

**Comments and Recommendations on
CHAIRPERSON'S TEXT FOR
A PROTOCOL ON ILLICIT TRADE IN
TOBACCO PRODUCTS**

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**Bureau of Health Promotion
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**Asian Center for WTO and International Health Law and Policy
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**COMMENTS AND RECOMMENDATIONS ON
“CHAIRPERSON’S TEXT FOR A PROTOCOL ON
ILLICIT TRADE IN TOBACCO PRODUCTS”
(FCTC/COP/INB-IT/2/3)**

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**Comments and Recommendations on
“Chairperson’s text for a protocol on illicit trade in
tobacco products”
(FCTC/COP/INB-IT/2/3)**

Preface

We are delighted to see the issuance of the “Chairperson’s text for a protocol on illicit trade in tobacco products” (FCTC/COP/INB-IT/2/3) (hereinafter “Chairperson’s text”) by Mr. Ian Walton-George, the Chairperson of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products after its first session in Geneva on 11-16 February 2008. This is a significant progress in the negotiation for the protocol on illicit trade in tobacco products. We congratulate the chairperson and the negotiators for the great success.

The Asian Center for WTO and International Health Law and Policy of National Taiwan University College of Law being a research institute of international health law, is very keen to observe the development of international regime for the control of tobacco. We thus carefully review the draft and find that it is very well formulated. We believe this should be a very good basis leading toward a successful completion of the Protocol. However, we also believe that it is the interest of international community to see the perfection of the draft through additional inputs offered from people outside the Intergovernmental Negotiating Body.

This booklet is prepared with such purpose of offering our inputs so that some different views will also be taken into account. The booklet includes the complete Articles of “Chairperson’s text” in the order of the original text, followed by our reasoned comments and recommendations on each issue that we consider of importance. These comments and recommendations are discussed and written by a group of experts and persons with the interest in the field of tobacco control in Taiwan after many rounds of deliberation. We sincerely hope that our comments and recommendations will be referential to

the future negotiation on illicit trade in tobacco products.

PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS CHAIRPERSON'S TEXT

Preamble

The Parties to this Protocol,

Deeply concerned by the magnitude and pervasiveness of the illicit trade in tobacco products which poses a serious threat to the health and welfare of human beings and to the economies of the Parties;

Aware that illicit trade in tobacco products generates huge financial profits funding transnational criminal activity which penetrates, contaminates and corrupts government objectives and legitimate commercial and financial businesses at all levels;

Taking into account that effective action to prevent and combat illicit trade in tobacco products requires a comprehensive international approach to, and close cooperation on, all aspects of illicit trade, including, as appropriate, illicit trade in tobacco and in manufacturing equipment [and key inputs] used in the manufacture of tobacco products;

Recalling Article 15 of the WHO Framework Convention on Tobacco Control, in which Parties recognize, inter alia, that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, is an essential component of tobacco control;

Convinced that supplementing the WHO Framework Convention on Tobacco Control by means of a comprehensive protocol will be a powerful and effective means to counter illicit trade in tobacco products and its grave consequences,

Hereby agree as follows:

Comments and recommendations:

1. The first paragraph of preamble mentions a serious threat to the economies of the Parties. However, according to Preamble of WHO Framework Convention on Tobacco Control, public health is what Convention focuses on, rather than economic issues. It is noted that illicit trade on tobacco products has a lot to do with domestic fiscal and tax problems and cause impacts to developing countries. Nevertheless the main concern sits in controlling and decreasing the consumption of tobacco products for protecting human health. Therefore, the paragraph here emphasizing economies of Parties might not be appropriate.

