

COMMENTS AND RECOMMENDATIONS ON  
**THE DRAFT PROTOCOL TO ELIMINATE ILLICIT  
TRADE IN TOBACCO PRODUCTS**

(FCTC/COP/INB-IT/4/7 of 21 March 2010)

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## INTRODUCTION

Illicit trade in tobacco products has been a constant threat to the effective control of tobacco supply. Article 15 of the FCTC indicates that the Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control. Thus they put a lot of efforts in negotiating the Protocol to Eliminate Illicit Trade in Tobacco Products. There have been a number of drafts as a result of the works of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products.

The most recent draft of 21 March 2010 (FCTC/COP/INB-IY/4/7) (hereinafter “Draft”) has made impressive progress on most aspects. As observers of the development of the FCTC and the illicit trade, we congratulate the achievements of the Intergovernmental Group thus far.

After careful review of the Draft, we thought there are many apparent missing or incorrect points. We thought that we might be able to provide some inputs so as to help perfection of the Draft and to move forward to the finalization of the Protocol.

There are many brackets in the Draft. We consider that the selections of different brackets should be the responsibility of the Parties. So we decided to avoid engaging in the debates on which brackets should be adopted. Instead, we focused more of our efforts in identifying the problems of the Draft that the negotiators might have missed or ignored.

The comments and recommendations in this document are made in line with the

order of the articles in the Draft. There are some issues simultaneously concerning more than one article. We put them in the last part of this comments and recommendations.

Concerning the format, we put the commented articles or paragraphs in the squares and then the comments and recommendations following the squares so as to clearly show the related parts to be commented in connection with our comments.

## 1. COMMENTS ON THE PREAMBLE

### Text of the relevant paragraphs in the Preamble

#### *Preamble*

*Acknowledging also that, although free-trade areas are established to facilitate legal trade, they have been used to facilitate the globalization of the illicit trade in tobacco products, both in relation to the illicit transit of smuggled products and in the manufacture of illicit 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.*

### COMMENTS

The first paragraph in the square uses the term “free-trade areas”. It is apparently not covering other economic integrations, such as customs union and common market, like Mercosur and EU. We suggest to broaden the scope so as not to exclude other kinds of economic integrations.

Since the aim of the second paragraph in the square is to alert decision-makers to take into consideration the impacts from illicit trade and tobacco industry on the strategies, it would be more useful to make an illustrative list to specific practices for which the Parties should be alerted so as to help them better understand possible problems, instead of using the broad and vague language “activities of the tobacco industry”.

## 2. COMMENTS ON ARTICLE 1

### Text of relevant paragraph of Article 1

#### *Article 1*

#### *Use of terms*

1. *“Carton” means packaging for five or more unit packs of tobacco products.*
2. *“Cigarette” means any product that contains tobacco and is intended to be burnt or heated under ordinary conditions of use; the term includes, without limitation, any “roll-your-own” tobacco, which, because of its appearance, type, packaging or labelling is suitable for use by and likely to be offered to or purchased by consumers as tobacco for making cigarettes.*
10. *“Master case” means packaging for about 10 000 cigarettes.*

### COMMENTS

The term “manufacture equipment” is used in various articles. However, there is no definition on this term in Article 1 or in the FCTC itself. There is a need to define such term in Article 1.

Tobacco companies might decide to put less than five unit packs in a carton. The definition of carton might not be able to take care of such different situations.

Paragraph 10 defines “master case”. But there is no other provision in the Draft mentioning or using such term. This needs to be fixed.

Concerning “roll-your-own” tobacco in paragraph 2, we thought that the definition relies too much on the appearance and packing and too little on the nature of the product.

### 3. COMMENTS ON ARTICLE 2

#### Text of Article 2

#### *Article 2*

#### ***Relationship between the Protocol and other agreements and legal instruments***

...

3. *Parties to this Protocol that are not Parties to the United Nations Convention against Transnational Organized Crime shall endeavour to apply the relevant provisions of that Convention, as appropriate, to cases of illicit trade in tobacco products.]*

*or*

3. *[[Parties to this Protocol that are also Parties to the United Nations Convention against Transnational Organized Crime shall [ensure the full application of] / [[try to] / apply] the provisions that [have not become] / [are not] Parties to the United Nations Convention against Transnational Organized Crime shall [consider] / [endeavour] applying the relevant provisions of that Convention, as appropriate, to cases of illicit trade in tobacco products.] [In particular, they shall consider application of Articles 5, 6, 8, 10–13, 15, 16 and 18 of the United Nations Convention against Transnational Organized Crime.]] (Propose to move to preamble)*

*or*

***[In the absence of any provision to the contrary the provisions of United Nations Convention against Transnational Organized Crime shall be made supplementally applicable. Non-Parties to United Nations Convention against Transnational Organized Crime are encouraged to apply relevant provisions thereof as appropriate.]***

*or*

*[The Parties to this Protocol shall consider ratifying all other international instruments that may assist in furthering the objectives of this Protocol]*

*or*

*[Nothing in the Protocol shall affect the rights and obligations of Parties towards any provision that are more conducive to the achievement of the elimination of illicit trade of tobacco products which may be contained in any other international convention, treaty or agreement in force for that Party, in particular United Nations Convention against Transnational Organized Crime.]*

*[Recalling and emphasizing the importance of other international agreements such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption and the obligations that Parties to these Conventions have to apply the relevant provisions of these Conventions to the illicit trade in tobacco.]* (To replace paragraph 19 in preamble)

*[Encourages those Parties to this Protocol that have not yet become Parties to these other international agreements to consider doing so.]* (To be inserted after paragraph 19 in preamble)...

## COMMENTS

Concerning the relations between the Protocol and the United Nations Convention against Transnational Organized Crime, we suggest to require the Parties collectively to “seek cooperation with” that UN convention. In this regard, the model of GATT Article 15 should be useful. It provides in paragraph 1: “The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.”



It is useful to encourage those Parties to this Protocol that have not yet become Parties to United Nations Convention against Transnational Organized Crime and other relevant treaties to consider doing so. However, it would be confusing to require the Parties to apply the relevant provisions of this Convention. Otherwise, there will be a problem about whether the Protocol or this convention will apply if there is a conflict between them.

#### 4. COMMENTS ON ARTICLE 4

##### Text of Article 4

#### **Article 4**

##### **General obligations (Consensus)**

*In addition to the provisions of Article 5 of the WHO Framework Convention on Tobacco Control, Parties shall:*

- 1. adopt and implement effective measures to control or regulate the supply chain of goods covered by the provisions of this Protocol in order to prevent, deter, detect, investigate and prosecute illicit trade in such goods and shall cooperate with one another to this end;*
- 2. take any necessary measures in accordance with their national law to increase the effectiveness of their competent authorities and services, including customs and police responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods covered by this Protocol;*
- 3. adopt effective measures for facilitating or obtaining technical assistance and financial support, capacity building and international cooperation in order to achieve the objectives of this Protocol and ensure the availability to, and secure exchange with, the competent authorities of information to be exchanged under this Protocol;*
- 4. cooperate closely with one another, consistent with their respective domestic legal and administrative systems, in order to enhance the effectiveness of law enforcement action to combat the offences covered by this Protocol;*
- 5. cooperate and communicate, as appropriate, with relevant regional and international intergovernmental organizations in the secure<sup>3</sup> exchange of information covered by this Protocol in order to promote the effective implementation of this Protocol; and*

*6. within the means and resources at their disposal, cooperate to raise financial resources for the effective implementation of this Protocol through bilateral and multilateral funding mechanisms.*

## COMMENTS

The way that this article is drafted is not commonly seen. The obligations covered in this article are too general. This article requires parties to adopt effective measures to implement this protocol in a very general way. The contents should be relocated in other more specific provisions so as to make them clearer concerning the obligations imposed on the Parties.

