COMMENTS AND RECOMMENDATIONS ON THE DRAFT PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS (FCTC/COP/INB-IT/5/5 OF 4 APRIL 2012)

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Asian Center for WTO and International Health Law and Policy
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INTRODUCTION

Illicit trade in tobacco products has been a constant and serious threat to the effectiveness of tobacco controls. Parties recognize, as stated in Article 15 of the WHO Framework Convention on Tobacco Control (hereinafter FCTC), that the elimination of all forms of illicit trade in tobacco products, including smuggling and illicit manufacturing, is an essential component of tobacco control.

We appreciate so many efforts have been put by the Parties to the FCTC over the past years on the development of a comprehensive Protocol to collectively tackle such sophisticated international issue. We are also delighted to see the recent issuance of the "Draft Protocol to Eliminate Illicit Trade in Tobacco Products" of 4 April 2012 (FCTC/COP/INB-IT/5/5) (hereinafter "Draft") that has made major progress on quite a number of aspects. We believe that this should have provided a sound basis for Parties to successfully complete the enactment of

the Protocol.

The Asian Center for WTO and International Health Law and Policy of National Taiwan University College of Law is an academic research institution for international health law and policy as well as a constant observer of the development of international regime for the control of tobacco. We are keen to see the successful enactment of the Protocol.

This is our third booklet specifically on the draft Protocol to eliminate illicit trade as the negotiation progresses. We would like to continue to offer our inputs in this filed so that some different views from outside the Intergovernmental Negotiating Body will also be taken into account.

In discussions of this Draft, we found that several points have been agreed by consensus in the negotiation. Therefore, we decided to avoid engaging in the debates on the measures which will be implemented by Parties to the extent possible. Instead, our discussion will mainly focus on the points that we consider to be of importance. It is our view that in order to create an effective and workable regime to prevent and combat illicit trade in tobacco products, there is a need to have closer international cooperation. We sincerely hope that our comments and recommendations in this booklet could help the perfection of the Draft and further the completion of the Protocol.

Draft Protocol to Eliminate Illicit Trade in Tobacco Products

1. COMMENTS ON THE PREAMBLE

Text of the relevant paragraphs in the Preamble

Preamble

…

Acknowledging that access to resources and relevant technologies is of great importance for enhancing the ability of Parties, particularly in developing countries and countries with economies in transition, to eliminate all forms of illicit trade in tobacco products;

…

Emphasizing the need to be alert to any efforts by the tobacco industry to undermine or subvert strategies to combat illicit trade in tobacco products and the need to be informed of activities of the tobacco industry that have a negative impact on strategies to combat illicit trade in tobacco products;…

…

Recalling and emphasizing the importance of other relevant international agreements such as the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the obligation that Parties to these Conventions have to apply, as appropriate, the relevant provisions of these Conventions to illicit trade in tobacco, tobacco products and manufacturing equipment and encouraging those Parties that have not yet become Parties to these agreements to consider doing so;…

COMMENTS

The first paragraph in the square (Paragraph 10 of the Preamble) recognizes the great importance of the access to resources and relevant technologies for Parties to enhance their

ability to eliminate illicit trade in tobacco products. We are of the view that capacity building in developing countries and countries with economies in transition to tackle illicit trade is essential to the successful implementation of this Protocol. Parties should be strongly encouraged to provide relevant assistance to developing countries and countries with economies in transition. In order to create an effective regime for combating illicit trade, we are of the view that it is equally important for such countries which are non-Parties to this Protocol to strengthen its capacity in the conduct of detecting illicit trade by regional or international cooperation. It should be useful to include a paragraph in the Preamble to encourage Parties to this Protocol to provide technical assistance or relevant resources to FCTC Parties which have not yet become the Parties to this Protocol as well as non-Parties to the FCTC when they so request.

The second paragraph in the square (Paragraph 16 of the Preamble) is to prevent the tobacco industry from negatively affecting the goal of combating illicit trade. However, the phrase “activities of tobacco industry” is too broad and vague. It would be useful to include an illustrative list of specific practices to which the Parties should be alerted so as to help them better understand possible problems in the context of illicit trade.

The third paragraph in the square (Paragraph 20 of the Preamble) indicates that the Parties recall and emphasize the importance of other relevant international agreements, including

the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. However, it is not clear regarding the relevance of this Convention to the provisions of this Protocol. Certain extent of clarification is needed.

Paragraph 17 of the Preamble of the FCTC emphasizes the special contribution of nongovernmental organizations and other members of civil society to tobacco control efforts nationally and internationally. We thought that the importance of the participation of nongovernmental organizations in the development in the future implementation of this Protocol should also be recognized. We recommend Parties to include a paragraph similar to FCTC paragraph 17 into the Preamble of this Protocol.

2. COMMENTS ON ARTICLE 5

Text of Article 5

Article 5

Protection of personal data

Parties shall protect personal data of individuals regardless of nationality or residence, subject to national law, taking into consideration international standards regarding the protection of personal data, when implementing this Protocol.

COMMENTS

1. Parties are imposed with the obligations to protect personal data subject to their national law and to take international standards regarding the protection of personal data into account when implementing this Protocol. However, we are of the view that the way this article is drafted does not provide useful guidance concerning personal data protection in the context of combating illicit trade. For instance, Parties are left with full discretion under their national laws to decide the protection of personal data. That is to say, there is no concrete obligation to be complied with by Parties from this Article. Also, the issue of what constitutes the "international standards" regarding the protection of personal data remains unclear. For the purpose of this Protocol, there would be a need to identify some international standards, where appropriate, to guide Parties to implement this article. In this regard, it is recommended that Parties should be encouraged to protect cross-border personal data (i.e., movements of personal date across national borders). In setting any international

standards regarding the protection of personal data, cross-border personal data should be placed as a special concern to be protected as the case of the EU and the OECD.

2. In addition to Article 5, we thought that quite a number of articles in this Protocol might involve the protection of personal data, which includes, Article 6.3(b)(i), Article 7.2, Article 7.3, Article 21.1(b), Article 22.2, Article 23.1, Article 27.1(c)(i), Article 29.8(e) and Article 32.5. For instance, according to Article 7, the persons engaged in the supply chain shall obtain and update the information listed thereof, including, as required by Article 7.2(b), the information regarding "the identity of their customers." Under Article 7.3, the scope of due diligence obligation may include obtaining and updating the documentation or a declaration regarding any criminal records as well as the identification of the bank accounts intended to be used in transactions. Pursuant to Article 21.1(b), Parties shall, subject to some conditions (e.g. on the request of a Party), exchange information for identification, monitoring and prosecution of natural or legal persons involved in illicit trade in tobacco products. As far as the information as to identification, monitoring and prosecution of natural persons is concerned, it usually falls into the scope of personal data under national laws. In this regard, how a requested Party would implement its information-sharing obligation in response to the requesting Party without impeding personal data protection; or how the requesting Party's proper use of information obtained from the requested Party is ensured remains questionable.

Therefore, there is a need to further elaborate how Article 5 would relate to those articles having bearing with personal data protection.

3. In order to ensure that personal data protection is safeguarded, we suggest Parties to ensure that when implementing relevant requirements involving personal data of persons engaged in the supply chain as required by Article 7.2, they will act in a manner consistent with the protection of personal data prescribed in its national laws.

4. We suggest that personal data should be shared with non-Parties in certain cases for the purpose of achieving the goal of this Protocol. In this aspect, it is useful to refer to EU Council Framework Decision 2008 977 JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters ("Council Framework Decision 2008 977 JHA"). According to Article 13 of it (Transfer to competent authorities in third States or to international bodies), personal data may be transferred to third States or international bodies only if the conditions provided in Article 13.1 are all fulfilled. The conditions include: (a) it is necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties; (b) the receiving authority in the third State or receiving international body is responsible for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal

penalties; (c) the Member State from which the data were obtained has given its consent to transfer; and (d) an adequate level of protection for the intended data processing is ensured.

