4.10 While the admissibility of evidence is a matter for the court, the fact that such evidence has been admitted by Australian courts in the past supports the robustness of those means of evidence collection for the purposes of mediation and arbitration.
- 4.11 It is the intention of each of the Applicants to collect evidence in a thorough and professional manner that enables that evidence to be used and admitted in court, and in mediation and arbitration.
- 4.12 In addition, mediation and arbitration involve the use of an independent mediator or arbitrator. If the Applicants were to attempt to use poor quality evidence in a mediation or arbitration, that evidence is likely to be challenged or questioned by the retailer and/or mediator or arbitrator. If photographic, video, or audio evidence is poor (as is sometimes the case), the Applicants would not use that evidence to take action against the retailer involved.

5 Article 5.3 (response to question in second bullet point of Commission's letter dated 3 May 2017)

- 5.1 The Commission has asked the following questions relating to Article 5.3:
- (a) could law enforcement agencies be prevented from requesting the Applicants to not take action with respect to a particular retailer as

a result of the Government's interpretation of the restrictions imposed by Article 5.3;

- (b) would this significantly impact the effectiveness of the Applicants' proposal in practice?; and
- (c) have the Applicants discussed this proposal with any law enforcement agencies and, if so, have they provided any indication as to whether they consider this approach satisfactory?

5.2 We answer each of these questions under the sub-headings below.

Could law enforcement agencies be prevented from requesting the Applicants to not take action with respect to a particular retailer as a result of the Government's interpretation of the restrictions imposed by Article 5.3?

5.3 The Applicants do not consider that the terms of Article 5.3 would restrict in any way the ability of law enforcement agencies or departments to request that the Applicants to not take action with respect to a particular retailer or wholesaler and, where they did make such request, the Applicants would comply with that request.

5.4 At the outset, it should be noted that Article 5.3 expressly permits agencies or departments to interact with the tobacco industry to enable the effective regulation of the tobacco industry and tobacco products³. It is clear, therefore that, to the extent that a law enforcement agency or department considers it necessary to interact with the Applicants with respect to a proposed boycott, it may do so.

5.5 It is also directly relevant to note that the terms of the FCTC's Protocol to Eliminate Illicit Trade in Tobacco Products further demonstrate that relevant agencies or departments would in no way be restricted from making requests of the Applicants to not take action with respect to a particular retailer. Indeed, this FCTC protocol expressly acknowledges the need for interaction between relevant government agencies and the tobacco industry for the purposes of combatting illicit trade.⁴

5.6 As is expressly permitted under Article 5.3, a number of governmental agencies do already engage on a regular basis with the tobacco industry when necessary for effective regulation. These meetings are minuted and publicly notified. Such agencies include the Commonwealth Department of Health which, consistent with its transparency obligations under Article 5.3, provides public notification of meetings with the tobacco industry. The Australian Tax Office also posts minutes of meetings with the Tobacco Stakeholder Group (TSG). The Australian Tax Office describes the TSG as "a consultative forum for representatives of the tobacco industry, ATO and the Department of

³ See WHO FCTC Guidelines for implementation of Article 5.3, at page 4.

⁴ See Article 8.13 of the WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products (2013).

Immigration and Border Protection to discuss issues of mutual interest in the tobacco industry”.⁵

- 5.7 The well-established history of meetings and communication between the industry and these agencies shows that they already communicate in a regular, transparent and appropriate manner, and that those departments and agencies consider these interactions necessary for them to effectively regulate illicit tobacco products.
- 5.8 The Applicants’ position on the scope and effect of Article 5.3 is further supported by the fact that, in the course of this authorisation process, no Commonwealth, State or Territory government department or law enforcement agency has made any submission that Article 5.3 would prevent them from requesting the Applicants not to take boycott action.
- 5.9 The only Commonwealth Government agency to raise Article 5.3 with respect to this application for authorisation is the Commonwealth Department of Health. However, the Department of Health:
 - (a) is not a law enforcement agency; and
 - (b) did not explain how the proposed conduct would impact on or influence public health policies with respect to the control of lawful or illicit tobacco products.
- 5.10 In a hearing of the Parliamentary Joint Committee on Law Enforcement (Illicit Tobacco) held on 22 March 2017 in Canberra, the Deputy Secretary, National Programme Delivery, Department of Health stated that, while the Applicants’ 15 March 2017 submission had only recently come to her attention, on her quick read of the submission it ‘had addressed many of the things that had been raised in the draft determination’.⁶
- 5.11 If an outcome of the proposed boycott conduct is that a consumer chooses to purchase one of the Applicants’ lawful tobacco products because he or she is no longer able to easily acquire an illicit tobacco product, compliant health warnings will be communicated to that consumer that would not have been communicated through the purchase of illicit tobacco (illicit tobacco is rarely accompanied by any health warnings and, where it is, those warning are generally non-compliant).
- 5.12 As mentioned above, the Department of Health is one of the Commonwealth agencies that the Applicants communicate with on a transparent basis. Furthermore, the Department of Health, the ACCC and the Australian Tax Office have all in the past requested and accepted intelligence from the Applicants regarding the trade in illicit tobacco. Accordingly, the proposed conduct of the Applicants informing

⁵ For example, see minutes of the Tobacco Stakeholder Group at < <https://www.ato.gov.au/General/Consultation/Consultation-groups/Stakeholder-relationship-groups/tobacco-stakeholder-group/#Minutes> >

⁶ Commonwealth of Australia, Proof Committee Hansard, Parliamentary Joint Committee on Law Enforcement Illicit Tobacco (Public) Wednesday, 22 March 2017, page 16.

the government agencies and departments of a proposed boycott is not materially different to past levels of cooperation between the Applicants and government agencies and departments with respect to illicit tobacco.

- 5.13 Finally, the Applicants wish to reiterate to the Commission that the proposed boycott conduct of the Applicants is to enforce private contractual rights, not to control or influence tobacco control laws or policies. It is misleading to conflate the legitimate exercise of private contractual rights with the development and implementation of tobacco control measures and laws by government.

Would this (a law enforcement agency being prevented from requesting the Applicants to not take action) significantly impact the effectiveness of the Applicants' proposal in practice?

- 5.14 The Applicants submit that agencies and departments are not prevented from requesting that the Applicants not take action against an alleged supplier of illicit tobacco.
- 5.15 In addition, the exercise of the Applicants' respective supply term rights (ie suspension or termination of supply) is a private contractual right and may be enforced independently of law enforcement activities.
- 5.16 The Applicants note that they have no legal obligation to consider (or be expected to know about) possible law enforcement activities when they independently suspend supply by exercising their private contractual rights. It is fundamental that this distinction between the exercise of private contractual rights (on the one hand) and tobacco law enforcement (on the other) is recognised by the Commission in considering this issue.
- 5.17 It should also be borne in mind that the proposal by the Applicants to inform law enforcement agencies was made by the Applicants to address the Commonwealth Department of Health's professed concern that the proposed conduct might interfere with law enforcement activities. However, it should be noted that the Department of Health is not a law enforcement agency and, as was recognised in the draft determination, this area does not fall within the policy remit of the Department of Health. As such, the Applicants submit that this concern should be given little weight.
- 5.18 The scope of the voluntary condition proposed by the Applicants would be that, if an agency chooses not to respond to the Applicants' notification of proposed boycott action, the Applicants would proceed to boycott that retailer/wholesaler.
- 5.19 The effect of this condition would be that, while the Applicants are not lawfully required to inform agencies of a proposed cessation of supply, they would (if the proposed conduct were authorised) be willing to do so in performing the authorised conduct.
- 5.20 Finally, we note that:

- (a) no law enforcement agency or department has stated that it would not be able to issue a request to the Applicants in accordance with this condition (if this issue were a real concern, one would have expected a wide range of written submissions from those agencies and departments objecting to the Applicants' proposal); and
- (b) agencies are expressly permitted by the terms of Article 5.3 to interact with the tobacco industry when necessary to enable them to effectively regulate the tobacco industry and tobacco products.

Have the Applicants discussed this proposal with any law enforcement agencies and, if so, have they provided any indication as to whether they consider this approach satisfactory?

- 5.21 The Applicants have held discussions with some agencies and departments about the Applicants' proposal to inform them prior to taking boycott action against a particular retailer or wholesaler. No concerns were raised.
- 5.22 The Applicants would not have put forward a proposal to inform law enforcement agencies and relevant departments about proposed boycott action if they had encountered opposition or serious concerns about such a proposal. As has already been noted in paragraph 5.20(a) above, if any agencies or departments had any concerns about this point, they certainly would have made submissions addressing those concerns as part of this application for authorisation. None have been made.

6 Information on Applicants acting unilaterally (response to question in third bullet point of Commission's letter dated 3 May 2017)

- 6.1 The Commission has requested that the Applicants provide more information about the experience of individual Applicants acting unilaterally in attempts to reduce the volume of illicit tobacco products being sold by retailers. In particular, information is sought about the following:
 - (a) instances where one of the Applicants detected illicit tobacco being sold but decided not to withhold supply from that retailer due to concerns that one or both of the other Applicants would 'fill the gap' by supplying more tobacco products to that retailer;
 - (b) instances where one of the Applicants did withhold supply due to sale of illicit tobacco, but this action was unsuccessful in disciplining the retailer because one or both of the other Applicants filled the gap by supplying more tobacco products to that retailer; and
 - (c) based on the Applicants' experience and research, if a customer was told by their regular tobacco retailer that their preferred brand of tobacco product was unavailable (due to supply of it being withheld), is it more likely that such a customer would continue to

shop at that retailer in future but buy an alternative brand tobacco product, or instead switch future purchases to another retailer who stocks their preferred brand?

