

Key recommendations on the Chairperson's text for a protocol on illicit trade in tobacco products (FCTC/COP/INB-IT/2/3)

**Second session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products
20-25 October 2008, Geneva, Switzerland**

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. The Conference of the Parties (COP) has recognized the need for a protocol to effectively address illicit trade, mandating an intergovernmental negotiating body (INB) to draft and negotiate a protocol.¹ In establishing the INB, the second session of the COP (COP-2) recognized the template for a protocol on illicit trade in tobacco products,² prepared by an expert group established by the first session of the COP (COP-1), 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. Support was expressed for the inclusion in a protocol of each of the key elements proposed in the expert group's template.³ The Chairperson of the INB has, in accordance with the COP-2 decision and based on the discussions of INB-1, elaborated a draft text for a protocol on illicit trade in tobacco products for consideration by the second session of the INB (INB-2).

The Chairperson's text

FCA congratulates the Chairperson and the Convention Secretariat on their work in elaborating the Chairperson's text for a protocol on illicit trade in tobacco products. FCA considers that the Chairperson's text contains most of the key elements of an effective protocol to combat illicit trade in tobacco

¹ '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)).

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

³ See generally the Chairperson's reflections on the overall content of the discussions: 'Drafting and negotiation of 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, first session, FCTC/COP/INB-IT/1/7, 15 February 2008), available at http://www.who.int/gb/fctc/PDF/it1/FCTC_COP_INB_IT1_7-en.pdf.

products and provides a strong basis for the work of INB-2. Nevertheless, FCA considers that the text should be improved in a number of respects. This document summarizes FCA's recommendations in relation to the key substantive elements contained in Parts III (Supply chain control), IV (Enforcement) and V (International cooperation) of the Chairperson's text. More detailed comments are presented in FCA's 'Comments on the Chairperson's text for a protocol on illicit trade in tobacco products (FCTC/COP/INB-IT/2/3)', available at www.fctc.org.

Part III: Supply chain control

FCA supports the inclusion in the protocol of a strong set of measures to control and monitor the tobacco product supply chain. These measures will form the core of an effective approach to combating illicit trade in tobacco products.

Licence

FCA supports the proposed requirement that key participants in the tobacco product supply chain be required to hold a license and that those who breach relevant laws and regulations not be permitted to participate. Licensing requirements enable authorities to restrict participation in an activity to those persons who can be expected to comply with relevant laws, and provide a flexible mechanism to support the enforcement of such laws.

FCA considers that the draft provision on Licensing in the Chairperson's text contains the key elements of an effective licensing system, including: designation of an agency or agencies to issue, renew, suspend and cancel licences; requirements that applicants for a licence provide information about themselves and their business; requirements for periodic review, renewal, inspection or audit of licensees; and suspension or cancellation of licenses where relevant laws have been contravened.

FCA recommends the following key improvements to the draft provision:

- extending licensing requirements to wholesalers, brokers and warehousemen of tobacco products, which are all important links in the supply chain;
- extending licensing requirements to all tobacco leaf dealers and all commercial importers and exporters of tobacco leaf, rather than requiring licensing of such persons based on threshold quantities of tobacco leaf sold;
- including a provision encouraging Parties to extend licensing requirements to tobacco growers where practicable to do so;
- including a provision encouraging Parties to extend licensing requirements to retailers of tobacco products where practicable to do so; and

- including a provision requiring Parties to refuse to grant a licence where an applicant has contravened or facilitated the contravention of relevant laws within a certain period.

Customer identification and verification

FCA supports the proposed requirement that participants in the tobacco product supply chain be obliged to conduct due diligence with respect to the persons with whom they transact, and to refuse to transact with persons who have contravened relevant laws. Due diligence obligations require persons to exercise responsibility with respect to those with whom they transact, and therefore for what happens with their products once they part with them.

FCA considers that the draft provision on Customer identification and verification in the Chairperson's text contains the key elements of effective due diligence requirements, including: requirements to obtain information from persons with whom transactions are engaged in; conduct of further due diligence in the event of a material change in circumstances; periodic reporting on compliance with due diligence obligations; termination of a relationship in circumstances of contravention of relevant laws; and monitoring of the activities of persons with whom transactions are engaged in in order to detect transactions that do not appear to be commensurate with product demand.

