

EXECUTIVE SUMMARY:

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

**(AS SET OUT IN DOCUMENT
A/FCTC/COP/2/9)¹**

At its second session, the Conference of the Parties to the WHO Framework Convention on Tobacco Control decided to establish an intergovernmental negotiating body (INB) to draft and negotiate a protocol on illicit trade in tobacco products (decision FCTC/COP2(12)). The decision recognised the protocol template prepared by the illicit trade expert group established by the Conference of the Parties at its first session as a basis for initiating the negotiations by the INB, and 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.

The Framework Convention Alliance for Tobacco Control (FCA) supports the template prepared by the expert group, which recommends the adoption of a protocol under which Parties agree to implement a comprehensive set of measures – at both the domestic and international levels – to combat illicit trade in tobacco products.² FCA’s comments on the protocol template were submitted to the Secretariat in accordance with decision FCTC/COP2(12) and are available online at www.fctc.org. This document summarizes FCA’s comments on the protocol template.

Key elements for inclusion in an effective protocol to combat illicit trade are:

1. CONTROL OF THE TOBACCO PRODUCT SUPPLY CHAIN

A set of measures to assist Parties in controlling and monitoring the tobacco product supply chain will be at the core of an effective protocol to combat illicit trade in tobacco products.

1.1 Licensing³

Licensing enhances the ability of competent authorities to ensure that participants in the tobacco business comply with relevant laws and regulations. Authorities may enforce such laws and regulations by refusing to issue licences to, or suspending or cancelling the licences of, those who fail to comply. 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, for example where there are a large number of street vendors selling tobacco products.

1.2 Know Your Customer procedures⁴

Requiring participants in the tobacco business to follow Know Your Customer (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. 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 to obtain prescribed information 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, and to monitor each such business relationship on an ongoing basis to ensure consistency with that information. 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 a person or entity with whom it transacts 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.

1.3 Anti-money laundering measures⁵

Because organised crime groups participate in illicit trade in tobacco products, it is critical that Parties adopt targeted 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. Parties to the protocol should prohibit participants in the tobacco business 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 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 is located or 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 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 products⁶

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 each manufacturer to take steps to ensure that it does not facilitate illicit trade in its products, and should attach serious civil and criminal penalties to failure to take such steps. Required 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; and 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. Parties should agree to treat seizures by law enforcement authorities of a significant quantity of contraband tobacco products as evidence that the manufacturer of those 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 products.

1.5 Tracking and tracing⁷

Tracking and tracing systems – through which secure information about the origin, payment of taxes in relation to and movement of tobacco products through the supply chain can be encoded onto the products themselves and accessed electronically – allow authorities to identify seized products as licit or illicit (meaning both whether they have been lawfully manufactured and distributed, and whether relevant taxes and duties have been paid), and to identify the last point at which a seized product was within the licit supply chain. Tracking and tracing is thus essential to the effective enforcement of laws designed to eliminate illicit trade in tobacco products. 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, including 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. Such information should be recorded using secure technologies, in a manner that can be accessed by law enforcement authorities within the Party's territory. Given the cross-border nature of the problem, Parties should agree to implement these

1.6 Record keeping⁸

The trade in tobacco products cannot be monitored by law enforcement authorities unless those who participate in it make and keep records of their activities, and provide access to these records to authorities. While certain information should be required to be recorded on products themselves through tracking and tracing, records also need to be maintained in a manner that can be obtained by law enforcement authorities at all relevant times, and not only when particular products are seized. Parties to the protocol should agree to 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, in a manner that allows for real-time access by law enforcement authorities, for at least five years. Such records should include information on: the 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.

1.7 Restrictions on internet and mail order sales⁹

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. Parties to the protocol should agree to establish as unlawful the use of these channels to sell tobacco products to consumers.

2. CRIMINALIZATION AND ENFORCEMENT

Agreement on a comprehensive set of criminal offences dealing with participation in illicit trade in tobacco products, and on associated enforcement matters – including enforcement mechanisms such as sanctions and penalties, search, seizure, tracing, freezing, confiscation, destruction and disposal, and special enforcement techniques; and supportive provisions dealing with such matters as the liability of corporate entities, the establishment of jurisdiction, and the enhancement of law enforcement capacity – will be central to an effective protocol to combat illicit trade. Effective criminalization and enforcement deters participation in illicit trade and allows competent authorities to hold participants in illicit trade accountable for their activities. Agreement on a common set of offences and associated enforcement matters will facilitate international cooperation to combat illicit trade and will minimize the availability of safe havens where participants in illicit trade can escape responsibility for their activities. Key elements dealing with criminalization and enforcement are as follows:

2.1 Establishment of offences¹⁰

2.2 Liability of legal persons¹¹

2.3 Sanctions and penalties¹²

2.4 Search, seizure, tracing, freezing, confiscation, destruction and disposal¹³

2.5 Enhanced law enforcement capacity¹⁴

2.6 Special enforcement techniques¹⁵

2.7 Establishment of jurisdiction¹⁶

3. INTERNATIONAL COOPERATION

The inclusion of a set of international cooperative measures designed to support Parties in implementing the core elements of a protocol on illicit trade in tobacco products will be critical in ensuring the effectiveness of the protocol. Key measures include: general cooperative measures – such as information sharing with respect to the nature and scope of illicit trade and the measures taken to address it, cooperation for the transfer of expertise and relevant technologies and for the standardization of such technologies where feasible, and cooperation in the development and implementation of training and educational programs; and cooperation with respect to particular offences or investigations – including cooperation in respect of investigation and prosecution of offences, and formal arrangements for mutual legal and administrative assistance, extradition, transfer of criminal proceedings, and cooperation for purposes of confiscation. Cooperation with non-Parties will also increase the effectiveness of the protocol. Key international cooperative measures include:

3.1 Information sharing¹⁷

3.2 Cooperation in scientific, technical and technological matters¹⁸

3.3 Cooperation in education, training and public awareness¹⁹

3.4 Cooperation in respect of investigation and prosecution of offences²⁰

3.5 Mutual legal and administrative assistance²¹

3.6 Extradition²²

3.7 Transfer of criminal proceedings²³

3.8 Cooperation for purposes of confiscation²⁴

3.9 Cooperation with non-Parties²⁵

4. EDUCATION AND AWARENESS RAISING²⁶

Appropriate educational and awareness raising programs about illicit trade in tobacco products and the policies, practices and laws implemented to deal with it will increase the effectiveness of core elements of a protocol on illicit trade, both by broadening 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, and by diminishing the attractiveness of illicit tobacco products to potential consumers.

5. INSTITUTIONAL ARRANGEMENTS AND IMPLEMENTATION MECHANISMS²⁷

An appropriate institutional framework to support the protocol and its implementation will be critical to the effectiveness of a protocol on illicit trade in practice. The elements of such an institutional framework, including implementation mechanisms (such as monitoring and reporting, compliance monitoring, assessment and review, and dispute settlement mechanisms), 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.

¹ This document summarises FCA's Comments on the Template for a Protocol on Illicit Trade in Tobacco Products (as set out in document A/FCTC/COP/2/9), submitted to the Secretariat on 11 November 2007 pursuant to decision FCTC/COP2(12) of the second session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control, and available online at www.fctc.org.

² '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), available online at http://www.who.int/gb/fctc/PDF/cop2/FCTC_COP2_9-en.pdf ('the protocol template').

³ Licensing is discussed in paras 6-10 of the protocol template.

⁴ Know Your Customer procedures are discussed in para 7 of the protocol template.

⁵ Anti-money laundering measures are discussed in paras 11-12 of the protocol template.

⁶ Obligations on manufacturers to control the supply chain for their products and not to facilitate smuggling are discussed in paras 25-26 of the protocol template.

⁷ Tracking and tracing is discussed in paras 13-20 of the protocol template.

⁸ Record keeping is discussed in paras 21-24 of the protocol template.

⁹ Restrictions on internet sales are discussed in paras 27-28 of the protocol template.

¹⁰ Establishment of offences is discussed in paras 32-34 of the protocol template.

¹¹ The need to 'ensure all individuals and *bodies* involved in illicit tobacco trade offences are held to account for their actions' is recognized in para 34 of the protocol template.

¹² Sanctions and penalties are discussed in paras 35-36 of the protocol template.

¹³ Search, seizure, tracing, freezing, confiscation, destruction and disposal are discussed in paras 37-42 of the protocol template.

¹⁴ Enhanced law enforcement capacity is discussed in paras 29-31 of the protocol template.

¹⁵ Special enforcement techniques are discussed in paras 48-50 of the protocol template.

¹⁶ Jurisdiction is discussed in paras 51-53 of the protocol template.

¹⁷ Information sharing is discussed in paras 54-57 of the protocol template.

¹⁸ Cooperation in scientific, technical and technological matters is discussed in paras 63-65 of the protocol template.

¹⁹ Cooperation in training is discussed in paras 68-69 of the protocol template.

²⁰ Cooperation in respect of investigation and prosecution of offences is discussed in paras 66-67 of the protocol template.

²¹ Mutual legal and administrative assistance is discussed in paras 70-72 of the protocol template.

²² Extradition is discussed in paras 75-77 of the protocol template.

²³ The need for coordination between Parties in relation to litigation and prosecution of the offences covered by the protocol is recognized in paras 66-67 of the protocol template.

²⁴ Cooperation for purposes of confiscation is discussed in paras 46-47 of the protocol template.

²⁵ Cooperation with non-Parties is discussed in para 5 of the protocol template.

²⁶ The promotion of public awareness is discussed in para 5 of the protocol template.

²⁷ The elements of an institutional framework to support the protocol and its implementation are discussed in paras 78-86 of the protocol template.