Also some of the contents in this article are already shown in other articles. It is not very clear about the relations between them, i.e. whether the obligations in this article are separate and additional obligations, or whether they are only the implementation methods for the obligations in other article.

## 5. COMMENTS ON ARTICLE 5

### Text of Article 5

#### *Article 5*

##### *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 legal or natural person except pursuant to a licence or equivalent approval (hereafter “licence”) granted, or control system implemented, by a competent national 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 legislation, any legal or natural 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 national 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 legislation, to conduct the activities specified in paragraph 1 of this Article;*

*(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, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and of any designated 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 laws;*

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

***[(h) each Party shall ensure that any manufacturing equipment or part thereof, which***

***(i) has been decommissioned for whatever reason,***

***(ii) has become unserviceable, or***

***(iii) has become obsolete***

***shall be declared to the licensing authority for the purposes of cancellation of licence, or destruction of such manufacturing equipment or part thereof; or***

*reissuing of a licence as the case may be;*

*(i) Parties shall ensure that the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the licensing authority, and the cost of such destruction shall be borne by the holder of the licence;*

*(j) Parties shall ensure that no person shall keep, store or possess, any manufacturing equipment or any part thereof, for whatever purpose, without a valid licence or permit as the case may be.]*

*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 of this Article, and without prior approval from the designated competent national authority.*

## COMMENTS

1. In paragraph 2 of this article, the phrase “endeavor to license” is used. We do not agree on the use of such phrase. It is because this phrase creates a very confusing situation. If countries are required to endeavor to license, it seems that tobacco related business activities are positive and countries are encouraged and even urged to give licenses to them. This would be in direct contradiction to paragraph 1 of this article, which provides that the parties should prohibit the business operation listed unless otherwise licensed. Therefore, we suggest to replace the phrase “endeavor to license” by the phrase “require the licensing of” to avoid possible confusing messages resulting from the provision.

2. The activities listed in sub-paragraph (d) of paragraph 2 include “retailing of tobacco products; growing of tobacco; transporting commercial quantities of tobacco products or manufacturing equipment; and wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment”. The coverage is different from that of paragraph 1. We thought that the activities

of "manufacturing of tobacco products", and "importing or exporting of tobacco products and manufacturing equipment" should also be subject to licensing requirement.

3. Paragraph 3(c) states that "monitor and collect...any license fees". However, fees are to be "collected", not to be "monitored". The usage of the collected fees is to be "monitored". We suggest the phrase "monitor and collect" to be replaced by the term "collect". The obligation concerning monitoring the use of fees should be added to the later paragraph. Also, in this paragraph, the phrase "where application" is used. It could be read as the collection of fees should be linked to the costs incurred from the administration of licensing service. If so interpreted, the licensing fee would lose its role as an instrument to elevate the threshold of licensing. We suggest the Parties to consider a different way of expression in this regard.

4. Paragraph 4 deals with the transfer and assignment of the license. However, the licenses acquired due to merger activities were not considered in this provision. We recommend the Parties to take into account the situations concerning mergers between tobacco companies or between tobacco companies and non-tobacco companies which result in licenses being acquired by different companies.



## 6. COMMENTS ON ARTICLE 6

### Text of Article 6

#### *Article 6*

##### *Customer identification and verification*

*[Each Party, or any natural or legal person obligated by the Party, shall, in accordance with its national laws or legally binding and enforceable agreements, conduct due diligence with regard to:*

*1. all natural and legal persons (“first purchaser”) engaged in:*

*(a) selling commercial quantities of [tobacco] or the manufacture, distribution, storage, shipment, import or export of tobacco products, [raw materials and inputs] excluding the final retailer and persons importing tobacco products for their personal consumption, and/or*

...

*[6. Each Party [shall] / [should] require that all natural and legal persons referred to in paragraph 1 of this Article terminate business relations, including the supply of [raw materials or inputs in the production of tobacco] [tobacco,] tobacco products[, key inputs] and manufacturing equipment used in the manufacture of tobacco products, with any customer if a competent authority provides such persons with sufficient evidence that the customer has knowingly engaged in the sale, distribution, storage or shipment of [tobacco], tobacco products or equipment used in the manufacture of tobacco products in contravention of provisions of this Protocol or any other activity contrary to the provisions of this Protocol. [Thereafter,] [to the extent permitted by [national] law and upon a decision by the competent authorities] / [After the conclusion of at least primary adjudication proceedings], such a customer shall be a “blocked customer”.]*

...

[8. With regard to blocked customers, each Party [shall] / [**should**] require that:

...

*(d) all blocked customers shall be barred from conducting business, directly or indirectly, with the natural and legal persons referred to in paragraph 1 of this Article relating to the manufacture, sale, distribution or storage of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;]*

or

[1. Each Party, or any natural or legal person obligated by the Party, shall, in accordance with its national laws or legally binding and enforceable agreements, conduct due diligence with regards to:

*(a) all natural and legal persons (“manufacturers”) engaged in:*

*(i) selling commercial quantities of tobacco or the commercial manufacture, sale, distribution, storage, shipment, import or export of tobacco products, excluding the final retailer and persons importing tobacco products for their personal consumption, and/or*

*(ii) the commercial manufacture, sale, distribution, storage, shipment, import or export of equipment used in the manufacture of tobacco products;*

...

*6. Each Party shall require that all natural and legal persons referred to in paragraph 1 of this Article terminate business relations, including the supply of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, with any customer if a competent authority provides information about the customer with sufficient evidence that the customer has knowingly engaged in the sale, distribution, storage or shipment of tobacco, tobacco products or equipment used in*

*the manufacture of tobacco products in contravention of obligations of this Protocol or any other activity contrary to the obligations of this Protocol. Thereafter, to the extent permitted by national law and [upon a decision by the competent authorities, after the conclusion of at least primary adjudication proceedings], following an administrative procedure, such a customer shall be a “blocked customer”.*

...

8. *With regard to blocked customers, each Party shall, subject to its national laws, require that:*

...

*(d) all blocked customers shall be barred from conducting business, directly or indirectly, with the natural and legal persons referred to in paragraph 1 of this Article relating to the manufacture, sale, distribution or storage of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;]*

## COMMENTS

1. The requirement that each Parties shall bear the obligation of conducting “due diligence” in this article may not be feasible since the situations and activities of natural and legal persons stipulated in each paragraph of this article are numerous. The parties may not be administratively capable to do this.

2. Paragraph 1(a) may inappropriately exclude the chain retailers which could have high market position and high influence in the market.

3. The term “customer” usually refers to the buyer. However, from the contexts of paragraph 8(d), it is not limited to buyers. Since paragraph 8(d) refers to paragraph 1, the term “customer” could include the seller and the first purchaser. If that is the case, then the downstream party of the “blocked customer” would have to reject trading with its upstream “blocked customer”.