3. COMMENTS ON ARTICLE 6

Text of Article 6

Article 6

Licence, equivalent approval or control system

1 To achieve the objectives of the WHO Framework Convention on Tobacco Control and with a view to eliminating illicit trade in tobacco products and manufacturing equipment, each Party shall prohibit the conduct of any of the following activities by any natural or legal person except pursuant to a licence or equivalent approval (hereafter "licence") granted, or control system implemented, by a competent authority in accordance with national law:

(a) manufacture of tobacco products and manufacturing equipment; and

(b) import or export of tobacco products and manufacturing equipment.

2 Each Party shall endeavour to license, to the extent considered appropriate, and when the following activities are not prohibited by national law, any natural or legal person engaged in:

(a) retailing of tobacco products;

(b) growing of tobacco, except for traditional small-scale growers, farmers and producers;

(c) transporting commercial quantities of tobacco products or manufacturing equipment; and

(d) wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment.

3 With a view to ensuring an effective licensing system, each Party shall:

(a) establish or designate a competent authority or authorities to issue, renew, suspend, revoke and/or cancel licences, subject to the provisions of this Protocol, and in accordance with its national law, to conduct the activities specified in paragraph 1;

(b) require that each application for a licence contains all the requisite information about the applicant, which should include, where applicable:

(i) where the applicant is a natural person, information regarding his or her identity, including full name, trade

name, business registration number (if any), applicable tax registration numbers (if any) and any other information to allow identification to take place;

(ii) when the applicant is a legal person, information regarding its identity, including full legal name, trade name, business registration number, date and place of incorporation, location of corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and of any designated legal representatives, including any other information to allow identification to take place;

(iii) precise business location of the manufacturing unit(s), warehouse location and production capacity of the business run by the applicant;

(iv) details of the tobacco products and manufacturing equipment covered by the application, such as product description, name, registered trade mark if any, design, brand, model or make and serial number of the manufacturing equipment;

(v) description of where manufacturing equipment will be installed and used;

(vi) documentation or a declaration regarding any criminal records;

(vii) complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details; and

(viii) a description of the intended use and intended market of sale of the tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand;

(c) monitor and collect, where applicable, any licence fees that may be levied and consider using them in effective administration and enforcement of the licensing system or for public health or any other related activity in accordance with national law;

(d) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation

of the licensing system;

(e) undertake measures such as periodic review, renewal, inspection or audit of licences where appropriate;

(f) establish, where appropriate, a time frame for expiration of licences and subsequent requisite reapplication or updating of application information;

(g) oblige any licensed natural or legal person to inform the competent authority in advance of any change of location of their business or any significant change in information relevant to the activities as licensed;

(h) oblige any licensed natural or legal person to inform the competent authority, for appropriate action, of any acquisition or disposal of manufacturing equipment; and

(i) ensure that the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the competent authority.

4. Each Party shall ensure that no licence shall be assigned and/or transferred without receipt from the proposed licensee of the appropriate information contained in paragraph 3, and without prior approval from the competent authority.

5. Five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain whether any key inputs exist that are essential to the manufacture of tobacco products, are identifiable and can be subject to an effective control mechanism. On the basis of such research, the Meeting of the Parties shall consider appropriate action.

COMMENTS

1. With respect to Article 6.1:

(1) Both Article 6.1 and Article 7.1 (due diligence) provide regulations for tobacco supply chain. However, the two provisions have different structures. Article 6.1 provides that "[t]o achieve the objectives of the WHO Framework…each party shall

prohibit the conduct of any of the following activities…in accordance with national law." Article 7.1 states that "[e]ach party shall require, consistent with its national law and the objectives of the WHO framework, that all natural and legal persons engaged in the supply chain of tobacco…." It seems that Parties might enjoy wider discretion under Article 6.1 by the omission of the requirement "consistent with the objectives of the FCTC." We suggest that the requirement "consistent with the objectives of the FCTC" should be taken into account in Article 6.1.

(2) Article 6.1 may inappropriately exclude the chain wholesalers who could have high market position and high influence in the market. In order to ensure an effective licencing system, we suggest that any natural or legal person engaging in wholesaling activities should be treated as manufacturers of tobacco products to be subject to a licence requirement. Textually, it is recommended that persons engaged in wholesaling, brokering, warehousing or distribution activities of tobacco and tobacco products or manufacturing equipment, currently provided in Article 6.2(d), should be included in Article 6.1.

2. With respect to Article 6.3:

(1) Article 6.3(c) refers to "monitor and collect, where applicable, any licence fees that may be levied." It seems to us that fees, by its nature, would only be collectible, not monitor-able. It is recommended that the term "monitor and collect…any licence fees" should be revised to "collect and monitor the use of

licence fees."

(2) Article 6.3(i) states that "the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the competent authority." In contrast, the prior Draft issued by the INB4 states that "Parties shall ensure that…the cost of [the] destruction [of any such manufacturing equipment or any part thereof] shall be borne by the holder of the licence." The deletion of the phrase "borne by the holder of the licence" might cause difficulty to developing countries with insufficient resources in their enforcement of the Protocol. For instance, developing countries may face difficulties in relation to the destruction of manufacturing equipment or any part thereof due to the limited budgets or lack of financial resources. In this regard, it is noted that Article 18 requires that such destruction shall use "environmentally friendly methods to the greatest extent possible." This requirement may create additional burden to developing countries. It is suggested that developing countries' capacity to destruct relevant manufacturing equipment of tobacco products should be taken into account.

3. With respect to Article 6.4: Paragraph 4 deals with the transfer and assignment of the licence. However, the licences acquired due to merger or acquisition activities were not taken into account in this article. We thought it might give rise to some practical issues. For instance, Company A is a tobacco product company. Company B is a distribution company (a non-tobacco product company which is not required to obtain a licence) with

criminal records. After the merger has taken place between these two companies (the existing company is Company A), since there is no assignment or transfer being made, former Company B, as it is not subject of Article 6.4, is not required to provide the appropriate information contained in paragraph 3, inter alia, documentation or a declaration regarding any criminal records provided in article 6.3(b) (vi), in order to receive the approval of the competent authority. In this case, Company B may indirectly join the tobacco product business due to its merger with Company A. However, it is not required by Article 6.4 to disclose its criminal records. Therefore, we suggest Parties to take into account the situations concerning mergers or acquisitions between tobacco companies; or between tobacco companies and non-tobacco companies which result in licences being obtained by different companies.

4. In the case of the violations of Article 6, such as conducting tobacco business without a licence, or deceptive use of a licence, it is recommended that Parties should consider imposing some forms of penalties as required in Article 14.1(a). Also, in the case that a company with a licence obtains tobacco products or manufacturing equipment from those unlicenced, penalties should be carried out under Article 14.1(g). In this regard, the practice that a licenced person illegally leases its licence to those unlicenced should be regarded as unlawful act under Article 14.

5. With respect to Article 6.5:

(1) The paragraph 5 deals with the key input issue. However, neither FCTC nor the Protocol provides clear definition concerning the term “key inputs.” There is a need for further clarification. Practically, in order to prevent the occurrence of illicit trade in tobacco products, it might be useful for Parties to target or narrow down their discussions on some components that are widely used as essential to the manufacture of specific tobacco products in the tobacco industry (such as cigarette papers and acetate filter tow) and include them into a control mechanism at the first stage. We suggest Parties to clearly recognize the importance of the control of key inputs to manufacture tobacco products in the elimination of the illicit trade.