Instances where one of the Applicants detected illicit tobacco being sold but decided not to withhold supply

- 6.2 Due to concerns that one or both of the other Applicants would 'fill the gap' that would result from a unilateral cessation of supply (and therefore render the unilateral cessation of supply ineffective), each of the Applicants has, on several occasions, made decisions not to cease supply.
- 6.3 It is precisely this competitive conduct that enables retailers or wholesalers of illicit tobacco to continue supplying illicit tobacco under the cover of the supply of legal tobacco products. Without authorisation, this conduct will continue.
- 6.4 If the proposed boycott conduct is authorised by the Commission, this competitive conduct would cease because the concerns currently held by each of the Applicants about cessation of supply inevitably being ineffective, would be removed.

Instances where one of the Applicants did withhold supply due to sale of illicit tobacco

- 6.5 In 2014, one of the Applicants took action to cease supply to a retailer that was subject to a dawn raid by police. In response, one of the other Applicants increased the supply of its products to that retailer.
- 6.6 Following the police raids of 7 retailers (6 Fairfield, 1 Bankstown), one of the Applicants terminated its trading relationship with all 7 retailers and notified their franchise group. Once that Applicant terminated supply, one of the other Applicants stepped-in and increased supply of cheaper products to that retailer.

Switching behaviour of consumers between products

- 6.7 The Applicants do not, at this point in time, have data to comment on switching by consumers between retailers and/or brands in circumstances where none of a consumer's regular brands are available in an outlet.

7 Balancing public benefits with public detriments

- 7.1 The outcome of the balancing of public benefits and detriments ('balancing exercise') for the draft determination was that the Commission, proposed not to authorise the proposed conduct.
- 7.2 Since the draft determination was issued in December last year, the Applicants have worked to address the alleged public detriments. A range of new measures and conditions have been proposed by the

Applicants. A pre-decision conference has also been held where the interests of key interested parties were voiced.

- 7.3 In this section of this submission, the Applicants comment on matters relevant to the balancing exercise performed under the draft determination and matters that will be relevant to the balancing exercise for the final determination.
- 7.4 The Applicants note that the majority of submissions made by interested parties with respect to this application are either strongly supportive, supportive or do not oppose the application. Despite this support, the draft determination of the Commission was to not grant authorisation.
- 7.5 In summarising the outcome of balancing public benefits and public detriments, the Commission stated:
125. The ACCC considers that, to the extent the proposed arrangements reduce the supply of illicit tobacco, they may result in some benefits in the form of reducing the loss of revenue by some suppliers of licit tobacco products, reducing lost customs duties, increasing the level of compliance with regulatory requirements, and ensuring the effectiveness of regulatory measures around the sale of tobacco.
126. However, the ACCC considers that there is considerable uncertainty regarding the extent to which the proposed arrangements are likely to reduce the supply of illicit tobacco. The ACCC considers that the benefits likely to result from the proposed arrangements are reduced because the proposed arrangements can only target a portion of illicit tobacco. This may result in changes to, rather than reductions in, the supply of illicit tobacco. Further, the potential for these benefits to be achieved is reduced by the likelihood of legislative and regulatory responses to the enforcement problems the proposed arrangements are seeking to address.
- 7.6 The Applicants disagree with the conclusion that there is 'considerable uncertainty' regarding the extent to which the proposed arrangements are likely to reduce the supply of illicit tobacco to consumers.
- 7.7 While they are competitors, the Applicants are the major suppliers of manufactured cigarettes and loose tobacco in Australia and their brands have a significant presence in the market.
- 7.8 In addition, the Applicants' research indicates that over 70% of illicit tobacco is sourced by consumers from retailers of legal tobacco products, including independent supermarkets, tobacconists, convenience stores, service stations and newsagencies.⁷ This fact supports the Applicants' submissions that the proposed boycott conduct would have a meaningful impact on behaviour in the market with respect to the retail and wholesale supply of illicit tobacco.

⁷ See summary of quantitative data extracted from Roy Morgan Research surveys at Annexure A of the Applicants' submission dated 19 January 2017.

- 7.9 On the question of whether supply is likely to be diverted to retailers who would choose to sell only illicit tobacco, the draft determination notes that diversion may occur to an unknown extent. The Applicants have a detailed knowledge of the market and have provided their views about the likelihood of retailers electing to only sell illicit tobacco in their submission dated 15 March 2017.⁸
- 7.10 A change in supply channels for illicit tobacco is, in the Applicants' opinion, a far more uncertain and speculative prospect than the unknown prospect of legislative changes and the even less certain prospect of any future legislative changes actually having any impact on the supply of illicit tobacco at the retail level of the supply chain.
- 7.11 The Applicants are concerned that the outcome of the balancing exercise performed by the Commission for the draft determination may not have given appropriate weight to:
- (a) the effect that boycotts by the Applicants would be likely to have on the market for the supply of illicit tobacco given:
 - (i) the market share held by the Applicants; and
 - (ii) that over 70% of illicit tobacco is sourced by consumers from retailers of legal tobacco products, including independent supermarkets, tobacconists, convenience stores, service stations and newsagencies;
 - (b) the range of submissions in support of granting authorisation, particularly those from retailer organisations (including submissions made at the pre-decision conference); and
 - (c) the range of important public benefits acknowledged by the Commission in paragraph 125 of the draft determination that would be likely to arise from the proposed conduct (even if not all of those benefits are significant in their own right, collectively they are).
- 7.12 The Applicants respectfully request that the Commission accord appropriate weight to the matters in paragraph 7.11 in performing its balancing exercise.
- 7.13 Since the draft determination was handed down, the Applicants note that they have also addressed a range of potential public detriments, including the issues in the table at paragraph 3.1 of the Applicants' submission dated 15 March 2017.

8 Future with and future without the proposed conduct

- 8.1 The Applicants appreciate that, to assist in its assessment of the proposed conduct against the authorisation test, the Commission compares the benefits and detriments likely to arise in the future with the

⁸ See item 6 of table in Applicants' submission dated 15 March 2017 (page 5).

conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.

Future without

- 8.2 As submitted in the answers given by the Applicants at paragraphs 6.2 to 6.6 of this submission, if authorisation is not granted, retailers and wholesalers of illicit tobacco will continue to be able to switch between the Applicants and may, as a result of the announcement of the final determination, be emboldened to continue or expand their trade in illicit tobacco (particularly in the absence of any imminent changes to the law).
- 8.3 Changes to tobacco legislation may occur. However, any such changes are speculative and uncertain at this stage. Even if changes to the law were to occur in the near future, they would be unlikely (based on the limited information available and the level of government at which those proposed changes are being considered) to operate at the retail level of the supply chain.

Future with

- 8.4 Since the draft determination was issued, the Applicants have proposed a range of significant measures and restrictions on the proposed conduct in a genuine effort to address issues raised by the Commission.
- 8.5 The effect of these measures and restrictions is that the future with the proposed conduct is one that is now more certain, measured and subject to clear and independent appeal rights and reporting requirements. The period of authorisation sought by the Applicants has also been reduced.
- 8.6 The Applicants have made clear that, while they have no obligation to do so, they are willing to continue to disclose intelligence to relevant agencies and departments in the interests of avoiding interference in law enforcement activities.
- 8.7 If the proposed conduct is authorised, the Applicants will be able to jointly boycott retailers found to have supplied illicit tobacco.
- 8.8 The current practice of retailers/wholesalers switching between the Applicants will end, as will the practice of the Applicants intentionally or inadvertently facilitating that switching behaviour by competing for the business of that retailer/wholesaler.
- 8.9 Finally, on-going surveys, data collection and reporting (on behalf of the Applicants and by other parties) would reveal the effectiveness of the conduct and could be used to determine whether any new application for authorisation beyond the initial period of authorisation should be granted.

9 Conclusion

- 9.1 The Applicants respectfully request that the Commission, in revisiting the balancing exercise that it conducted for its draft determination, takes into account the significant clarifications, amendments and conditions

proposed in this and previous submissions made on behalf of the Applicants.

- 9.2 Thank you for the opportunity for the Applicants to make this submission. If you have any questions, please contact us to discuss.

Yours faithfully

Corrs Chambers Westgarth

A handwritten signature in black ink, appearing to be 'ES' followed by a long horizontal stroke.

Eddie Scuderi

Partner

Attachments

WHO Framework Convention on Tobacco Control, *Protocol to Eliminate Illicit Trade in Tobacco Products* (2013).



PROTOCOL

TO ELIMINATE ILLICIT TRADE
IN TOBACCO PRODUCTS



FCTC

WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL



PROTOCOL

TO ELIMINATE ILLICIT TRADE
IN TOBACCO PRODUCTS



FCTC

WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL



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FOREWORD

The Protocol to Eliminate Illicit Trade in Tobacco Products is the first protocol to the WHO Framework Convention on Tobacco Control (WHO FCTC), and a new international treaty in its own right. It was adopted by consensus on 12 November 2012 at the fifth session of the Conference of the Parties (COP) to the WHO FCTC (Seoul, Republic of Korea, 12–17 November 2012). The Protocol builds upon and complements Article 15 of the WHO FCTC, which addresses means of countering illicit trade in tobacco products, a key aspect of a comprehensive tobacco control policy.

