

CONFRONTING ILLICIT TOBACCO TRADE:



WORLD BANK GROUP

A GLOBAL REVIEW OF COUNTRY EXPERIENCES

THE PROTOCOL TO ELIMINATE ILLICIT TRADE IN
TOBACCO PRODUCTS: A GLOBAL SOLUTION TO A
GLOBAL PROBLEM

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The Protocol to Eliminate Illicit Trade in Tobacco Products: A Global Solution to a Global Problem

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Chapter Summary

The Protocol to Eliminate Illicit Trade in Tobacco Products was adopted during the fifth session of the Framework Convention on Tobacco Control (FCTC) Conference of the Parties, in 2012. After obtaining its required fortieth ratification, the Protocol entered into force on September 25, 2018.

The Protocol has three core elements:

1. **Prevention:** The treaty aims to secure the supply chain of tobacco products through a series of measures to be taken by governments. Notably, the Protocol requires the

¹ Head of the Secretariat of the WHO Framework Convention on Tobacco Control. The author writes on behalf of the Convention Secretariat technical team. Special thanks to Nicolas Guerrero Peniche, Patrick Musavuli, Yoni Dekker, and Martin Grande.

establishment of a global tracking and tracing regime, comprising national and regional tracking and tracing systems and a global information sharing point. Other measures include licensing and record-keeping requirements, as well as regulation of Internet sales, duty-free sales, and international transit.

2. **Law enforcement:** The Protocol also establishes the unlawful conduct related to trade in tobacco products, including criminal offenses.
3. **International cooperation:** In its third pillar, the treaty aims to boost international cooperation both among Parties and intergovernmental organizations concerned with customs, crime, and trade.

One of the Protocol's most critical measures is the tracking and tracing regime. Its purpose is to assist Parties in determining the origin and legal status of tobacco products and their point of diversion, if applicable, and to monitor and control the movement of tobacco products.

The tobacco industry is active in promoting its own tracking and tracing solutions, which are less rigorous than those stipulated by the Protocol. For example, the industry aggressively promotes its privately developed Codentify tracking and tracing regime. The Codentify system conflicts with the Protocol and does not meet the treaty's requirements that the tracking and tracing system should be "controlled by the Party." In implementing track-and-trace, as in all other aspects of tobacco control, country authorities and regional bodies must maintain an appropriate critical distance from the tobacco industry.

The Protocol will provide the national authorities in charge of fighting illicit tobacco with a forum in which to exchange best practices, examine new challenges, and consolidate trust. Implementation will nurture enhanced domestic and international cooperation between agencies from multiple sectors (including health, law enforcement, customs, trade, and others).

In fighting the illicit tobacco trade, some countries struggle with the lack of an adequate regulatory and legislative framework; weak enforcement mechanisms; insufficient financial resources and expertise; a high level of corruption; conflict or political unrest; and unprotected or porous borders. These problems will not disappear overnight, but can be reduced or better managed through international cooperation under the auspices of the Protocol.

1. Historical Background

In 2007, two years after the entry into force of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), Parties to the Convention determined that it was urgent to strengthen supply-reduction measures. Leaders saw illicit trade as one of the key supply-related areas of the Convention requiring immediate additional attention. Illicit tobacco trade was both a growing concern among governments and an argument used by the tobacco industry to hinder implementation of other provisions of the treaty, especially Article 6.

Parties judged that a platform of international cooperation was needed to tackle illicit trade, a threat that no nation can resolve within its own borders. During the second session of the WHO FCTC Conference of the Parties (COP2), they established an Intergovernmental Negotiating Body (INB) tasked to develop an illicit trade Protocol. Following its adoption by the Conference of the Parties and entry into force, the Protocol would be a treaty in its own right and a major instrument to eliminate illicit trade in tobacco products.

The INB confirmed that a coordinated global approach was necessary to solve the problem of illicit trade in tobacco products. There was consensus among the Parties on the need for a protocol with strong obligations. In five rounds of meetings, a preliminary text was agreed upon. The final text of the Protocol to Eliminate Illicit Trade in Tobacco Products was then adopted during the fifth session of the FCTC Conference of the Parties in Seoul, Republic of Korea, in 2012. This new international legal instrument was the first protocol to be derived from the WHO FCTC. After obtaining its necessary fortieth ratification by the United Kingdom, it will enter into force on September 25, 2018. As of the end of August 2018, the Protocol included 48 Parties.

