

# Smuggling provisions in the FCTC

## Positioning the US and WCO proposals

### Action on Smoking and Health (London)

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One of the key measures in the FCTC is the development of a regime to tackle tobacco smuggling – important for both fiscal and human health. Many proposals have been made and captured in the Co-Chairs' texts and a later text proposal on liability. During INB-3 proposals for a smuggling protocol made by the U.S delegation and a protocol on 'Mutual administrative assistance' developed by the World Customs Organisation became available.

### **Positioning**

The **Co-Chairs' texts** provide a series of basic measures that give the outline of a smuggling regime and some useful starting points on which a robust regime might be created. In some cases, detail would need to be elaborated in a more technical instrument – a protocol.

The government of Iran has developed **language on liability and compensation**, and this includes liability arising out smuggling. This would establish a series of principles that could be included in the FCTC and then, if necessary, elaborated in a protocol.

The **US protocol proposal** provides helpful language in several areas – and gives welcome impetus to the development of a smuggling regime. But, the general nature of the language and commitments – which should be mostly uncontroversial – suggest this text is appropriately placed in the Convention itself. The problem with the US proposal is not the measures that were proposed, but that they were proposed as a *protocol* – thus suggesting extremely limited ambition for the protocol, leaving no place for the detail necessary. The proposal also only covers a subset of the potential measures, and does not include, for example: tracking and tracing, security markings, banning or controlling duty free, liability, destination market label. For these reasons the NGO response was generally quite negative.

The **WCO protocol** proposal has been developed outside the FCTC process – this is currently subject to consultation among the WCO members and will be discussed at the WCO policy committee in December. This is a specific instrument of some 35 articles providing a thorough elaboration of just one aspect of an anti-smuggling regime – 'mutual administrative assistance'. This type of instrument could easily form a 'chapter' in an FCTC smuggling protocol, dealing with one of the basic obligations expressed in the Convention.

### **Contents of proposals**

This summarises the scope of proposals made so far.

### **Co-Chairs' texts**

The main elements include:

- Banning duty free sales
- Tracking and tracing / markings
- Labelling of destination market
- Licensing
- National measures
- Co-operation
- Data collection
- Disposal of seized contraband
- Monitoring and control of distribution
- Ban on internet sales
- Formulation of a protocol

The suggestion that smuggling might also be tackled by harmonising tax policies has also been made, but this is unlikely to be successful – as most smuggling involves evading all tax rather than exploiting tax differences between countries.

### **Liability and compensation proposal (Iran)**

The main elements include:

- Criminal sanctions applied to those supporting, financing or facilitating smuggling
- Civil liability applied to producers, importers, exporters for harms caused by them arising from smuggling
- Liability of governments for failing to implement the treaty properly

### **US protocol proposal**

The main elements include:

- National measures
- Closed distribution system
- Licensing of 'wholesale' trade including producers
- Record keeping
- Monitoring
- Co-operation
- Information exchange
- Reporting
- Research and development

### **WCO protocol proposal on 'mutual administrative assistance'**

The main elements include:

- Definitions
- Scope of information exchange
- Surveillance of suspect movements
- Controlled delivery (sting operations)
- Arrangements for assistance
- Hot pursuit
- Joint operations
- Information exchange
- Recovery of Customs claims
- Exchange of expert witnesses
- Procedures for making requests of other parties
- Arrangements for visiting officials
- Confidentiality
- Exemptions
- Cost sharing regime
- Reservations and final clauses

### ***Conclusion and recommendations***

It can readily be seen that the WCO protocol text represents a detailed and thorough implementation of just one general principle – that of mutual assistance or co-operation. This principle could be incorporated in the FCTC and elaborated as one 'chapter' in a smuggling protocol. Other chapters could elaborate other approaches specified in the FCTC. We recommend the following approach:

- The US could present some or all of its text for adoption within the *convention* rather than as a protocol.

- The final version of the WCO protocol could be adopted as a 'chapter' in a protocol that elaborates the principle of co-operation established in the Convention.
- The protocol could be negotiated in parallel with the convention and aim to give all the obligations specified in the convention operational effect - at a level of detail equivalent to the WCO protocol.
- The negotiation of the smuggling protocol could be a joint undertaking by WHO/WCO and relevant officials of governments in separate meetings.
- Overall responsibility and political commitment would remain with governments, with the FCTC being the main enabling