The Protocol was developed in response to the growing international illicit trade in tobacco products, which poses a serious threat to public health. Illicit trade increases the accessibility and affordability of tobacco products, thus fuelling the tobacco epidemic and undermining tobacco control policies. It also causes substantial losses in government revenues, and at the same time contributes to the funding of transnational criminal activities.

The objective of the Protocol is the elimination of all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO FCTC.

The Protocol, in particular, aims to secure the supply chain of tobacco products – measures widely considered to be the “heart” of the Protocol. It requires the establishment of a global tracking and tracing regime within five years of entry into force of the Protocol, comprising national and/or regional tracking and tracing systems and a global information sharing point located in the Convention Secretariat. Other provisions to ensure control of the supply chain cover licensing, due diligence, record keeping, and security and preventive measures, as well as measures in relation to Internet- and telecommunication-based sales, duty free sales, and free zones and international transit.

The Protocol also covers important matters concerning offences, with provisions on liability, prosecutions and sanctions, seizure payments and special investigative techniques, as well as the disposal and destruction of confiscated products. Another key group of substantive articles addresses the issue of international cooperation, such as measures on information sharing, technical and law enforcement cooperation, protection of sovereignty, jurisdiction, mutual legal and administrative assistance, and extradition.

The Protocol establishes the reporting obligations of the Parties, linked to the reporting system of the WHO FCTC, as well as the financial and institutional arrangements necessary for its implementation. The Protocol stipulates that the

Meeting of the Parties shall be the governing body of the Protocol, and that the Convention Secretariat shall also be the Secretariat of the Protocol.

The Protocol was opened for signature on 10 January 2013 at WHO Headquarters in Geneva. More than 50 Parties participated in this event, during which 12 Parties, representing all six regions, signed the Protocol. The Protocol then remained open for signature at United Nations Headquarters in New York until 9 January 2014. The Secretary-General of the United Nations is the Depositary for the Protocol (Article 46).

Any Party to the WHO FCTC may become a Party to the Protocol. The Protocol shall enter into force on the 90th day following the deposit of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.

The development and adoption of the Protocol is the result of close cooperation between the Parties and multiple sectors of government, demonstrating how a unified stand on a public health subject can benefit important government objectives on health and beyond. Continued intersectoral and international collaboration, including cooperation with relevant international organizations, as called for in the Protocol, will be crucial to its successful implementation.

The Protocol to Eliminate Illicit Trade in Tobacco Products is a milestone in strengthening global action against tobacco and is a new legal instrument in public health. It supplements the WHO FCTC with a comprehensive tool to counter and eventually eliminate illicit trade in tobacco products and to strengthen legal dimensions for international health cooperation.

Dr Haik Nikogosian
Head, Convention Secretariat



Protocol to Eliminate Illicit Trade in Tobacco Products

PREAMBLE

The Parties to this Protocol,

Considering that on 21 May 2003, the Fifty-sixth World Health Assembly adopted by consensus the WHO Framework Convention on Tobacco Control, which came into force on 27 February 2005;

Recognizing that the WHO Framework Convention on Tobacco Control is one of the United Nations' most rapidly ratified treaties and a fundamental tool for attaining the objectives of the World Health Organization;

Recalling the Preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health as a fundamental right of every human being without distinction of race, religion, political belief, economic or social condition;

Determined also to give priority to their right to protect public health;

Deeply concerned that the illicit trade in tobacco products is contributing to the spread of the tobacco epidemic, which is a global problem with serious consequences for public health that calls for effective, appropriate and comprehensive domestic and international responses;

Recognizing further that illicit trade in tobacco products undermines price and tax measures designed to strengthen tobacco control and thereby increases the accessibility and affordability of tobacco products;

Seriously concerned by the adverse effects that the increase in accessibility and affordability of illicitly traded tobacco products has on public health and the well-being, in particular of young people, the poor and other vulnerable groups;

Seriously concerned about the disproportionate economic and social implications of illicit trade in tobacco products on developing countries and countries with economies in transition;

Aware of the need to develop scientific, technical and institutional capacity to plan and implement appropriate national, regional and international measures to eliminate all forms of illicit trade in tobacco products;

Acknowledging that access to resources and relevant technologies is of great importance for enhancing the ability of Parties, particularly in developing countries and countries with economies in transition, to eliminate all forms of illicit trade in tobacco products;

Acknowledging also that, although free zones are established to facilitate legal trade, they have been used to facilitate the globalization of illicit trade in tobacco products, both in relation to the illicit transit of smuggled products and in the manufacture of illicit tobacco products;

Recognizing also that illicit trade in tobacco products undermines the economies of Parties and adversely affects their stability and security;

Also aware that illicit trade in tobacco products generates financial profits that are used to fund transnational criminal activity, which interferes with government objectives;

Recognizing that the illicit trade in tobacco products undermines health objectives, imposes additional strain on health systems and causes losses of revenue to the economies of the Parties;

Mindful of Article 5.3 of the WHO Framework Convention on Tobacco Control in which Parties agree that in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law;

Emphasizing the need to be alert to any efforts by the tobacco industry to undermine or subvert strategies to combat illicit trade in tobacco products and the need to be informed of activities of the tobacco industry that have a negative impact on strategies to combat illicit trade in tobacco products;

Mindful of Article 6.2 of the WHO Framework Convention on Tobacco Control, which encourages Parties to prohibit or restrict, as appropriate, sales to and/or importation by international travellers of tax- and duty-free tobacco products;

Recognizing in addition that tobacco and tobacco products in international transit and transshipment find a channel for illicit trade;



Taking into account that effective action to prevent and combat illicit trade in tobacco products requires a comprehensive international approach to, and close cooperation on, all aspects of illicit trade, including, as appropriate, illicit trade in tobacco, tobacco products and manufacturing equipment;

Recalling and emphasizing the importance of other relevant international agreements such as the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the obligation that Parties to these Conventions have to apply, as appropriate, the relevant provisions of these Conventions to illicit trade in tobacco, tobacco products and manufacturing equipment and *encouraging* those Parties that have not yet become Parties to these agreements to consider doing so;

Recognizing the need to build enhanced cooperation between the Convention Secretariat of the WHO Framework Convention on Tobacco Control and the United Nations Office on Drugs and Crime, the World Customs Organization and other bodies, as appropriate;

Recalling Article 15 of the WHO Framework Convention on Tobacco Control, in which Parties recognize, inter alia, that the elimination of all forms of illicit trade in tobacco products, including smuggling and illicit manufacturing, is an essential component of tobacco control;

Considering that this Protocol does not seek to address issues concerning intellectual property rights; and

Convinced that supplementing the WHO Framework Convention on Tobacco Control by a comprehensive protocol will be a powerful, effective means to counter illicit trade in tobacco products and its grave consequences,

Hereby agree as follows:

PART I: INTRODUCTION

ARTICLE 1

Use of terms

1. "Brokering" means acting as an agent for others, as in negotiating contracts, purchases, or sales in return for a fee or commission.
2. "Cigarette" means a roll of cut tobacco for smoking, enclosed in cigarette paper. This excludes specific regional products such as bidis, ang hoon, or other similar products which can be wrapped in paper or leaves. For the purpose of Article 8, "cigarette" also includes fine cut "roll your own" tobacco for the purposes of making a cigarette.
3. "Confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority.
4. "Controlled delivery" means the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.
5. "Free zone" means a part of the territory of a Party where any goods introduced are generally regarded, in so far as import duties and taxes are concerned, as being outside the Customs territory.
6. "Illicit trade" means any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity.
7. "Licence" means permission from a competent authority following submission of the requisite application or other documentation to the competent authority.
8. (a) "Manufacturing equipment" means machinery which is designed, or adapted, to be used solely for the manufacture of tobacco products and is integral to the manufacturing process.¹

¹ Parties may include reference to the Harmonized Commodity Description and Coding System of the World Customs Organization for this purpose, wherever applicable.



- (b) “Any part thereof” in the context of manufacturing equipment means any identifiable part which is unique to manufacturing equipment used in the manufacture of tobacco products.
9. “Party” means, unless the context indicates otherwise, a Party to this Protocol.
10. “Personal data” means any information relating to an identified or identifiable natural person.
11. “Regional economic integration organization” means an organization that is composed of several sovereign states, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters.²
12. The “supply chain” covers the manufacture of tobacco products and manufacturing equipment; and import or export of tobacco products and manufacturing equipment; and may be extended, where relevant, to one or more of the following activities when so decided by a Party:
- (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.
13. “Tobacco products” means products entirely or partly made of the leaf tobacco as raw material, which are manufactured to be used for smoking, sucking, chewing or snuffing.
14. “Tracking and tracing” means systematic monitoring and re-creation by competent authorities or any other person acting on their behalf of the route or movement taken by items through the supply chain, as outlined in Article 8.

² Where appropriate, national or domestic will refer equally to regional economic integration organizations.

ARTICLE 2

Relationship between this protocol and other agreements and legal instruments

1. The provisions of the WHO Framework Convention on Tobacco Control that apply to its protocols shall apply to this Protocol.
2. Parties that have entered into the types of agreements mentioned in Article 2 of the WHO Framework Convention on Tobacco Control shall communicate such agreements to the Meeting of the Parties through the Convention Secretariat.
3. Nothing in this Protocol shall affect the rights and obligations of any Party pursuant to any other international convention, treaty or international agreement in force for that Party that it deems to be more conducive to the achievement of the elimination of illicit trade in tobacco products.
4. Nothing in this Protocol shall affect other rights, obligations and responsibilities of Parties under international law, including the United Nations Convention against Transnational Organized Crime.

