

COMMENTS ON THE TEMPLATE FOR A PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS

(AS SET OUT IN DOCUMENT
A/FCTC/COP/2/9)

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Introduction

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 global 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,¹ and deprives governments of billions of dollars in taxation, 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.²

The Framework Convention Alliance (FCA) estimates that the global illicit cigarette trade represents approximately 10.7% of global sales, or 600 billion cigarettes annually, and that losses to government revenue as a result of illicit trade in tobacco products total approximately \$US 40 to 50 billion annually.³

Illicit trade in tobacco products is a transnational problem, the resolution of which will require international cooperation. While Parties to the FCTC have already accepted important obligations with respect to illicit trade in Article 15 of the Convention, an effective approach to the problem will require Parties to commit to the implementation of additional measures, including a comprehensive system of international cooperation. The need to supplement the provisions of Article 15 with additional commitments was recognized by the first session of the Conference of the Parties to the FCTC (COP-1), which noted 'the need to further develop the obligations set out in Article 15 in an internationally binding legal instrument',⁴ and decided to establish an expert group to prepare a template for a protocol on illicit trade, to be presented to its second session (COP-2).⁵

¹ See generally Frank J Chaloupka, Teh-wei Hu, Kenneth E Warner, Rowena Jacobs, and Ayda Yurekli, 'The Taxation of Tobacco Products', in Prabhat Jha and Frank J Chaloupka (eds), *Tobacco Control in Developing Countries* (OUP: Oxford, 2000) 237-272, available online 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 online at <http://www1.worldbank.org/tobacco/reports_pdf.asp>.

² 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 online at <<http://www.gao.gov/new.items/d04163.pdf>>.

³ Framework Convention Alliance, *How big was the illicit tobacco problem in 2006?* (Geneva, 2007), available online at <http://fctc.org/x/documents/HowBigWasTheIllicitTobaccoTradeProblem_2006_English.pdf>.

⁴ 'Second report of Committee A (Draft): Additional matters identified in the Convention for consideration by the Conference of the Parties' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, first session, agenda item 5, A/FCTC/COP/1/10, 17 February 2006) 2.

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

At COP-2, the Parties to the FCTC decided to establish an intergovernmental negotiating body (INB) to draft and negotiate a protocol on illicit trade.⁶ The decision recognised that the template prepared by the expert group establishes a basis for initiating the negotiations by the INB. As such, it invited Parties and accredited intergovernmental and nongovernmental organizations to provide comments on the template, at the latest three months prior to the first session of the INB. In its capacity as an accredited nongovernmental organization, representing over 300 nongovernmental organizations from more than 100 countries, the FCA submits these comments in support of the template prepared by the expert group.

The content of the template: key elements of a protocol on illicit trade

On the basis of a firm recognition that illicit trade in tobacco products ‘significantly contributes to the global death and disease burden caused by tobacco consumption by making cigarettes cheaper, more accessible and more difficult to regulate’,⁷ the template prepared by the expert group recommends the adoption of a protocol to the FCTC under which Parties agree to implement a comprehensive set of measures – at both the domestic and international levels – to combat illicit trade. Key elements of a protocol, as identified in the template, include:

- **measures dealing with control of the tobacco product supply chain**, including tracking and tracing of tobacco products, licensing of participants in the tobacco business, obligations on tobacco manufacturers to control the supply chain for their products, record keeping obligations, anti-money laundering measures, and restrictions on internet sales of tobacco products;
- **measures dealing with criminalization and enforcement**, including establishment of offences, sanctions and penalties, search, seizure, tracing, freezing, confiscation, destruction and disposal, enhanced law enforcement capacity, special enforcement techniques, and establishment of jurisdiction; and
- **international cooperative measures**, including information sharing, cooperation in scientific, technical and technological matters, cooperation in training, cooperation in respect of investigation and prosecution of offences, mutual legal and administrative assistance, and extradition.

The template also discusses a number of significant measures which may support the core commitments proposed, including public awareness raising and an appropriate institutional framework to support the protocol and its implementation (including financial resources and implementation mechanisms such as reporting and compliance monitoring).

Each of the measures identified in the template prepared by the expert group will be significant in an effective protocol to combat illicit trade in tobacco products. The rationale for the inclusion of each of these measures, and the content which should be considered for inclusion in a protocol, is discussed below.

1. Control of the tobacco product supply chain

1.1 Licensing

⁶ ‘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)).