(2) Paragraph 5 only refers to “five years following the entry into force of this Protocol.” From this text, it appears that Parties are under no obligation to conduct or forward any research about “key inputs” until five years after the entry into force of this Protocol. If that is the case, it would not sufficiently address the urgent need to deal with illicit trade problems. We thought that Parties should be expected to take more active actions in this aspect. It is suggested that “five years following the entry into force of this Protocol” is changed to “no later than five years following the entry into force of this Protocol”.

4. COMMENTS ON ARTICLE 7

Text of Article 7

Article 7
Due diligence

1 Each Party shall require, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment:

(a) conduct due diligence before the commencement of and during the course of, a business relationship;

(b) monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use; and

(c) report to the competent authorities any evidence that the customer is engaged in activities in contravention of its obligations arising from this Protocol.

2 Due diligence pursuant to paragraph 1 shall, as appropriate, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, include, inter alia, requirements for customer identification, such as obtaining and updating information relating to the following:

(a) establishing that the natural or legal person holds a licence in accordance with Article 6;

(b) when the customer is a natural person, information regarding his or her identity, including full name, trade name, business registration number (if any), applicable tax registration numbers (if any) and verification of his or her official identification;

(c) when the customer is a legal person, information regarding its identity, including full name, trade name, business registration number, date and place of incorporation, location of corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and any designated legal representatives, including the representatives' names and verification of their official identification;

(d) a description of the intended use and intended market of

sale of tobacco, tobacco products or manufacturing equipment; and

(e) a description of the location where manufacturing equipment will be installed and used.

3 Due diligence pursuant to paragraph 1 may include requirements for customer identification, such as obtaining and updating information relating to the following:

(a) documentation or a declaration regarding any criminal records; and

(b) identification of the bank accounts intended to be used in transactions.

4 Each Party shall, on the basis of the information reported in paragraph 1(c), take all necessary measures to ensure compliance with the obligations arising from this Protocol, which may include the designation of a customer within the jurisdiction of the Party to become a blocked customer as defined by national law.

COMMENTS

1. With respect to Article 7.1:

(1) The meaning of "all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment" is not clear. The vagueness of this term might cause problems when enforcing the paragraph. It is preferable to have a more precise definition with illustrative or enumerative provisions. In this regard, Article 1.12 defines the "supply chain" to cover two types of activities, i.e., the manufacture of tobacco products and manufacturing equipment as well as import or export of tobacco products and manufacturing equipment. In regard to other activities closely connected to tobacco-related trade business, such as retailing of tobacco

products; growing of tobacco (except for traditional small-scale growers, farmers and producers) and transporting commercial quantities of tobacco products or manufacturing equipment; and wholesaling, brokering, warehousing or distribution activities of tobacco and tobacco products or manufacturing equipment, whether they are included into the definition of the "supply chain" will be subject to the decision of Parties. In this sense, the definition of "supply chain" as stipulated in Article 1.12 might narrow down the scope of the application of Article 7.1. It may further result in state's inconsistent practices. Therefore, we also suggest Parties to revise the definition of "supply chain" under Article 1.12 as an alternative approach to achieve the purpose of Article 7.1.

(2) It is suggested that farmers growing tobacco under contract as well as wholesalers of tobacco products should be obligors to conduct due diligence since their market positions are closer to the source of the supply chain or the upstream in the supply chain. Alternatively, we suggest Parties to consider the differentiation of the diligence obligations contained in Article 7.1. It seems to us that the level of duty required by Articles 7.1(a), 7.1(b) and 7.1(c) might not necessarily be the same. Therefore, a higher level of duty of due diligence contained in Articles 7.1(a) and 7.1(b) might be imposed on some specific obligors. A lower level of duty as set out in Article 7.1(c) might be imposed on some obligors with lesser duty.

(3) Article 7.1(c) provides that any "evidence" that the customer is engaged in activities in contravention of this Protocol

shall be reported to the competent authorities. We thought that the term "evidence" might require higher threshold of substantiated or verified information, not merely the general information. We suggest Parties to replace the term "evidence." Article 7.1(c) might be drafted as "report to the competent authorities *when they have valid grounds for suspecting that* the customer is engaged in activities in contravention of its obligations arising from this Protocol."

(4) The phrase "the natural or legal person holds a licence in accordance with Article 6" under Article 7.2(a); "persons licensed in accordance with Article 6" under Article 9.2; and "all natural and legal persons subject to Article 6" under Article 10.1 seem to have the same meaning. We suggest that these phrases should be drafted in a more consistent form.

2. With respect to Article 7.2: We are of the view that Article 7 (*Due diligence*) and Article 6 (*Licence, equivalent approval or control system*) are different in terms of the coverage and functions. In the case that tobacco growers and wholesalers are not subject to a licence under Article 6, it is still possible to require them to conduct due diligence concerning customer identification under Article 7, such as the obligations set out in Articles 7.2(b) and 7.2(c). In this sense, it might enhance the transparency of transactions of tobacco products and manufacturing equipment to prevent the occurrence of illicit trade.

3. With respect to Article 7.3(a): As required in Article

7.3(a), due diligence may include requirements for customer identification, such as obtaining and updating information about "documentation or a declaration regarding any criminal records." However, Parties might not provide for criminal procedures and penalties to be applied in cases of unlawful conducts in relation to illicit trade. Furthermore, in cases of applying criminal penalties, it seems to us that the disclosure of information about "any" criminal records of a customer which are not relating to tobacco trade might raise concern about the protection of personal data. Therefore, we suggest that Article 7.3(a) should be drafted by adding the phrase "or offences related to the tobacco trade."

4. We thought that there would be of practical value to have a provision requiring relevant persons engaged in the supply chain of tobacco products to "keep the record of compliance with the obligations for customer identification and verification" and "make available to the competent authorities" in Article 7. It would not only urge persons engaged in the supply chain to comply with their due diligence obligation, but also help the competent authorities to conduct further verification where appropriate. We also recommend that the requirement that "persons engaged in the supply chain of tobacco products shall bear the obligation of keeping the record of compliance with due diligence" could be introduced into Article 9.1 concerning the obligation of record-keeping.

5. With regard to Article 7.4:

(1) Article 7.4 requires Parties to base the information reported in Article 7.1(c) to take necessary measures for ensuring the compliance with the Protocol, including the designation of blocked customer. Under the condition "on the basis of the information reported in paragraph 1(c)," Parties might not be able to seek information from any relevant sources where they deem appropriate to identify blocked customer. We thought the way the Article is drafted would place the competent authority of Parties in a passive position. Therefore, we suggest that Parties should have the right to use any credible information to ensure the compliance with the Protocol and to designate blocked customer. In this regard, Article 4.5 (Inspection–Prohibited or Restricted Ingredients) of the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC might provide some useful reference. We recommend that Parties should, on their own initiative, conduct visit to the relevant persons engaged in tobacco, tobacco products and manufacturing equipment so as to ensure the compliance with the obligations arising from this Protocol.

(2) According to Article 7.4, each Party shall base on relevant information to designate a customer within the jurisdiction of the Party to become a blocked customer as defined by national law. Therefore, Parties are accorded with complete discretion to define the term "blocked customer" under their national laws. Under such situation, further divergent and confusing practices regarding blocked customer might occur. For

instance, concerning the definition of “blocked customer,” whether the term “customer” would include the seller and the fist purchaser, which is not limited to buyers, remains questionable. There will also be a problem about how to recognize a “blocked customer.” As a result of inconsistent state’s practices, it would not only increase the difficulties of the effective enforcement of this Protocol, but also create a barrier to hinder Parties from sharing information about blocked customers in the detection or investigation of illicit trade. There is a need to elaborate the “blocked customer” issue in an explicit and feasible form. Also, Parties should be encouraged to establish a regional or global system for sharing information regarding blocked customers to prevent illicit trade activity.