The question is whether it is feasible? If the downstream party is required to reject trading with its upstream “blocked customer”, it seems that the innocent downstream parties would be punished by not being allowed to do business with their supplier. There could be many downstream parties being affected by the misconduct of their supplier, when it becomes a “blocked customer”.

## 7. COMMENTS ON ARTICLE 7

### Text of Article 7

#### *Article 7 (Consensus)*

#### *Tracking and tracing*

- 1. For the purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products, the Parties to this Protocol agree to establish within five years of entry into force of this Protocol a global tracking and tracing regime, comprising national and/or regional tracking and tracing systems and a global information sharing focal point located at the Convention Secretariat of the WHO Framework Convention on Tobacco Control and accessible to all Parties, enabling Parties to make enquiries and receive relevant information.*
- 2. Each Party shall establish, in accordance with this Article, a tracking and tracing system, controlled by the Party for all tobacco products that are manufactured in or imported onto its territory taking into account their own national or regional specific needs and available best practice.*
- 3. With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique*

*identification markings), such as codes or stamps, are affixed to or form part of all unit packets, packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party.*

*4.1 Each Party shall, for purposes of paragraph 3, as part of the global tracking and tracing regime, require that the following information be available, either directly or accessible by means of a link, to assist Parties in determining the origin of tobacco products, the point of diversion where applicable, and to monitor and control the movement of tobacco products and their legal status:*

*(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 who is not affiliated with 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, the shipment date, shipment destination, point of departure and consignee.*

*4.2 The information in subparagraphs (a), (b), (g) and where available (f), shall form part of the unique identification markings.*

*4.3 Where the information in subparagraph (f) is not available at the time of marking,*

*the Parties shall require the inclusion of such information in accordance with the provisions of Article 15.2(a) of the WHO Framework Convention on Tobacco Control.*

*5. Each Party shall require, within the time limits specified in this Article, that the information set out in paragraph 4 of this Article is recorded, at the time of production, or at the time of first shipment by any manufacturer or at the time of import onto its territory.*

*6. Each Party shall ensure that the information recorded under paragraph 5 of this Article is accessible by that Party by means of a link with the unique identification markings required under paragraphs 3 and 4 of this Article.*

*7. Each Party shall ensure that the information recorded in accordance with paragraph 5 of this Article, as well as the unique identification markings rendering such information accessible in accordance with paragraph 6 of this Article shall be included in a format established or authorized by the Party and its competent national authorities.*

*8. Each Party shall ensure that the information recorded under paragraph 5 of this Article is accessible to the global information sharing focal point on request, subject to the provisions of paragraph 9, through a standard electronic secure interface with its national and/or regional central point. The global information sharing focal point shall compile a list of the designated competent national authorities of the Parties and make the list available to all Parties.*

*9. Each Party or the designated national competent authority shall:*

*(a) have access to the information outlined in paragraph 4 in a timely manner by making a query to the global information sharing focal point;*

*(b) request such information only where it is necessary for the purpose of detection or investigation of illicit trade in tobacco products;*

*(c) not unreasonably withhold information;*

*(d) answer the information requests in relation to paragraph 4, in accordance with its national laws; and*

*(e) protect and treat as confidential, as mutually agreed, any information that is exchanged.*

*10. Each Party shall require the further development and expansion of the scope of the applicable tracking and tracing system up to the point that all duties, relevant taxes, and where appropriate, other obligations have been discharged at the point of manufacture, import or release from customs or excise control.*

*11. Parties shall cooperate with each other and with competent international organizations, as mutually agreed, in sharing and developing best practices for tracking and tracing systems including:*

*(a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;*

*(b) support for training and capacity-building programmes for Parties that express such a need; and*

*(c) further development of the technology to mark and scan unit packs and packets of tobacco products to make accessible the information listed in paragraph 4 of this Article.*

*12. Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry.*

*13. Each Party shall ensure that its designated competent national authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of the provisions of this Article.*

*14. Each Party may require the tobacco industry to bear any costs associated with that Party's obligations under this Article.*

## COMMENTS

1. There is a tracking and tracing system build under this article. Unlike big entities, small entities might have financial difficulties in fulfilling the obligations under this article. If small entities are required to cooperate in building this global tracking and tracing system, they may be forced to quit the legal market or turn to black markets. This may cause market concentration in consequence. The market will be dominated by big companies and there will be market concentration. We need economists to inform us whether market concentration is desirable for the purpose of effective control of tobacco.

As to the law enforcement aspect, it's hard to estimate the costs for constructing the global tracking and tracing system. For the least developed countries and the developing countries, the costs might be too high for them to bear. They might also need technical expertise to help establish the system and to be cooperated with. Although Article 23.1 has a general rule concerning international assistance and cooperation, we thought there is a need to have a provision specifically designed for the international assistance and cooperation needed for constructing the global tracking and tracing system in Article 7.

2. According to article 7.4.1(d), the production shift or time of manufacture should be included in the unique identification marking. The purpose of the requirement concerning "shift" is unclear because the "production shift" does not provide meaningful information for the purpose of controlling the sale channel. Also, Article 7.4.1(d) only requires recording the production shift "or" time of manufacture. We suggest both of the production shift "and" time of manufacture should be included.

3. There are three terms referring to buyers of tobacco in this protocol: "first purchaser", "first customer" and "purchaser" with slight difference among them. The concept of customer might be a little wider than purchaser concerning the scope. Also the purchaser should not include final retailers. We suggest that the definition of "first purchaser" in Article 6.1 is changed to the definition of



“purchaser”. And the term “purchaser” Article 7.4.1(i) (“... of any known subsequent purchaser...”) should be replaced by customer.

4. Article 7.4.3 instructs Parties to this protocol to “require the inclusion of such information in accordance with the provision of Article 15.2(a)”. But the preamble is not included. We suggest to also include the provision in the preamble, instead of just the provision of Article 15.2(a).

5. FCTC Article 15.2(a) used the term “domestic market”. It seems that only the importing country is responsible and that the exporting country is free from this obligation. When tobacco products are sold within the country where it is manufactured, the country does not have to perform the duty under this article. However, the purpose for Article 7.4.3 is different. We suggest Article 7.4.3 to require both the importing and the exporting countries to follow the requirement concerning the inclusion of information.

6. According to Article 7.5, each Party shall require the information set out in paragraph 4 of this Article to be recorded. However, it is not clear about who (the Party or the tobacco industry) should fulfill the obligation of recording the information. We suggest that paragraph 5 should be refined to include an explicit definition concerning the obligor. Furthermore, in order to prevent the obligor from unduly avoiding their duty, we suggest that the term “or” should be revised to the term “and”.

7. For the purpose of making the structure and meaning of Article 7.9 more logical, we suggest that the sequence of paragraph 7 should be rearranged into (a), (b), (d), (c) and (e).

8. The structure and meaning of Article 7.10 is very complicated and not easy to understand. We suggest to refine the structure and contents of paragraph 10 to make it earlier for future application and implementation.

9. We consider that it would be necessary to consider the needs of developing countries when interpreting the term “best practice” in paragraph 11.

Also it is not clear concerning whether the Parties can develop regional “best practice” or develop one’s own “best practice”. We suggest that the term “best practice” should have a clear definition.