⁷ ‘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) 5.

Paragraphs 6-10 of the protocol template consider licensing of participants in the tobacco business.

Rationale

Licensing of participants in the tobacco business – including manufacturers, distributors, importers, exporters, and wholesalers of tobacco products, tobacco leaf dealers, and suppliers of major inputs to the manufacturing process, including suppliers of manufacturing equipment and suppliers of filter tow – will contribute significantly to the elimination of illicit trade in tobacco products. Licensing regimes enhance the ability of competent authorities to ensure that participants in the tobacco business comply with relevant laws and regulations such as Know Your Customer (KYC) procedures and requirements relating to acceptable forms of payment. Authorities may enforce such laws and regulations by refusing to issue licences to, or suspending or cancelling the licences of, those who fail to meet the requirements. In addition, requiring periodic renewal of licenses facilitates ongoing monitoring of compliance by participants in the tobacco business with license conditions, and allows for the updating of license conditions in accordance with changes to the market or newly available evidence about the market, and relevant technological advances. Licensing of retailers of tobacco products will also contribute to the elimination of illicit trade, by allowing enforcement agencies to suspend or cancel the licences of retailers selling illicit tobacco products. Licensing of retailers should therefore be strongly encouraged, though it should be recognized that it may not be practical in some countries, for example where there are a large number of street vendors selling tobacco products.

Content

Parties to the protocol should agree to require participants in the tobacco business, including manufacturers, distributors, importers, exporters, and wholesalers of tobacco products, tobacco leaf dealers, and suppliers of major inputs to the manufacturing process, including suppliers of manufacturing equipment and suppliers of filter tow, to apply for a license to conduct such business, to hold a current license at all times while conducting such business, and to periodically apply to renew the license. The protocol should strongly encourage Parties to consider extending their licensing requirements to include retailers of tobacco products and tobacco growers, while recognizing that such requirements will not be practicable in all Parties. Parties should agree to require license holders to be of good character and to comply with all relevant domestic laws and regulations, including KYC procedures and requirements relating to acceptable forms of payment.

1.2 Know Your Customer procedures

Paragraph 7 of the protocol template discusses Know Your Customer (KYC) procedures.

Rationale

Requiring participants in the tobacco business to follow KYC procedures – prescribed procedures for the performance of due diligence in the selection of customers and contractors – will help to minimise the risk of tobacco products being diverted into the illicit supply chain.

Content

Parties to the protocol should agree to require each manufacturer, distributor, importer, exporter, and wholesaler of tobacco products, tobacco leaf dealer, and supplier of major inputs to the manufacturing process, in respect of any person or entity with whom it transacts for the sale, storage, transport or distribution of tobacco, tobacco products, or major inputs to the tobacco product manufacturing process, including manufacturing equipment, to:

- establish the identity of the person or entity using reliable independent source documents, data or information;
- establish that the person or entity possesses all relevant licenses required by law;
- obtain information regarding any relevant offences recorded against, or charges filed by government agencies against, the person or entity, or, in respect of an entity, against any of its managers, directors, and/or legal representatives;
- obtain information regarding the purpose of the business relationship, including, in particular, the nature and intended destination of the tobacco, tobacco products, or inputs to the tobacco product manufacturing process which are to be sold, stored, transported, or distributed pursuant to the relationship; and
- monitor, on an ongoing basis, the business relationship and transactions undertaken pursuant to the relationship, to ensure consistency with the information obtained by the participant in the tobacco business with respect to the person or entity.

Each participant in the tobacco business should be required to immediately report to competent authorities any information which could reasonably be taken as an indication that any person or entity with whom it transacts for the sale, storage, transport or distribution of tobacco, tobacco products, or inputs to the tobacco product manufacturing process may have committed or been involved in the commission of, or may be likely to commit or be involved in the commission of, an offence covered by the protocol, and to cease transacting with that person or entity unless and until authorised to do so by the competent authority. Parties should agree to establish appropriate systems and procedures to ensure that such reporting can be carried out efficiently and effectively. Such systems and procedures may include dedicated telephone ‘hotlines’ or electronic reporting mechanisms.

1.3 Anti-money laundering measures

Paragraphs 11-12 of the protocol template discuss anti-money laundering measures.