ARTICLE 3

Objective

The objective of this Protocol is to eliminate all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO Framework Convention on Tobacco Control.



PART II: GENERAL OBLIGATIONS

ARTICLE 4

General obligations

1. In addition to the provisions of Article 5 of the WHO Framework Convention on Tobacco Control, Parties shall:
 - (a) adopt and implement effective measures to control or regulate the supply chain of goods covered by this Protocol in order to prevent, deter, detect, investigate and prosecute illicit trade in such goods and shall cooperate with one another to this end;
 - (b) take any necessary measures in accordance with their national law to increase the effectiveness of their competent authorities and services, including customs and police responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods covered by this Protocol;
 - (c) adopt effective measures for facilitating or obtaining technical assistance and financial support, capacity building and international cooperation in order to achieve the objectives of this Protocol and ensure the availability to, and secure exchange with, the competent authorities of information to be exchanged under this Protocol;
 - (d) cooperate closely with one another, consistent with their respective domestic legal and administrative systems, in order to enhance the effectiveness of law enforcement action to combat the unlawful conduct including criminal offences established in accordance with Article 14 of this Protocol;
 - (e) cooperate and communicate, as appropriate, with relevant regional and international intergovernmental organizations in the secure³ exchange of information covered by this Protocol in order to promote the effective implementation of this Protocol; and
 - (f) within the means and resources at their disposal, cooperate to raise financial resources for the effective implementation of this Protocol through bilateral and multilateral funding mechanisms.

³ A secure exchange of information between two parties is resistant to interception and tampering (falsification). In other words, the information exchanged between the two parties cannot be read or modified by a third party.

2. In implementing their obligations under this Protocol, Parties shall ensure the maximum possible transparency with respect to any interactions they may have with the tobacco industry.

ARTICLE 5

Protection of personal data

Parties shall protect personal data of individuals regardless of nationality or residence, subject to national law, taking into consideration international standards regarding the protection of personal data, when implementing this Protocol.

PART III: SUPPLY CHAIN CONTROL

ARTICLE 6

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 natural or legal person except pursuant to a licence or equivalent approval (hereafter "licence") granted, or control system implemented, by a competent 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 law, any natural or legal 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 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 law, to conduct the activities specified in paragraph 1;
 - (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 and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and of any designated legal 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 law;
 - (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 natural or legal person to inform the competent 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 natural or legal person to inform the competent authority, for appropriate action, of any acquisition or disposal of manufacturing equipment; and
 - (i) ensure that the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the competent 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, and without prior approval from the competent 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 7

Due diligence

1. Each Party shall require, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment:
- (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 competent authorities any evidence that the customer is engaged in activities in contravention of its obligations arising from this Protocol.
2. Due diligence pursuant to paragraph 1 shall, as appropriate, consistent with its national law and the objectives of the WHO Framework Convention on

Tobacco Control, include, inter alia, requirements for customer identification, such as obtaining and updating information relating to the following:

- (a) establishing that the natural or legal person holds a licence in accordance with Article 6;
 - (b) when the customer 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 verification of his or her official identification;
 - (c) when the customer is a legal person, information regarding its identity, including full name, trade name, business registration number, date and place of incorporation, location of corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and any designated legal representatives, including the representatives' 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; and
 - (e) a description of the location where manufacturing equipment will be installed and used.
3. Due diligence pursuant to paragraph 1 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.
4. Each Party shall, on the basis of the information reported in paragraph 1(c), take all necessary measures to ensure compliance with the obligations arising 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

Tracking and tracing

1. For the purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products, the Parties agree to establish within five years of entry into force of this Protocol a global tracking and tracing regime, comprising national and/or regional tracking and tracing systems and a global information-sharing focal point located at the Convention Secretariat of the WHO Framework Convention on Tobacco Control and accessible to all Parties, enabling Parties to make enquiries and receive relevant information.
2. Each Party shall establish, in accordance with this Article, a tracking and tracing system, controlled by the Party for all tobacco products that are manufactured in or imported onto its territory taking into account their own national or regional specific needs and available best practice.
3. With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party.
- 4.1 Each Party shall, for purposes of paragraph 3, as part of the global tracking and tracing regime, require that the following information be available, either directly or accessible by means of a link, to assist Parties in determining the origin of tobacco products, the point of diversion where applicable, and to monitor and control the movement of tobacco products and their legal status:
 - (a) date and location of manufacture;
 - (b) manufacturing facility;
 - (c) machine used to manufacture tobacco products;
 - (d) production shift or time of manufacture;
 - (e) the name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer;
 - (f) the intended market of retail sale;
 - (g) product description;
 - (h) any warehousing and shipping;

- (i) the identity of any known subsequent purchaser; and
 - (j) the intended shipment route, the shipment date, shipment destination, point of departure and consignee.
- 4.2 The information in subparagraphs (a), (b), (g) and where available (f), shall form part of the unique identification markings.
- 4.3 Where the information in subparagraph (f) is not available at the time of marking, Parties shall require the inclusion of such information in accordance with Article 15.2(a) of the WHO Framework Convention on Tobacco Control.
- 5. Each Party shall require, within the time limits specified in this Article, that the information set out in paragraph 4 is recorded, at the time of production, or at the time of first shipment by any manufacturer or at the time of import onto its territory.
- 6. Each Party shall ensure that the information recorded under paragraph 5 is accessible by that Party by means of a link with the unique identification markings required under paragraphs 3 and 4.
- 7. Each Party shall ensure that the information recorded in accordance with paragraph 5, as well as the unique identification markings rendering such information accessible in accordance with paragraph 6 shall be included in a format established or authorized by the Party and its competent authorities.
- 8. Each Party shall ensure that the information recorded under paragraph 5 is accessible to the global information-sharing focal point on request, subject to paragraph 9, through a standard electronic secure interface with its national and/or regional central point. The global information-sharing focal point shall compile a list of the competent authorities of Parties and make the list available to all Parties.
- 9. Each Party or the competent authority shall:
 - (a) have access to the information outlined in paragraph 4 in a timely manner by making a query to the global information-sharing focal point;
 - (b) request such information only where it is necessary for the purpose of detection or investigation of illicit trade in tobacco products;
 - (c) not unreasonably withhold information;
 - (d) answer the information requests in relation to paragraph 4, in accordance with its national law; and

- (e) protect and treat as confidential, as mutually agreed, any information that is exchanged.
- 10. Each Party shall require the further development and expansion of the scope of the applicable tracking and tracing system up to the point that all duties, relevant taxes, and where appropriate, other obligations have been discharged at the point of manufacture, import or release from customs or excise control.
- 11. Parties shall cooperate with each other and with competent international organizations, as mutually agreed, in sharing and developing best practices for tracking and tracing systems including:
 - (a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;
 - (b) support for training and capacity-building programmes for Parties that express such a need; and
 - (c) further development of the technology to mark and scan unit packets and packages of tobacco products to make accessible the information listed in paragraph 4.
- 12. Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry.
- 13. Each Party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of this Article.
- 14. Each Party may require the tobacco industry to bear any costs associated with that Party's obligations under this Article.

ARTICLE 9

Record-keeping

- 1. Each Party shall require, as appropriate, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment 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 6 to provide, on request, the following information to the 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 6, provide, on request, to the 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 law.
5. For the purposes of implementing paragraph 1, 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 competent authorities; and
 - (c) maintained in a format, as required by the competent authorities.
6. Each Party shall, as appropriate and subject to national law, establish a system for sharing details contained in all records kept in accordance with this Article with other Parties.
 7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved systems for record-keeping.

ARTICLE 10

Security and preventive measures

1. Each Party shall, where appropriate, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, require that all natural and legal persons subject to Article 6 take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, inter alia:
 - (a) reporting to the competent authorities:
 - (i) the cross-border transfer of cash in amounts stipulated in national law or of cross-border payments in kind; and
 - (ii) all “suspicious transactions”; and
 - (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, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, require that payments for transactions carried out by natural or legal persons subject to Article 6 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. A Party may require that payments carried out by natural or legal persons subject to Article 6 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.

4. 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.

ARTICLE 11

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 12

Free zones 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.



ARTICLE 13

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 Framework Convention on Tobacco Control.
2. No later than 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 further action.

PART IV: OFFENCES

ARTICLE 14

Unlawful conduct including criminal offences

1. Each Party shall adopt, subject to the basic principles of its domestic law, such legislative and other measures as may be necessary to establish all of the following conduct as unlawful under its domestic law:
 - (a) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment contrary to the provisions of this Protocol;
 - (b)
 - (i) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels;
 - (ii) any other acts of smuggling or attempted smuggling of tobacco, tobacco products or manufacturing equipment not covered by paragraph (b)(i);
 - (c)
 - (i) any other form of illicit manufacture of tobacco, tobacco products or manufacturing equipment, or tobacco packaging bearing false fiscal stamps, unique identification markings, or any other required markings or labels;
 - (ii) wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting of illicitly manufactured tobacco, illicit tobacco products, products bearing false fiscal stamps and/or other required markings or labels, or illicit manufacturing equipment;
 - (d) mixing of tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products;
 - (e) intermingling of tobacco products with non-tobacco products in contravention of Article 12.2 of this Protocol;
 - (f) using Internet-, telecommunication- or any other evolving technology-based modes of sale of tobacco products in contravention of this Protocol;

- (g) obtaining, by a person licensed in accordance with Article 6, tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed in accordance with Article 6;
 - (h) obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;
 - (i)
 - (i) making any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment and when not contrary to the right against self incrimination;
 - (ii) misdeclaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment or any other information specified in the protocol to:
 - (a) evade the payment of applicable duties, taxes and other levies, or
 - (b) prejudice any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;
 - (iii) failing to create or maintain records covered by this Protocol or maintaining false records; and
 - (j) laundering of proceeds of unlawful conduct established as a criminal offence under paragraph 2.
2. Each Party shall, subject to the basic principles of its domestic law, determine which of the unlawful conduct set out in paragraph 1 or any other conduct related to illicit trade in tobacco, tobacco products and manufacturing equipment contrary to the provisions of this Protocol shall be criminal offences and adopt legislative and other measures as may be necessary to give effect to such determination.
3. Each Party shall notify the Secretariat of this Protocol which of the unlawful conduct set out in paragraphs 1 and 2 that Party has determined to be a criminal offence in accordance with paragraph 2, and shall furnish to the Secretariat copies of its laws, or a description thereof, that give effect to paragraph 2, and of any subsequent changes to such laws.