Throughout the process of developing and ratifying the Protocol, tobacco industry interference has never been far away. While the Protocol could in theory be a beneficial instrument for tobacco firms that operate legally, the tobacco industry has fought to diminish its obligations under the Protocol and to delay the treaty's adoption. Notably, the industry has tried to push for its own tracking and tracing mechanism, Codentify, that is far less transparent than the tool the Protocol stipulates.²

This chapter will explore the objectives and scope of the Protocol, its status as a young international treaty, the tracking and tracing system it requires Parties to establish, and the challenges faced concerning the global illicit trade in tobacco products.

2. Objectives and Scope of the Protocol

The objective of the Protocol is the elimination of all forms of illicit trade in tobacco products.³

Today, the illicit tobacco trade has become a pervasive problem reaching all corners of the globe. It threatens the health of the population, while fostering criminality and reducing tax revenues. Some sources estimate that if the global illicit tobacco trade were eliminated overnight, governments would see an immediate gain of billions of dollars in revenue.⁴

² <https://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2018/06/13/tobaccocontrol-2017-054191.full.pdf> Accessed August 28, 2018.

³ Article 1 of the Protocol defines, in Paragraph 6, illicit trade as "any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity."

⁴ Financial Action Task Force/Organization for Economic Co-operation and Development, 2012. <http://www.fatf-gafi.org/media/fatf/documents/reports/Illicit%20Tobacco%20Trade.pdf>

Parties to the Protocol enjoy a wide spectrum of benefits, extending from the reinforcement of national security to increased fiscal revenues. Most importantly, these countries are more effectively protecting the health of their people, particularly vulnerable groups.⁵

It is well recognized that the prevalence of smoking is price sensitive, making illicit products particularly attractive to lower-income and younger segments of the population, who constitute most tobacco-product consumers. Eliminating illicit trade in tobacco products ensures the market is composed of taxed tobacco products subject to health regulations and thus reduces tobacco consumption and smoking prevalence, as lower-income and younger people find tobacco more expensive and less attractive. The public-health implications are substantial, ranging from lower chronic disease prevalence to saving funds that would otherwise have been spent on health care for tobacco-related diseases. By accelerating reductions in smoking prevalence among the poor, the fight against illicit trade also strengthens health equity, since lower-income groups tend to suffer disproportionately from tobacco-related health problems.

According to the World Customs Organization, growth in the illicit tobacco trade remains a worrying worldwide phenomenon and an enduring source of funding for illicit activities that undermine social order, good governance, and the rule of law.⁶ Eliminating the illicit trade in tobacco products generates higher revenues from the increase of taxable tobacco products, while upholding and strengthening national tax policies. This fosters improved national security by weakening criminal organizations and reducing corruption.

Key Components of the Protocol

The Protocol has three core elements that together establish the framework of policies for eliminating illicit trade.

1. **Prevention:** In order to prevent this illegal trade, the Protocol aims to secure the supply chain of tobacco products through a series of government measures. It requires the establishment of a global tracking and tracing regime within five years of the Protocol's entry into force, comprising national and regional tracking and tracing systems and a global information sharing point. Other measures include licensing and record-keeping requirements, as well as regulation of Internet sales, duty-free sales, and international transit.
2. **Law enforcement:** Not only technical requirements are needed, but the Protocol also establishes the unlawful conduct related to trade in tobacco products, including criminal offenses.

⁵ World Health Organization. *Illegal Trade of Tobacco Products. What you should know to stop it.* Geneva: WHO, 2015.

⁶ World Customs Organization. *The illicit trade report 2013.* Brussels: World Customs Organization, 2014.

3. **International cooperation:** In its third important pillar, the Protocol aims to boost international cooperation both among Parties and among international intergovernmental organizations concerned with customs, crime, and trade.