2. The ratiocination of the first paragraph of preamble referring illicit trade to posing threat to welfare of human beings is not complete. We suggest a forward analysis that illicit trade causes counterfeit and degraded tobacco products available in the market and the uncontrollable quality threaten human health.
3. The second paragraph of preamble states that illicit trade in tobacco products generates huge financial profits funding transnational criminal activity. Although illicit trade may cause adverse effect on government objective and economy, it cannot necessarily lead to the conclusion that the financial profits generated from illicit trade provides other international criminal activity. Some researches even show that the connection between illicit trade and other criminal activities is not that tight.
4. The term “International approach” used in the third paragraph of preamble is not well defined and may cause misunderstanding since many approaches can be unilaterally done by countries and international cooperation is to supplement unilateral measures. Therefore we suggest replacing the phrase “International approach” with “comprehensive approach”.
5. The phrase “key input” used by the third paragraph of preamble is not definite enough. We propose a less abstract regulation and provide the exact objects.
6. We suggest removing the word “powerful” in the fifth paragraph as the term can be confusing and the “effective” enforcement of WHO Framework Convention on Tobacco Control can achieve the goal.

PART I: INTRODUCTION

Use of terms

“carton” means packaging for five or more unit packs of tobacco products;

“cigarette” means any product that contains tobacco and is intended to be burned or heated under ordinary conditions of use, and includes, without limitation, any “roll-your-own” tobacco which, because of its appearance, type, packaging, or labelling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes;

“Conference of the Parties” means the Conference of the Parties established by Article 23 of the WHO Framework Convention on Tobacco Control;

“confiscation”, which includes forfeiture where applicable, means the permanent deprivation of property by a competent authority;

“controlled delivery” means the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of those involved in the commission of the offence;

“Convention Secretariat” means the Secretariat to the WHO Framework Convention on Tobacco Control;

“due diligence” means a reasonable state-of-the-art investigation conducted before the commencement of, or during the course of, a business relationship for the purpose of ascertaining whether a business partner or prospective business partner is complying with, or can reasonably be expected to comply with, their legal obligations;

“illicit trade” means any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase including any practice or conduct intended to facilitate such activity;

[“key inputs” means those inputs specified in Annex 1 that are used in the manufacture of tobacco products;]

“licence” means permission from a competent authority following the requisite submission of an application or other documentation to the competent authority;

“master case” means packaging for about 10 000 cigarettes;

“Party” means, unless the context otherwise indicates, a Party to this Protocol;

“proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of a criminal offence;

“seizure” means the temporary prohibition of the transfer, conversion, disposition or movement of property or the temporary assumption of custody or control of property by a competent authority;

“suspicious transactions” means transactions which do not correspond or conform to ordinary commercial practices;

“tobacco products” means products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing;

“tracing” means the re-creation by any competent authority or other person on their behalf of the route or movement taken by tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products through their respective supply chains of manufacture, sale, distribution, storage, shipment, import or export, or any part thereof;

“tracking” means the systematic monitoring by the competent authorities or other person on their behalf of the route or movement taken by tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products through their respective supply chains of manufacture, sale, distribution, storage, shipment, import or export, or any part thereof,

Comments and recommendations:

1. The definition of “illicit trade” is exactly the same as that in the WHO Framework Convention on Tobacco Control and perhaps there is no need for a repeated provision.
2. The concept of deprivation of “property” might not be the same in each country. For example, if proceeds of crime are deposited in the bank, it is questionable whether the right to ask the bank to return the benefit or money can fall into the scope of “property”. To make sure the definition is broad enough, we suggest that the term “other right and interest” can be added in so that the phrase becomes “deprivation of property and other right and interest”.

Relationship with the WHO Framework Convention on Tobacco Control and other agreements and legal instruments

1. The provisions of the WHO Framework Convention on Tobacco Control applying to its protocols shall apply to this Protocol to the WHO Framework Convention on Tobacco Control.

2. The relationships of this Protocol with other agreements and legal instruments are governed by Article 2 of the WHO Framework Convention on Tobacco Control. The Parties to the Protocol that have entered into agreements mentioned in Article 2 of the WHO Framework Convention on Tobacco Control shall communicate such agreements to the Meeting of the Parties through the Convention Secretariat.