10. According to Article 7.12, obligations assigned to a Party shall not be performed by or delegated to the tobacco industry. However, it is not very clear about the scope of the term “obligation”: Does it include all obligations set out in this Protocol? Or is it only to include obligations set out in Article 7? We suggest that this paragraph should include an explicit definition on this.

11. Regarding the limitation of the interaction between competent authorities and tobacco industry prescribed in Article 7.13, there are already regulations prescribed in FCTC Article 5.3. We suggest to include reference in this paragraph to FCTC Article 5.3.

12. Article 7.14 stipulates that each Party may require the tobacco industry to bear any costs associated with that Party’s obligations under this Article. However, it may contradict the principle set forth in FCTC Article 5.3. We suggest to redraft this paragraph and to require Parties to only rely on taxes to require the tobacco industry to bear costs.

## 8. COMMENTS ON ARTICLE 8

### Text of Article 8

#### *Article 8*

#### *Record-keeping*

1. *[Each Party [shall] / [should] require [that] [the tobacco industry] / [all natural and legal persons engaged in the commercial sale of tobacco or in the manufacture, sale, [distribution, storage, shipment,] import or export of tobacco products [or manufacturing equipment used in the manufacture of tobacco products]] [to] [raw materials and inputs for tobacco product manufacture] maintain complete and accurate records of all transactions relevant to the objectives and purposes of this Protocol in accordance with its national laws and regulations.]*

*or*

*[Each party shall require that all natural and legal persons engaged in the activities referred to in Article 5.1:*

*(a) maintain complete and accurate records of all transactions relevant to the objectives and purposes of this Protocol;*

*(b) provide general information on the market, where one exists, production volumes, imports, exports and/or sales, trends, forecasts, and other relevant information;*

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

2. *Each Party [shall] / [should] require persons licensed in accordance with Article 5 to provide the following information to the competent authorities, on request:*

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

*(b) the quantities of [raw materials [and inputs in the production of tobacco,]] [tobacco,] tobacco products, [key inputs] [and manufacturing equipment used in the manufacture of tobacco products] in the licensee's possession, custody or control kept in stock in tax and customs warehouses under the regime of transit or duty suspension [or temporary regime] as of the date of the request.*

*3. With respect to [raw materials and inputs in the production of tobacco,] [tobacco,] tobacco products[, key inputs] [and manufacturing equipment used in the manufacture of tobacco products] sold or manufactured on the territory of the Party for export outside the territory of the Party or subject to duty-suspended movement in transit on the territory of the Party, each Party [shall] / [should] in accordance with its national laws and regulations require that persons licensed or equivalently approved in accordance with this Protocol provide the competent authorities in the country of departure (electronically where the appropriate infrastructure exists) at the time of departure from their control with the following information upon request:*

*(a) date of shipment from the last point of physical control of the products by the person licensed in accordance with this Protocol;*

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

*(c) intended shipping routes and destination;*

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

*(e) mode of transport, including the identity of the transporter;*

*(f) 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 tobacco growers, except for traditional growers working on a non-commercial basis and retailers maintain complete and accurate records of all [relevant] transactions in which they engage in accordance with its national laws and regulations.*

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

*(a) maintained for a period of [not less] than [five years];*

*(b) made available to the competent [authority or] authorit[y]/[ies]; and*

*(c) kept in a common format, as far as possible, or as prescribed by the competent authorit[y]/[ies].*

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

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

## COMMENTS

1. With regard to Article 8.1:

(a) The meaning of “complete and accurate records” is not clear. The vagueness of the provision could cause problems when enforcing the paragraph. It should be preferable to have a more precise definition with some illustrative examples.

(b) The term “relevant transaction” in this paragraph should be defined more clearly. For example, purchasing material or equipment is relevant

transaction, while employing labors is not. A illustrative list of “relevant transaction” should be useful in clarifying the meaning of the term.

(c) We suggest to clearly define whether a traditional grower is the obligor in this paragraph.

2. We suggest that the term “market volume” in paragraph 2(a) should be defined explicitly and clearly. Furthermore, paragraph 2(a) requires persons licensed in accordance with Article 5 to provide information to the competent authorities. But the requirement for information may infringe on the tobacco industry’s trade secret.

3. With regard to Article 8.3:

(a) Paragraph 3 requires that persons licensed or equivalently approved in accordance with this Protocol provide the competent authorities information set out in subparagraph (a) to (g). But this is not clear enough. We suggest that the obligor in paragraph 3 should be defined in a more explicit form.

(b) Under the term “upon request” in this paragraph, the tobacco industry have obligation only when accepting competent authorities do make request. We suggest that this paragraph should impose the obligation of providing information actively by the tobacco industry and that details about timing and frequency to the obligation should also be provided in this paragraph.

## 9. COMMENTS ON ARTICLE 9

### Text of Article 9

#### **Article 9**

##### ***Security and [other] preventive measures***

*1. Each Party shall adopt[, in accordance with its national laws and regulations and implement effective legislative, executive, administrative or other measures to require that [all natural and legal persons engaged in commercial sales of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products]/[the tobacco industry] [the activities referred to in Articles 5.1 and 5.2]] take all [reasonably] effective measures to prevent the diversion of [raw materials and inputs in the production of tobacco,]/[basic inputs, raw materials, and] [tobacco,] tobacco products[, key inputs,] and manufacturing equipment used in the manufacture of tobacco products into illicit trade channels.*

*2. Each Party shall in accordance with national laws ensure that any contravention of the measures adopted pursuant to paragraph 1 of this Article is subject to appropriate criminal, or civil or administrative procedures and effective, proportionate and dissuasive sanctions, including, as appropriate, suspension or cancellation of a licence. (Placement of article needs further discussion)*

*[3. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to require that tobacco products are not intermingled with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transport, import and export, if intended to conceal or disguise tobacco products.] (Placement of article needs further discussion)*

*or*

*[Each Party may adopt and implement effective legislative, executive, administrative or other measures to expand the depth of its minimum obligations pursuant to this Article and to further enhance its security and preventive measures scheme. Additional measures may include;*

*(a) requiring suspension or cancellation of a licence and prohibition of the licensee from re-applying for a license during a five-year period for contravention of the measures adopted pursuant to paragraph 1 of this Article;*

*(b) requiring that tobacco products are not intermingled with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transport, import and export;*

*(c) Establishing specific requirements relative to acceptable forms of payment and the reporting of cross-boarder transfers of substantial quantities of cash;*

*(d) Requiring that all natural and legal persons engaged in commercial sale of leaf tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products shall supply such products only in amounts commensurate with legitimate consumption or use in the intended market of use or retail sale;*

*(e) Requiring that persons involved in the trade in tobacco products be liable for reporting “suspicious activities” relative to the tobacco trade to its competent authorities.]*

*4. Parties [should] / [shall] require that natural or legal persons engaged in trade in [raw materials or inputs in the production of tobacco,] tobacco, tobacco products[, key inputs,] [or manufacturing equipment used in the manufacture of tobacco products]] / [the tobacco industry] report [to competent national authority] [and in accordance with procedures established by such an authority] [the cross-[external] border[s] transfer of] substantial quantities of cash [and appropriate negotiable*



*instruments] as stipulated in national laws or regulations.*

*5. [Parties [shall] / [should] require that payments for transactions relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and [raw materials and inputs for tobacco products,] manufacturing equipment used in the manufacturing of tobacco products be allowed only through legal modes of payment from the financial institutions located in the territory of the intended market of sale of the tobacco products, and should not be operated through any other alternate remittance system.]*