The Convention Secretariat, which will also serve as the Secretariat of the Protocol through the stipulated monitoring system, will closely follow the implementation of all provisions of the Protocol. The time-bound provisions foreseen in the treaty are expected to require special attention. They include the establishment of a global tracking and tracing regime within five years⁷; ensuring that cigarette packaging contains unique identification markings within five years⁸; instituting unique marking systems for other tobacco-product packaging within ten years; and conducting research on the relation between duty-free sales and the extent of illicit trade, to be completed within five years.⁹

Like the WHO FCTC, the Protocol includes provisions that raise awareness about potential tobacco industry interference with treaty implementation. In the Preamble to the Protocol, Parties are reminded “to be alert to any efforts by the tobacco industry to undermine or subvert strategies to combat illicit trade in tobacco products.”

3. Status of the Protocol and Plans to Expand Its Reach

The Protocol is still newborn. The treaty encompasses 47 countries and the European Union as of its official entry into force on September 25, 2018.¹⁰ The initial session of the Meeting of the Parties is the first opportunity for Parties to discuss priorities and next steps for implementation.

Considering the ratification from a geographical perspective, one can observe that most Parties are from the European and African regions. To achieve a more global coverage of implementation efforts, promoting further ratifications will be key. For the Protocol to become truly effective and efficient in fighting the global illicit tobacco trade, more Parties are needed.

4. Tracking and Tracing Tools

One of the Protocol’s most critical measures is the global tracking and tracing regime described in Article 8. The purpose of a tracking and tracing system is to assist Parties in determining the origin of tobacco products and their point of diversion, if applicable, and to monitor and control the movement of tobacco products and their legal status. The Protocol

⁷ Art. 8.1 of the Protocol to Eliminate Illicit Trade in Tobacco Products.

⁸ Art. 8.3 of the Protocol to Eliminate Illicit Trade in Tobacco Products.

⁹ Art. 13.2 of the Protocol to Eliminate Illicit Trade in Tobacco Products.

¹⁰ For status updates, consult the UN Treaty collection: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4-a&chapter=9&lang=en

will allow Parties to obtain information throughout the supply chain, until duties are paid or other obligations discharged.

Article 8 requires Parties to make an extensive body of information available to assist each other in determining the origin and legal status of tobacco products and in monitoring product movements. An effective tracking and tracing system should capture all relevant tobacco product data, including:

- a. Date and location of manufacture;
- b. Manufacturing facility;
- c. Machine used to manufacture tobacco products;
- d. Production shift or time of manufacture;
- e. The name, invoice, order number, and payment records of the first customer not affiliated to the manufacturer;
- f. The intended market of retail sale;
- g. Product description;
- h. Any warehousing and shipping;
- i. The identity of any known subsequent purchaser; and
- j. The intended shipment route, shipment date, shipment destination, point of departure, and consignee.

Technological Considerations: Unique Identifiers and Data Carriers

One of the elements of the tracking and tracing regime of the Protocol is the use of unique identifiers. These consist of a distinctive combination of numbers, letters, or both that are unique for each pack/item. They cannot be used twice and are not predictable. For instance, passports use a combination of letters and numbers that is unique for each person. The attribution of this combination identifies each person and is not predictable. Digital Mass Encryption is a widely used method to make codes less predictable and prevent unauthorized access by establishing a very large population of possible codes, of which only a proportion are valid and used. Valid codes can only be generated if mathematical formulas (algorithms) and secret keys that are used for their creation are known. The representation of the identifier on the package can be readable by the human eye (letters or numbers) or machine readable (barcodes).^{11 12}

¹¹ FCTC. Analysis of the available technology for unique markings in view of the global track and trace regime proposed in the negotiating text for a protocol to eliminate illicit trade in tobacco products. FCTC/COP/IINB-IT/4/INF.DOC./1.

¹² European Commission. EAHC/2013/Health/II Final Report Concerning the Provision of an Analysis and Feasibility Assessment Regarding EU systems for Tracking and Tracing of Tobacco Products and for Security Features. Brussels, March 2015.

In addition to the serialized unique identifier, a data carrier is also required, with a serialized unique identifier and other information available at the time of manufacturing, such as place and time of manufacture. The data carrier should comply with quality¹³ standards (to avoid extracting incorrect data or to access the data even if a portion of the carrier is damaged), be readable by authorized agencies of any Party to the Protocol, and be suitable for high-speed production lines.

