

Comments and Recommendations on “Drafting and Negotiation of a Protocol on Illicit Trade in Tobacco Products”



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**Taiwan, a Partner and Friend of the FCTC
June 2008**

**COMMENTS AND RECOMMENDATIONS ON
“DRAFTING AND NEGOTIATION OF A PROTOCOL
ON ILLICIT TRADE IN TOBACCO PRODUCTS”
(FCTC/COP/INB-IT/1/7)**

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Preface

We have the pleasure to review the note recording the Chairperson’s personal view of the overall content of the discussions that have taken place during the first session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products held in Geneva, 11–16 February 2008. The document is entitled “Drafting and Negotiation of a Protocol on Illicit Trade in Tobacco Products” (FCTC/COP/INB-IT/1/7) (hereinafter “INB Drafting and Negotiation Document”), which includes very detailed discussions on the drafting and negotiation of a protocol on illicit trade in tobacco products. We are pleased to note the significant progress in the discussions.

Situated in a region that is of substantial interest to prevent and eliminate illicit trade in tobacco products, and being a member in the international society, we feel that we have a moral obligation to share our opinions on certain issues, in the hope that these opinions might be taken into consideration in the next stage of negotiations.

The comments and recommendations presented in this booklet are drafted and prepared carefully by a group of experts in Taiwan after many rounds of deliberation. They are made in accordance with the order of the issues discussed in “INB Drafting and Negotiation Document”, with the original paragraphs being included in each column, followed by our reasoned comments and recommendations.

This is our second time to make comments and recommendations on the FCTC documents. In June 2007, we made our “Comments and Recommendations on Draft Guidelines and Protocols for Tobacco Control under FCTC”. We will be working on commenting other documents under

the FCTC. We do hope that our constant and continuous efforts will be of help to enhance the negotiations and to perfect the future protocol on illicit trade as well as other documents.

Licensing Issues

Original texts of “INB Drafting and Negotiation Document”

Para. 7

Many delegations called for the protocol to contain clear and strong licensing obligations, such as periodic licensing renewal. A concern was raised that economic burdens placed on licensees may actually lead to an increase in illicit trade. Concern was also raised that loopholes may decrease the effectiveness of the goals of the protocol. In light of this, specific consideration should be given to ensuring unity and coherence between the protocol and other agreements and legislation, where possible.

Para. 9

Another topic of considerable discussion was the issue regarding revenue collected from licensing. Many Parties felt that the terms of the protocol should allow governments more flexibility concerning the use of licensing revenues.

Para. 10

Two differing views were raised regarding the transferability or assignability of licenses. One perspective was that licenses should not be transferable or assignable to prevent weakened control by governments over the licensing process and enforcement. However, other Parties noted that in order to protect economically vulnerable licensees and to recognize the reality of genuine business activity, such as corporate mergers, licenses should be transferable or assignable. Concerns were raised over the administrative costs of the licensing procedure in general; specifically, developing country Parties as well as Parties with economies in transition were concerned about the proposed periodic renewals of licenses.

Comments and recommendations:

1. We consider the licensing system an effective way to control illicit trade. Thus, we are of the view that the protocol on illicit trade in tobacco products should incorporate an obligation of establishing a licensing system in the Parties. By regulating the tobacco merchants and collecting the revenue by issuing licenses, governments would be

in better position for the control of tobacco products and their illicit trade.

2. When deciding whether to adopt a licensing system, we must consider the costs associated with and arising from the administration and implementation of regulatory regimes and the burden on the relevant players, especially the retailers. Moreover, to ensure effective enforcement of a licensing system, there should be sanctioning mechanism against those in breach of the licensing requirement.

Original texts of “INB Drafting and Negotiation Document”**Para. 11**

Several delegations raised the possibility that the protocol could adopt a process of registration through a public registry, rather than licensing. This may assist both government authorities and smaller retailers by reducing the administrative burden associated with the licensing process. Establishing a public registry may also reduce the potential for forged licenses.

Para. 12

The scope of licensing of the tobacco chain was discussed. The matter of very small retailers was raised, particularly with regard to transient retailers or those that sell individual pieces, given their impact on youth access to tobacco products. The difficulty in licensing small retailers was considered. It was proposed that retailers could be required to obtain a license in order to sell tobacco products, and that in order to eliminate the sale of single pieces, only those retailers that sell tobacco products in appropriate packages would be allowed licenses.

