

## **Briefing 1: Elaboration of a protocol on illicit trade in tobacco products**

**Third session of the Conference of the Parties to the  
WHO Framework Convention on Tobacco Control  
17-22 November 2008, Durban, South Africa**

### **Recommendation**

**The third session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control should decide:**

- **that the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products shall hold its third session from 28 June to 5 July 2009 in Geneva, and, if the third session of Intergovernmental Negotiating Body decides that a further session is required, a fourth session at a venue and time to be decided by the Bureau of the Conference of the Parties;**
- **to request the Convention Secretariat:**
  - **to prepare comprehensive background papers on the following legal and technical matters to facilitate the elaboration of a revised Chairperson's text and to inform the work of the third session of the Intergovernmental Negotiating Body:**
    - **the relationship between the proposed protocol and other international agreements relevant to the elimination of illicit trade in tobacco products, including, in particular, the UN Convention against Transnational Organized Crime;**
    - **the development of an international tracking and tracing system which will be effective for all Parties, low- and high-income alike;**
    - **requirements for customer identification and verification;**
    - **security and preventive measures;**
    - **the implementation of a ban on internet sales of tobacco products;**
    - **the implementation of a ban on duty-free sales of tobacco products; and**
    - **the scope of the protocol, especially in relation to manufacturing equipment and key inputs used in the manufacture of tobacco products;**
  - **to undertake the preparation of the background papers in consultation with the Chairperson and the Bureau of the Intergovernmental Negotiating Body, with the assistance of relevant experts, and with the participation of interested**

- Parties and relevant intergovernmental and nongovernmental organizations with specific expertise in the matters;**
- **to initiate, as a matter of priority, formal relations with other relevant international bodies, particularly relevant treaty Secretariats, including the UN Office on Drugs and Crime, in order to maximize synergy and complementarity, and to avoid duplication, between the draft protocol and other relevant agreements and arrangements;**
  - **to make the necessary arrangements, including budgetary arrangements, for the third and, if required, fourth sessions of the Intergovernmental Negotiating Body, the undertaking of all necessary intersessional work prior to the third session and, if required, between the third and fourth sessions, and the convening of regional consultations preparatory to each session;**
  - **to undertake any further work requested by the third session of the Intergovernmental Negotiating Body; and**
- **to allocate sufficient resources in the budget to allow the work of the Intergovernmental Negotiating Body to be carried out efficiently and effectively, noting, in particular, the importance of intersessional work, regional consultations, and participation of delegates from a range of government sectors, including from low- and middle-income Parties.**

## **Background**

Parties to the WHO Framework Convention on Tobacco Control (FCTC) recognize, in Article 15.1, that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, is an essential component of tobacco control.

Illicit trade in tobacco products undermines high tobacco taxation policy, which evidence shows is one of the most effective ways to reduce tobacco consumption,<sup>1</sup> and deprives governments of billions of dollars in revenue, thereby reducing the funding available for public health and other policies. In addition to being a major health problem, illicit trade in tobacco products poses a significant threat to the maintenance of law and order. There is evidence that illicit trade in tobacco products is carried out by organized transnational criminal groups, and that money gained from illicit trade in tobacco products is used for other serious criminal enterprises, including terrorist operations.<sup>2</sup>

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<sup>1</sup> See generally FJ Chaloupka, T Hu, KE Warner, R Jacobs, and A Yurekli, 'The Taxation of Tobacco Products', in P Jha and FJ Chaloupka (eds), *Tobacco Control in Developing Countries* (OUP: Oxford, 2000) 237-272, available at <http://www1.worldbank.org/tobacco/tcdc/237TO272.PDF>; World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (Washington, DC: World Bank, 1999), available at [http://www1.worldbank.org/tobacco/reports\\_pdf.asp](http://www1.worldbank.org/tobacco/reports_pdf.asp).

<sup>2</sup> See generally United States General Accounting Office, 'Terrorist Financing: US Agencies Should Systematically Assess Terrorists Use of Alternative Financing Mechanisms', Report to Congressional Requesters GAO-04-163 (November 2003), available at <http://www.gao.gov/new.items/d04163.pdf>.