PART II: GENERAL OBLIGATIONS

General obligations

1. Parties shall adopt and implement appropriate measures to control or regulate the supply chain of tobacco, tobacco products, and manufacturing equipment [and key inputs] used in the manufacture of tobacco products in order to prevent, detect and investigate illicit trade, and shall cooperate with one another to this end.
2. Parties shall take appropriate measures to increase the effectiveness of customs, police and other relevant regulatory agencies responsible for preventing, deterring, detecting, investigating and eliminating all forms of illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.
3. Parties shall adopt clear and effective measures for technical assistance and financial support, capacity building and international cooperation including measures that assure the availability to, and exchange with, the competent authorities of production and trade data for all forms of tobacco, tobacco products, and manufacturing equipment [and key inputs] used in the manufacture of tobacco products originating within their territory.
4. Parties shall 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. Parties shall cooperate and communicate with relevant organizations and bodies in the exchange of information covered by this Protocol.
6. In addition to the provisions of Article 5 of the WHO Framework Convention on Tobacco Control, Parties shall, within means and resources at their disposal, cooperate to raise financial resources for effective implementation of this Protocol through bilateral and multilateral funding mechanisms.

Comments and recommendations:

1. We share the opinion that the term “appropriate measures” stated in the first and second paragraphs can be substituted by the term “measures as required by the protocol.” Otherwise the original terms would make this article too vague and general so that it is not clear whether this article can be the legal basis to claim that a country has breached this obligation arising from it.
2. The first and forth paragraphs both state that Parties should

cooperate with other Parties, and the contents and obligation stipulated in the two paragraphs seem to be too duplicated.

3. We agree with the view that Parties shall cooperate and communicate with relevant organizations and bodies with regard to exchange of information. But we also suggest that the range of cooperation should not be limited to information and there should be no limitation on the contents of cooperation.
4. About the term “funding mechanism”, it should be noted in the provision that the funding should not come directly or indirectly from tobacco corporations. The Protocol could also encourage Parties to cooperate with non-Parties in respect of funding mechanism so as to achieve the goal of the Protocol.

PART III: SUPPLY CHAIN CONTROL

Licence

1. With a view to eliminating illicit trade in tobacco, tobacco products, and manufacturing equipment [and key inputs] used in the manufacture of tobacco products and in light of the public health objectives of the WHO Framework Convention on Tobacco Control, each Party shall prohibit the conduct of any of the following activities by any legal or natural person except pursuant to a licence to conduct such activities granted by a competent authority:

- (a) selling more than *X* tonnes of tobacco per year;
- (b) manufacturing tobacco products;
- (c) manufacturing the manufacturing equipment [or key inputs] used in the manufacture of tobacco products; and
- (d) commercial import or export of more than *X* tonnes of tobacco per year, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.

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

- (a) designate or establish an agency or set of agencies to issue, renew, suspend and cancel licences to conduct the activities specified in paragraph 1 of this Article to all applicants that satisfy the requirements in this Article, regardless of nationality or residency. The designated agencies may include customs agencies, revenue authorities, public health authorities or any other competent authority;
- (b) require that each licence application contains all the requisite information about the licensee, including:
 - (i) where the applicant is a natural person, information regarding his or her identity, including but not limited to, full name, business registration number (if any), date and place of birth and applicable tax registration numbers and copy of his or her official identification;
 - (ii) where the applicant is a legal person, information regarding its identity, including, but not limited to, full name, business registration number, date and places of incorporation, corporate capital, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, the names of its officers and directors, and the name of any designated representatives, including but not limited to the representatives' complete names, and copies of their official identification;
 - (iii) location of manufacturing unit(s) and production capacity of

business run by the applicant;

(iv) details of the tobacco, tobacco products, and manufacturing equipment [and key inputs] used in the manufacture of tobacco products covered by the application such as product description, name, registered trade mark, if any, design, brand, model or make;

(v) documentation regarding any offences committed or charges filed by government agencies;

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

(vii) a description of the intended use and intended market of retail sale of tobacco, tobacco products, [or key inputs used in the manufacture of tobacco products], with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand; and

(viii) a description of where manufacturing equipment for use in the manufacture of tobacco products will be installed and used.