Rationale

Through money laundering – the practice of engaging in financial transactions in order to conceal the source of money – criminals can conceal and profit from their illicit activities. Because organised crime groups participate in illicit trade in tobacco products, it is critical that Parties take measures to prevent the use of proceeds of criminal activities as payment for tobacco, tobacco products, or major inputs to the tobacco product manufacturing process. Implementing KYC procedures will be instrumental in this respect. In addition, targeted anti-money laundering measures will be required to restrict the methods by which payments related to the sale, storage, transport or distribution of tobacco, tobacco products, and major inputs to the tobacco product manufacturing process may be made.

Content

Parties to the protocol should prohibit participants in the tobacco business – including manufacturers, distributors, importers, exporters, and wholesalers of tobacco products, tobacco leaf dealers, and suppliers of major inputs to the manufacturing process – from accepting payments related to the sale, storage, transport or distribution of tobacco, tobacco products, or major inputs to the tobacco product manufacturing process, except payments by the end consumer of tobacco products, other than in specified acceptable forms. All payments should be required to be made in the same currency and amount as the invoice issued by the participant in the tobacco business, and acceptable forms of payment should be limited to:

- wire transfers or cheques from a bank account in the name of the person or entity, or an affiliate of the person or entity, with whom the participant in the tobacco business is transacting;
- cashier's cheques, bank drafts, or letters of credit issued by a bank in the country in which the person or entity with whom the participant in the tobacco business is transacting is located, or a bank in the country in which the participant in the tobacco business is located; and
- cash, but only where the nature and scale of the business of the person or entity with whom the participant in the tobacco business is transacting are such that it is not commercially feasible for that person or entity to use a wire transfer, cheque, cashier's cheque or bank draft (such as may be the case for a small retailer of tobacco products).

1.4 Duty upon manufacturers not to facilitate illicit trade in their products

Paragraphs 25-26 of the protocol template discuss obligations on manufacturers to control the supply chain for their products and not to facilitate smuggling.

Rationale

Manufacturers of tobacco products have significant control over the supply chain of their products. In order to ensure that manufacturers exercise this control responsibly, Parties should require manufacturers to take steps to ensure that they do not facilitate illicit trade in their products, and should attach serious civil and criminal penalties to failure to take such steps.

Content

Parties to the protocol should agree to require each manufacturer of tobacco products operating within their territory to take steps to ensure that it does not facilitate illicit trade in its products. Such steps should include, at minimum:

- not to transact for the sale, storage, transport or distribution of its tobacco products with a person or entity who might, after the carrying out of the requisite KYC procedures, reasonably be suspected to have participated or be likely to participate in illicit trade in tobacco products;
- to sell and distribute its tobacco products only in amounts commensurate with retail demand in the intended market of sale;
- to have in place adequate procedures for the monitoring of transactions for the sale, storage, transport or distribution of its tobacco products, including training of its employees and appropriate systems for the internal reporting of suspicious transactions.

Recognizing the control that a manufacturer can exercise over the supply chain of its products, Parties to the protocol should agree to treat seizures by law enforcement authorities of a significant quantity of contraband tobacco products as evidence that the manufacturer of those tobacco products has failed to take steps to ensure that it does not facilitate illicit trade in its products, and should hold the manufacturer liable for unpaid taxes and duties on the seized products.

1.5 Tracking and tracing

Paragraphs 13-20 of the protocol template discuss the tracking and tracing of tobacco products.

Rationale

In order to effectively combat illicit trade in tobacco products, law enforcement authorities need to be able to: monitor the movement of lawfully manufactured tobacco products as they travel through the supply chain; re-create the route taken by lawfully manufactured tobacco products that they have seized; and distinguish lawfully manufactured tobacco products from counterfeit and other unlawfully manufactured products. Tracking and tracing technologies allow them to do each of these, and their use is thus essential to effective enforcement of laws designed to eliminate illicit trade in tobacco products.

The essence of tracking and tracing systems is that secure information about the origin, payment of taxes in relation to and movement of products through the supply chain is encoded onto the products themselves, using a combination of overt and covert security features, with this information being able to be accessed through the use of electronic reading devices. These systems allow for the identification of products as licit or illicit – meaning both whether they have been lawfully manufactured and distributed, and whether relevant taxes and duties have been paid – through the reading of the information encoded on the products. Where a product is seized, law enforcement authorities are able to identify the last point at which the product was within the licit supply chain, and thus more easily ascertain how it came to be in the illicit market.