5. COMMENTS ON ARTICLE 9

Text of the relevant paragraphs in Article 9

Article 9
Record-keeping

1 Each Party shall require, as appropriate, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment maintain complete and accurate records of all relevant transactions. Such records must allow for the full accountability of materials used in the production of their tobacco products.

2 Each Party shall, as appropriate, require persons licensed in accordance with Article 6 to provide, on request, the following information to the competent authorities:

(a) general information on market volumes, trends, forecasts and other relevant information; and

(b) the quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock, in tax and customs warehouses under the regime of transit or transhipment or duty suspension as of the date of the request.

3 With respect to tobacco products and manufacturing equipment sold or manufactured on the territory of the Party for export, or subject to duty-suspended movement in transit or transhipment on the territory of the Party, each Party shall, as appropriate, require that persons licensed in accordance with Article 6, provide, on request, to the competent authorities in the country of departure (electronically, where the infrastructure exists) at the time of departure from their control with the following information:

(a) the date of shipment from the last point of physical control of the products;

(b) the details concerning the products shipped (including brand, amount, warehouse);

(c) the intended shipping routes and destination;

(d) the identity of the natural or legal person(s) to whom the products are being shipped;

(e) the mode of transportation, including the identity of

the transporter;

(f) the expected date of arrival of the shipment at the intended shipping destination; and

(g) intended market of retail sale or use.

4. If feasible, each Party shall require that retailers and tobacco growers, except for traditional growers working on a non-commercial basis, maintain complete and accurate records of all relevant transactions in which they engage, in accordance with its national law.

5. For the purposes of implementing paragraph 1, each Party shall adopt effective legislative, executive, administrative or other measures to require that all records are:

(a) maintained for a period of at least four years;

(b) made available to the competent authorities; and

(c) maintained in a format, as required by the competent authorities.

6. Each Party shall, as appropriate and subject to national law, establish a system for sharing details contained in all records kept in accordance with this Article with other Parties.

7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved systems for record-keeping.

COMMENTS

1. With respect to Article 9.1: Article 9.1 requires persons engaged in the supply chain of tobacco products to maintain complete and accurate records of all relevant transactions. Such records must allow for the full accountability of materials used in the production of their tobacco products. We thought both the

phrase “full accountability” and the term “materials” are not clear. For instance, the question of how the requirement of “complete and accurate records” would relate to the records allowing for “the full accountability” remains. The issue of whether the full accountability of “materials” used in the production of their tobacco products is intended to refer to “key inputs” or “raw materials” also needs a further clarification.

2. With respect to Article 9.2:

(1) Article 9.2 requires that persons licenced in accordance with Article 6 to provide the competent authorities with information including general information on market volumes, trends, forecasts as set out in subparagraph (a). It is not appropriate to require all persons licenced situated at different stages of the supply chain to provide the same type of market information. For instance, compared to the manufacturer of tobacco product, tobacco growers might find more difficulties in providing general information on market volumes, trends or forecasts of tobacco products. It is recommended that the types of information to be provided should be differentiated in accordance with the status of the persons lienced in the supply chain. The persons lienced who plays a more essential role in the supply chain and have greater economic power should be required to provide more information to the competent authorities. Furthermore, in order to avert infringing on the tobacco industry’s trade secret, “general information” and “other relevant information” in Article 9.2(a) should be applied and interpreted as

the general market information unrelated to trade secret.

(2) We suggest that the phrase in Article 9.2(a) should be defined more explicitly and clearly. We thought that the information regarding imports and exports of tobacco products is closely connected with the illicit trade activities. To effectively combat illicit trade, there should be a need to require the persons licenced to provide such information to the competent authorities. It is suggested that the wording such as "general information on the market, where one exists, production volumes, imports, exports and/or sales, trends, forecasts, and other relevant information" used in Article 8.1(b) of the INB4's draft should be useful in re-defining the phrase.

(3) Under the phrase "tobacco products and manufacturing equipment" in Article 9.2 (b), tobacco growers, while being subject to licences in accordance with Article 6, would under no obligation to provide quantitative information regarding "tobacco (leaf)." With the absence of information about "quantities of tobacco (leaf)," the competent authorities might not be able to precisely obtain sufficient information concerning tobacco production. We suggest that the subparagraph (b) should be revised to include "tobacco."

3. With respect to Article 9.3:

(1) We suggest that "tobacco" should be added in Article 9.3 since tobacco growers licenced in accordance with Article 6 would also bear the obligation to provide relevant information.

(2) Under Article 9.3, only the exporting country will be

able to obtain the information regarding the shipments or details of tobacco products for exports from the persons licenced under the Protocol when it do make request. But we considered this is not sufficient. For instance, as a matter of practice, the tobacco products might disappear during their international transport, without reaching the intended shipping destination. In such case, due to an absence of a systemic connection between the exporting country and the country of final shipping destination in relation to tobacco product shipments, Parties may not be able to effectively and timely address some potential cases where the illicit trade might have occurred. Therefore, there is a need to establish a system for sharing information regarding the information listed in Article 9.3. For instance, both the exporting country and the country of final destination should be imposed on the obligations to notify each other regarding the intended tobacco product shipments. This could form a part of a system for sharing details contained in all records kept as set out in Article 9.6. In this aspect, in order to establish and facilitate an effective global network, non-Parties, including those countries that have not become Parties to the FCTC, should also be included for the purpose of sharing relevant information.

4. With respect to Article 9.4:

(1) The term “[i]f feasible” is not clear. We suggest that it should be defined clearly.

(2) Both the phrases “traditional growers working on a

non-commercial basis" under Article 9.4 and "traditional small-scale growers" under Articles 1.12(b) and Article 6.2(b) appear to refer to home-grown tobacco for personal use. If that is the case, we suggest the terms should be drafted in a more consistent form.

(3) We thought that the relationship between Article 9.4 and Article 9.1 is not clear. According to Article 9.4, each Party shall require that retailers and tobacco growers maintain complete and accurate records of all relevant transactions. At the same time, pursuant to Article 9.1, each Party also has to require that "all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment" maintain complete and accurate records of all relevant transactions. The phrase "all natural and legal persons engaged in the supply chain of tobacco, tobacco products," by its definition, could cover retailers and tobacco growers. Therefore, retailers and tobacco growers could be simultaneously subject to Article 9.1 and Article 9.4. In addition, in terms of the content of the obligations, there are some differences. Under Article 9.4, by the inclusion of the words "[i]f feasible" and "in accordance with its national law," retailers and tobacco growers might be subject to lower extent of obligation. However, under Article 9.1, persons engaged in the supply chain shall be required to maintain the records that "must allow for the full accountability of materials used in the production of their tobacco products." Further to this, as Article 9.5 provides, each Party, for the purposes of implementing Article 9.1, shall adopt effective

legislative, executive, administrative or other measures to require that all records are maintained for a period of at least four years; made available to the competent authorities; and maintained in a format, as required by the competent authorities. Taking these together, retailers and tobacco growers will be subject to higher extent of obligation in terms of Articles 9.1 and Article 9.5. Given this, we suggest that the relationship between Article 9.1 and Article 9.4 as well as Article 9.4 and Article 9.5 should be further clarified.

5. With respect to Article 9.7: the phrase "endeavor to cooperate" is used. We thought that this phrase is positive and countries should be encouraged to cooperate with each other. In order to ensure a powerful network for combating illicit trade, we suggest that both FCTC Parties that have not yet become parties to the Protocol as well as non-Parties to the FCTC should be included to form a part of comprehensive systems for sharing record-keeping.

6. COMMENTS ON ARTICLE 10

Text of the relevant paragraphs in Article 10

Article 10

Security and preventive measures

1 Each Party shall, where appropriate, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, require that all natural and legal persons subject to Article 6 take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, inter alia:

(a) reporting to the competent authorities:

(i) the cross-border transfer of cash in amounts stipulated in national law or of cross-border payments in kind; and

(ii) all "suspicious transactions"; and

(b) supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use.