Para. 13

With regard to the supply chain, it was suggested that the scope of the licensing obligations should include references to tobacco leaf growers, producers and dealers, as well as to transportation services, machinery and key elements in the production of cigarettes, such as acetate tow. With regard to retailers, it was suggested that licensing obligations in the protocol should address non-tobacco-specific retailers, such as supermarkets and newsagents, as well as tobacco-specific retailers.

Comments and recommendations:

1. About the growers: Some of the tobacco leaves are grown by individual tobacco farmers, and others are grown by business enterprises in larger scale. Although applying licensing regulations to individual tobacco farmers would cause heavy burden to them, it is still necessary to regulate both the individual farmers and business

entities in order to control the transaction of tobacco leaves. This is basically because individual tobacco farmers also sell raw leaf materials to business entities. If individual tobacco farmers are not subject to similar licensing regulation, we will not be able to have complete picture about the sources and amount of tobacco leaves and thus will be unable to enact proper policies and to have effective implementation. However, we are of the opinion that there must be distinction between these two kinds of business operations in their regulations. For individual farmers, the procedure of applying a license should be processed in an expedited manner; the required documents should be reduced down to a very minimum level; and the requirement of fees should be waived.

2. About the machinery: It is not very feasible to regulate the transaction of machinery through licensing system. Machineries used to produce tobacco products can be assembled from different components. And the assembling can be done by the tobacco producers themselves. Thus if we are to impose licensing requirement on the manufacturing of “tobacco producing machinery”, the machinery producers might decide only to produce components or parts of the machines, instead of producing the final machines for the production of tobacco products. While if we are to impose licensing requirement on the production of components or parts of machineries, it is even more impractical. Because most of these parts and components can be used not only for assembling machineries for the production of tobacco products, but also for assembling machineries for other purpose. It is not likely, for regulatory purpose, to distinguish which components are specifically used for the final assembly for machines to produce tobacco products. Even there is such licensing requirement on the manufacturing of the parts and components that can be assembled for machines to produce tobacco products, the requirement is not easy to be implemented.
3. About the transportation of tobacco products: The problem with a licensing requirement on the transportation of tobacco products is of similar nature. Transporters are usually not limiting themselves for transporting tobacco products. If we are to require all companies which transport tobacco products, whether or not regularly or exclusively doing this business, to be subject to licensing requirement, it is in essence to require all companies in the transportation business to apply for licenses. This would be a very cumbersome regulatory

regime. But if we are to require those companies regularly or exclusively doing the business of transporting tobacco products, we might not be able to regulate any. Because, if the licensing requirement constitutes a real burden to the companies, they might decide to broaden their business operations so as not to make transporting tobacco products as their sole or regular business.

4. About the distributors: We share the opinion that distributors should be subject to licensing regulation.
5. About the retailers: In most countries, there are multitudinous retailers. If a licensing system is adopted for the purpose of regulating retailers, there could involve very high administrative costs for the regulatory agencies and heavy burden for the retailers. In this regard, we suggest to have cost/benefit analysis before imposing licensing requirement on the retailers. In addition, if the protocol is to impose governments with the obligation to establish a licensing system for retailers, it is suggested that countries, especially developing countries and countries with economies in transition, are provided with flexibilities for their decisions to implement such requirement.
6. About the chain store: Chain store is not mentioned in the document. Chain stores are neither distributors nor regular retailers. Considering their scale of sales and their widely covering network as well as their capability to import huge amounts of tobacco products, chain stores should be subject to licensing regulations similar to those for distributors.
7. About the control of the key element: The concept of “key element” is too indistinct. And the range may be too extensive. We believe that this kind of abstract regulating mode must be avoided and the regulated object should be specifically listed.

Anti-money Laundering Issues

Original texts of “INB Drafting and Negotiation Document”

Para. 16

It was noted that the template includes a range of distinct but related concepts in this area dealing with money laundering. It was suggested that these individual concepts be more clearly and separately elaborated in order to facilitate a more logical structure.

Comments and recommendations:

1. We recommend including a provision in the protocol to require governments to in turn require banks, non-bank financial institutions and other institutions which are frequently being utilized to conduct money laundry to set up their monitoring systems. At least we recommend that parties adopt “know your customer rules” (i.e. confirm clients’ identity, save transaction data, and return dubious transactions) to avoid laundering problems.
2. Additionally, considering the fact that international regulations on money-laundering issues, such as the United Nations Anti-Corruption Convention, United Nations Convention Against Transactional Organized Crime already exist, and in order to avoid any unnecessary overlap, we do not see the need of having money laundry issue being covered by the protocol. We suggest elaborating the reasons about why an additional set of provision on money laundry is needed in the protocol on illicit tobacco trade.