Content

Parties to the protocol should agree to require all tobacco products manufactured, sold, supplied, or offered for sale or supply within their territory to be marked with prescribed information. Such information should be recorded using secure technologies, in a manner that can be accessed by law enforcement authorities within the Party's territory. It should include information on the place, date, machine and production shift of manufacture, the movement of products through the supply chain, and the payment of applicable taxes and duties. Requirements to record information should be imposed on manufacturers, wholesalers, exporters and importers. Given the cross-border nature of illicit trade in tobacco products, Parties should agree to implement measures in a way that facilitates the international standardization of the technologies used.

1.6 Record keeping

Paragraphs 21-24 of the protocol template discuss record keeping by participants in the tobacco business.

Rationale

The trade in tobacco products that have been lawfully manufactured cannot be monitored by law enforcement authorities unless those who participate in the trade make and keep records of their activities, and provide access to these records to authorities. Records need to be kept at each stage of the trade, including manufacture, wholesale, retail, export, import and shipment so that activities engaged in at each of these stages can be monitored. While much of this information should be required to be recorded on products themselves using tracking and tracing technologies, those who participate in the trade need to maintain the records in a manner that can be obtained by law enforcement authorities at all relevant times, and not only when particular products are seized. Law enforcement authorities must be able to conduct routine audits of the conduct of those who participate in the trade, and to conduct investigations where wrongdoing is suspected.

Content

Parties to the protocol should agree that they will require manufacturers, wholesalers, exporters, importers and other distributors of tobacco products operating within their territory to make records of all transactions in which they engage and to maintain such records for at least five years. Such records should include information on: place, date, machine and production shift of manufacture, and the manufacturer's intended market of retail sale; the payment of any relevant taxes or duties; the identity of any entity or person from whom the product is obtained or to whom it is supplied and the date of the relevant transaction or shipment. Parties should agree that they will require these records to be maintained in a manner that allows for real-time access, and that law enforcement agencies be given access to these records for the purposes of audit or investigation.

1.7 Restrictions on internet and mail order sales

Paragraphs 27-28 of the protocol template discuss restrictions on internet sales.

Rationale

The sale of tobacco products over the internet or through other mail order channels is easily used as a means of evading taxes and other regulations, including prohibitions on sales to minors and packaging and labelling requirements. To effectively address this problem, Parties will need to apply appropriate restrictions to internet and mail order sales of tobacco products so as to prevent the use of these channels to sell tobacco products to consumers.

Content

Parties to the protocol should agree to adopt such measures as may be necessary to establish as unlawful:

- the sale or offering for sale of tobacco products to a consumer in circumstances where the consumer places the order for such sale by means of telecommunications, the mails, the internet, or any other means where the consumer is not in the same physical location as the seller when the sale or offer of sale is made;

- the sale or supply of products or services (including credit card facilities) to any person or entity where that sale or supply facilitates sale or offering for sale of tobacco products in the circumstances referred to immediately above, where the person or entity who sells or supplies the products or services knows, or ought reasonably to know, that the other person or entity is engaged in, or intends to engage in, such unlawful conduct; and
- the delivery or causing to be delivered of tobacco products to a consumer by use of the mails, common carrier, private delivery service, or any other means where the consumer is not in the same physical location as the seller when the consumer obtains physical possession of the tobacco products.

2. Criminalization and enforcement

2.1 Establishment of offences

Paragraphs 32-34 of the protocol template discuss the establishment of offences for participation in illicit trade in tobacco products.

Rationale

To hold participants in illicit trade in tobacco products accountable for their activities, Parties will need to establish a comprehensive set of offences dealing with the relevant conduct. Agreement on a common set of offences will facilitate international cooperation to combat illicit trade and will minimise the availability of safe havens where participants in illicit trade can escape responsibility for their activities.

Content

Parties to the protocol should agree to adopt such measures as may be necessary to establish as criminal offences, when committed intentionally:

- sale, or supply or delivery for payment, or offering for sale or supply, of tobacco products on which applicable taxes and duties have not been paid, or which are not labelled, marked and stamped in accordance with relevant requirements;
- possession, with intent to sell, or supply or deliver for payment, of tobacco products on which applicable taxes and duties have not been paid, or which are not labelled, marked and stamped in accordance with relevant requirements;
- counterfeiting of tobacco products, tobacco packaging, fiscal stamps or other markings that are used on tobacco products;
- sale, or supply or delivery for payment, or offering for sale or supply of counterfeit tobacco products, tobacco packaging, fiscal stamps or other markings that are used on tobacco products;
- possession, with intent to sell, or supply or deliver for payment, of counterfeit tobacco products, tobacco packaging, fiscal stamps or other markings that are used on tobacco products;
- sale or supply, or offering for sale or supply of tobacco products without the requisite license;
- possession of tobacco products by a participant in the tobacco business without the requisite license;
- sale or supply, or offering for sale or supply of inputs to the tobacco manufacturing process, including manufacturing equipment, without the requisite license;