*or*

*[Parties should require that payments for transactions relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and manufacturing equipment used in the manufacture of tobacco products be allowed only in the currency and in the same amount as the invoice for those products, and only by wire or cheque from financial institutions located on the territory of the intended market of retail sale of the tobacco products and shall not be operated through any other alternative remittance system.]*

*[6. Each Party [shall] [should]/ [may] require that all natural and legal persons engaged in [commercial sale of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or]/[the activities referred to in Article 5.1, the supply of tobacco, tobacco products and] [raw materials and inputs for tobacco products,] manufacturing equipment used in the manufacture of tobacco products shall supply such products only in amounts commensurate with estimated consumption or use in the intended market of use or retail sale and refuse to supply such items in amounts that exceed such consumption or use.]*

*or*

*[The Parties require that all natural or legal persons engaged in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products shall supply*

*such products only in the amounts recognized by the competent national authorities, commensurate with consumption or use on the local market.]*

*7. Each Party [shall] / [should] require that [all natural and legal persons engaged in [the manufacture, sale, distribution, storage, transit, shipment, import or export of tobacco products or [raw materials and inputs for tobacco products,] manufacturing equipment used in the manufacture of tobacco products]]/[the tobacco industry] the activities referred to in Article 5.1 report all suspicious transactions to the competent authorities.*

## COMMENTS

With regard to the legal structure of Article 9, some of the contents are duplicated and might cause confusing. For instance, paragraph 4 and paragraph 3(c) of the second version are almost the same. The relationship between them is unclear. We recommend to rearrange these paragraphs in a more logical sequence.

1. The phrase “in accordance with its national laws and regulations” in paragraph 1 of this article provides Parties with discretion to implement the obligation and is not in line with the purposes of this Protocol.

2.

(a)The obligation of adopting ”effective ... and dissuasive sanctions” in paragraph 2 of this Article might not be enough to deter illegal trade *in advance*. We suggest to refer to the way of dealing with similar problem in Article 61 of the TRIPS Agreement, which is clearer and more specific than this one. (TRIPS Agreement Article 61: “Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties

applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.”)

(b) We suggest to put this paragraph at the end of this article, and to include not only paragraph 1 violation, but also violations of all the other paragraphs of this article, in order to strengthen the effectiveness of the preventive measure.

3.

(a) The term “intermingle” in paragraph 3 of this Article is not clear enough. For instance, whether tobacco and non-tobacco products being stored in a warehouse or loaded in a boat should be interpreted as “intermingling” tobacco and non-tobacco products is a matter that needs clarification.

(b) The phrase “if intended to conceal or disguise tobacco products” in the third paragraph in this article is the same as the phrase used in paragraph 1(d) in Article 12. The former requires Parties to adopt preventive or security measures, whereas the latter is regard to unlawful conduct, including criminal offences. Their respective purposes are different. However, both of them require the same element “intend to conceal or disguise tobacco products”. It might be inappropriate to include a subjective requirement of “intention” for the purpose of taking effective preventive measures.

4. Paragraph 4 requires natural and legal persons engaged in trade to report the cross-external borders transfer of substantial quantities of cash. However, the

term "trade" should be replaced by "transaction" so as to include activities such as large-scale transaction happened in domestic market. Besides, payment instruments other than cash, such as checks and other negotiable instruments, should also be reported. Therefore, we suggest that cash should be replaced by payment instruments in this paragraph.

5. The scope of "intended market of sale" in paragraph 5 of the first version is too narrow. It should be extended to the situation where the transfer is done indirectly through a third country's financial institutes.

6. The second version of paragraph 6 requires that all legal or natural persons shall supply only in the amounts recognized by the competent national authorities. It does not mention anything about procedures to admit such recognized amounts. Also, the first version requires to supply only in amounts commensurate with estimated consumption. But there has not been any regulation concerning reporting estimated consumption. We suggest the Parties to further elaborate on this aspect.

7. The term "suspicious transactions" in paragraph 7 in this Article is defined in paragraph 15 in Article 1. But its meaning might be too narrowed and not be able to cover illegal conducts listed in this Protocol. We suggest to broaden the extent of suspicious transactions to include them. Furthermore, it might be appropriate to impose financial institutes an obligation of reporting suspicious transactions to competent authorities as they are most likely to have it.

## 10. COMMENTS ON ARTICLE 10

### Text of Article 10

#### **Article 10**

##### ***Sale by Internet, telecommunication or any other evolving technology***

*[Each Party shall require that all legal and natural persons engaged in commercial sales of tobacco or the manufacture, sale, distribution, storage, shipment, import or export of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products conducting business through Internet-, telecommunication- or any other evolving technology-based modes of sale shall comply with all relevant obligations covered by this Protocol. Retailing of tobacco products by means of the above ways of distribution should be banned.]*

*or*

*[Each Party shall ban sales of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale.]*

*or*

*[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.]*

*Each Party may ban sales of tobacco products or manufacturing equipment through Internet-, telecommunication- or any other evolving technology-based modes of sale [to end consumers].]*

*or*

*[Each Party may ban sales of tobacco products or manufacturing equipment*

*through Internet-, telecommunication- or any other evolving technology-based modes of sale.*

*Where a Party has not banned sales of tobacco products or manufacturing equipment through Internet-, telecommunication- or any other evolving technology-based modes of sale, that 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, and in full respect of the obligations arising under Article 13 of the WHO Framework Convention on Tobacco Control.]*

## COMMENTS

According to this Article, each Party shall regulate tobacco product trade by internet or telecommunication. There are slightly different regulatory approaches amongst these four versions of drafted words. However, there is a common question to be clarified. Under these provisions, all levels of transactions through internet and other telecommunication are to be prohibited. Thus, the importers or the whole sellers are not able to order products from foreign manufacturers through internet or facsimile; the retailers are not able to order products from the importers or the whole sellers. If this interpretation is correct, then basically all transactions and trade will be banned because they are always transacted through certain types of telecommunication. We suggest to limit the prohibition only concerning such sales through internet and telecommunication to consumers.

## 11. COMMENTS ON ARTICLE 11

### Text of Article 11

#### **[Article 11**

##### **Free zones**

*1. Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective controls on all manufacturing and all trade in tobacco, tobacco products, [equipment used in the manufacture of tobacco products] [and raw material and inputs in the production of tobacco products,] in free zones, by use of all relevant measures as provided in this Protocol, in particular, but not limited to, **tracking and tracing, customer identification and verification and security and preventive measures.***

*2. In addition, the intermingling of tobacco products with any non-tobacco products on **imports to and exports from free zones shall be prohibited.***

(Text above as reflected in document FCTC/COP/INB-IT/3/5 Rev.1)

*or*

#### **[Article 11**

##### **Free zones**

*1. Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective controls on all transactions in tobacco, 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 any non-tobacco products on **imports to and exports from free zones shall be prohibited.***

(Text above as reflected in document FCTC/COP/INB-IT/4/3)

## COMMENTS

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. In other words, whether those specific control measures for non-free zones should be applied to the same extent for free-zones needs clarification.

2. The parties are to use relevant measures to control trade in free-zones. The scope of regulation is not very clear. For example, 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 such effective control requirement is to be clarified.