FCA recommends the following key improvements to the draft provision:

- extending due diligence obligations to all tobacco leaf dealers and all commercial importers and exporters of tobacco leaf, rather than requiring licensing of such persons based on threshold quantities of tobacco leaf sold;
- including a provision encouraging, but not requiring, Parties to extend due diligence obligations to growers of tobacco leaf; and
- including in the provision on Customer identification and verification the proposed obligation with respect to suspicious transaction reporting (currently located in sub-provision 7 of the draft provision on Security and preventive measures), which is an important element of due diligence.

Tracking and tracing

FCA supports the proposal that Parties be required to implement tracking and tracing measures, and the application of tracking and tracing obligations as far through the tobacco product supply chain as possible. Tracking and tracing measures allow authorities to monitor the movement of lawfully manufactured tobacco products as they travel through the supply chain, and re-create the route taken by lawfully manufactured tobacco products that they have seized.

FCA considers that the draft provision on Tracking and tracing in the Chairperson's text includes the key elements of an effective international tracking and tracing system, including: recording of information on both imported and locally manufactured products; uploading of information onto a database, with that information being accessible by the authorities; sharing of information between Parties; and ongoing improvement of the system in light of ongoing technological developments.

However, FCA considers that there are a number of complex technological and practical issues that need to be further considered before draft provisions on tracking and tracing can be concluded. The discussion of these issues will require considerable technical expertise and attention, and FCA considers that progress requires the establishment of a dedicated working group, which should be mandated to present a report to the third session of the INB (INB-3).

While the detail of obligations with respect to tracking and tracing should be considered further through a working group, FCA would like to note some general preliminary concerns with respect to the draft provision in the Chairperson's text:

- FCA is concerned that the Chairperson's text proposes requirements with respect to cigarettes only when packaged in master cases and cartons, and not at pack level – the only reference to cigarette packs is the requirement in sub-provision 10(d) to endeavour to cooperate with respect to 'further development of the technology to mark and scan cigarette packs'. FCA considers that the protocol should include obligations relating to cigarette packs.
- FCA is concerned that the Chairperson's text may be read as suggesting that tracking and tracing will occur through non-standard national systems. FCA considers that the possibility of internationally standardized tracking and tracing should be considered by the proposed working group.
- FCA is concerned that the use of the word 'scanning' in the draft provisions in the Chairperson's text may be too restrictive, suggesting a requirement for certain kinds of technology.
- FCA is concerned that the approach taken in sub-provision 10 of the draft provision in the Chairperson's text to ongoing cooperation in relation to technological matters may not be effective. FCA considers that, given the complexity of the technological issues, the establishment of an ongoing subsidiary body should be considered to facilitate the necessary cooperation.

Record-keeping

FCA supports the proposed requirement that participants in the tobacco product supply chain be obliged to keep records of transactions in which they engage and to make these records easily accessible to relevant authorities. The trade in tobacco products cannot be monitored by authorities unless

those who participate in it make and keep records of their activities, and provide access to these records to authorities.

FCA considers that the draft provision on Record-keeping in the Chairperson's text includes the key elements of an effective international approach to record-keeping, including: obligations to maintain records for a specified period of time; obligations to make records available to relevant authorities; and sharing of records between Parties.

As obligations with respect to record-keeping and the sharing of records between Parties will overlap with those relating to tracking and tracing, FCA recommends that the draft provision on record-keeping also be considered by the proposed working group on tracking and tracing, to ensure that the two provisions work effectively together, with all necessary information being required to be recorded and shared and no unnecessary duplication.

While noting that obligations on record-keeping should be considered further through a working group, FCA recommends that record-keeping obligations should apply to all transactions other than final retail sale – including for all tobacco leaf dealers and all commercial importers and exporters of tobacco leaf – with the only exception being for tobacco growers, in relation to whom the obligations should be encouraged rather than required.

Security and preventive measures

FCA supports the proposed requirement that Parties oblige participants in the tobacco product supply chain to take measures to prevent the diversion of tobacco products into illicit trade channels. Such requirements ensure that participants in the tobacco product supply chain exercise responsibility with respect to what happens to products once they part with them, reinforcing provisions requiring the undertaking of due diligence.

FCA considers that the draft provision on Security and preventive measures in the Chairperson's text includes key effective measures, including: a general obligation to take all reasonably practicable measures to prevent diversion; restrictions on acceptable methods of payment; and an obligation not to supply in amounts that exceed legitimate demand.