- possession of inputs to the tobacco manufacturing process, including manufacturing equipment, without the requisite license;
- failure, by a participant in the tobacco business to keep records as required by law;
- maintaining fraudulent records with respect to the tobacco business;
- failure to provide a required notification of export or import;
- misdeclaring matters required to be declared in a notification of export or a notification of import;
- falsifying, removing, defacing, altering or otherwise interfering with tobacco product stamping or marking;
- sale, offering for sale, delivering, or causing to be delivered tobacco products in breach of restrictions on internet and mail order sales;
- conversion or transfer of property, knowing that such property is the proceeds of conduct which would constitute a relevant offence covered by the protocol, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her actions;
- concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of conduct which would constitute a relevant offence covered by the protocol;
- acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of conduct which would constitute a relevant offence covered by the protocol;
- promising, offering or giving to a public official, directly or indirectly, an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of any official duties that relate to any matters referred to in the protocol;
- soliciting or accepting, by a public official, directly or indirectly, an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of any official duties that relate to any matters referred to in the protocol;
- obstructing a public official from performing any official duties that relate to any matters referred to in the protocol;
- making false or misleading statements, or providing false or misleading documents to, a competent authority or public official performing any official duties that relate to any matters referred to in the protocol.

Parties should also agree to establish as criminal offences attempting to commit or participating as an accomplice in any of the above offences, and organizing, directing, aiding, abetting, facilitating or counselling the commission of any of the above offences.

2.2 Liability of legal persons

Paragraph 34 of the protocol template recognizes the need to ‘ensure all individuals and bodies involved in illicit tobacco trade offences are held to account for their actions’.

Rationale

In order to effectively target participants in illicit trade in tobacco products, Parties will need the capacity to hold legal persons (i.e. corporate entities) liable for the commission of offences covered by the protocol.

Content

Parties to the protocol should agree to adopt such measures as may be necessary to establish the liability of legal persons for the offences covered by the protocol.

2.3 Sanctions and penalties

Paragraphs 35-36 of the protocol template discuss sanctions and penalties for the commission of offences relating to illicit trade in tobacco products.

Rationale

In order to deter and punish the commission of the offences covered by the protocol, Parties must attach appropriate sanctions and penalties to these offences.

Content

Parties to the protocol should agree to make the commission of offences covered by the protocol liable to sanctions which reflect their gravity and are serious enough to deter the criminal conduct in practice, taking into account the significant financial incentives associated with the conduct and the substantial resources often available to those engaged in illicit trade, such as tobacco manufacturers and organised crime groups. Such sanctions should be applicable to both legal and natural persons, including managers, directors, officers and/or legal representatives of a legal person who bear responsibility for the conduct of the legal person, and should include:

- imprisonment;
- confiscation of assets including proceeds of offences covered by the protocol, property the value of which corresponds to such proceeds, and income or other benefits derived from such proceeds;
- substantial additional financial penalties;
- confiscation of equipment, conveyances or other property or assets used in or destined for use in the commission of offences covered by the protocol; and,
- where applicable, suspension or cancellation of a license.

2.4 Search, seizure, tracing, freezing, confiscation, destruction and disposal

Paragraphs 37-42 of the protocol template discuss search, seizure, tracing, freezing, confiscation, destruction and disposal to assist in enforcement action to combat illicit trade in tobacco products.

Rationale

Effective enforcement action to combat illicit trade in tobacco products will require that the competent authorities within each Party are empowered to search for, trace, freeze, seize, confiscate, and destroy or otherwise dispose of contraband and counterfeit tobacco products, equipment, conveyances or other property or assets used in or destined for use in the commission of offences covered by the protocol, and proceeds of (or property of corresponding value to proceeds of) such offences. Search, tracing, freezing and seizing

allow authorities to locate proceeds, property and other assets against which sanctions may be enforced, and to prevent such proceeds, property and assets from being moved between jurisdictions, laundered, or dissipated. Confiscation and, as appropriate, destruction and disposal of such proceeds, property and assets prevents their use in ongoing criminal activity, provides evidence for use in the prosecution of offenders, and can contribute to the enhancement of law enforcement capacity.