Further along the supply chain, any shipping and receiving events should be recorded, for instance the departure of a pallet from the manufacturing site and its arrival with a specific trader. International standards should be established and recommended for the capture and exchange of data and events with due regard to potential tobacco-industry influence on standardization bodies.

Finally, data and events along the supply chain should be stored in an independent database controlled by competent government authorities. At the global level, a multitude of national and/or regional databases need to have the capacity to interrelate to facilitate international inquiries by competent authorities. Similarly, the Protocol stipulates that access to and retrieval of this data need to be controlled by each Party.

Maintaining Independence from the Industry: Concerns about “Codentify”

A very important factor in this system is that generation and encryption linked to a tobacco industry patent should be excluded. The tracking and tracing of cigarettes and other tobacco products should be objective and not biased by financial or economic interests. However, the tobacco industry is active in promoting its own tracking and tracing solutions.

One of these is called Codentify. Strictly speaking, Codentify is not a tracking and tracing system, but is a code generator system installed on the production line that creates unique codes on packs.¹⁴ Codentify uses elements of production-related information (such as production line and time of production) to generate, via a secret “key,” an unpredictable and unique encrypted 12-character combination of letters and numbers. This code can be used to identify and authenticate a pack of cigarettes. The number, linked to a digital signature, can be read by a human or by a computer. By capturing the human-readable code or scanning a machine-readable code, a computer program will determine whether the code is correctly formed or not. If the code is correctly formed, the program can retrieve associated trace information from a database (e.g., details of first customer). Meanwhile, cartons, master cases, and pallets use unique non-encrypted codes to identify the packages, rather than Codentify codes. This combination of Codentify codes on packs and other codes on the

¹³ Bialous SA, Yach D. Whose standard is it, anyway? How the tobacco industry determines the International Organization for Standardization (ISO) standards for tobacco and tobacco products. *Tobacco Control*, 2001;10:96-104, doi:10.1136/tc.10.2.96.

¹⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3897562/> Accessed: August 28, 2018.

secondary packaging units is presented as a tracking and tracing system and is endorsed by the major transnational cigarette companies.¹⁵

The Codentify system has been criticized as non-transparent. Given that the system is not open source, some observers have suggested that Codentify may contain hidden features known only to the tobacco industry. Codentify is managed and controlled by the industry and protected by a tobacco industry patent, thus it clearly appears conceived to serve the industry's interests.¹⁶ In this sense, some analysts argue, choosing Codentify for track-and-trace operations would be opting for a "black box" system. According to a study commissioned by the WHO FCTC Secretariat and informally circulated at COP6, the Codentify system conflicts with the FCTC Protocol and does not meet the requirements of Article 8.2 that the tracking and tracing system should be "controlled by the Party."¹⁷

Importantly, the Codentify system was designed by the industry specifically to address the issue of counterfeit tobacco. However, this is only a minor part of the overall illicit trade problem. A larger proportion of illicit trade consists of tax evasion by the mainstream tobacco industry itself, along with the cross-border smuggling of cigarettes and other tobacco products.

In contrast to the case of counterfeit pharmaceuticals, for example, all forms of tobacco are harmful to human beings, including both counterfeit cigarettes and those that are manufactured and sold in complete legality. Even in its limited role with counterfeiting, Codentify is an ineffective means of authentication, because the codes are visible and easy to forge. In fact, the so-called validity codes generated by this system can be easily cloned, recycled, or migrated, particularly if the tobacco industry itself were involved in the illicit trade.¹⁸

Multiple track-and-trace solutions exist for a wide variety of products, but concerns have been raised about the efficacy and cost of such systems. At the time of writing, Brazil, Kenya, and Turkey have already implemented specific marking systems for tobacco products, and their experience will be relevant to next steps in the establishment of a tracking and tracing system under the Protocol.

¹⁵ <https://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2018/06/13/tobaccocontrol-2017-054191.full.pdf> Accessed: August 28, 2018.