## **12. COMMENTS ON ARTICLE 12**

### Text of Article 12

#### *Article 12*

#### *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 used in the manufacture of tobacco products 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 used in the manufacture of tobacco products 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 of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products not covered by paragraph (b)(i);*

*(c)*

*(i) counterfeiting tobacco products or manufacturing equipment used in the manufacture of tobacco products or counterfeiting packaging, applicable fiscal stamps, unique identification markings, or any other markings or labels;*

*(ii) wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting counterfeit tobacco products or counterfeit manufacturing equipment used in the manufacture of tobacco products or counterfeit fiscal stamps or unique identification markings, or any other markings or labels;*

*(iii) defacing, falsifying, removing, altering or otherwise interfering with applicable fiscal stamps, unique identification markings, or any other required markings or labels affixed to tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products in order to, directly or indirectly, obtain any advantage, financial or other material benefit;*

*(d) intermingling tobacco products with non-tobacco products during the*

*progression through the supply chain of tobacco products, including during storage, warehousing, transit, transportation, import or export, for the purpose of concealing or disguising tobacco products;*

*[(e) using Internet-, telecommunication- or any other evolving technology-based modes of sale of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, in contravention of the provisions of this Protocol;] (Final formulation depends on outcome of the discussions on Article 10)*

*(f) obtaining, by a person licensed in accordance with Article 5, tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products from a person who should be, but is not, licensed in accordance with Article 5;*

*(g) 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 used in the manufacture of tobacco products;*

*(h)*

*(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 used in the manufacture of tobacco products 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 used in the manufacture of tobacco products 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 used in the manufacture of tobacco products;*

*(iii) failing to create or maintain records covered by this Protocol or maintaining false records.*

*2. Each Party shall, subject to the basic principles of its domestic law, determine which of the unlawful conduct set out in paragraph 1 of this Article shall be criminal offences and adopt legislative and other measures as may be necessary to give effect to such determination.*

*3. Each Party shall adopt, subject to the basic principles of its domestic law, such legislative and other measures as may be necessary to establish the following conduct as criminal offences, when committed intentionally:*

*(a) converting or transferring property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (UNTOC,<sup>1</sup> Article 6.1(a)(i), non-substantive modification<sup>2</sup>)*

*(b) concealing or disguising the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; (UNTOC, Article 6.1(a)(ii), non-substantive modification)*

*(c) acquiring, possessing or using property, knowing, at the time of receipt, that such property is the proceeds of crime. (UNTOC, Article 6.1(b)(i), non-substantive modification)*

*4. With respect to criminal offences established in accordance with paragraphs 2 and 3 of this Article, each Party shall, subject to the basic principles of its domestic law, and having regard to the nature and gravity of the offence, adopt such legislative and*

*other measures as may be necessary to establish as criminal offences the following conduct:*

*(a) participating in, associating with or conspiring to commit an offence;*

*(b) attempting to commit an offence;*

*(c) aiding, abetting, or inciting the commission of an offence.*(UNTOC, Article 6.1(b)(ii) modified1)

*5. For the purposes of implementing or applying paragraph 3 of this Article, each Party shall in accordance with its domestic law include as predicate offences the criminal offences established in accordance with paragraphs 2 and 4 of this Article as a result of which proceeds have been generated.*

*6. Knowledge, intent, or purpose required as an element of an offence established in accordance with paragraph 3 of this Article may be inferred from objective factual circumstances. (UNTOC, Article 6.2(f) modified)*

## COMMENTS

1. Although Article 9:5 and paragraph 1 (a) of this Article are dealing with different situations, the types of transactions are similar. However, the exact types and scopes are not provided exactly in the same manner. The listed types of activities include: “the manufacture, sale, distribution, storage, shipment, import or export of tobacco products ... manufacturing equipment used in the manufacturing of tobacco products” Whereas Article 12:1(a) lists the following activities: “manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products...” We do not consider that there is a sound reason necessary to omit the activities of wholesaling, brokering and transporting from Article 9:5.

2. According to Article 61 of the TRIPS Agreement, all counterfeiting

conducts with commercial scale should be prosecuted criminally. However, under paragraph 2 of this Article, counterfeiting conducts as specified in paragraph 1(c) of this Article is not necessarily criminally prosecuted. This could be inconsistent with the strict policy adopted in Article 61 of the TRIPS Agreement. Therefore, it is recommended to modify the relevant provision so as to that such counterfeiting conduct of commercial scale shall not be treated more strictly so as to be compatible with the TRIPS Agreement.

3. Under paragraph 2 of this article, the Parties have discretion to decide which of the unlawful conducts provided by paragraph 1 of this article should be held liable criminally. However, this article does not require how the Parties would have to deal with other unlawful conducts. We recommend that there should be provisions dealing with the unlawful conducts which are not criminalized so that these unlawful acts will still be subject to strict regulations.

### 13. COMMENTS ON ARTICLE 13

#### Text of Article 13

#### *Article 13 (Consensus)*

#### *Liability of legal persons*

*1. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the unlawful conduct including criminal offences established in accordance with Article 12 of this Protocol.*

...

#### COMMENTS

Article 13.1 concerns the penalties for legal persons. However, it fails to provide which levels of cooperate officers or employees (i.e. whether only to cover the chairman of the board, or to include members of the board of directors, managers, and other employees) and which types of conducts of these persons (i.e. whether only to include the activities when “representing” the legal persons or whether to further include all of their activities “during” their works) would result in the criminal liabilities of the legal persons. Certain provisions in this regard would help prevent ambiguity concerning the obligations of the Parties under this article.

## 14. COMMENTS ON ARTICLE 14

### Text of Article 14

#### ***Article 14***

##### ***Prosecutions and sanctions***

*1. Each Party shall adopt such measures as may be necessary, in accordance with national legislation, to ensure that legal and natural persons held liable for the unlawful conduct including criminal offences established in accordance with Article 12 are subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*

...

### COMMENTS

1. The sequence of the words in the phrase “effective, proportionate and dissuasive” in Article 14.1 should be changed to “effective, dissuasive and proportionate”. It is because the “effectiveness” and the “dissuasiveness” are the main objectives of prosecution and sanction; and the “proportionality” is only to qualify and confine the extensiveness of such prosecution and sanction.

2. Article 14.1 includes the measurement of “monetary sanctions”. We thought that it could provide more clearly and specifically about the extent of such sanctions. We suggest that all existing and potential interests directly and indirectly deriving from such criminal offences should all be deprived. This is to ensure that there will be no economic incentive for people to commit such crimes.

## 15. COMMENTS ON ARTICLE 16

### Text of Article 16

#### **Article 16**

***[Confiscation and seizure of assets] / [Seizure and confiscation]***

1. *[Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:]*

*or*

***[Parties shall adopt the strongest measures possible within their domestic legal systems as may be necessary to enable confiscation of:]***

*[(a) proceeds of crime derived from [[**criminal**] [offences] / [**unlawful conduct**] [covered by [Article 12[.1]]]] / [**criminal offences established in accordance with Article 12**] of this Protocol [**as determined by the Party**] or property the value of which corresponds to that of such proceeds;]*

*or*

***[(a) proceeds of crime derived from criminal offences established in accordance with Article 12 of this Protocol or property the value of which corresponds to that of such proceeds;]***

*(b) property, equipment or other instrumentalities used in or destined for use in [offences covered by [Article 12[.1]]] / [**criminal offences established in accordance with Article 12**] of this Protocol.]*

*or*

***[(b) property, equipment or other instrumentalities used in or destined for use in [criminal offences established in accordance with Article 12 of this Protocol.]***



...