FCA recommends the following key improvements to the draft provision:

- applying the obligation to 'take all reasonably practicable measures to prevent the diversion of tobacco products into illicit trade channels' to all participants in the tobacco business – while what is 'reasonably practicable' will depend on the kind of entity and the circumstances in which it operates, all participants in the tobacco business should be required to meet this standard; and
- including a provision obliging participants in the tobacco business to transact only with persons they, on reasonable grounds, believe to be

licensed, where a license is required for the conduct of the activities in which such persons are engaged.

As noted above, FCA recommends that sub-provision 7, dealing with the reporting of suspicious transactions, be moved to the draft provision on Customer identification and verification.

Internet and other telecommunication-based modes of sale

FCA does not support the approach to internet and other telecommunication-based sales of tobacco products proposed in the Chairperson's text, which would permit the sale of tobacco products via the internet and other means of telecommunication, provided 'all relevant obligations covered by th[e] Protocol' had been complied with.

The sale and purchase of tobacco products via the internet or other means of telecommunication are easily used as a means of evading taxes, as well as other regulations including prohibitions on sales to minors and packaging and labelling requirements. FCA considers that such evasion cannot be effectively addressed by the measures proposed under other provisions of the Chairperson's text, most of which do not require obligations to be imposed on those centrally involved in internet sales – including retailers, purchasers, delivery service providers and others who facilitate such transactions, including credit card service providers. FCA recommends the inclusion in the protocol of a provision requiring Parties to ban internet and other telecommunication-based modes of sale of tobacco products to consumers, as proposed by several Parties at INB-1.

Part IV: Enforcement

FCA supports the inclusion in the protocol of strong provisions relating to enforcement – both the establishment of a comprehensive set of offences and the provision of effective enforcement mechanisms. Effective enforcement of laws against illicit trade in tobacco products deters participation in illicit trade and holds those who breach the law accountable for their conduct.

Offences

FCA supports the proposed requirement that Parties establish offences to hold those who participate in or facilitate illicit trade in tobacco products accountable for their conduct and to facilitate international cooperation to combat illicit trade.

FCA considers that, while that not all of the offences to be established should be required to be criminal offences – as some Parties may wish to establish other kinds of offences (such as regulatory offences that carry civil fines or

other civil penalties) for some kinds of proscribed conduct – it is critical that the most serious conduct be criminalized by all Parties, particularly if criminalization is to be treated as the basis for the formal aspects of international legal cooperation set out in Part V of the Chairperson’s text.

FCA recommends the following key improvements to the draft provision:

- moving certain of the conduct included in sub-provision 1 (to be established as ‘unlawful’) to sub-provision 2 (to be established as ‘criminal’), including: defacing, falsifying, removing altering or interfering with required labelling, stamping or marking of tobacco products; obstruction of inspectors, auditors and other public officials and making incomplete or false statements to inspectors, auditors, customs officers or other authorised public officials; and failure to maintain records or maintaining false records; and
- not requiring the criminalization of counterfeiting tobacco products or dealing in counterfeit tobacco products. FCA notes that counterfeit as an intellectual property matter is already dealt with through other international agreements and arrangements, and considers that the protocol, and the resources that will be required to ensure its effective implementation, should only be concerned with the sale of counterfeit products to the extent that this undermines public health by evading taxation laws and other relevant laws and regulations, not with the protection of tobacco manufacturers’ intellectual property rights.

FCA broadly supports the draft provisions on:

Liability of legal persons – which will ensure that Parties may hold corporate entities liable for the commission of any offence covered by the protocol;

Sanctions – which will ensure that Parties impose effective sanctions on those held liable for any offence covered by the protocol;

Search of premises and seizure of evidence – which will ensure that Parties’ competent authorities may search premises and seize evidence with respect to the commission of any offence covered by the protocol;

Confiscation and seizure – which will ensure, to the greatest extent possible, that Parties’ competent authorities may: confiscate property, equipment or other instrumentalities used in or destined for use in any criminal offence covered by the protocol, and proceeds of (or property of corresponding value to proceeds of) such offences; and identify, trace and seize such items for the purpose of eventual confiscation;

Destruction – which will ensure that tobacco, tobacco products or relevant manufacturing equipment or key inputs confiscated by Parties are destroyed and cannot re-enter the illicit market, but allow for their legitimate use in training and law enforcement; and

Special investigative techniques – which will ensure that Parties' competent authorities may use appropriate special investigative techniques to effectively combat illicit trade.