(c) monitor and collect any licence fees as may be levied and allow for their use in the effective administration and enforcement of the licensing system or for any other related activity, including for public health;

(d) enact or strengthen legislation, with appropriate penalties and remedies, against contravention of relevant laws;

(e) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;

(f) undertake measures such as periodic review, renewal, inspection or audit of licensees;

(g) establish a time frame for expiration of licences and subsequent requisite reapplication or updating of application information; and

(h) suspend or cancel a licence for a period of not less than five years, and prohibit the licensee from re-applying for a licence during that period, when a licensee has contravened or has facilitated the contravention of relevant laws or provisions.

3. Each Party shall, as appropriate and in accordance with national laws, enact provisions regarding mergers and acquisitions of licensed entities and assignability or transferability of licences.

Comments and recommendations:

1. The way how paragraph 1 (a) and (d) regulate “more than X tones of tobacco”:

- A. In some countries, small sellers play more important role in the sales network. Therefore, a smaller unit, rather than ton, should be considered as the criterion.
 - B. Under these regulations, the government's control would have to be based on records provided by sellers. They might be incorrect.
 - C. If it is a newly entering company, it does not have historical records. The competent authority would have difficulty to determine how many tones of tobacco had been sold or should have been sold per year by the company.
 - D. In different jurisdictions, the same weight of tobacco products might have different impact. In other words, fewer tones of tobacco products may exercise strong influence in some countries. Thus to have a fixed tons to be applied by different countries might not be appropriate.
2. According to the above reasons, we suggest to have a more flexible criterion concerning paragraph 1 (a). That is to say, large-scale manufacturers should be subject to stricter license procedure; in contrast, small ones could be subject to milder control. But they are both subject to certain license procedure.
 3. In connection with paragraph 1 (b): Growers are not included in current articles. If business enterprises in large scale simultaneously grow tobacco and manufacture tobacco products, then it can be controlled under paragraph 1 (b), which covers "manufacturing tobacco products". However, if the growers do not engage in manufacturing, it will not be control under the licensing mechanism. We are of the opinion that the growers should be under the control of licensing system. But we are of the view that there must be distinction between individual and large-scale business entities growing tobacco when applying license procedure.
 4. In connection with subparagraph 2 (a): Under the current wording in this provision, countries might be considered to have committed an obligation to allow foreign tobacco companies to enter into their respective markets to produce or to sell tobacco products. Although the provision is to require Parties to designate or establish an agency to conduct the issuance and renewal of licences, it could be interpreted that Parties must designate or establish an agency and the agency must issue licence when an applicant satisfies the requirements in this provision.. Even

though Article 2 of the Convention regulates that the provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, provided that such agreements are compatible with their obligations under the Convention and its protocols, the problem whether it would contradict the rules under the WTO (about whether to allow foreign companies to establish a commercial presence to engage in the sales of tobacco products) and under investment treaties (about whether to allow foreign companies to set up their production facilities to produce tobacco products) should be seriously considered.

5. Concerning paragraph 2 (b)(iii), the new-establish companies would not be able to provide its “production capacity”. Therefore, “intended/expected production capacity” should be the better term.
6. In connection with paragraph 2 (b) (vi):
 - A. The term “relevant transactions and other relevant payment details” might not be definite enough.
 - B. It is more comprehensive for the governments to regulate bank accounts “used or intended to be used”, rather than “intended to be used.”
7. In connection with paragraph 2 (e): The term “appropriate” is vague; it would be clearer if it is substituted by “effective.”
8. In connection with subparagraph (f): The frequency of “periodic review, renewal, inspection or audit of licensees” should be defined. The requirements for “renewal” and the contents of “inspection” should also be elaborated.
9. In connection with paragraph 2 (g):
 - A. The Protocol should specify a definite time frame for the expiration of licences. Otherwise, there could be an extreme situation where countries could establish a 20-year time frame under this provision. This would make the provision meaningless.
 - B. Not only the time frame of “update”, but also the “obligation” of update should be included.
10. Mergers and acquisitions on the one hand and assignability and transferability of licences on the other hand should better be differentiated. Therefore, paragraph 3 of this Article should be

divided into two paragraphs:

- A. With regard to mergers and acquisitions, the Protocol should require countries to provide in their domestic laws that the existing company after mergers and acquisitions shall comply with all rules concerning licences .
- B. The Protocol should exclude assignability or transferability of licences. In other words, if a company is to engage in manufacturing or selling of tobacco products, it must apply for the necessary licence so that the authority would be able to examine whether the requirements are met. It should not be allowed to acquire the licence through the assignment or transfer from another company. Also if a licence can be transferred, then the licence could have some economical value with it. The situation might not be what the Parties intend to create.

11. Additional recommendations:

- A. The definition of "tobacco" should be added into this Protocol. In subparagraph (a) and (b) of paragraph 1, there is distinction between "tobacco" and "tobacco products"; nevertheless, in some articles, tobacco refers to raw material, while in others, it refers to raw material and manufactured products. Besides, definition of "tobacco" is not included in the text of WHO Framework Convention on Tobacco Control (FCTC). It is necessary to make it clear.
- B. There could be a compulsory educational program required to be attended by the applicants and their key employees before they are issued licences by the authorities.
- C. The Protocol could also require tobacco manufacturers and traders to have self-regulation or compliance program before they apply for their licences, This is to avoid future illegal behaviors.

Customer identification and verification

1. Each Party shall obligate all natural and legal persons engaged in selling more than X tonnes of tobacco per year or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products, excluding the final retailer and persons importing tobacco products for their personal consumption, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products to conduct due diligence with respect

to any such natural or legal person with which they engage in a commercial transaction, and to require that any such natural or legal person who sells, distributes or ships tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products to further natural or legal persons requires such further persons to conduct due diligence on the persons (other than final consumers) to which they subsequently sell, distribute or ship tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.

2. Due diligence pursuant to paragraph 1 of this Article shall include requirements for customer identification, which shall include requirements to obtain information relating to, but not limited to, the following, to the extent reasonably available:

(a) confirmation that the legal or natural person holds a valid licence in accordance with Article XX (*Licence*), if applicable;

(b) where the customer is a natural person, information regarding his or her identity, including but not limited to, full name, business registration number (if any), date and place of birth and applicable tax registration numbers and copy of his or her official identification;

(c) where the customer is a legal person, information regarding its identity, including, but not limited to, full name, business registration number, date and places of incorporation, corporate capital, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, the names of its officers and directors, and the name of any designated representatives, including but not limited to the representatives' complete names, and copies of their official identification;

(d) documentation regarding any offences committed or charges filed by government agencies;

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

(f) a description of the intended use and intended market of retail sale of the tobacco products or manufacturing equipment [or key inputs] used in the manufacture of tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand; and

(g) a description of where manufacturing equipment for use in the manufacture of tobacco products will be installed and used.

3. Each Party shall obligate all natural and legal persons referred to in paragraph 1 of this Article to conduct further due diligence, including the requirements in paragraph 2 of this Article, in order to verify and update

customer information whenever there is a material change in circumstances.

4. Each Party shall obligate all natural and legal persons referred to in paragraph 1 of this Article to report on their compliance with the customer identification and verification obligations on a periodic basis.

5. Each Party shall take all necessary legislative, administrative and other measures to ensure that all natural and legal persons referred to in paragraph 1 of this Article comply with the above provisions.

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 [and key inputs] used in the manufacture of tobacco products, with any customer upon a competent authority providing such legal and natural persons with, or those persons otherwise coming into possession of, sufficient evidence that such customer has knowingly engaged in the sale, distribution, storage, or shipment of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products in contravention to provisions of this Protocol or any other activity contrary to the provisions of this Protocol. Thereafter, such customer shall be a blocked customer.