The Conference of the Parties (COP) has recognized the need for a protocol to the FCTC to effectively address illicit trade in tobacco products, mandating an intergovernmental negotiating body (INB) to draft and negotiate a protocol.<sup>3</sup>

In establishing the INB, the second session of the COP (COP-2) recognized the template for a protocol on illicit trade in tobacco products,<sup>4</sup> prepared by an expert group established by the first session of the COP (COP-1),<sup>5</sup> as a basis for initiating negotiations. At its first session (INB-1), the INB considered the expert group's template and discussed the content and form of a protocol on illicit trade in tobacco products. In accordance with the COP-2 decision, the Chairperson of the INB elaborated, based on the discussions of INB-1, a draft text for a protocol.<sup>6</sup>

At its second session (INB-2), the INB considered the Chairperson's draft text, highlighted a range of areas on which further work will be required before a draft protocol on illicit trade in tobacco products can be completed for presentation to the COP, and prepared a progress report (Document FCTC/COP/3/4) for consideration by the third session of the COP (COP-3).

## **The progress report**

The progress report of the INB provides a summary of the progress made by INB-1 and INB-2. It highlights a number of matters which INB-2 requested be given further consideration prior to INB-3, as follows:

### *Legal and technical background work*

As noted at para 19 of the progress report, INB-2 'requested the Chairperson and the Convention Secretariat to make arrangements for prioritized expert reviews (including technical reports) and legal advice on a number of elements of the Chairperson's text'. The elements identified included the following:

- 'the relationship of the protocol with other related international instruments';
- 'the feasibility and effectiveness of an international system for tracking and tracing, particularly for lower-resource countries';
- 'customer identification and verification';
- 'security and preventive measures';
- 'the treatment of sales of tobacco products via the internet';

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<sup>3</sup> 'Elaboration of a protocol on illicit trade in tobacco products' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, second session, decision FCTC/COP2(12)).

<sup>4</sup> 'Elaboration of a template for a protocol on illicit trade in tobacco products' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, second session, provisional agenda item 5.4.1, A/FCTC/COP/2/9, 19 April 2007).

<sup>5</sup> 'Elaboration of protocols' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, first session, decision FCTC/COP1(16)).

<sup>6</sup> 'Chairperson's text for a protocol on illicit trade in tobacco products' (World Health Organization, WHO Framework Convention on Tobacco Control, Conference of the Parties, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, second session, FCTC/COP/INB-IT/2/3, 18 August 2008).

- ‘the relationship between illicit trade and duty free sales’; and
- ‘the scope of the protocol with particular regard to key inputs and manufacturing equipment’.

INB-2 requested that the results of this legal and technical background work be taken into account by the Chairperson in elaborating a revised Chairperson’s text for consideration by INB-3 (para 20).

#### *Coordination with other relevant bodies*

As noted at para 22 of the progress report, INB-2 ‘requested that the Chairperson and the Convention Secretariat establish coordination with the Secretariat of the United Nations Convention Against Transnational Organized Crime and the Secretariats of other relevant treaties’. Such coordination will be fundamental to the achievement of the objective ‘to maximize synergy and complementarity, and to avoid duplication’, between the protocol and existing agreements and arrangements relevant to the objective of the INB, as requested by COP-2.

#### *Timeline and process for the work of the INB*

INB-2 endorsed the Chairperson’s proposal that INB-3 be held from 28 June to 5 July 2009 in Geneva (para 20). It requested that, prior to INB-3, the Chairperson – supported by the Convention Secretariat, the Bureau and experts, as necessary – elaborate a revised draft text for a protocol on illicit trade in tobacco products, taking into account the discussions and proposals made at INB-2 and the results of the legal and technical background work discussed above. The INB requested that the revised Chairperson’s text and the background work discussed above be released ‘in good time’ to allow Parties to examine them before INB-3, and that regional consultation meetings be held prior to INB-3 (para 21).

As noted at para 25 of the progress report, INB-2 recognized that ‘the complexity and scope of the subject matters of the protocol’ is such that it may not be able to finalize its work at INB-3 and within the timeframe envisaged by COP-2. The INB therefore requested guidance from the COP on the possibility of an extended time schedule.

#### *Resources for the work of the INB*

Finally, the INB requested the COP ‘to consider allocating additional resources for completion of its work’ (para 26), noting, in particular, the need to provide for the undertaking of the background work discussed above, the convening of regional consultations, the proposed extension of INB-3 from six to eight working days, and possible follow-up work after INB-3, if necessary.