## COMMENTS

The phrase “used in” in Article 16.1 is not clear concerning its coverage. There could be two possible interpretations for this phrase: (1) to be “exclusive” used in criminal offences and (2) to be “partly” used in criminal offences. We suggest to clarify the meaning of the phrase.

## 16. COMMENTS ON ARTICLE 17

### Text of Article 17

#### *Article 17*

#### *Seizure payments*

*For the purpose of eliminating illicit trade in tobacco products, the Parties should, in accordance with their domestic law, consider adopting such legislative and other measures as may be necessary to authorize competent authorities to levy an amount equivalent to lost taxes and duties from the [producer,] manufacturer, importer or exporter of seized [tobacco,] tobacco products [or equipment] used in the production of tobacco products.*

### COMMENTS

Under this Article, the Parties are to “levy an amount equivalent to lost taxes and duties”. However, the calculation of the “lost taxes and duties” is not defined clearly. Legally speaking illicitly traded tobacco products are not supposed to be subject to taxes and duties. In other words, the government does not have taxes and duties to lose. Technically speaking there could be different ways of calculating the lost taxes and duties: (1) to treat the illicitly traded tobacco products as the legally trade products for the purpose of calculating their amount and to decide the lost taxes and duties; (2) to estimate the lost sales of legally traded tobacco products as a result of illicitly traded products in the market so as to decide the lost taxes and duties. We suggest to make it clear in these regards.

## 17. COMMENTS ON ARTICLE 19

### Text of Article 19

#### ***Article 19***

#### ***Special investigative techniques***

...

2. *For the purpose of investigating the offences covered by this Protocol, Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using the techniques referred to in paragraph 1 of this Article in the context of cooperation at the international level.*

...

### COMMENTS

It is recommended that “regional cooperation” should be included in the text “appropriate bilateral or multilateral agreements or arrangements” in Article 19:2 in order to enhance the scope and effectiveness of cooperation. We believe that they need to be drafted in a consistent manner. We prepare a table at the end of this document to compare various parts of the Draft for the purpose of enhancing the quality of the Protocol. Please see the last comment in this document.

## 18. COMMENTS ON ARTICLE 20

### Text of Article 20

#### **Article 20**

##### **General information sharing**

*1. The 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: (Consensus)1*

*(a) in aggregate form, details of seizures of tobacco, tobacco products or manufacturing*

*equipment used in the manufacture of tobacco products, quantity, value of seizures, product descriptions, dates and places of manufacture; counterfeit and genuine brands; and taxes evaded; (Consensus)1*

*(b) import, export, transit, tax-paid and duty-free sales and quantity or value of production of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; (Consensus)1*

*[(c) data on the agricultural production of tobacco;]*

*(d) trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and (Consensus)1*

*(e) any other relevant information, as agreed by the Parties. (Consensus)1*

### COMMENTS

Both Article 20 (*General Information Sharing*) and Article 34 (*Reporting and Exchange of Information*) of this Protocol are to achieve the goal of

information sharing. Under Article 20 information, such as that related to seizure, import, information on export, transit, tax-paid and duty-free sales, data on production, agricultural data and information on the trend, concealment methods, *modi operandi* of illicit trade, etc. is to be reported to the Secretariat of the FCTC. According to Article 34, information on legislative, executive, administration or other measures used in implementing this protocol, constraints and barriers encountered in implementing this protocol and measures taken to overcome those barriers, information concerning financial and technical assistances, etc. is to be reported. In other words, these two articles require the Parties to submit different kinds of information. We suggest to clarify the relations between the two information sharing mechanisms and to make them more coherent to each other.

## 19. COMMENTS ON ARTICLE 23

### Text of Article 23

#### *Article 23 (Consensus)<sup>1</sup>*

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

...

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.*

...

### COMMENTS

1. Article 23.2 suggests that the Parties may join “multilateral, regional or bilateral agreement or arrangement”. Similar requirements of international cooperation at different levels (multilateral, regional and bilateral levels) are seen throughout the entire protocol. But the phrases are not exactly same. We believe that they need to be drafted in a consistent manner. Please see the last comment in this document.

2. The Parties need to give special consideration for the difficult situations of the least developed countries and countries in economic transition concerning technical assistance for and cooperation with these countries.

## 20. COMMENTS ON ARTICLE 24

### Text of Article 24

#### *Article 24 (Consensus)*

##### *Assistance and cooperation: investigation and prosecution of offences*

*1. The Parties shall, in accordance with their domestic law, take all necessary measures, where appropriate, to strengthen cooperation by multilateral, regional or bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of legal or natural persons engaged in illicit trade in tobacco, tobacco products [or manufacturing equipment used in the manufacture of tobacco products].*

*2. Each Party shall ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating illicit trade in tobacco, tobacco products [or manufacturing equipment used in the manufacture of tobacco products] (including, where permitted under domestic law, judicial authorities) cooperate and exchange relevant information at national and international levels within the conditions prescribed by its domestic law.*

### COMMENTS

Article 24 requires the Parties to strengthen cooperation by multilateral, regional or bilateral arrangements. Similar requirements of international cooperation at different levels (multilateral, regional and bilateral levels) are seen throughout the entire protocol. But the phrases are not exactly same. We believe that they need to be drafted in a consistent manner. Please see the last comment in this document.

## 21. COMMENTS ON ARTICLE 25

### Text of Article 25

#### **Article 25**

##### ***Protection of/[Respect for]/[Protection of and respect for] 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. (Consensus)1*

*[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] / [by its domestic or international law].]*

### COMMENTS

Under this article, the Parties shall carry out their obligations in a manner consistent with the principles of sovereign equality and territorial integrity of States and the principle of non-intervention in the domestic affairs of other States. However, due to the seriousness of illicit trade, the protocol requires closer cooperation between the Parties. Articles 4 and 5 in this Draft thus require the Parties to cooperate closely with each other to achieve the purpose of FCTC. Although it is an important principle to respect sovereignty and non-interference in international law to some extent, this article might be misused as an excuse for non-fulfillment of obligations of a Party. For instance, it would be unacceptable for a Party to refuse providing relevant information under Articles 7 and 21 based on the sovereignty principle and the principle of non-intervention in the domestic affairs of other States. Thus, we suggest the Parties to reconsider the need of including this article in the Draft.



## 22. COMMENTS ON ARTICLE 26

### Text of Article 26

#### **Article 26**

#### **Jurisdiction**

...

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:*

*(i) one of those established in accordance with Article [12.1]/[12] and is committed outside its territory with a view to the commission of a crime within its territory;*

*(ii) one of those established in accordance with Article 12.1 and is committed outside its territory with a view to the commission of an offence established in accordance with Article 12.1 within its territory.*

3. *For the purposes of Articles 31 and 33, each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences covered by this Protocol 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 covered by this Protocol when the alleged offender is present on its territory and it does not extradite him or her.*

*5. If a Party exercising its jurisdiction under paragraph 1 or 2 of this Article has been notified, or has otherwise learnt, that one or more other Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

*6. Without prejudice to norms of general international law, this Protocol does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.*

## COMMENTS

1. With regard to paragraph 2:

(a) The phrase “subject to Article 25” is not clear enough. It could result in jurisdictional conflicts. For example, when two parties claim their respective jurisdictions under paragraphs 2 (a) and (c), a question arises concerning which jurisdiction prevail. We suggest that the phrase “subject to Article 25” should be defined more explicitly concerning the priority of exercising jurisdictions based on different articles.