¹⁶ Joossens L, Gilmore AB. The transnational tobacco companies' strategy to promote Codentify, their inadequate tracking and tracing standard. *Tob Control* 2013;050796. doi:10.1136/tobaccocontrol-2012-050796

¹⁷ FCTC. 6th Conference of the Parties to the WHO Framework Convention. Secretariat study of the basic requirements of the tracking and tracing regime to be established in accordance with Article 8 of the Protocol to Eliminate Illicit Trade in Tobacco Products. Executive Summary, White Paper. Moscow: 2014.

¹⁸ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3897562/> Accessed August 28, 2018.

5. Challenges Faced in the Implementation of the Protocol

Although the Protocol will only enter into force at the end of 2018, Parties have already been reporting on illegal trade through the requirements linked to Article 15 of the WHO FCTC. The key observations from these progress reports are that:

- » A growing number of Parties confirm having legislation in place to address illicit trade in tobacco products;
- » The implementation of most measures under this article has improved considerably in the period 2016-2018.

According to WHO's 2018 FCTC implementation progress report, over half of all Parties to the WHO FCTC required monitoring and collection of data on cross-border trade in tobacco products, including illicit trade. On the other hand, only 18 percent reported having data on the percentage of smuggled tobacco products within their jurisdiction. Only one-third of all these Parties had developed or implemented a practical tracking and tracing regime to secure the distribution system and assist in the investigation of illicit trade.¹⁹

Resisting Industry Pressures

Many challenges for implementation of the Protocol are linked to potential interference by the tobacco industry and alleged front groups, such as the International Tax and Investment Center (ITIC²⁰). For example, the industry and those that promote its interests have intensified their advocacy for industry-derived tracking and tracing systems (e.g., Codentify).

Country authorities and regional bodies must maintain an appropriate critical distance from the tobacco industry. A positive example comes from Lithuania, which initiated a motion to reject, at European Union level, the Codentify tracking and tracing system proposed by the tobacco industry. The motion was signed by Lithuania's Minister of Health, the Chairperson of the Committee for Health, the Chairperson of the National Health Board, and the President of the National Alcohol and Tobacco Control Coalition.

It appears that the legal tobacco industry would benefit from measures taken against illicit trade, since in theory illegal trade in tobacco products causes the legal industry to lose revenue. However, the reality is more complex. Evidence indicates that the tobacco industry is often one of the biggest suppliers of tobacco products on the illicit market. This way, tax can be evaded, while the industry can still profit from the sale of its highly addictive products in a market without controls.²¹

¹⁹ World Health Organization. 2018 global progress report on the implementation of the WHO Framework Convention on Tobacco Control. Geneva: WHO, 2018.

²⁰ http://seatca.org/dmdocuments/Asia%2014%20Critique_Final_20May2015.pdf

²¹ <https://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2018/06/13/tobaccocontrol-2017-054191.full.pdf> Accessed: August 28, 2018.

Thus, the tobacco industry is not to be regarded as a partner in eliminating the illicit trade in tobacco products, although some contacts with tobacco companies to implement a tracking and tracing system are unavoidable. Some information, in the data carrier for instance, should be provided by the industry, such as place and date of production. However, contacts with the tobacco industry should be strictly limited and transparent in all cases.

Overcoming Challenges through International Cooperation

Controlling the supply chain serves to prevent illicit trade. The Protocol also contains provisions regarding unlawful conduct, including criminal offenses, international cooperation, and finances. Sectors taking a leading role in these provisions may therefore include foreign affairs, finance, and law enforcement authorities.

Governing systems may vary widely between Parties. To determine the roles and responsibilities of different government agencies, it may be useful to establish a multi-sectoral mechanism, composed of potentially relevant government sectors, to review the existing mandate of each sector and determine the roles and responsibilities under the obligations prescribed in the Protocol.

In fighting the illicit tobacco trade, some countries struggle with the lack of an adequate regulatory and legislative framework for tobacco products and the tobacco industry; weak enforcement mechanisms; insufficient financial resources and expertise; a high level of corruption; conflict or political unrest; and unprotected or porous borders. These problems will not disappear overnight, but can be reduced or better managed through international cooperation under the auspices of the Protocol.