Tracking and Tracing Issues

Original texts of “INB Drafting and Negotiation Document”

Para. 19

It was suggested that consensus is required regarding international traceability standards to ensure their practicality and operability. However, several delegations voiced their concern regarding the feasibility and capacity of developing country Parties and Parties with economies in transition to implement a complex or sophisticated tracking and tracing system. Various delegations expressed the need to consider Parties who do not have the capacity to control large areas of their national boundaries and the difficulties they may face when attempting to implement a tracking and tracing obligation.

Comments and recommendations:

1. There could be commercial interests arising from the requirement of tracking and tracing. Technically, there must be international standards established for the purpose of unifying tracking and tracing mechanism so as to allow different countries to effectively implement such policy. Considering the technical ability needed and manufacturing costs required to unify the standards and to manufacture the relevant equipments, there may only be manufacturers in developed countries and limited number of more advanced developing countries that have the required manufacturing capability. The results could be that small number of manufacturers might be able to monopolize the commercial interests and that it causes too much financial burden to developing countries and countries with economies in transition to implement the tracking and tracing requirement. We suggest to put more thoughts on this possible situation and on the ways of coping with it so as to avoid a situation where developing countries and countries in economic transition will have to pay unreasonable costs arising from acquiring equipment and facilities for the implementation of tracking and tracing mechanism.

Record-keeping Issues

Original texts of “INB Drafting and Negotiation Document”

Para. 23

There was discussion with regard to ensuring that the protocol establishes a firm obligation on manufacturers and distributing bodies to comply with record-keeping provisions. Several delegations recommended that sanctions may be imposed if these obligations were not met. It was also suggested that the obligations concerning record-keeping could be extended to include tobacco growers and other participants in the supply chain.

Para. 25

It was noted that developing country Parties as well as Parties with economies in transition may face limited record-keeping capacity, including access to suitable equipment, needed to maintain computerized records and real-time access to records. This difficulty also extends to smaller manufacturers and distributing bodies from all jurisdictions for the same reasons. However, it was suggested that the obligation could be widened to include non-computerized records.

Comments and recommendations:

1. We agree with the opinion of many delegations who suggest that the protocol should establish a firm obligation on manufacturing and distributing apparatus to comply with record-keeping provisions. And we also agree with the opinions of delegations who suggest that the obligations concerning record-keeping could be extended to include tobacco growers and other participants in the supply chain.
2. We share the view that a well-established system of information-sharing between Parties is valuable in combating illicit trade in tobacco. We are also of the view that the role that the non-Parties can play in the establishment and implementation of an information-sharing scheme is also of equal importance and should be taken into proper account. Including non-Parties into information-sharing systems would make the system more complete and efficiently operational.

Issues on Security and Preventive Measures

Original texts of “INB Drafting and Negotiation Document”

Para. 26

There was general discussion regarding the security of the supply chain to ensure that all participants act responsibly to prevent tobacco products from being diverted during their production, storage and movement. It was suggested that if the obligations in the protocol were not respected, then there should be criminal and/or civil sanctions imposed. There was also a suggestion that in addition to the manufacturers, other participants, such as shippers and transporters, be included in the definition of the supply chain and be covered by any such sanctions.

Para. 27

There was considerable discussion regarding the level and type of sanction that could be applied and the appropriateness of using criminal, civil and administrative measures to achieve this goal. Principles of criminal liability were discussed and distinctions were noted between negligence and lack of due diligence.

Comments and recommendations:

1. Countries having jurisdiction to impose punishment: We are of the view that Parties should be obligated to ensure that participants at any stage or level of the supply chain would take measures to prevent the illegal diversion of tobacco products during production, storage, and transportation. If such products are diverted to an unintended destination, the participants responsible for the supervision of such products should be liable. Based on this reason, we suggest the protocol to empower exporting countries, importing countries, the countries where smuggles are taking place, and any other related countries (as long as the products are in that country), to impose punishment against participants of illicit trade at any level or stage of transaction. Although there could be a problem of conflict of jurisdictions arising from such view, it could be solved through international cooperation.
2. Persons subject to punishment: According to the reasons mentioned in

the preceding paragraph, participants of any stage in the supply chain should have the obligation to secure tobacco products not to be diverted to the unintended destination. Therefore, we suggest all participants at any stage in the supply chain be subject to the provision of punishment.