…

4. Each Party shall ensure that any contravention of the requirements of this Article is subject to appropriate criminal, civil or administrative procedures and effective, proportionate and dissuasive sanctions including, as appropriate, suspension or cancellation of a licence.

COMMENTS

1. With respect to Article 10.1:

(1) The subparagraph (a) (ii) refers to "suspicious transactions." But there is no definition concerning "suspicious transactions" in this Protocol. We recommend Parties to develop a workable definition or provide some useful indicative factors to be applied on this. Otherwise, it could be confusing when implementing this article. Also both the designation of "blocked

customer" in Article 7.4 and "suspicious transactions" in Article 10.1.(a)(ii) might refer to transactions that do not correspond or conform to ordinary commercial practices. We suggest further clarifying the difference between the terms of "blocked customer" and "suspicious transactions." In addition, it might also be appropriate to impose financial institutes with an obligation of reporting suspicious transactions to the competent authorities as they are most likely to have the information on cross-border transfer of cash or cross-border payments in practice.

(2) According to subparagraph (b), persons holding a licence are required to supply tobacco products or manufacturing equipment only in amounts commensurate with the demand within the intended market of retail sale or use. However, it is not clear about the phrase "only in amounts commensurate with the demand for such products within the intended market of retail sale or use." If it is applied and interpreted to require the obligors to supply tobacco products or manufacturing equipment in terms of the "total" demand within the intended market, instead of concrete demand concerning the individual transaction, we thought it would be infeasible. The supply and demand of tobacco products and manufacturing equipment within a country are usually subject to market situations. In most instances, there is no quantitative cap on tobacco-related transaction in international trade. Therefore, it would be hard for the obligors to ensure the entire amount of the demand in relation to the intended market. Also, the obligors would face the difficulties to base on total demand within the intended territory to determine the amount to

be applied in the individual transaction.

2. With respect to Article 10.4: The terms “effective, proportionate and dissuasive” are unclear so that Parties could have very different interpretations and approaches. It is our view that any sanction available for Parties to address the violations should provide sufficient deterrent effect. The obligation of adopting “effective, proportionate and dissuasive sanctions” might not be enough to deter illegal actions in advance. We suggest the phrase “dissuasive sanctions” to be replaced by “deterrent sanctions.”

7. COMMENTS ON ARTICLE 11

Text of Article 11

Article 11

Sale by Internet, telecommunication or any other evolving technology

1. Each Party shall require that all legal and natural persons engaged in any transaction with regard to tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale comply with all relevant obligations covered by this Protocol.

2. Each Party shall consider banning retail sales of tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale.

COMMENTS

1. With respect to Article 11.1:

(1) According to Article 11.1, each Party shall regulate tobacco product trade by Internet or telecommunication or other evolving technology. However, the scope and meaning of "Internet-mode of sale, telecommunication-mode of sale and evolving technology-based mode of sale" should be further clarified. It is not clear whether all tobacco-related business activities or transactions by means of Internet or telecommunication would be covered in this Article. For instance, it is quite common that the importers or the sellers to order products from foreign manufactures through mobile phones, emails, or Internet. In order to avoid confusion, we suggest that this Article should only apply to sales through Internet, telecommunication or any other evolving technology to consumers.

(2) The phrase "relevant obligations covered by this Protocol" might invite different interpretations and ambiguities. For instance, given that there is no specific provision for the sale by Internet or telecommunication or other evolving technology in this Protocol, what constitutes the "relevant" obligations would remain questionable. If the obligations arising from the rest of all other articles in this Protocol would be seen as the "relevant" obligations and equally apply to the Internet sale, the further issue of whether those obligations would be suitable to apply to the case of the Internet sale would need more elaborations. In this regard, we are of the view that the equal application of this Protocol to the case of the Internet sale might give rise to some feasibility problems, in particular in relation to customer aspect. Also it would be hard for sellers to know precisely or identify the customer to whom the products are to be sold. However, there are some obligations which would involve customers in this Protocol. For instance, in terms of due diligence obligations under Article 7, persons engaged in the supply chain are required to monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use (Article 7.1(b)); to report to the competent authorities any evidence that the customer is engaged in activities in contravention of its obligations arising from this Protocol (Article 7.1(c)); and to conduct customer identification (Articles 7.2 and 7.3). In regard to record-keeping obligation, persons engaged in the supply chain might need to provide to the competent authorities with

information to identity of the natural or legal person(s) to whom the products are being shipped (Article 9.3(d)). Given this, we recommend Parties to further carefully examine the suitability of relevant provisions for the Internet sale.

2. With respect to Article 11.2:

(1) Article 11.2 instructs Parties to consider taking a ban on retail sales of tobacco products through Internet, telecommunication or any other evolving technology. But in current form, Parties are only required to "consider" taking a ban on retail sale through Internet. No obligation has been imposed on Parties to "take" such a ban. We thought it is not appropriate. Given the anonymous nature of the Internet, the legally-permitted Internet sale of tobacco products might provide the inducement or opportunity for the young persons, in particular teens under 18, to buy tobacco products through the Internet. There might be a contravention to the essence of the FCTC to protect the protection of young persons. The Preamble of the FCTC states that "deeply concerned about the escalation in smoking and other forms of tobacco consumption by children and adolescents worldwide, particularly smoking at increasingly early ages." Article 16.1(b) of the FCTC requires each Party to ban the sale of tobacco products "in any manner" by which they are directly accessible. FCTC Article 16.3 provides that each Party shall endeavor to prohibit the sale of cigarettes individually or in small packets "which increase the affordability of such products to minors." Article 16.4 of the Convention also states that measures to prevent

tobacco product sales to minors should, where appropriate, be implemented in conjunction with other provisions contained in the FCTC. Given these, in effect, legally-permitted retail sale of tobacco products through the Internet might indirectly undermine the measures preventing tobacco product sales to the young persons, prohibiting the sale of cigarettes individually "which increase the affordability of such products" to the young persons; banning the sale of tobacco products in any manner by which the young persons are directly accessible. We thus recommend Parties to introduce a complete ban on the retail sales of tobacco products through Internet, telecommunication or any other evolving technology to maintain the effectiveness of tobacco controls as a whole.

(2) Even if it is impracticable to ban the retail sale through Internet, telecommunication or any other evolving technology in certain cases, we suggest that Parties should at least be required to establish some forms to check the consumers' age for the purpose of controlling the Internet sales of tobacco products. For instance, only credit card payments are allowed in this case. Practically, the credit card issuing institution might be able to help verify the card holder's age.

8. COMMENTS ON ARTICLE 12

Text of Article 12

Article 12

Free zones and international transit

1. Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective controls on all manufacturing of, and transactions in, tobacco and tobacco products, in free zones, by use of all relevant measures as provided in this Protocol.

2. In addition, the intermingling of tobacco products with non-tobacco products in a single container or any other such similar transportation unit at the time of removal from free zones shall be prohibited.

3. Each Party shall, in accordance with national law, adopt and apply control and verification measures to the international transit or transhipment, within its territory, of tobacco products and manufacturing equipment in conformity with the provisions of this Protocol in order to prevent illicit trade in such products.

COMMENTS

1. With respect to Article 12.1:

(1) The article uses the phrase "implement effective control." However, it is not clear as to the extent of control that would meet the requirement of effectiveness expected in this article.

(2) The phrase "transactions in, tobacco and tobacco products, in free zone" is also not clear. For instance, if the transactions are conducted between a seller in the free-zone and a buyer in the domestic market; or if the transactions are conducted between a seller and a buyer both located in the free-zone, whether they should be subject to "transactions in free zone"

needs to be clarified.