Content

Parties to the protocol should agree to adopt such measures as may be necessary to enable their competent authorities to identify, trace, freeze, seize, confiscate, destroy or otherwise dispose of: equipment, conveyances or other property used in or destined for use in the commission of offences covered by the protocol; and proceeds of crime derived from offences covered by the protocol, or property the value of which corresponds to such proceeds. Parties should agree to empower their competent authorities to order that bank, financial or commercial records be made available and/or seized for these purposes. Parties should also agree to ensure that illicit tobacco products and related property seized in connection with offences covered by the protocol are destroyed or disposed of, but should allow some flexibility so that Parties may use seized proceeds, property or assets in training customs and other law enforcement officials, and may, where appropriate, compulsorily resell contraband products to the manufacturer of those products in order to prevent the manufacturer profiting from illicit trade.

2.5 Enhanced law enforcement capacity

Paragraphs 29-31 of the protocol template discuss the enhancement of law enforcement capacity to combat illicit trade in tobacco products.

Rationale

Effective enforcement action will require adequate resourcing of, and delivery of appropriate training and educational programs to, police, customs, excise and tax officials, and other relevant regulatory personnel.

Content

Parties to the protocol should agree to take appropriate measures to increase the effectiveness of police, customs and regulatory agencies in combating illicit trade in tobacco products, including provision of adequate financial support and provision of appropriate training, for example, training in surveillance, investigation and enforcement techniques to combat illicit trade.

2.6 Special enforcement techniques

Paragraphs 48-50 of the protocol template discuss special enforcement techniques to be used in combating illicit trade in tobacco products.

Rationale

Special enforcement techniques – including controlled delivery, electronic surveillance and undercover operations – are an important means of effectively dealing with criminal networks of the kind engaged in illicit trade in tobacco products.

Content

Parties to the protocol should agree to take the necessary measures to allow for the appropriate use of controlled delivery and other special investigative techniques, including electronic surveillance and undercover operations, for the purpose of effectively combating illicit trade in tobacco products.

2.7 Establishment of jurisdiction

Paragraphs 51-53 of the protocol template discuss the establishment of jurisdiction over offences relating to illicit trade in tobacco products.

Rationale

The effective exercise by Parties of their jurisdiction over the offences covered by the protocol will be critical in ensuring that participants in illicit trade in tobacco products are held accountable for their activities.

Content

Parties to the protocol should agree to adopt such measures as may be necessary to establish their jurisdiction over the offences covered by the protocol when committed in particular circumstances, including: wholly or partly within the territory of the Party; on board a vessel flying its flag or an aircraft registered under its laws; by its national/s or stateless person/s who habitually reside in its territory; outside its territory in circumstances in which it is foreseeable that the extraterritorial activity will lead to the commission of a relevant offence within its territory; and when the alleged offender is present in its territory and it does not extradite him or her.

3. International cooperation

3.1 Information sharing

Paragraphs 54-57 of the protocol template discuss the sharing of information relating to illicit trade in tobacco products.

Rationale

Effective action to combat illicit trade in tobacco products will be greatly facilitated by timely and efficient sharing of information regarding the nature and scope of illicit trade and the measures taken by Parties to address it.

Content

Parties to the protocol should agree to provide relevant information regarding the nature and scope of illicit trade in tobacco products, including information on trends in illicit trade, persons or entities involved in illicit trade and their methods and means; and information regarding measures taken to address illicit trade, both successes and failures. This information should be communicated to a central

authority – whether the Secretariat or another designated body – and should, subject to requirements for protection of confidential or sensitive information, be disseminated as necessary to inform and facilitate action to combat illicit trade.

3.2 Cooperation in scientific, technical and technological matters

Paragraphs 63-65 of the protocol template discuss cooperation in scientific, technical and technological matters relevant to effective action against illicit trade in tobacco products.

Rationale

Effective action to combat illicit trade in tobacco products will require Parties to have the necessary state-of-the-art technologies and expertise, including in tracking and tracing, law enforcement and special enforcement techniques, and the gathering, management, and sharing of information. Given the cross-border nature of illicit trade in tobacco products, effective action to combat the problem will be facilitated by standardization of relevant technologies where feasible.