3. Types of punishment: In many jurisdictions, administrative penalty plays an important role because its process is less complicated and more flexible, and the implementation could be more efficient. Therefore, in addition to civil and criminal penalties, administrative penalty is also a possible choice. This could be emphasized in the future protocol.

Internet Sales Issues

Original texts of “INB Drafting and Negotiation Document”

Para. 28

Delegations noted the importance of eliminating the illicit trade in tobacco products on the Internet, but recognized the regulatory challenges posed by such trade, especially in relation to licensing and taxation. It was proposed that Internet sales should be included in licensing processes. Regarding taxation of Internet sales of tobacco products, delegations felt that taxes on both sellers and buyers should be included in the protocol. It was suggested that the tracking and tracing regime, and the requirements that it would place on distributors, would help to address these regulatory challenges. Many delegations called for the protocol to address the transport and delivery of tobacco products marketed over the Internet. While direct local delivery by businesses may not be controlled, it was recognized that mail orders could be included in the provisions of a protocol. Delegations noted that both Internet sales and mail order sales of tobacco products should be included in the protocol.

Para. 29

Delegations had divergent views on whether Internet sales of tobacco products should be prohibited completely. Several delegations called for a complete prohibition of sales of tobacco products over the Internet given the difficulty of monitoring such sales and the jurisdictional issues that may arise. Others regarded such a prohibition as problematic. It was recommended that the protocol include a prohibition of Internet sales of tobacco products to minors.

Para. 30

Many delegations reiterated the link between Articles 13 and 15 of the WHO Framework Convention on Tobacco Control and suggested that the Article 13 work on Internet advertising might provide important guidance to the development of this provision of a protocol on illicit trade in tobacco products. Additionally, delegations noted that a provision on Internet sales in a protocol on illicit trade must take into account the obligations regarding Internet advertising, promotion and sponsorship under Article 13

of the WHO Framework Convention.

Comments and recommendations:

1. There are many reasons to have complete prohibition of internet sales. First, internet transaction has such anonymity nature. Identifying the real buyers who use internet and preventing teenagers from buying tobacco products through the internet are extremely difficult and costly. Second, traders could avoid taxes through internet sales. Third, tracking and tracing tobacco products would become impracticable for internet sales. Fourth, licensing mechanism for the purpose of controlling tobacco sales would become ineffective with regard to sellers on the internet, especially those sellers located in other countries. Fifth, the country where the buyer of tobacco products is located might have practical difficulty in exercising its jurisdiction over the company of another country operating the websites, through which tobacco products are sold. Sixth, Parties are required, under paragraph 4(e) of Article 13 of FCTC, to undertake a comprehensive ban on advertisement on internet within five year. In order to conduct internet sales, the sellers would have to display the names, brands or pictures of tobacco products and their prices on the internet. The displaying of such information would constitute “tobacco advertising and promotion,” which is defined by Article 1(c) of FCTC as a “form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.” Since internet advertisement of tobacco products should be prohibited, there is no reason to allow their internet sales, which would always constitute internet advertisement.
2. In regard to mail order sales, there will always be certain forms of indications providing information about the tobacco products by the seller so as to generate mail order sale. The indication is a form of “commercial communication, recommendation, or action with the aim, effect, or likely effect of promoting a tobacco product or tobacco use either directly or indirectly advertising and promotion,” and thus constitutes “tobacco advertising and promotion.” It is apparent that mail order sales should also be completely banned.

Issues on Enhanced Law Enforcement Capacity

Original texts of “INB Drafting and Negotiation Document”

Para. 32

The discussion regarding enhanced law enforcement capacity addressed the need for clear and strong provisions in the areas of technical assistance, financial support, international cooperation and capacity building. It was highlighted that control of the illicit trade in tobacco products should enjoy the same international support as the existing areas of illicit trade in arms and pharmaceutical products. Additionally, clarification was requested for the terms “illicit tobacco”, “illicit trading” and “enforcement officers”.

Para. 33

It was suggested that a protocol could place an obligation upon the Parties to enhance the effectiveness of police, customs and other relevant authorities through capacity building and the application of adequate resources. Such a measure would help to ensure the successful implementation and enforcement of the provisions of a protocol. However, it was noted that an obligation to enhance law enforcement capacity may place an enormous burden on developing country Parties and Parties with economies in transition.