FCA also supports the principle reflected in the draft provision on **Seizure payments** – that a manufacturer/producer has significant capacity to control its supply chain, and should be held accountable for failing to exercise this control responsibly. However, FCA considers that further work may be required to articulate how this principle can best be implemented with respect to cross-border trade. FCA recommends that the Parties request the Convention Secretariat to prepare a paper on these issues for consideration by INB-3.

Part V: International cooperation

FCA supports the inclusion of strong provisions on international cooperation in the protocol. Effective international cooperation – including exchange of a range of relevant information, cooperation in scientific, technical and technological matters and cooperation in law enforcement – is critical to combating illicit trade in tobacco products.

Information sharing

FCA supports the inclusion in the protocol of comprehensive provisions on information sharing between Parties. FCA considers that the draft provisions dealing with information sharing in the Chairperson's text will greatly facilitate the sharing of relevant information in order to effectively combat illicit trade, including through the communication of information to a central authority to be shared with all Parties.

However, FCA considers that further work will be required to articulate how the 'secure, central, automated database' proposed in the Chairperson's text will work – including how information will be placed on the database, how information will be accessible, and by whom the database will be administered (eg the Secretariat or a technical body reporting to the Meeting of the Parties) – and to ensure that the various provisions of the Chairperson's text that deal with information sharing work effectively together. FCA recommends the establishment of a working group to further consider the draft provisions on information sharing, either at INB-2, or inter-sessionally to report back to INB-3.

FCA broadly supports the draft provisions on:

Assistance and cooperation: Training, technical assistance and cooperation in scientific, technical and technological matters – which will facilitate cooperation in training, technical assistance and scientific,

technical and technological matters to assist in effective action against illicit trade in tobacco products;

Jurisdiction – which will ensure that Parties establish their jurisdiction over criminal offences covered by the protocol in appropriate circumstances;

Joint investigations – which will facilitate the establishment of joint investigative bodies on a bilateral or multilateral basis to combat illicit trade in tobacco products;

Mutual legal assistance – which will facilitate the provision of the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the criminal offences covered by the protocol; and

Extradition – which will assist Parties in holding those involved in the commission of criminal offences covered by the protocol accountable for their criminal conduct.

FCA fully supports the principle that Parties should cooperate in the prevention, detection, investigation, prosecution and punishment of offences covered by the protocol, but recommends that the relationship between the draft provisions on **Assistance and cooperation: Investigation and prosecution of offences** and **Law enforcement cooperation** be further examined, and the provisions carefully drafted together to ensure their effectiveness.

FCA also fully supports the principle that Parties should share all relevant information to assist one another in the prevention, detection, investigation, prosecution and combating of illicit trade, but recommends that the content of the draft provision on **Mutual administrative assistance** be moved to the provision on Information sharing, and examined together with the other provisions dealing with information sharing to ensure their effectiveness.

Omissions from the Chairperson's text

FCA notes that two important provisions considered in the expert group's template for a protocol on illicit trade in tobacco products have not been included in the Chairperson's text, and recommends that they be added to the draft protocol:

Enhancement of law enforcement capacity – 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 personnel (as recognized in paras 29-31 of the template); and

Cooperation for purposes of confiscation – 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 (as recognized in paras 46-47 of the template).

The expert group's template also recognized the importance of three other matters which FCA considers should be included in the protocol:

- a provision providing for the **transfer of proceedings** for the prosecution of a criminal offence covered by the protocol from one Party to another, where such transfer is considered to be in the interests of the proper administration of justice (the need for coordination between Parties in relation to litigation and prosecution of offences was discussed at paras 66-67 of the protocol template);
- provisions dealing with **public education and awareness-raising** to prevent and combat illicit trade in tobacco products (promotion of public awareness was discussed at para 5 of the protocol template); and
- a provision dealing with **cooperation with non-Parties** to the protocol, which should be drafted when the substantive content of the protocol is further advanced and the Parties to the FCTC can determine which of the arrangements for exchange of information and cooperation might usefully be extended to non-Parties to the protocol (the relationship between Parties and non-Parties was discussed at para 5 of the protocol template).

Finally, FCA considers that, as proposed by several Parties at the first session of the INB, the protocol should require Parties to **ban tax-free and tax-reduced sales of tobacco products to international travelers**, including such sales that occur in duty-free stores. In many parts of the world, tobacco products supposedly intended for duty-free outlets are diverted in vast volumes, tax-free, into contraband distribution networks. The most effective way to prevent this from occurring would be to completely ban such sales.