4. In order to enhance international cooperation in combatting the criminal offences related to illicit trade in tobacco, tobacco products and manufacturing equipment, Parties are encouraged to review their national laws regarding money laundering, mutual legal assistance and extradition, having regard to relevant international conventions to which they are Parties, to ensure that they are effective in the enforcement of the provisions of this Protocol.

ARTICLE 15

Liability of legal persons

1. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the unlawful conduct including criminal offences established in accordance with Article 14 of this Protocol.
2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the liability of the natural persons who have engaged in the unlawful conduct or committed the criminal offences established in accordance with national laws and regulations and Article 14 of this Protocol.

ARTICLE 16

Prosecutions and sanctions

1. Each Party shall adopt such measures as may be necessary, in accordance with national law, to ensure that natural and legal persons held liable for the unlawful conduct including criminal offences established in accordance with Article 14 are subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.
2. Each Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for the unlawful conduct, including criminal offences established in accordance with Article 14, are exercised to maximize the effectiveness of law enforcement measures in respect of such unlawful conduct including criminal offences, and with due regard to the need to deter the commission of such unlawful conduct including offences.

3. Nothing contained in this Protocol shall affect the principle that the description of the unlawful conduct including criminal offences established in accordance with this Protocol and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a Party and that such unlawful conduct including criminal offences shall be prosecuted and sanctioned in accordance with that law.

ARTICLE 17

Seizure payments

Parties should, in accordance with their domestic law, consider adopting such legislative and other measures as may be necessary to authorize competent authorities to levy an amount proportionate to lost taxes and duties from the producer, manufacturer, distributor, importer or exporter of seized tobacco, tobacco products and/or manufacturing equipment.

ARTICLE 18

Disposal or destruction

All confiscated tobacco, tobacco products and manufacturing equipment shall be destroyed, using environmentally friendly methods to the greatest extent possible, or disposed of in accordance with national law.

ARTICLE 19

Special investigative techniques

1. If permitted by the basic principles of its domestic legal system, each Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems it appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities on its territory for the purpose of effectively combating illicit trade in tobacco, tobacco products or manufacturing equipment.
2. For the purpose of investigating the criminal offences established in accordance with Article 14, Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using the techniques referred to in paragraph 1 in the context of cooperation at the international level.

3. In the absence of an agreement or arrangement as set forth in paragraph 2, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.
4. Parties recognize the importance of, and need for, international cooperation and assistance in this area and shall cooperate, with each other and with international organizations, in developing capacity to achieve the goals of this Article.

PART V: INTERNATIONAL COOPERATION

ARTICLE 20

General information sharing

1. Parties shall, for the purpose of achieving the objectives of this Protocol, report, as part of the WHO Framework Convention on Tobacco Control reporting instrument relevant information, subject to domestic law, and where appropriate, inter alia, on matters such as:
 - (a) in aggregate form, details of seizures of tobacco, tobacco products or manufacturing equipment, quantity, value of seizures, product descriptions, dates and places of manufacture; and taxes evaded;
 - (b) import, export, transit, tax-paid and duty-free sales and quantity or value of production of tobacco, tobacco products or manufacturing equipment;
 - (c) trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment; and
 - (d) any other relevant information, as agreed by the Parties.
2. Parties shall cooperate with each other and with competent international organizations to build the capacity of Parties to collect and exchange information.
3. Parties shall deem the said information to be confidential and for the use of Parties only, unless otherwise stated by the transmitting Party.

ARTICLE 21

Enforcement information sharing

1. Parties shall, subject to domestic law or any applicable international treaties, where appropriate, exchange, on their own initiative or on the request of a Party that provides due justification that such information is necessary for the purpose of detection or investigation of illicit trade in tobacco, tobacco products or manufacturing equipment, the following information:
 - (a) records of licensing for the natural and legal persons concerned;
 - (b) information for identification, monitoring and prosecution of natural or legal persons involved in illicit trade in tobacco, tobacco products or manufacturing equipment;

- (c) records of investigations and prosecutions;
 - (d) records of payment for import, export or duty-free sales of tobacco, tobacco products or manufacturing equipment; and
 - (e) details of seizures of tobacco, tobacco products or manufacturing equipment (including case reference information where appropriate, quantity, value of seizure, product description, entities involved, date and place of manufacture) and modi operandi (including means of transport, concealment, routing and detection).
2. Information received from Parties under this Article shall be used exclusively to meet the objectives of this Protocol. Parties may specify that such information may not be passed on without the agreement of the Party which provided the information.

ARTICLE 22

Information sharing: confidentiality and protection of information

1. Each Party shall designate the competent national authorities to which data referred to in Articles 20, 21 and 24 are supplied and notify Parties of such designation through the Convention Secretariat.
2. The exchange of information under this Protocol shall be subject to domestic law regarding confidentiality and privacy. Parties shall protect, as mutually agreed, any confidential information that is exchanged.

ARTICLE 23

Assistance and cooperation: training, technical assistance and cooperation in scientific, technical and technological matters

1. Parties shall cooperate, with each other and/or through competent international and regional organizations in providing training, technical assistance and cooperation in scientific, technical and technological matters, in order to achieve the objectives of this Protocol, as mutually agreed. Such assistance may include the transfer of expertise or appropriate technology in the areas of information gathering, law enforcement, tracking and tracing, information management, protection of personal data, interdiction, electronic surveillance, forensic analysis, mutual legal assistance and extradition.

2. Parties may, as appropriate, enter into bilateral, multilateral or any other agreements or arrangements in order to promote training, technical assistance and cooperation in scientific, technical and technological matters taking into account the needs of developing-country Parties and Parties with economies in transition.
3. Parties shall cooperate, as appropriate, to develop and research the possibilities of identifying the exact geographical origin of seized tobacco and tobacco products.

ARTICLE 24

Assistance and cooperation: investigation and prosecution of offences

1. Parties shall, in accordance with their domestic law, take all necessary measures, where appropriate, to strengthen cooperation by multilateral, regional or bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of natural or legal persons engaged in illicit trade in tobacco, tobacco products or manufacturing equipment.
2. Each Party shall ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating illicit trade in tobacco, tobacco products or manufacturing equipment (including, where permitted under domestic law, judicial authorities) cooperate and exchange relevant information at national and international levels within the conditions prescribed by its domestic law.

ARTICLE 25

Protection of sovereignty

1. Parties shall carry out their obligations under this Protocol in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. Nothing in this Protocol entitles a Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

ARTICLE 26

Jurisdiction

1. Each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when:
 - (a) the offence is committed in the territory of that Party; or
 - (b) the offence is committed on board a vessel that is flying the flag of that Party or an aircraft that is registered under the laws of that Party at the time that the offence is committed.
2. Subject to Article 25, a Party may also establish its jurisdiction over any such criminal offence when:
 - (a) the offence is committed against that Party;
 - (b) the offence is committed by a national of that Party or a stateless person who has his or her habitual residence on its territory; or
 - (c) the offence is one of those established in accordance with Article 14 and is committed outside its territory with a view to the commission of an offence established in accordance with Article 14 within its territory.
3. For the purposes of Article 30, each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when the alleged offender is present on its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.
4. Each Party may also adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when the alleged offender is present on its territory and it does not extradite him or her.
5. If a Party exercising its jurisdiction under paragraph 1 or 2 has been notified, or has otherwise learnt, that one or more other Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions.
6. Without prejudice to norms of general international law, this Protocol does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.



ARTICLE 27

Law enforcement cooperation

1. Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to:
 - (a) enhance and, where necessary, establish channels of communication between the competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the criminal offences established in accordance with Article 14;
 - (b) ensure effective cooperation among the competent authorities, agencies, customs, police and other law enforcement agencies;
 - (c) cooperate with other Parties in conducting enquiries in specific cases with respect to criminal offences established in accordance with Article 14 concerning:
 - (i) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
 - (ii) the movement of proceeds of crime or property derived from the commission of such offences; and
 - (iii) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;
 - (d) provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;
 - (e) facilitate effective coordination among its competent authorities, agencies and services and promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the Parties concerned, the posting of liaison officers;
 - (f) exchange relevant information with other Parties on specific means and methods used by natural or legal persons in committing such offences, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities; and
 - (g) exchange relevant information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the criminal offences established in accordance with Article 14.