Comments and recommendations:

1. We share the view of some delegations that governments should be imposed with an obligation to enhance the effectiveness of the implementation through capacity building. However, when setting up concrete criteria for the determination of the obligations, some practical problems must be dealt with. In other words, it seems very difficult to precisely delineate the contents of the obligation concerning the certain required capacity of implementing the FCTC and the protocol. For instance, how much financial or human resources should be invested or allocated so as to enhance the capacity of the custom administrations is a matter that cannot be decided numerically. Since countries with different levels of development would have different ranges of available resource, we suggest only to establish some kind of minimum standards of capacity, with some

flexibilities provided for developing countries and countries with economic transition.

Original texts of “INB Drafting and Negotiation Document”**Para. 34**

There was general discussion regarding possible methods of international cooperation that can be used to enhance law enforcement capacity, such as collaboration with nongovernmental organizations, the encouragement of public awareness, the possibility of providing hotlines, the provision of training on tracking and tracing practices and the sharing of data across regions and internationally. The concern was raised that without this support, developing country Parties and Parties with economies in transition could be exploited by transnational organized crime.

Para. 35

It was suggested that a protocol should call for customs activities to be expanded to include not only the import and export of tobacco products, but also the transit of tobacco products. Additionally, it was proposed that the protocol should consider the effects of existing international agreements and instruments to avoid duplication.

Comments and recommendations:

1. With respect to international cooperation, delegations only touched upon cooperation among Parties. However, it should be emphasized that illicit trade takes place not only between or among Parties, but also between Parties and non-parties. We strongly urge delegations to consider the enhancement of cooperation with non-Parties under the protocol through some forms of regional or international initiatives so as to effectively eliminate illicit trade.
2. On the issue of information sharing, we suggest that the sharing of information concerning national implementation and law enforcement experiences, such as methods of detecting illegal activities, could also be useful. Sharing experiences and other information would help countries to reduce the duplication of their learning efforts.

Issues of Offences, Sanctions and Penalties

Original texts of “INB Drafting and Negotiation Document”

Para. 38

It was noted that references to unauthorized activities should always acknowledge the relevant authorizing body. Delegations made suggestions of specific offences that should be covered by the protocol in addition to those set out in the template. These additions included, inter alia: the sale of tobacco seeds without a license, failing to maintain accounting documents, falsifying licenses and accounting documents, the sale of counterfeit tobacco products or fiscal stamps, the sale of illicit tobacco products to and by minors, submitting incomplete information to a customs official and the sale of tobacco products over the Internet. Concern regarding strict liability offences was also raised.

Para. 39

Delegations indicated that a clear definition of illicit trade was needed in order to make it a criminal offence. It was raised that including criminal offences in the protocol may not be appropriate and that Parties should consider including administrative and civil offences instead.

Para. 41

It was recognized that there is a need for coherence between the licensing and offences sections of the protocol. Discussion covered the need to include in the protocol effective deterrents to illicit trade and indicated that in the drafting of the Chairperson’s text, different legal systems and relevant existing agreements and arrangements should be taken into account. It was noted that a minimum standard for offences should be set and defined, with the penalty for the offence being set by the Parties.

Comments and recommendations:

1. We share the view about criminalizing those serious breaches of regulations of tobacco products. This would also help law enforcement agencies in carrying out their duties. For instance, if there is no criminal punishment, agencies in charge of criminal investigation might not be in a position to help regulators to conduct their

investigations and to collect evidence. With criminal punishment, the criminal investigating authorities are in proper position to intervene all investigations about tobacco illicit trade.

2. We also suggest that, in addition to imprisonment, criminal punishments should include sizable pecuniary penalties, the amount of which should be large enough to deter further violation. Applying this conception of “impoverishing offenders” would effectively create disincentives for illicit tobacco trade.
3. When requiring Parties to impose criminal sanctions, some principles could be included in the protocol for the Parties to take into account: First, criminal sanctions must be serious enough to deter violation. Second, the principle of proportionality must be an important element for Parties to formulate their criminal provisions and for judges to make sentences. Third, infringements or breaches of law in commercial scale must be differentiated from minor or smaller scale offenses concerning their respective sanctions.
4. Note that the term “strict liability” is commonly used to refer to liability to compensate the damage, regardless of whether the actors have any negligence. The concept of strict liability normally is not used to refer to criminal offenses. Thus the term “strict liability” in paragraph 38 of the “INB Drafting and Negotiation Document” is a little bit confusing.