Content

Taking into consideration the needs of developing country Parties and Parties with economies in transition, Parties to the protocol should agree to cooperate to strengthen their capacity to implement the provisions of the protocol, including by promoting the transfer of technical, scientific, legal and other relevant expertise and technology. Recognizing the cross-border nature of illicit trade in tobacco products, Parties should also agree to cooperate to promote the international standardization of relevant technologies.

3.3 Cooperation in education, training and public awareness

Paragraphs 68-69 of the protocol template discuss cooperation in education and training of relevant officials, persons involved in the sale, distribution, storage and shipment of tobacco products, nongovernmental organizations and others, with respect to policies, practices and laws to combat illicit trade in tobacco products.

Rationale

Cooperation between Parties in the development and implementation of training and educational programs for police, customs, excise and tax officials and other relevant regulatory personnel, and educational and awareness raising programs for the public and for persons engaged in the sale, distribution, storage and transportation of tobacco products, would significantly enhance the effectiveness of such programs.

Content

Parties to the protocol should agree to cooperate in and to promote internationally the development and implementation of appropriate educational and training programs for police, customs, excise and tax officials, prosecutors and other relevant regulatory personnel, for the public, and for persons engaged in the sale, distribution, storage and transportation of tobacco products, including through secondments and exchanges of staff, development and sharing of materials to be used in education and training, and

mobilization of funding for the development and implementation of educational and training programs.

3.4 Cooperation in respect of investigation and prosecution of offences

Paragraphs 66-67 of the protocol template discuss cooperation in respect of investigation and prosecution of offences relating to illicit trade in tobacco products.

Rationale

Because illicit trade in tobacco products is transnational in nature, cooperation between Parties in respect of the investigation and prosecution of offences covered by the protocol is critical to effective law enforcement action to combat these offences.

Content

Parties to the protocol should agree to cooperate closely with one another in respect of investigation and prosecution of offences covered by the protocol, including through: establishing channels of communication between their competent authorities to facilitate exchange of information; cooperating with one another in conducting enquiries with respect to offences covered by the protocol, including, for example, identifying and monitoring natural persons and legal entities involved in such offences; and facilitating effective coordination between their competent authorities, including through the exchange of personnel and other experts and the undertaking of joint investigations.

To facilitate effective investigation and prosecution of offences and avoid duplication, Parties to the protocol should agree that where a Party is taking, or is considering taking, enforcement action in relation to an offence covered by the protocol, in circumstances in which it is aware or has reason to believe that another Party may be taking, or considering taking, enforcement action in relation to the same or related conduct, it will consult with competent authorities in the other Party, with a view to coordinating their actions.

3.5 Mutual legal and administrative assistance

Paragraphs 70-72 of the protocol template discuss mutual legal and administrative assistance with respect to investigations, prosecutions, and judicial proceedings in relation to offences dealing with illicit trade in tobacco products.

Rationale

In addition to general cooperation between competent authorities in respect of investigation and prosecution of offences covered by the protocol, effective law enforcement action will require formal arrangements for the provision of mutual legal and administrative assistance, including, for example: provision of evidentiary items, documents and records; taking evidence or statements; effecting service of documents; examining objects and sites; executing searches and tracing, seizing and freezing assets or other property; facilitating the voluntary appearance of persons to assist in investigations, prosecutions, and judicial proceedings; and undertaking surveillance and providing relevant information.

Content

Parties to the protocol should agree to afford one another the widest measure of mutual legal and administrative assistance in investigations, prosecutions, and judicial proceedings in relation to the offences covered by the protocol, including the types of assistance just outlined. Mutual legal and administrative assistance should be provided to the fullest extent possible under the relevant laws, treaties, agreements and arrangements of Parties. The protocol should provide for the identification by each Party of a central authority to coordinate mutual legal and administrative assistance requests.

3.6 Extradition

Paragraphs 75-77 of the protocol template discuss extradition of those suspected of offences relating to illicit trade in tobacco products.

Rationale

Because illicit trade in tobacco products is transnational in nature, international cooperation may be required to bring those suspected of relevant offences covered by the protocol to trial.

Content

The protocol should provide for extradition arrangements in respect of a specified range of offences. It should provide that these offences are to be deemed to be included as extraditable offences in any extradition treaty existing between the Parties. The protocol should also provide that if a Party which makes extradition conditional on the existence of a treaty receives an extradition request in respect of these offences from a Party with which it has no extradition treaty, it may consider the protocol as the legal basis for extradition. It should provide that Parties that do not make extradition conditional on the exercise of a treaty should be required to recognise these offences as extraditable offences between themselves.