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

(c) 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 regard to paragraph 3:

(a) According to 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.

- (b) Since Article 33 has been proposed for deletion as reflected in document FCTC/COP/INB-IT/4/4, the phrase “For the purpose of Article 31 and 33” should be revised to “For the purpose of Article 31”.
- 3. With regard to paragraph 4: 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. We do not see any sound reason to give such discretion.

## 23. COMMENTS ON ARTICLE 27

### Text of Article 27

#### *[Article 27*

#### ***Joint investigations***

*Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The Parties involved shall ensure that the sovereignty of the Party on the territory of which such investigation is to take place is fully respected.]*

### COMMENTS

1. Article 27 requires the Parties to consider concluding bilateral or multilateral agreements. Similar requirements of international cooperation at different levels (multilateral, regional and bilateral levels) are seen throughout the entire protocol. But the phrases are not exactly same. We believe that they need to be drafted in a consistent manner. Please see the last comment in this document.

2. For the purpose of enhancing the effectiveness of joint investigations against illicit trade in tobacco product, we suggest to encourage Parties to make bilateral, regional, or multilateral agreements and set up an assistance or cooperation mechanism for non-parties.

## 24. COMMENTS ON ARTICLE 34

### Text of Article 34

#### **Article 34**

##### ***Reporting and exchange of information***

1. *Each Party shall submit to the Meeting of the Parties, through the Convention Secretariat, periodic reports on its implementation of this Protocol.*
2. *The format and content of such reports shall be determined by the Meeting of the Parties. These reports shall form part of the regular Framework Convention on Tobacco Control reporting instrument.*
3. *The content of the periodic reports referred to in paragraph 1 of this Article, shall be determined having regard, inter alia, to the following:*
  - (a) *information on legislative, executive, administrative or other measures taken to implement this Protocol;*
  - (b) *information, as appropriate, on any constraints or barriers encountered in the implementation of this Protocol and on the measures taken to overcome those barriers;*
  - (c) *information, as appropriate, on financial and technical assistance provided, received, or requested for activities related to the elimination of illicit trade in tobacco products; and*
  - (d) *the information specified in Articles XX, XX, XX, XX and XX.*

*In those cases when relevant data are already being collected as part of the Conference of the Parties reporting mechanism, the Meeting of the Parties shall not duplicate these efforts.*

*4. The Meeting of the Parties, pursuant to Articles XX and XX, shall consider arrangements to assist developing-country Parties and Parties with economies in transition, at their request, in meeting their obligations under this Article.*

*5. The reporting of information under those Articles shall be subject to national law regarding confidentiality and privacy. The Parties shall protect, as mutually agreed, any confidential information that is reported or exchanged.*

## COMMENTS

The contents provided in Article 20 overlap with the contents provided in this Article. Meanwhile, most of which are covered by official reporting instrument provided in Article 21 of the Framework Convention on Tobacco Control. It is recommended to integrate these articles.

## 25. OVERALL COMMENTS

The following table contains articles that involve various kinds of bilateral, regional and multilateral cooperation and agreements. However, they use different ways of expressing such cooperation and agreements. We suggest to make them more consistent:

Article	Contents
4.6	<p><i>In addition to the provisions of Article 5 of the WHO Framework Convention on Tobacco Control, Parties <b>shall</b>:</i></p> <p><i>within the means and resources at their disposal, cooperate to raise financial resources for the effective implementation of this Protocol through <b>bilateral and multilateral</b> funding mechanisms.</i></p>
19.2	<p><i>For the purpose of investigating the offences covered by this Protocol, Parties <b>are encouraged to conclude</b>, when necessary, appropriate <b>bilateral or multilateral</b> agreements or arrangements for using the techniques referred to in paragraph 1 of this Article in the context of cooperation at the international level.</i></p>
23.2	<p><i>Parties <b>may</b>, as appropriate, enter into <b>bilateral, multilateral or any other</b> 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</i></p> <p><i>economies in transition.</i></p>
24.1	<p><i>The Parties <b>shall</b>, in accordance with their domestic law, take all necessary measures, where appropriate, to strengthen cooperation by <b>multilateral</b>,</i></p>

	<p><i><b>regional or bilateral</b> arrangements for the prevention, detection, investigation, prosecution and punishment of legal or natural persons engaged in illicit trade in tobacco, tobacco products [or manufacturing equipment used in the manufacture of tobacco products].</i></p>
27	<p><i>Parties <b>shall</b> consider concluding <b>bilateral or multilateral</b> agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The Parties involved shall ensure that the sovereignty of the Party on the territory of which such investigation is to take place is fully respected.]</i></p>
28.1(e)	<p><i>Each Party <b>shall</b> adopt, consistent with their respective domestic legal and administrative systems, effective measures to:</i></p> <p><i>facilitate effective coordination among its competent authorities, agencies and services and promote the exchange of personnel and other experts, including, subject to <b>bilateral</b> agreements or arrangements between the Parties concerned, the posting of liaison officers</i></p>
28.2	<p><i>With a view to giving effect to this Protocol, Parties <b>shall</b> consider entering into <b>bilateral or multilateral</b> agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them accordingly. In the absence of such agreements or arrangements between the Parties concerned, the Parties may consider this Protocol as the basis for mutual law enforcement cooperation in respect of the offences covered by this Protocol. Whenever appropriate, Parties shall make full use of agreements or arrangements, including international or regional organizations, to</i></p>



	<i>enhance the cooperation between their law enforcement agencies.</i>
30.4	<i>The provisions of this Article <b>shall</b> not affect the obligations under any <b>other treaty, bilateral or multilateral</b>, which governs or will govern, in whole or in part, mutual legal assistance.</i>
30.24	<i>The Parties <b>shall</b> consider, as may be necessary, the possibility of concluding <b>bilateral or multilateral</b> agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this Article.</i>
31.15	<i>Parties <b>shall</b> seek to conclude <b>bilateral and multilateral</b> agreements or arrangements to carry out or to enhance the effectiveness of extradition.</i>

## COMMENTS

There are a few points we would like to make concerning the above provisions:

1. The terms used are different, some being “bilateral and multilateral”, while others being “bilateral, multilateral, and regional”. We do not see apparent reasons to use different terms in these articles. We thus suggest to make them consistent with each other.
2. The terms “shall” and “may” are alternatively used in these different provisions. Again, we do not see apparent reasons to differentiate these articles concerning the need of use either “shall” or “may”.
3. Since bilateral, regional and multilateral arrangements or agreements might not include all Parties, it is necessary to require that these arrangements or agreements being open to accessions by other FCTC Parties, which are not parties to these arrangements or agreements.

4. Since the prevention and control of illicit trade needs fullest cooperation, the Parties might need to consider the possibilities of allowing non-FCTC parties to be parties to or to associate themselves with the bilateral, regional and multilateral agreements or even the Protocol.

DRAFTING MEMBERS

of

THE COMMENTS AND RECOMMENDATIONS

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