2. With a view to giving effect to this Protocol, Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them accordingly. In the absence of such agreements or arrangements between the Parties concerned, the Parties may consider this Protocol as the basis for mutual law enforcement cooperation in respect of the offences covered by this Protocol. Whenever appropriate, Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.
3. Parties shall endeavour to cooperate within their means to respond to transnational illicit trade of tobacco products committed through the use of modern technology.

ARTICLE 28

Mutual administrative assistance

Consistent with their respective domestic legal and administrative systems, Parties shall provide each other, either on request or on their own initiative, with information to ensure proper application of customs and other relevant law in the prevention, detection, investigation, prosecution and combating of illicit trade in tobacco, tobacco products or manufacturing equipment. The Parties shall deem the said information to be confidential and for restricted use, unless otherwise stated by the transmitting Party. Such information may include:

- (a) new customs and other enforcement techniques of demonstrated effectiveness;
- (b) new trends, means or methods of engaging in illicit trade in tobacco, tobacco products and manufacturing equipment;
- (c) goods known to be the subject of illicit trade in tobacco, tobacco products and manufacturing equipment as well as details of description, packaging, transport and storage and methods used in respect of those goods;
- (d) natural or legal persons known to have committed or to be a party to an offence established in accordance with Article 14; and
- (e) any other data that would assist designated agencies in risk assessment for control and other enforcement purposes.



ARTICLE 29

Mutual legal assistance

1. Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Article 14 of this Protocol.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which legal persons may be held liable in accordance with Article 15 of this Protocol in the requesting Party.
3. Mutual legal assistance to be afforded in accordance with this Article may be requested for any of the following purposes:
 - (a) taking evidence or statements from persons;
 - (b) effecting service of judicial documents;
 - (c) executing searches and seizures, and freezing;
 - (d) examining objects and sites;
 - (e) providing information, evidentiary items and expert evaluations;
 - (f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
 - (g) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
 - (h) facilitating the voluntary appearance of persons in the requesting Party; and
 - (i) any other type of assistance that is not contrary to the domestic law of the requested Party.
4. This Article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance.
5. Paragraphs 6 to 24 shall, on the basis of reciprocity, apply to requests made pursuant to this Article if the Parties in question are not bound by a treaty or intergovernmental agreement of mutual legal assistance. If the Parties are bound by such a treaty or intergovernmental agreement, the corresponding

provisions of that treaty or intergovernmental agreement shall apply unless the Parties agree to apply paragraphs 6 to 24 in lieu thereof. Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

6. Parties shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to their respective competent authorities for execution. When a Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. Each Party shall notify the Head of the Convention Secretariat at the time of accession, acceptance, approval, formal confirmation or ratification of this Protocol of the central authority designated for this purpose. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the central authorities designated by the Parties. This requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through appropriate international organizations, if possible.
7. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested Party under conditions allowing the Party to establish authenticity. The language or languages acceptable to each Party shall be notified to the Head of the Convention Secretariat at the time of accession, acceptance, approval, formal confirmation or ratification of this Protocol. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.
8. A request for mutual legal assistance shall contain:
 - (a) the identity of the authority making the request;
 - (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or judicial proceeding;
 - (c) a summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents;

- (d) a description of the assistance sought and details of any particular procedure that the requesting Party wishes to be followed;
 - (e) where possible, the identity, location and nationality of any person concerned;
 - (f) the purpose for which the evidence, information or action is sought; and
 - (g) the provisions of the domestic law relevant to the criminal offence and the punishment therefore.
9. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.
10. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.
11. The requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested Party. Nothing in this paragraph shall prevent the requesting Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting Party shall notify the requested Party prior to the disclosure and, if so requested, consult with the requested Party. If, in an exceptional case, advance notice is not possible, the requesting Party shall inform the requested Party of the disclosure without delay.
12. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.
13. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a Party and has to be heard as a witness or expert by the judicial authorities of another Party, the first Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting Party. Parties may agree that the hearing shall be conducted by a judicial authority of the requesting Party and attended by a judicial authority of the requested Party.

14. Mutual legal assistance may be refused:
 - (a) if the request is not made in conformity with this Article;
 - (b) if the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
 - (c) if the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
 - (d) where the request involves a crime where the maximum penalty in the requested Party is less than two years of imprisonment or other forms of deprivation of liberty or, if, in the judgment of the requested Party, the provision of the assistance would impose a burden on its resources that is disproportionate to the seriousness of the crime; or
 - (e) if it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.
15. Reasons shall be given for any refusal of mutual legal assistance.
16. A Party shall not decline to render mutual legal assistance under this Article on the ground of bank secrecy.
17. Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
18. Parties may decline to render mutual legal assistance pursuant to this Article on the ground of absence of dual criminality. However, the requested Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested Party.
19. The requested Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting Party and for which reasons are given, preferably in the request. The requested Party shall respond to reasonable requests by the requesting Party regarding progress in its handling of the request. The requesting Party shall promptly inform the requested Party when the assistance sought is no longer required.

20. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
21. Before refusing a request pursuant to paragraph 14 or postponing its execution pursuant to paragraph 20, the requested Party shall consult with the requesting Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting Party accepts assistance subject to those conditions, it shall comply with the conditions.
22. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne.
23. In the event of a request, the requested Party:
 - (a) shall provide to the requesting Party copies of government records, documents or information in its possession that under its domestic law are available to the general public; and
 - (b) may, at its discretion, provide to the requesting Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.
24. Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this Article.

ARTICLE 30

Extradition

1. This Article shall apply to the criminal offences established in accordance with Article 14 of this Protocol when:
 - (a) the person who is the subject of the request for extradition is located in the territory of the requested Party;

- (b) the criminal offence for which extradition is sought is punishable under the domestic law of both the requesting Party and the requested Party; and
 - (c) the offence is punishable by a maximum period of imprisonment or other forms of deprivation of liberty of at least four years or by a more severe penalty or such lesser period as agreed by the Parties concerned pursuant to bilateral and multilateral treaties or other international agreements.
2. Each of the criminal offences to which this Article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
 3. If a Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Protocol as the legal basis for extradition in respect of any criminal offence to which this Article applies.
 4. Parties that do not make extradition conditional on the existence of a treaty shall recognize the criminal offences to which this Article applies as extraditable offences between themselves.
 5. Extradition shall be subject to the conditions provided for by the domestic law of the requested Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested Party may refuse extradition.
 6. Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any criminal offences to which this Article applies.
 7. A Party in whose territory an alleged offender is present, if it does not extradite such person in respect of a criminal offence to which this Article applies solely on the ground that he or she is one of its nationals, shall, at the request of the Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a similar nature under the domestic law of that Party. The Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

8. Whenever a Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that Party and the Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 7.
9. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.
10. Any person regarding whom proceedings are being carried out in connection with any of the criminal offences to which this Article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the Party in the territory of which that person is present.
11. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite if the requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.
12. Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.
13. Before refusing extradition, the requested Party shall, where appropriate, consult with the requesting Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.
14. Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition. Where Parties are bound by an existing treaty or intergovernmental arrangement the corresponding provisions of that treaty or intergovernmental arrangement shall apply unless the Parties agree to apply paragraph 1 to 13 in lieu thereof.

ARTICLE 31

Measures to ensure extradition

1. Subject to its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.
2. Measures taken in accordance with paragraph 1 shall be notified, in conformity with national law, as appropriate and without delay, to the requesting Party.
3. Any person regarding whom the measures in accordance with paragraph 1 are being taken, shall be entitled to:
 - (a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or, if that person is a stateless person, the State in the territory of which that person habitually resides; and
 - (b) be visited by a representative of that State.

PART VI: REPORTING

ARTICLE 32

Reporting and exchange of information

1. Each Party shall submit to the Meeting of the Parties, through the Convention Secretariat, periodic reports on its implementation of this Protocol.
2. The format and content of such reports shall be determined by the Meeting of the Parties. These reports shall form part of the regular WHO Framework Convention on Tobacco Control reporting instrument.
3. The content of the periodic reports referred to in paragraph 1, shall be determined having regard, inter alia, to the following:
 - (a) information on legislative, executive, administrative or other measures taken to implement this Protocol;
 - (b) information, as appropriate, on any constraints or barriers encountered in the implementation of this Protocol and on the measures taken to overcome those barriers;
 - (c) information, as appropriate, on financial and technical assistance provided, received, or requested for activities related to the elimination of illicit trade in tobacco products; and
 - (d) the information specified in Article 20.

In those cases when relevant data are already being collected as part of the Conference of the Parties reporting mechanism, the Meeting of the Parties shall not duplicate these efforts.

4. The Meeting of the Parties, pursuant to Articles 33 and 36, shall consider arrangements to assist developing-country Parties and Parties with economies in transition, at their request, in meeting their obligations under this Article.
5. The reporting of information under those Articles shall be subject to national law regarding confidentiality and privacy. Parties shall protect, as mutually agreed, any confidential information that is reported or exchanged.

PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES

ARTICLE 33

Meeting of the Parties

1. A Meeting of the Parties is hereby established. The first session of the Meeting of the Parties shall be convened by the Convention Secretariat immediately before or immediately after the next regular session of the Conference of the Parties following the entry into force of this Protocol.
2. Thereafter, regular sessions of the Meeting of the Parties shall be convened by the Convention Secretariat, immediately before or immediately after regular sessions of the Conference of the Parties.
3. Extraordinary sessions of the Meeting of the Parties shall be held at such other times as may be deemed necessary by the Meeting or at the written request of any Party, provided that, within six months of the request being communicated to them by the Convention Secretariat, it is supported by at least one third of the Parties.
4. The Rules of Procedure and the Financial Rules of the Conference of the Parties to the WHO Framework Convention on Tobacco Control shall apply, *mutatis mutandis*, to the Meeting of the Parties unless the Meeting of the Parties decides otherwise.
5. The Meeting of the Parties shall keep under regular review the implementation of the Protocol and take the decisions necessary to promote its effective implementation.
6. The Meeting of the Parties shall decide on the scale and mechanism of the voluntary assessed contributions from the Parties to the Protocol for the operation of this Protocol as well as other possible resources for its implementation.
7. At each ordinary session, the Meeting of the Parties shall by consensus adopt a budget and workplan for the financial period until the next ordinary session, which shall be distinct from the WHO Framework Convention on Tobacco Control budget and workplan.



ARTICLE 34

Secretariat

1. The Convention Secretariat shall be the Secretariat of this Protocol.
2. The functions of the Convention Secretariat with regard to its role as the secretariat of this Protocol shall be to:
 - (a) make arrangements for sessions of the Meeting of the Parties and any subsidiary bodies as well as working groups and other bodies established by the Meeting of the Parties and provide them with services as required;
 - (b) receive, analyse, transmit and provide feedback to Parties concerned as needed and to the Meeting of the Parties on reports received by it pursuant to this Protocol and facilitate the exchange of information among Parties;
 - (c) provide support to the Parties, particularly developing country Parties and Parties with economies in transition, on request, in the compilation, communication, and exchange of information required in accordance with the provisions of this Protocol, and assistance in the identification of available resources to facilitate implementation of the obligations under this Protocol;
 - (d) prepare reports on its activities under this Protocol under the guidance of and for submission to the Meeting of the Parties;
 - (e) ensure, under the guidance of the Meeting of the Parties, the necessary coordination with the competent international and regional intergovernmental organizations and other bodies;
 - (f) enter, under the guidance of the Meeting of the Parties, into such administrative or contractual arrangements as may be required for the effective discharge of its functions as secretariat to this Protocol;
 - (g) receive and review applications by intergovernmental and nongovernmental organizations wishing to be accredited as observers to the Meeting of the Parties, while ensuring that they are not affiliated with the tobacco industry, and present the reviewed applications to the Meeting of the Parties for its consideration; and
 - (h) perform other secretariat functions specified by this Protocol and such other functions as may be determined by the Meeting of the Parties.

ARTICLE 35

Relations between the meeting of the Parties and intergovernmental organizations

In order to provide technical and financial cooperation for achieving the objective of this Protocol, the Meetings of the Parties may request the cooperation of competent international and regional intergovernmental organizations, including financial and development institutions.

ARTICLE 36

Financial resources

1. Parties recognize the important role that financial resources play in achieving the objective of this Protocol, and acknowledge the importance of Article 26 of the WHO Framework Convention on Tobacco Control in achieving the objectives of the Convention.
2. Each Party shall provide financial support in respect of its national activities intended to achieve the objective of this Protocol, in accordance with its national plans, priorities and programmes.
3. Parties shall promote, as appropriate, the utilization of bilateral, regional, subregional and other multilateral channels to provide funding for strengthening the capacity of developing-country Parties and Parties with economies in transition in order to meet the objectives of this Protocol.
4. Without prejudice to Article 18, Parties are encouraged, subject to national laws and policies and where appropriate, to use any confiscated proceeds of crime deriving from the illicit trade in tobacco, tobacco products and manufacturing equipment to achieve the objectives set out in this Protocol.
5. Parties represented in relevant regional and international intergovernmental organizations and financial and development institutions shall encourage these entities to provide financial assistance for developing-country Parties and for Parties with economies in transition to assist them in meeting their obligations under this Protocol, without limiting the rights of participation within these organizations.



6. Parties agree that:
 - (a) to assist Parties in meeting their obligations under this Protocol, all relevant potential and existing resources available for activities related to the objective of this Protocol should be mobilized and utilized for the benefit of all Parties, especially developing-country Parties and Parties with economies in transition; and
 - (b) the Convention Secretariat shall advise developing-country Parties and Parties with economies in transition, upon request, on available sources of funding to facilitate implementation of their obligations under this Protocol.
7. Parties may require the tobacco industry to bear any costs associated with a Party's obligations to achieve the objectives of this Protocol, in compliance with Article 5.3 of the WHO Framework Convention on Tobacco Control.
8. Parties shall endeavour, subject to their domestic law, to achieve self-financing of the implementation of the Protocol including through the levying of taxes and other forms of charges on tobacco products.

PART VIII: SETTLEMENT OF DISPUTES

ARTICLE 37

Settlement of disputes

The settlement of disputes between Parties concerning the interpretation or application of this Protocol is governed by Article 27 of the WHO Framework Convention on Tobacco Control.

PART IX: DEVELOPMENT OF THE PROTOCOL

ARTICLE 38

Amendments to this Protocol

1. Any Party may propose amendments to this Protocol.
2. Amendments to this Protocol shall be considered and adopted by the Meeting of the Parties. The text of any proposed amendment to this Protocol shall be communicated to the Parties by the Convention Secretariat at least six months before the session at which it is proposed for adoption. The Convention Secretariat shall also communicate proposed amendments to the signatories of this Protocol and, for information, to the Depositary.
3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment to this Protocol. If all efforts at consensus have been exhausted and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For purposes of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the Convention Secretariat to the Depositary, who shall circulate it to all Parties for acceptance.
4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least two thirds of the Parties.



5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

ARTICLE 39

Adoption and amendment of annexes to this Protocol

1. Any Party may make proposals for an annex to this Protocol and may propose amendments to annexes to this Protocol.
2. Annexes shall be restricted to lists, forms and any other descriptive material relating to procedural, scientific, technical or administrative matters.
3. Annexes to this Protocol and amendments thereto shall be proposed, adopted and enter into force in accordance with the procedure set forth in Article 38.

PART X: FINAL PROVISIONS

ARTICLE 40 **Reservations**

No reservations may be made to this Protocol.

ARTICLE 41 **Withdrawal**

1. At any time after two years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the WHO Framework Convention on Tobacco Control shall also be considered as having withdrawn from this Protocol, with effect as of the date of its withdrawal from the WHO Framework Convention on Tobacco Control.

ARTICLE 42 **Right to vote**

1. Each Party to this Protocol shall have one vote, except as provided for in paragraph 2.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States that are Parties to the Protocol. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice versa.



ARTICLE 43

Signature

The Protocol shall be open for signature by all Parties to the WHO Framework Convention on Tobacco Control at World Health Organization Headquarters in Geneva from 10 to 11 January 2013, and thereafter at United Nations Headquarters in New York until 9 January 2014.

ARTICLE 44

Ratification, acceptance, approval, formal confirmation or accession

1. This Protocol shall be 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 Framework Convention on Tobacco Control. It shall be open for accession from the day after the date on which the Protocol is closed for signature. Instruments of ratification, acceptance, approval, formal confirmation or accession shall be deposited with the Depositary.
2. Any regional economic integration organization that becomes a Party without any of its Member States being a Party shall be bound by all the obligations under this Protocol. In the case of organizations one or more of whose Member States is a Party, the organization and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the Member States shall not be entitled to exercise rights under this Protocol concurrently.
3. Regional economic integration organizations shall, in their instruments relating to formal confirmation or in their instruments of accession, declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification to the extent of their competence.

ARTICLE 45

Entry into force

1. This Protocol shall enter into force on the ninetieth day following the date of deposit of the fortieth instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.
2. For each Party to the WHO Framework Convention on Tobacco Control that ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the conditions set out in paragraph 1 for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval, accession or formal confirmation.
3. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States Members of that organization.

ARTICLE 46

Depositary

The Secretary-General of the United Nations shall be the Depositary of this Protocol.

ARTICLE 47

Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Annex 1:
**Decision FCTC/COP5(1) – Protocol to Eliminate Illicit Trade
 in Tobacco Products**

The Conference of the Parties,

Deeply concerned that the illicit trade in tobacco products is contributing to the spread of the tobacco epidemic, which is a global problem with serious consequences for public health that calls for effective, appropriate and comprehensive domestic and international responses;

Taking into account Article 15 of the WHO Framework Convention on Tobacco Control, which recognizes, inter alia, that the elimination of all forms of illicit trade in tobacco products is an essential component of tobacco control;

Recalling its decision FCTC/COP2(12) by which the Intergovernmental Negotiating Body was established, with the objective of drafting and negotiating a protocol on illicit trade in tobacco products, which would build upon and complement the provisions of Article 15 of the WHO Framework Convention on Tobacco Control, and further decisions FCTC/COP3(6) and FCTC/COP4(11) which reflected upon the progress achieved during the negotiations;

Acknowledging the work undertaken by the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products resulting in the draft protocol to eliminate illicit trade in tobacco products, contained in document FCTC/COP/5/6;

Convinced that supplementing the WHO Framework Convention on Tobacco Control with a comprehensive protocol will be a powerful, effective means to counter illicit trade in tobacco products and its grave consequences,

1. ADOPTS in accordance with Article 33 of the WHO Framework Convention on Tobacco Control the attached Protocol to Eliminate Illicit Trade in Tobacco Products; and
2. CALLS UPON all Parties to the WHO Framework Convention on Tobacco Control, to consider signing, ratifying, accepting, approving, formally confirming or acceding to the Protocol at the earliest opportunity, with a view to bringing the Protocol into force as soon as possible.