(3) Parties are required to use of "all relevant measures as provided in this Protocol" to control trade in free-zones. However, the phrase "all relevant measures as provided in this Protocol" is too broad and vague. Whether there are "relevant" measures in this Protocol that can avail Parties to achieve the goal of effective control for trade in free-zones seems unclear. Further, whether the specific measures for non-free zones in this Protocol should be applied to the same extent for free-zones also needs clarification. For instance, persons engaged in the supply chain are required to report to the competent authorities with information regarding the cross-border transfer of cash, as required under Article 10.1(a) (i), how this requirement would practically apply to the case of free zone remains to be seen.

(4) We suggest that the purpose of this Article should be introduced in a clearer form. Generally, Parties should be required to take active measures to prevent free-zones from being used a channel to illegally facilitate tobacco products' access to their domestic markets. In any event, tobacco products traded in free-zones are not permitted to release into the channels of commerce within the importing country.

(5) We suggest "manufacturing equipment" should also be subject to Article 12.1. Tobacco products and relevant manufacturing equipment in free-zones physically appear within the territory of the Parties. Also, geographically, the free-zones are close to the normal domestic market of a Party. Therefore, tobacco products traded in free-zones are potentially exposed to

higher risk of being smuggled. In order to minimize such risks, we suggest that Parties should consider banning the production of tobacco products and the assembly or the manufacture of tobacco-related manufacturing equipment in free-zones.

2. With respect to Article 12.3:

(1) Parties are required to adopt and apply control and verification measures to the international transit or transhipment, within its territory, of tobacco products and manufacturing equipment in conformity with the provisions of this Protocol. However, several points are unclear. For instance, in the case of international transit or transshipment of tobacco products, what constitutes "control and verification measures" "in conformity with this Protocol"? To what extent Parties are expected to apply the provisions of this Protocol to international transit or transshipment? What provisions might be deemed as the most relevant measures to international transit or transshipment? We suggest Parties to further clarify these.

(2) As far as applying control and verification measures to international transit or transshipment of tobacco products is concerned, we thought that Article V of the GATT should be of relevance. Article V of the GATT provides that, traffic in transit in principle shall not be subject to any unnecessary delays or restrictions. All regulations imposed by members on traffic in transit shall be reasonable. In light of these, whether "control and verification measures" contained in this Protocol will be

qualified as unnecessary delays, restrictions or unreasonable measures in the GATT, should be taken into account.

(3) Tobacco products in transit by their nature only across or pass the frontier of a Party, with no aim to enter the domestic market of the Party. It might be more appropriate to change the phrase “within its territory” into “through its territory”.

COMMENTS ON ARTICLE 13

Text of Article 13

Article 13
Duty free sales

1. Each Party shall implement effective measures to subject any duty free sales to all relevant provisions of this Protocol, taking into consideration Article 6 of the WHO Framework Convention on Tobacco Control.

2. No later than five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain the extent of illicit trade in tobacco products related to duty free sales of such products. On the basis of such research, the Meeting of the Parties shall consider appropriate further action.

COMMENTS

1. With respect to Article 13.1:

(1) The phrases "implement effective measures" and "all relevant provisions of this Protocol" are not clear. We suggest Parties to elaborate them in a more explicit form.

(2) To be more specific, we suggest that Article 13.1 should be drafted as "Each Party shall implement effective measures to subject any duty free sales *of tobacco products* to all relevant provisions of this Protocol…."

2. With respect to Article 13.2:

(1) Article 13.2 deals with evidence-based research to be conducted to ascertain the extent of illicit trade related to duty free sales of tobacco products. We thought that the availability of duty-free sale of tobacco products might facilitate illicit trade.

When a government lacks sufficient enforcement to safeguard the duty-free tobacco products within the duty free allowance (such as 200 tobacco sticks for personal use) under its national law, it is likely that such duty free products over the permitted amounts are diverted into illicit trade by smugglers. This problem might become serious in some countries where higher tobacco tax or duty is set. Therefore, we suggest that the Meeting of the Parties should take more active response to such emerging issue. Along this line, it is recommended that Parties might need to shorten the period from five years to three years to complete the research work to the most extent possible.

(2) The meaning of "at its next session" is not clear. We suggest Parties to change the phrase as "at its first session." Alternatively, it is recommended that the Meeting of the Parties instructs forming a working group or study group to conduct research on the issue of duty-free sale of tobacco products. Such working group should be required to submit relevant reports and recommendations at the next session of the Meetings of the Parties for the purpose of facilitating discussion and decision-making by Parties.

(3) There are some disputes about the connection between duty-free sales and tobacco smuggling thus far. In this regard, we recommend that the "nature" of illicit trade in tobacco products related to duty free sales should first be identified before its "extent" could be explored.

(4) Based on the above, we suggest that this Article is changed as follows: "no later than ***three years*** following the

entry into force of this Protocol, the Meeting of the Parties shall ensure at its *first session* that evidence-based research is conducted to ascertain the *nature* and extent of illicit trade in tobacco products related to duty free sales of such products."

9. COMMENTS ON ARTICLE 14

Text of the relevant paragraphs in Article 14

Article 14

Unlawful conduct including criminal offences

1 Each Party shall adopt, subject to the basic principles of its domestic law, such legislative and other measures as may be necessary to establish all of the following conduct as unlawful under its domestic law:

(a) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment contrary to the provisions of this Protocol;

(b) (i) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels;

(ii) any other acts of smuggling or attempted smuggling of tobacco, tobacco products or manufacturing equipment not covered by paragraph (b)(i);

(c) (i) any other form of illicit manufacture of tobacco, tobacco products or manufacturing equipment, or tobacco packaging bearing false fiscal stamps, unique identification markings, or any other required markings or labels;

(ii) wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting of illicitly manufactured tobacco, illicit tobacco products, products bearing false fiscal stamps and/or other required markings or labels, or illicit manufacturing equipment;

(d) mixing of tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products;

(e) intermingling of tobacco products with non-tobacco products in contravention of Article 12.2 of this Protocol;

(f) using Internet-, telecommunication- or any other evolving technology-based modes of sale of tobacco products in contravention of this Protocol;

(g) obtaining, by a person licensed in accordance with Article 6, tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed in accordance with Article 6;

(h) obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;

(i) (i) making any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment and when not contrary to the right against self incrimination;

(ii) mis-declaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment or any other information specified in the protocol to:

(a) evade the payment of applicable duties, taxes and other levies, or

(b) prejudice any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;

(iii) failing to create or maintain records covered by this Protocol or maintaining false records; and

(j) laundering of proceeds of unlawful conduct established as a criminal offence under paragraph 2.

…

COMMENTS

Article 14.1(g) deals with the unlawful conduct that persons licenced in accordance with Article 6 “obtain” tobacco, tobacco products or manufacturing equipment from a person who does not hold a licence. However, practically, the persons licenced might not “obtain” tobacco, tobacco products or manufacturing equipment in person. Instead, they might control such products in an indirect manner such as by the means of resale. In other words, if the meaning of the term “obtain” specifically refers to picking up products in person or controlling the products directly, then Article 14.1(g) might become less useful. We suggest Parties to clarify this.

11. COMMENTS ON ARTICLE 20

Text of Article 20

Article 20
General information sharing

1. Parties shall, for the purpose of achieving the objectives of this Protocol, report, as part of the WHO Framework Convention on Tobacco Control reporting instrument relevant information, subject to domestic law, and where appropriate, inter alia, on matters such as:

(a) in aggregate form, details of seizures of tobacco, tobacco products or manufacturing equipment, quantity, value of seizures, product descriptions, dates and places of manufacture; and taxes evaded;

(b) import, export, transit, tax-paid and duty-free sales and quantity or value of production of tobacco, tobacco products or manufacturing equipment;

(c) trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment; and

(d) any other relevant information, as agreed by the Parties.