Original texts of “INB Drafting and Negotiation Document”**Para. 42**

Many delegations expressed support for strong sanctions and penalties for illicit trade in tobacco products. It was also indicated that governments should have flexibility to decide which penalties to impose, and there was support for the consideration of a wide range of remedies, rather than just penalties. The inclusion of criminal sanctions, in addition to civil sanctions, was proposed. There was also a suggestion to remove mention of specific types of penalties. It was noted that new sanctions not covered by the WHO Framework Convention should be considered carefully, and there was a recommendation that sanctions and penalties be based on the seriousness of the offence.

Para. 44

Further clarification was requested for various terms and ideas, including “restitution”, “probation” and “previous conviction”. A number of delegations indicated that the title “sanctions and penalties” should be revised, given the disparity of penal and administrative systems among Parties; possible alternatives suggested included “illicit conduct” or simply “penalties”.

Para. 45

Some delegations raised the question of how previous convictions may affect sanctions and penalties. In particular, concern was expressed regarding the inclusion in the protocol of reference to “previous convictions” and the effect this may have on domestic prosecutions.

Comments and recommendations:

1. As suggested in the preceding section, we suggest to include the following principles in the protocol: First, criminal sanctions must be serious enough to deter violation. Second, the principle of proportionality must be an important element for Parties to formulate their laws and for judges to make sentences. Third, infringements or breaches of law in commercial scale must be differentiated from minor

or smaller scale offenses.

2. In addition, we agree that a clear definition of illicit trade in tobacco products is indispensable in order to make it a criminal offence. Although all kinds of unauthorized activities could fall within the concept of illicit trade, not all of them should constitute criminal offenses. The criminal sanctions should be imposed only for those more serious illicit trade activities.
3. Also, if civil sanctions against illicit trade in tobacco products are to be included in the protocol, the following issues have to be clarified: 1. the parties entitled to enforce the rights; and 2. whether it is appropriate to provide tobacco companies with a legal basis for claims on civil liability.
4. To explain further, the rights of civil sanction against illicit trade in tobacco products would basically be based on torts, rather than contractual obligations. In order to apply the tort law, it is necessary to define whose legitimate interest is injured, how much damage is caused and who is entitled to bring legal action for the remedies. However, these issues are unclear with regard to illicit trade in tobacco products. If we are to allow the government to make civil claim, it is unclear about how we could consider the government having any right or legitimate interests, which is injured by the illicit traders. If we are to allow tobacco companies to make civil claim against illicit traders, it might not be an acceptable policy from public health perspective. If we are to allow potential consumers of tobacco products to make the claim, neither is it in line with the policy of reducing smoking, nor is it likely to establish a right or a legitimate interest of the consumers that have been infringed. In brief, the legal basis for having a civil sanction is unclear. There is a need to further clarify in future negotiations.
5. We agree with the view that countries could also apply administrative measures to sanction illicit trade. However, it should be noted that the degree of administrative sanction may vary widely from jurisdiction to jurisdiction. In some countries the strictness of administrative sanction, such as very high administrative fine, is not less effective than some kinds of criminal liability. Therefore, the protocol should allow certain flexibility to countries with regard to administrative measures to replace criminal punishment, as long as the administrative punishment is serious enough to deter further illicit trade in tobacco products.

Issues on Search, Confiscation and Seizures of Illicit Tobacco Products and Disposal of Proceeds of Crime

Original texts of “INB Drafting and Negotiation Document”

Para. 48

Many delegations voiced support for including provisions in the protocol for granting customs and law enforcement officials search and seizure powers, and it was suggested that a minimum standard for such powers could be included in the protocol. However, delegates noted that standards should be flexible enough to allow Parties to reflect them in their own legislation. It was noted that all customs officials should have the legal basis to search for and confiscate tobacco products.

Para. 49

Another topic of considerable discussion was the issue regarding revenue collected from licensing. Many Parties felt that the terms of the protocol should allow governments more flexibility concerning the use of licensing revenues.

Para. 50

During the discussion, delegations reiterated the need for the protocol to contain clear definition of property that can be seized and confiscated.