3.7 Transfer of criminal proceedings

Paragraphs 66-67 of the protocol template discuss the need for coordination between Parties in relation to litigation and prosecution of offences dealing with illicit trade in tobacco products.

Rationale

The effective administration of justice and the avoidance of duplication in the prosecution of offences covered by the protocol will be greatly facilitated by arrangements for the transfer of criminal proceedings from one Party to another in appropriate circumstances.

Content

Parties to the protocol should agree to consider transferring to one another proceedings for the prosecution of an offence covered by the protocol in cases where such transfer is considered to be in the interests of the proper administration of justice, with a view to concentrating the prosecution.

3.8 Cooperation for purposes of confiscation

Paragraphs 46-47 of the protocol template discuss cooperation for purposes of confiscation of proceeds, property, or other assets derived from or used in the commission of offences relating to illicit trade in tobacco products.

Rationale

Because illicit trade in tobacco products is transnational in nature, formal cooperative arrangements between the Parties may be required to allow for confiscation of property or assets used in or destined for use in, and proceeds derived from (or property of corresponding value to proceeds derived from), the commission of offences covered by the protocol. Where Parties cooperate for purposes of confiscation, they should share the confiscated proceeds or property or other assets.

Content

Parties to the protocol should agree that each Party, upon request from another Party in respect of an offence covered by the protocol over which it has jurisdiction, shall submit the request to its competent authorities for the purpose of obtaining an order of confiscation of proceeds, or property the value of which corresponds to such proceeds, or equipment, conveyances or other property or assets used in or destined for use in the offence/s, and give effect to such an order if granted; or shall submit to its competent authorities, with a view to giving effect to it, an order of confiscation issued by a court in the territory of the requesting Party. Parties should agree to consider sharing with other Parties, on a regular or case-by-case basis, proceeds or property or other assets, or funds derived from the sale of such proceeds or property or other assets, confiscated through such cooperation.

3.9 Cooperation with non-Parties

Paragraph 5 of the protocol template discusses the relationship between Parties to the protocol and non-Parties.

Rationale

The effectiveness of measures taken to combat illicit trade in tobacco products will be maximised if as many States as possible participate in these efforts.

Content

Parties to the protocol should agree to encourage non-Parties to adhere to the terms of the protocol, to contribute appropriate information and assistance, and to cooperate with Parties in pursuing the objectives of the protocol. The protocol should encourage Parties to cooperate with non-Parties by responding to requests for assistance which would further the objectives of the protocol, including the provision of appropriate information.

4. Education and awareness raising

Paragraph 5 of the protocol template discusses the promotion of public awareness with respect to illicit trade in tobacco products and the provisions of the protocol.

Rationale

The delivery of appropriate educational and awareness raising programs about illicit trade in tobacco products and the policies, practices and laws implemented to deal with it will significantly increase the effectiveness of measures to combat illicit trade. Educational and awareness raising programs can broaden awareness of enforcement action and sanctions associated with illicit trade, thereby deterring participation in illicit trade and encouraging communication to competent authorities of relevant information and intelligence. Educational and awareness raising programs can also diminish the attractiveness of illicit tobacco products to potential consumers.

Content

Parties to the protocol should agree to develop and implement appropriate programs to educate persons engaged in the sale, distribution, storage and transportation of tobacco products, and to raise awareness among the public, about illicit trade in tobacco products and the policies, practices and laws implemented to deal with it.

5. Institutional arrangements and implementation mechanisms

Paragraphs 78-86 of the protocol template briefly discuss the elements of an institutional framework to support the protocol and its implementation.

Rationale

An appropriate institutional framework to support the protocol and its implementation will be critical to the effectiveness of the protocol in practice. The elements of such an institutional framework are briefly outlined in the protocol template. They may be expected to be discussed in more detail at a later stage in the development of the instrument, following consideration of the core obligations to be included in the protocol.

Content

Key elements of an effective institutional framework to support the protocol and its implementation include:

- the Conference of the Parties;
- the Secretariat;
- committees, as deemed necessary by the Conference of the Parties (these may include, for example, permanent committees to provide advice on scientific, technological, and implementation matters);
- appropriate financial arrangements; and
- implementation mechanisms (including monitoring and reporting, compliance monitoring, assessment and review, and dispute settlement mechanisms).