2. Parties shall cooperate with each other and with competent international organizations to build the capacity of Parties to collect and exchange information.

3. Parties shall deem the said information to be confidential and for the use of Parties only, unless otherwise stated by the transmitting Party.

COMMENTS

1. With respect to Article 20.1:

(1) Article 20.1 provides that Parties shall report on relevant matters "as part of the WHO Framework Convention on Tobacco Control reporting instrument." But it is not clear as to how the reporting mechanism would operate. We suggest that the time,

frequency and the Party to whom report is to be submitted should be included and further elaborated.

(2) Article 21.1 of the FCTC states that each Party shall submit to the Conference of the Parties, through the Secretariat, periodic reports on its implementation of this Convention. Also, Article 32 of this Protocol provides that each Party shall submit to the Meeting of the Parties, through the Convention Secretariat, periodic reports on its implementation of this Protocol. However, as required in Article 20.1 of this Protocol, it only mentions such report "as part of the WHO Framework Convention on Tobacco Control reporting instrument." Therefore, for the purpose of implementing the reporting obligation under Article 20.1 of this Protocol, whether Parties could directly submit their reports to the Conference of the Parties in accordance with Article 21.1 of the FCTC is not be very clear. Also, Article 20.3 of this Protocol states that the relevant information reported under Article 20.1 is required for the use of Parties only. Whether Article 20.3 will create a barrier to hinder Parties from implementing their reporting obligations under Article 20.1 by the recourse to the Conference of the Parties of the FCTC remains questionable. We recommend Parties to clarify this issue.

2 With respect to Article 20.3:

(1) Pursuant to Article 20.3, the reported information under Article 20.1 shall be deemed as confidential and only Parties to this Protocol are entitled to use such information. We do not agree on this. In order to create an effective system for information

sharing, there would be a need to include non-Parties to join the information sharing network to the most extent possible. Also, it is important to note that Article 32.5 of this Protocol states that "the reporting of information under those Articles shall be subject to national law regarding confidentiality and privacy." Article 22.2 of the FCTC also provides that "the exchange of information under this Protocol shall be subject to domestic law regarding confidentiality and privacy." That is to say, the reported information will not necessarily be subject to strict confidentiality. We suggest that the confidentiality requirement under Article 20.3 of this Protocol should be refined and be replaced by a more flexible form.

(2) We are of the view that information to be shared between Parties and non-Parties should not be made easily available to the tobacco industry in public. We suggest Parties to consider establishing a system to manage and control the intergovernmental information-sharing, by which the tobacco industries are prevented from having access via the Internet and public media to information especially involving Parties' strategies in combating illicit trade.

12. COMMENTS ON ARTICLE 23

Text of Article 23

Article 23

Assistance and cooperation: training, technical assistance and cooperation in scientific, technical and technological matters

1. Parties shall cooperate, with each other and/or through competent international and regional organizations in providing training, technical assistance and cooperation in scientific, technical and technological matters, in order to achieve the objectives of this Protocol, as mutually agreed. Such assistance may include the transfer of expertise or appropriate technology in the areas of information gathering, law enforcement, tracking and tracing, information management, protection of personal data, interdiction, electronic surveillance, forensic analysis, mutual legal assistance and extradition.

2. Parties may, as appropriate, enter into bilateral, multilateral or any other agreements or arrangements in order to promote training, technical assistance and cooperation in scientific, technical and technological matters taking into account the needs of developing-country Parties and Parties with economies in transition.

Parties shall cooperate, as appropriate, to develop and research the possibilities of identifying the exact geographical origin of seized tobacco and tobacco products.

COMMENTS

With respect to Article 23.2, we suggest that particular consideration should be given to the difficult situations of the least developed countries and countries in economic transition. They might need technical assistance. The needs of developing countries who have not yet become Parties to the Protocol should also be taken into account in this regard.

13. COMMENTS ON ARTICLE 25

Text of Article 25

Article 25
Protection of sovereignty

1. Parties shall carry out their obligations under this Protocol in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Protocol entitles a Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

COMMENTS

Article 25 on protection of sovereignty might easily become a cause preventing the Parties from performing their obligations under this Protocol. We suggest Parties to consider whether there is a need to have such article. For instance, Parties might use the principle of sovereign equality or the principle of non-interference in the domestic affairs as a reason to justify their failure of implementing the obligation of sharing information.

14. COMMENTS ON ARTICLE 26

Text of the relevant paragraphs in Article 26

Article 26
Jurisdiction

1. Each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when:

(a) the offence is committed in the territory of that Party; or

(b) the offence is committed on board a vessel that is flying the flag of that Party or an aircraft that is registered under the laws of that Party at the time that the offence is committed.

2. Subject to Article 25, a Party may also establish its jurisdiction over any such criminal offence when:

(a) the offence is committed against that Party;

(b) the offence is committed by a national of that Party or a stateless person who has his or her habitual residence on its territory; or

(c) the offence is one of those established in accordance with Article 14 and is committed outside its territory with a view to the commission of an offence established in accordance with Article 14 within its territory.

3. For the purposes of Article 30, each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when the alleged offender is present on its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4 Each Party may also adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when the alleged offender is present on its territory and it does not extradite him or her.

…

COMMENTS

1. With respect to Article 26.2:

(1) The phrase “subject to Article 25” is not very clear. It could result in jurisdictional conflicts. For instance, when two Parties claim their respective jurisdictions under paragraphs 2 (a) and (c), a question may arise concerning which jurisdiction should prevail. It is suggested that the phrase “subject to Article 25” should be defined in more explicit manner concerning the priority of exercising jurisdictions based on different articles.

(2) The phrase “against the Party” in paragraph 2 (a) is too vague. It would be subject to different views about whether all negative effects resulting from tobacco should be considered as against the Party. We suggest clarifying the scope and application of paragraph 2 (a).

(3) Paragraph 2 (c) concerning offences “committed outside its territory with a view to the commission of a crime within its territory” is too broad. Also, it would be difficult to decide whether it is “with a view to the commission of a crime within its territory.”

2. With respect to Article 26.3: Under paragraph 3, Party shall establish its jurisdiction when the alleged offender is present on its territory and it does not extradite such person solely on the ground that he or she is one of its nationals. Thus, one of the conditions a Party to be required to establish its jurisdiction is no extraditing its nationals. This is not an appropriate requirement. If one Party does not extradite such person because of other grounds, there is no reason that it should not be required to establish

jurisdiction.

3. With respect to Article 26.4: By indicating the term “may,” this paragraph gives the Parties discretion to decide whether to establish its jurisdiction over the criminal offences when the alleged offender is present on its territory and it does not extradite him or her. The discretion might result in the situation where the Party has no jurisdiction but does not extradite him or her. We are of the view that there is no sound reason to give such discretion.

15. COMMENTS ON ARTICLE 29-31

Text of the relevant paragraphs in Article 29-31

Article 29
Mutual legal assistance

1. Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Article 14 of this Protocol.

…

4. This Article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance.

5. Paragraphs 6 to 24 shall, on the basis of reciprocity, apply to requests made pursuant to this Article if the Parties in question are not bound by a treaty or intergovernmental agreement of mutual legal assistance. If the Parties are bound by such a treaty or intergovernmental agreement, the corresponding provisions of that treaty or intergovernmental agreement shall apply unless the Parties agree to apply paragraphs 6 to 24 in lieu thereof. Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

6. Parties shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to their respective competent authorities for execution. …

…

24. Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this Article.

Article 30
Extradition

…

14. Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition. Where Parties are bound by an existing treaty or

intergovernmental arrangement the corresponding provisions of that treaty or intergovernmental arrangement shall apply unless the Parties agree to apply paragraph 1 to 13 in lieu thereof.