Comments and recommendations:

1. There are two issues involved in the confiscation and seizure of illicit tobacco products. First, the definition of property subjected to confiscation or seizure is ambiguous. For example, it is debatable whether the state could confiscate factories or residences in which contraband or counterfeit tobacco products are manufactured or stored. Second, even though the criminal law allows the government to confiscate or seize the proceeds of crime and the tools or devices with which crimes were committed, the definitions of proceeds and tools could be diverse from state to state. Thus, the Protocol should take different domestic legislations into considerations when specifying the scope of property that the state can confiscate and seize in cases of illicit tobacco productions and sales.

2. We also suggest delegations to consider imposing obligations onto producers to buy back tobacco products being traded illicitly at market prices. This is basically a strict liability for the producers. It will also ensure producers to make certain that their tobacco products will not be diverted to any places other than their original destination.
3. From the perspective of the government, if the government is given with the options to either destroy the tobacco products or require producers to buy back contraband tobacco products, it could enhance the effectiveness of law enforcement and could also increase revenue for its law enforcement activities. One exception to the flexibility is that the counterfeit tobacco products must all be destroyed.
4. The protocol should put more emphasis on the methods of enhancing the effectiveness of law enforcement. For example, with a proper rewarding program or other incentives, governmental officials would be more willing to put more efforts in conducting the search, confiscation and seizure activities.

Concerning the Shift of Burden of Proof

Original texts of “INB Drafting and Negotiation Document”

Para. 58

Several delegations expressed concern regarding the inclusion of provisions that could create a reverse burden of proof.

Comments and recommendations:

1. We agree with several delegations’ concern about creating a reverse burden of proof in cases of illicit production and trade of tobacco. Reversing burden of proof is feasible in civil cases, while it may violate suspects’ privilege against self-incrimination in criminal cases. Thus, if the protocol is to create the reverse burden of proof in criminal cases related to illicit tobacco productions and trade, we suggest that the provision should be applied only to shift the government’s burden of proving the mount of suspect’s proceed which is subject to confiscation to the suspect so as to require the suspect to prove that his property is not the proceeds of crime.
2. More specifically, the reverse of burden in criminal cases related to illicit tobacco trade should be applied with prudence because it would compel the suspect to be a witness against himself. However, if a suspect is proved guilty of illicit tobacco trade and the court needs to decide what are subject to confiscation, the privilege against self-incrimination does not seem to apply. Because the confiscation of property is irrelevant to the establishment of crime. Thus, it seems not problematic to create a reverse burden of proof and require the suspect to prove his property being not the proceeds of illicit tobacco production and trade.

Issues on Special Enforcement Techniques

Original texts of “INB Drafting and Negotiation Document”

Para. 59

It was clarified that certain wording in the template was not prescriptive, but rather provides examples of methods available to Parties to achieve the goals of the protocol. Several delegations suggested that the protocol should refrain from listing specific examples of special enforcement techniques, including electronic surveillance methods. Delegations indicated that there should be flexibility in the implementation of measures having to do with special enforcement techniques, and reiterated that provisions must take into account the requirements of national law.

Para. 60

Concern was raised that developing country Parties as well as Parties with economies in transition may not have the means to implement sophisticated electronic surveillance systems. It was suggested that such Parties would benefit from international cooperation and assistance in this area.

Comments and recommendations:

1. Generally speaking, high technologies, professional skills, and international cooperation are required in order to have effective implementation. We thus suggest states to extent cooperation to a wider range of fields, such as mutual judicial and administrative assistance, information exchanges, and technical assistance. Since illicit trade would always involve two or more countries, special and expedited procedures for the cooperation between countries should be developed to allow effective investigation.

Jurisdiction Issues

Original texts of “INB Drafting and Negotiation Document”

Para. 63

Several delegations called for the protocol to include an obligation on Parties to enter into bilateral extradition agreements or alternative arrangements to ensure the prosecution of offenders. It was noted that the issue of jurisdiction is complex and that it may not be possible to deal with it comprehensively in this protocol. Therefore, it was suggested that a cautious approach be adopted in this regard.

Comments and recommendations:

1. We share the view about encouraging Parties to enter into bilateral extradition agreements. However, we also suggest that a multilateral extradition agreement should be more effective for the purpose of ensuring the extradition of offenders from different countries. Moreover, we are of the view that if the protocol is to have really effective implementation, non-Parties should be given an opportunity and even should be encouraged to participate in such extradition mechanism.