7. With regard to blocked customers, each Party shall require that:

(a) all natural and legal persons referred to in paragraph 1 of this Article maintain a list of blocked customers;

(b) once so designated, a customer will remain “blocked” for a period of five years following the termination of a business relationship in accordance with paragraph 6 of this Article;

(c) 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 [or key inputs] used in the manufacture of tobacco products; and

(d) if a blocked customer does not engage in illicit sale, distribution, storage, or shipment of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products or any other activity contrary to the provisions of this Protocol during the five-year period, the “blocked” designation shall be lifted and the customer shall again be subject to the customer identification and verification provisions.

8. Each Party shall require all natural and legal persons referred to in paragraph 1 of this Article to monitor their customers’ purchases to ensure that the quantities of such purchases are commensurate with the demand for such products within the intended market of sale or use.

Comments and recommendations:

1. This Article requires the state to obligate persons engaging in selling more than X tonnes of tobacco per year to conduct due diligence with respect to any person with which they engage in a commercial transaction. However, it would be difficult for the competent authority to determine how much tones of tobacco will be sold per year by the companies newly entering into the market.
2. The legal structure of this Article seems to have contradictory elements. This Article seems to imply that customers who engage in any activity in contravention to provisions of this Protocol shall be a “blocked customer” “after” the termination of business relations. However, logically business relations would not be terminated unless the natural or legal person has been declared as a “blocked customer”. In other words, the competent authority should first determine who would be a “blocked customer” through an announcing process before tobacco merchants can be required to terminate business relations with “blocked customers”. Thus there should be a blocked customer identifying process “before” the termination of business relations.
3. There must be due process conducted by the competent authorities to determine a “blocked customer”. Furthermore, there must be an appeal process available for the “blocked customer” to have judicial review Unfortunately, due process protection does not appear in this Protocol.
4. The phrase “demand in the intended market” is used in this Article while the phrase “legitimate consumption or use in the intended market” is used in other places of the draft Protocol. It would be more appropriate to make them the same.

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, each Party shall establish a tracking and tracing system for all tobacco products, and manufacturing equipment [and key inputs] used in the manufacture of tobacco products that are manufactured in or imported into its territory, based on available best practices.

2. With a view to enabling effective tracking and tracing, each Party shall, within three years of entry into force of this Protocol for that Party, require that unique machine-scannable and human readable markings are affixed to:

- (a) all master cases and cartons of cigarettes manufactured in or imported into its territory;
- (b) all packages that contain more than one unit pack of tobacco products, other than cigarettes, that are manufactured in or imported into its territory; and
- (c) all manufacturing equipment [or key inputs] used in the manufacture of tobacco products, that are manufactured in or imported into its territory.

3. Each Party shall, as part of its tracking and tracing system, require that the unique markings affixed, pursuant to paragraph 2 of this Article, to each master case and carton of cigarettes, each package of other tobacco products containing more than one unit pack, and piece of manufacturing equipment [or key inputs] used in the manufacture of tobacco products permit, when scanned pursuant to this Protocol, the determination of the following information:

- (a) date of manufacture;
- (b) manufacturing facility;
- (c) machine of manufacture, where possible;
- (d) production shift of manufacture;
- (e) first purchaser name, invoice/order number and payment record;
- (f) the intended market of retail sale or of installation or use, as appropriate;
- (g) product description;
- (h) any warehousing and shipping;
- (i) the identity of any known subsequent purchaser; and
- (j) the shipment date, shipment destination, point of departure, and consignee.

4. Each Party shall, as part of its tracking and tracing system, require, within three years of entry into force of this Protocol for that Party, that the information set out in paragraph 3 of this Article is recorded, using scanning technology, at the time of first shipment by the manufacturer in a tracking and tracing database.