Annex 2:

History of the negotiations of the Protocol to Eliminate Illicit Trade in Tobacco Products

As early as 2006, at the first meeting of the Conference of the Parties (COP) following entry into force of the WHO FCTC, the Parties discussed possible protocols to the Convention. One of the areas in which they agreed that a protocol could be established was illicit trade in tobacco products, and accordingly, the COP set up an expert group to prepare a template for a possible protocol in this area. The expert group presented its report to the COP at its second session in 2007.

Recognizing that cooperative action was necessary in order to eliminate the illicit trade, the COP at its second session established an Intergovernmental Negotiating Body (INB), 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 FCTC.

The INB held five sessions, all in Geneva, Switzerland. The first session of the INB was held on 11–15 February 2008. The template for a protocol on illicit trade as proposed by the expert group served as the basis for the negotiations. Mr Ian Walton-George, representing the European Union, was elected as Chairperson of the INB, and Dr J. Al-Lawati (Oman), Dr E. Jaramillo (Mexico), Mr P. Krishna (India), Mrs L. Asiedu (Ghana) and Mr J. Martin (Federated States of Micronesia) as Vice-Chairpersons. Following the first session, Mr Walton-George drafted a “Chairperson’s text”, taking into account the comments made by Parties during the first session.

The second session of the INB was held on 20–25 October 2008, with the Chairperson’s text serving as the basis for negotiations. The INB reported to the third session of the COP (17–22 November 2008, Durban, South Africa) on progress. The Conference requested the INB to continue its work and to submit a draft protocol to its fourth session.

As also requested by the COP, regional consultations were held for all six regions between the second and third sessions of the INB. The consultations took place in Tehran, Islamic Republic of Iran (Eastern Mediterranean Region), Geneva (African and European Regions), Mexico City, Mexico (Region of the Americas), Beijing, China (Western Pacific Region) and Dhaka, Bangladesh (South-East Asia Region).

Expert papers were also prepared by the Secretariat on several technical matters to serve as background documents for the discussions at the third session of the INB: the feasibility of an international tracking and tracing

regime; the legal ramifications of a possible ban of sales of tobacco products via the Internet as well as of a possible ban on duty free sales of tobacco products; legal advice on the scope of the protocol; and an assessment of potential requirements at national level for an international track and trace regime.

For the third session of the INB (28 June – 5 July 2009), the Chairperson prepared a revised Chairperson's text, taking into account the discussions during the second session of the INB, the expert papers, and legal advice. The revised Chairperson's text served as the basis for discussions at the third session of the INB. The INB re-elected Mr Walton-George as Chairperson. As Vice-Chairpersons, the INB elected Dr T. Vinit (Papua New Guinea), Mr H. Mohamed (Maldives), Mrs L. Asiedu (Ghana) – replaced by Dr M. Anibueze (Nigeria) at the fourth session of the INB –, Dr E. Al Mansoori (United Arab Emirates) and Dr J. Regalado Pineda (Mexico).

The third session resulted in a negotiating text, which the INB agreed would form the basis for further negotiations.

Two drafting groups established by the INB worked between its third and fourth sessions and proposed text for articles relating to the control of the supply chain and matters of criminal law, mutual legal assistance and extradition, in order to facilitate further negotiations at the fourth session. The groups were chaired by Dr M. Anibueze (Nigeria) and Mrs I. Demuni de Silva (Sri Lanka).

At the fourth session of the INB (14–21 March 2010), the delegations discussed provisions of the negotiating text as well as proposals made by the drafting groups. At the closure of the session, the INB decided to recommend that the draft protocol be considered by the COP at its fourth session. The text of the draft protocol showed the progress made by the INB to this point – consensus had been reached on 26 provisions, while 23 remained under discussion. In particular, consensus had been reached on the tracking and tracing provisions and the great majority of the provisions relating to licensing. However, a number of important and challenging issues remained unsolved. On several matters, the INB sought guidance from the COP, including regarding the method of financing of the protocol.

The COP acknowledged the progress made by the INB and extended the mandate of the INB to a final session in early 2012, requesting the INB to submit the text of a draft protocol to its fifth session for consideration. It also established an informal working group to make proposals and develop possible text, in order to facilitate negotiations at the fifth session of the INB.

The informal working group, comprising representatives of 30 Parties (five Parties per WHO region), held two meetings (Geneva, 4–8 July and 19–23 September 2011) and was chaired by Dr Nuntavarn Vichit-Vadakan (Thailand). In accordance with its mandate, the group developed possible text for those articles in Part III of the protocol, on supply chain control, that had not yet been agreed, and made proposals on the other matters within its mandate, including the method of financing of the protocol and the inclusion of mutual legal assistance and extradition in the draft protocol.

The fifth session of the INB was held from 29 March to 4 April 2012. The INB confirmed Mr Walton-George as Chairperson. Mr A.T. Faireka (Cook Islands) replaced Dr T. Vinit (Papua New Guinea), and Dr M. Kabir (Nigeria) replaced Dr M. Anibueze (Nigeria) as Vice-Chairpersons.

After four years and five sessions of negotiations, on 4 April 2012 the delegations to the fifth session of the INB agreed on a consensus text to be submitted to the COP for consideration at its fifth session. The text of the draft protocol also took account of the comments submitted by Parties on the Arabic, Chinese, French, Russian and Spanish translations of the English text, in line with the decision of the INB.

On 12 November 2012, the Protocol was adopted by consensus at the fifth session of the COP (Seoul, Republic of Korea, 12–17 November 2012). It thus became the first protocol to the WHO FCTC, and a new international treaty in its own right.

The Protocol was opened for signature on 10 January 2013 at WHO headquarters in Geneva. More than 50 Parties participated in this event, during which 12 Parties, representing all six WHO regions, signed the Protocol; one more Party signed the following day. The 13 Parties are: China, France, Gabon, Libya, Myanmar, Nicaragua, Panama, Republic of Korea, South Africa, Syrian Arab Republic, Tunisia, Turkey and Uruguay. The Protocol remained open for signature at United Nations Headquarters in New York until 9 January 2014.

The Protocol to Eliminate Illicit Trade in Tobacco Products is a landmark in the strengthening of global action against tobacco and is a new legal instrument in public health. It supplements the WHO FCTC with a comprehensive tool to counter and eventually eliminate illicit trade in tobacco products and to strengthen legal dimensions for international health cooperation.

Annex 3:
Article 15 of the WHO Framework Convention
on Tobacco Control

Illicit trade in tobacco products


1. The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.
2. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to ensure that all unit packets and packages of tobacco products and any outside packaging of such products are marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status. In addition, each Party shall:
 - (a) require that unit packets and packages of tobacco products for retail and wholesale use that are sold on its domestic market carry the statement: “*Sales only allowed in (insert name of the country, subnational, regional or federal unit)*” or carry any other effective marking indicating the final destination or which would assist authorities in determining whether the product is legally for sale on the domestic market; and
 - (b) consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.
3. Each Party shall require that the packaging information or marking specified in paragraph 2 of this Article shall be presented in legible form and/or appear in its principal language or languages.
4. With a view to eliminating illicit trade in tobacco products, each Party shall:
 - (a) monitor and collect data on cross-border trade in tobacco products, including illicit trade, and exchange information among customs, tax and other authorities, as appropriate, and in accordance with national law and relevant applicable bilateral or multilateral agreements;

- (b) enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes;
 - (c) take appropriate steps to ensure that all confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products are destroyed, using environmentally-friendly methods where feasible, or disposed of in accordance with national law;
 - (d) adopt and implement measures to monitor, document and control the storage and distribution of tobacco products held or moving under suspension of taxes or duties within its jurisdiction; and
 - (e) adopt measures as appropriate to enable the confiscation of proceeds derived from the illicit trade in tobacco products.
5. Information collected pursuant to subparagraphs 4(a) and 4(d) of this Article shall, as appropriate, be provided in aggregate form by the Parties in their periodic reports to the Conference of the Parties, in accordance with Article 21.
6. The Parties shall, as appropriate and in accordance with national law, promote cooperation between national agencies, as well as relevant regional and international intergovernmental organizations as it relates to investigations, prosecutions and proceedings, with a view to eliminating illicit trade in tobacco products. Special emphasis shall be placed on cooperation at regional and subregional levels to combat illicit trade of tobacco products.
7. Each Party shall endeavour to adopt and implement further measures including licensing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.

Annex 4:
Article 33 of the WHO Framework Convention
on Tobacco Control

Protocols

1. Any Party may propose protocols. Such proposals will be considered by the Conference of the Parties.
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.
3. The text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before the session at which it is proposed for adoption.
4. Only Parties to the Convention may be parties to a protocol.
5. Any protocol to the Convention shall be binding only on the parties to the protocol in question. Only Parties to a protocol may take decisions on matters exclusively relating to the protocol in question.
6. The requirements for entry into force of any protocol shall be established by that instrument.



The Protocol to Eliminate Illicit Trade in Tobacco Products is the first protocol to the WHO Framework Convention on Tobacco Control (WHO FCTC). It was developed in response to the growing international illicit trade in tobacco products, which poses a serious threat to public health by increasing the accessibility and affordability of tobacco products, thus fuelling the tobacco epidemic and undermining tobacco control policies. The illicit trade also causes substantial losses in government revenues, and at the same time contributes to the funding of transnational criminal activities. The objective of the Protocol is the elimination of all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO FCTC, by requiring Parties to take measures to control the supply chain of tobacco products effectively and to cooperate internationally on a wide range of matters.

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