International Cooperation Issues

Original texts of “INB Drafting and Negotiation Document”

Para. 64

There was general recognition that the protocol should require Parties to collect and share information in a timely manner and should include cooperation with other bodies such as the World Customs Organization and the European Anti-Fraud Office. It was also suggested that information already shared as part of existing international agreements could be drawn on as part of the information sharing required under the protocol.

Para. 65

Delegations discussed the need for a centralized, user-friendly, secure database. The data base should be easily accessible, with training to be provided on its use. It was suggested that such a database be administered by either the Convention Secretariat, regional offices or another centralized body, with Parties providing information online.

Para. 70

Delegations supported the establishment of optimum standards in the field of data protection, provided national laws regarding confidentiality and privacy are observed. In addition, they discussed the need for strong bilateral agreements and possible additional national legislation that would enhance international cooperation in this area.

Comments and recommendations:

1. We agree with the idea that information being available for law enforcement and customs agencies for their timely access is essential to combat against illicit tobacco trade. However, we also suggest that some kind of mechanism to allow the general public to provide relevant information and to have access to such information not only would enhance public awareness, but also could help enforcement activities.
2. Moreover, we also suggest that non-Parties should be encouraged to provide relevant information to enhance the database. And the

information should also be made available to them. It is crucial to have complete information disregarding the information being from Parties or non-Parties. It is equally important to have the information being properly used by both Parties and non-Parties so as to have effective implementation of the protocol and to prevent illicit trade.

Original texts of “INB Drafting and Negotiation Document”**Para. 74**

Various delegations requested clarification on the cooperation measures proposed in the template and how these measures can be distinguished from those in other sections of the template and other United Nations conventions concerning transnational crime. It was noted that while Parties may already have investigation cooperation agreements in force, it would be possible to create further obligations in this protocol.

Para. 75

Several delegations referred to a need for Parties to share their experiences of prosecution of those involved in the illicit trade in tobacco products in order to analyze and draw on successful policy, systems and measures for use internationally.

Para. 76

With regard to cooperation in the prosecution of offences, concern was raised regarding the admissibility of evidence collected in other jurisdictions. It was proposed that customs authorities and other relevant bodies be encouraged to enter into mutual administrative assistance agreements to ensure that evidence collected is admissible in proceedings.

Comments and recommendations:

1. Making effective use of evidence collected by other Parties helps the prosecuting Party to effectively proceed with its judicial process. However, there might be a need to modify domestic litigation rules so as to ensure that this evidence is admissible and bearing significant weight of proof in the legal proceeding of the prosecuting Party. Delegations mentioned only the passive admission of evidence collected in other jurisdictions. We believe that the active assistance should be given more consideration in designing the mechanism of mutual assistance.

Original texts of “INB Drafting and Negotiation Document”**Para. 78**

Several delegations suggested that Parties should be able to refuse the rendering of mutual legal assistance on the grounds of the absence of dual criminality.

Para. 79

There were some concerns about duplicating obligations in other international agreements. However, it was noted that the parties to those agreements may not be exactly the same as those to the protocol. Therefore it might be appropriate to repeat some of the relevant elements in the protocol, while ensuring that such elements do not conflict with existing obligations or arrangements. There were also suggestions that the protocol should encourage Parties to enter into mutual legal and administrative assistance agreements.

Comments and recommendations:

1. We suggest that the mechanism of cooperation and mutual assistance should be established not merely among Parties. It is equally significant to Parties to allow non-Parties to be associated with the cooperation arrangement. The future protocol shall take into account the role that the non-Parties can play to help the achievement of the goals of the FCTC and the protocol.

Original texts of “INB Drafting and Negotiation Document”**Para. 80**

The discussion on the topic of extradition produced differing opinions. Some delegations suggested that the protocol should promote the use of international agreements. Others thought that it was an issue for each Party to decide, with due regard to national law. It was noted that consensus on this issue may be difficult due to the complexity of extradition issues.

Comments and recommendations:

1. The availability of extradition does help Parties to combat illicit trade in tobacco products. However, it should be noted that difficult problems sometimes occur when exercising extradition. This is mainly because of the different substantive requirements and procedural rules adopted by the Parties. Instead of focusing on extradition, we suggest that requiring Parties to impose certain minimum criminal punishment would reduce the need of extradition. In other words, if an offender is to be criminally punished in the country requested to extradite the person, the importance and need of extraditing the person to the requesting country to be prosecuted there would be greatly reduced and the original goal of extradition can basically be met.

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THE COMMENTS AND RECOMMENDATIONS

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