6. Conclusion

With the Protocol's entry into force, the international community has at its disposal a new set of tools to fight the illicit trade in tobacco products. The Protocol includes innovative and ambitious mechanisms. At its heart is the tracking and tracing regime, which the Parties have committed to implement within five years. The establishment of a global information-sharing focal point, to be located at the Convention Secretariat, will constitute a technical, political, and financing challenge. However, once operational, this hub will provide Parties with an essential tool to share information and better understand the structure and paths of illicit trade.

The Protocol will also provide the various national authorities in charge of fighting illicit tobacco with a forum in which to exchange best practices, examine new challenges, and consolidate trust. Implementation will nurture enhanced domestic and international cooperation between agencies from multiple sectors (including health, law enforcement, customs, trade, and others). In this way, the Protocol offers Parties an unprecedented opportunity to curb a major public health threat while securing multisectoral benefits at the national level.

As they seize the opportunity, countries will reinforce the rule of law in their own territories and globally, strengthen international ties, boost fiscal revenues, and ensure a healthier future for the generations to come.

COVER QUOTE SOURCES

ⁱ WHO Framework Convention on Tobacco Control Press Release, June 28, 2018.
<https://www.who.int/fctc/mediacentre/press-release/protocol-entering-into-force/en/>

ⁱⁱ World Health Organization Press Release, July 19, 2017.
<https://www.who.int/en/news-room/detail/19-07-2017-who-report-finds-dramatic-increase-in-life-saving-tobacco-control-policies-in-last-decade>

ⁱⁱⁱ Combatting illicit trade in tobacco products: Commissioner Andriukaitis' Statement on the EU's adoption of an EU-wide track and trace system. European Commission Press Release, December 15, 2017.
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^{iv} How to design and enforce tobacco excises? International Monetary Fund, October 2016
<https://www.imf.org/en/Publications/Fiscal-Affairs-Department-How-To-Notes/Issues/2016/12/31/How-to-Design-and-Enforce-Tobacco-Excises-44352>

^v World Bank Group: "Global Tobacco Control: A Development Priority for the World Bank Group", Preface of WHO Global Tobacco Report 2015.
http://www.who.int/tobacco/global_report/2015/timevansandworldbankforeword.pdf?ua=1

“To tackle illicit trade is to tackle accessibility and affordability of tobacco products, to be more effective on the control of the packaging and to reduce funding of transnational criminal activities whilst protecting the governmental revenues from tobacco taxation.”ⁱ

– **Dr. Vera Luiza da Costa e Silva**
Head of the Secretariat of the WHO Framework Convention on Tobacco Control

“Governments around the world must waste no time in incorporating all the provisions of the WHO Framework Convention on Tobacco Control into their national tobacco control programmes and policies. They must also clamp down on the illicit tobacco trade, which is exacerbating the global tobacco epidemic and its related health and socio-economic consequences.”ⁱⁱ

– **Dr. Tedros Adhanom Ghebreyesus, Director-General**
World Health Organization

“Tobacco still remains the biggest avoidable cause of premature death in the EU, and the illicit trade in tobacco facilitates access to cigarettes and other tobacco products, including for children and young adults. In addition, millions of euros in tax revenues are lost every year as a result of the illicit trade.”ⁱⁱⁱ

– **Commissioner Vytenis Andriukaitis**
Health and Food Safety / European Commission

“Given their light weight, small size, and high value, tobacco products are susceptible to fraud through illegal trade, production, and cultivation. . . . Illegal trade is a context-specific activity that has various modus operandi and therefore requires multi-dimensional context-specific solutions.”^{vi}

– **Patrick Petit (Senior Economist) & Janos Nagy (Senior Economist)**
Fiscal Affairs Department / International Monetary Fund

“Effective tobacco tax regimens that make tobacco products unaffordable represent a 21st century intervention to tackle the growing burden of noncommunicable diseases. We are convinced that, working together with WHO and other partners in support of countries, we will be able to prevent the human tragedy of tobacco-related illness and death, and save countless lives each year.”^v

–**Dr. Tim Evans (Senior Director) & Patricio V Márquez (Lead Public Health Specialist)**
Health, Nutrition and Population Global Practice / World Bank Group