Article 31
Measures to ensure extradition

…

1. Any person regarding whom the measures in accordance with paragraph 1 are being taken, shall be entitled to:

(a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or, if that person is a stateless person, the State in the territory of which that person habitually resides; and

(b) be visited by a representative of that State.

COMMENTS

1. Articles 29-31 of this Protocol specifically deal with mutual legal assistance and extradition. They are largely based on the model of the United Nations Convention against Transnational Organized Crime (UNTOC), but with slight differences in the coverage. For Parties to this Protocol who also Parties to the UNTOC, there might be a potential problem about whether the Protocol or the UNTOC will apply if there is a conflict between them. For instance, under Article 29.1, Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Article 14 of this Protocol. However, under the UNTOC, the main concern is related to transnational organized crime. Criminal

offences may involve participation in an organized criminal group, money laundering, corruption and obstruction of justice. We suggest clarifying such conflict.

2. Article 2.1 provides that "[t]he provisions of the FCTC that apply to its protocols shall apply to this Protocol." Article 15.6 of the FCTC also states that "[t]he Parties shall, as appropriate and in accordance with national law, promote cooperation between national agencies, as well as relevant regional and international intergovernmental organizations as it relates to investigations, prosecutions and proceedings, with a view to eliminating illicit trade in tobacco products. Special emphasis shall be placed on cooperation at regional and subregional levels to combat illicit trade of tobacco products." We suggest that the relationship between the articles on mutual legal assistance and extradition of this Protocol and Article 15.6 of the FCTC should be clarified clearly.

2. The extensive obligations concerning mutual legal assistance and extradition in this Protocol are not applicable to FCTC Parties who have not yet become the Parties to this Protocol. However, these FCTC Parties are under the obligation to implement Article 15.6 of the FCTC to promote cooperation concerning investigations, prosecutions and proceedings at national, regional and international levels to combat illicit trade of tobacco products. Such Article 15.6 obligation also concurrently applies to Parties to this Protocol. Therefore, we urge that both Parties and non-Parties to this Protocol should cooperate with

each other on the matters of mutual legal assistance and extradition to the most extent possible so as to facilitate the implementation of both FCTC and this Protocol. The issue of signing this Protocol should not constitute a hindrance or an obstacle preventing Parties from further conducting closer cooperation to each other. Practically, in order to ensure the effectiveness of the regulatory system to combat illicit trade created by this Protocol, Parties should be encouraged to provide, on request, relevant cooperation and assistance to countries that have not become Parties to FCTC on matters of mutual legal assistance and extradition.

3. Article 29.4 suggests that article on mutual legal assistance of this Protocol shall not affect the obligations under "any other treaty, bilateral or multilateral," which governs or will govern, in whole or in part, mutual legal assistance. Similar requirements of international cooperation at different levels (multilateral, regional and bilateral levels) are also seen in several articles throughout the entire Protocol. But the phrases are not exactly same. For instance, the phrase under Article 19.2 is "multilateral, regional or bilateral arrangements;" the phrase under Article 24.1 is "multilateral, regional or bilateral arrangements;" the phrase under Article 27.2 is "bilateral or multilateral agreements or arrangements;" the phrase under Article 29.24 "bilateral or multilateral agreements or arrangements." They need to be drafted in a consistent manner.

4. Article 29.24 provides that Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of the Article on mutual legal assistance. It is suggested that a Party that is a party to other agreement or arrangement concerning the elimination of illicit trade, shall afford adequate opportunities for other interested Parties to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. In this regard, non-Parties to this Protocol, including non-Parties to FCTC, should also be afforded with such opportunities to participate in the negotiation to facilitate the implementation of this Protocol.

5. Article 29.6 states that "Parties" shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to their respective competent authorities for execution. It could be subject to an absurd interpretation that there needs only one central authority for all Parties to implement mutual legal assistance among Parties. We suggest the term should be revised to "Each Party" to make it clearer.

16. COMMENTS ON ARTICLE 36

Text of the relevant paragraphs in Article 36

Article 36
Financial resources

…

3. Parties shall promote, as appropriate, the utilization of bilateral, regional, subregional and other multilateral channels to provide funding for strengthening the capacity of developing-country Parties and Parties with economies in transition in order to meet the objectives of this Protocol.

…

7. Parties may require the tobacco industry to bear any costs associated with a Party's obligations to achieve the objectives of this Protocol, in compliance with Article 5.3 of the WHO Framework Convention on Tobacco Control.

…

COMMENTS

1. With respect to Article 36.3: The paragraph 3 provides that Parties shall promote, as appropriate, the utilization of bilateral, regional, subregional and other multilateral channels to provide funding for strengthening the capacity of developing-country Parties and Parties with economies in transit. We thought that only requiring Parties to promote, as they deem appropriate, the use of existing bilateral, regional, subregional and other multilateral channels to provide funding might not be able to sufficiently address the special needs of developing-country Parties and Parties with economies in transition. To facilitate the implementation of this Article, we suggest Parties to establish a mechanism for seeking financial resources from any body,

institution or countries which have interests to provide such resources, including non-Parties to FCTC. Furthermore, According to Article 35, in order to provide technical and financial cooperation for achieving the objective of this Protocol, the Meetings of the Parties may request the cooperation of competent international and regional intergovernmental organizations, including financial and development institutions. Along this line, it is suggested that the Meetings of the Parties or the WHO might make appropriate arrangements for cooperation with other international institution, such as the Work Bank, to provide financial assistance in favor of developing-country Parties and Parties with economies in transition.

2. With respect to Article 36.7: Paragraph 7 suggests that Parties may require the tobacco industry to bear any costs associated with a Party's obligations to achieve the objectives of this Protocol, in compliance with Article 5.3 of FCTC. We are of the view that such a regulatory approach would not be appropriate for the purpose of the implementation of this Protocol.

First, textually, the tobacco industry would thus be afforded with the opportunity to establish a positive public image in the local community by assisting Parties in meeting their legal obligations in this Protocol. We considered this to be contrary to the essence of FCTC. We do not agree with the point that Parties could directly or indirectly rely on the tobacco industry to "bear any cost" through financial means to relieve their burden or cost

from the implementation of the obligations in this Protocol.

Second, the phrase "to bear any costs associated with a Party's obligations to achieve the objectives of this Protocol" is too broad and unclear. There is a need to elaborate it in more explicit form.

Third, the phrase "in compliance with Article 5.3 of the FCTC" is also of vagueness. The relationship between Article 36.7 of this Protocol and Article 5.3 of the FCTC needs to be clarified. In our view, Article 36.7 in its current form might be against Article 5.3 of the FCTC and its implementation Guidelines. For instance, requiring the tobacco industry to bear any costs in connection with Parties' obligations in this Protocol might be seen as a form of tobacco industry "interference" with Parties' tobacco control policies. Furthermore, paragraph 20 of Article 5.3 of the Guidelines states that "in setting and implementing public health policies with respect to tobacco control, any necessary interaction with the tobacco industry should be carried out by Parties in such a way as to avoid the creation of any perception of a real or potential partnership or cooperation resulting from or on account of such interaction." It seems possible that measures under Article 37.6 of this Protocol might raise the concern about "the creation of any perception of a real or potential partnership or cooperation" with the tobacco industry. In addition, paragraph 21 of Article 5.3 of the Guidelines recommends that "the tobacco industry should not be a partner in any initiative linked to setting or implementing public

health policies, given that its interests are in direct conflict with the goals of public health." From this perspective, a question arises concerning whether the tobacco industry becomes a "partner" due to its bearing any costs concerning Parties' obligations for combating illicit trade. Following the line of Article 5.3 of the Guidelines, we suggest that Parties should not accept, support or endorse the tobacco industry's participation in any legal initiatives that are directly or indirectly related to tobacco control. Neither should Parties accept, support or endorse any offer for assistance or in collaboration with the tobacco industry in the elimination of illicit trade of tobacco products.

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