5. Each Party shall establish the means by which its designated authorities are able to obtain the information set out in paragraph 3 of this Article, including an obligation on licensees to provide the information as required.

6. Each Party shall require that a central point is established in its territory through which all the information contained in paragraph 3 of this Article can be made accessible or available to the competent authorities upon any seizure within its territory of cigarettes, other tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.

7. Each Party shall require that a link is established between the central point established in its territory and the equivalent central points established in the territories of other Parties or a central point of contact for all Parties so that the information contained in paragraph 3 of this Article can be obtained in relation to a seizure in the territory of another Party of cigarettes, other tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.

8. Each Party shall require the further development and expansion of the scope of the applicable tracking and tracing system to require the marking and recording of information relating to sales by first purchasers, second purchasers and, wherever feasible, subsequent purchasers, and to enable Parties and their designated authorities to have access to such information.

9. Parties shall cooperate with each other, with the objective to establish a global tracking and tracing system, to ensure that as far as possible the tracking and tracing systems established in their territories avoid unnecessary costs and duplication of requirements being imposed on manufacturers of cigarettes, other tobacco products, and manufacturing equipment [or key inputs] used in the manufacture of tobacco products. Where a tracking and tracing system already exists in another Party, it shall be taken into account when establishing any system in a Party which does not currently have such a system.

10. The Parties shall endeavour to cooperate, with each other and with competent international organizations, in sharing progressively and developing, or requiring licensees to develop, improved technologies for tracking and tracing. Such cooperation shall include:

- (a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;
- (b) facilitation of the sharing between Parties of tracking and tracing information stored in databases, in accordance with paragraphs 2 and 3 of this Article;
- (c) support for training and capacity building programmes to Parties that express a need for such capacity building initiatives; and
- (d) further development of the technology to mark and scan cigarette packs and unit packs of other tobacco products to provide the information contained in paragraph 3 of this Article.

Comments and recommendations:

1. The meaning and content of the term “available best practices” in this Article is not clear. We are of the view that there should be more clarification on this point.
2. The content of the duty to “establish a tracking and tracing system” is not clear enough. We are of the view that the content of the obligation to establish tracking and tracing system should include acquiring or establishing proper equipment and facilities to enable effective tracking and tracing. Furthermore, this Article should clarify the due date when the Party needs fulfill its obligation to have proper facilities for tracking and tracing. In other words, this Article needs to clarify whether each Party needs to acquire or establish proper equipments and facility immediately or within a specified time-period (such as three years after entry into force of this Protocol).

Record-keeping

1. Each Party shall require that all natural and legal persons engaged in selling more than X tonnesb of tobacco per year or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products, maintain complete and accurate records of all transactions relevant to the object and purposes of this Protocol.
2. Each Party shall require persons licensed in accordance with Article XX (*Licence*) to provide to the competent authorities, on request, the following information:
 - (a) general information on market volumes, trends, forecasts, and other relevant information; and
 - (b) quantities of tobacco, tobacco products, and manufacturing equipment [and key inputs] 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.
3. With respect to tobacco, tobacco products, and manufacturing equipment [and key inputs] used in the manufacture of tobacco products sold or manufactured in the territory of the Party for export outside the territory of the Party, or subject to duty-suspended movement in transit in the territory of the Party, each Party shall require that persons licensed 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, the following information:

- (a) date of shipment from the last point of physical control of the products of the person licensed in accordance with this Protocol;
- (b) details concerning the products shipped (including brand, amount, warehouse);
- (c) intended shipping destination;
- (d) identity of the person to whom the products are being shipped;
- (e) mode of transportation, 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. Wherever feasible, and subject to national laws, each Party shall require that tobacco growers and retailers maintain complete and accurate records of all relevant transactions in which they engage.

5. For the purposes of implementing paragraph 1 of this Article, each Party shall adopt effective 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 authorities; and
- (c) as far as feasible, kept in a common format.

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

Comments and recommendations:

1. The phrase “all transactions relevant to the object and purposes of this Protocol” in paragraph 1 of this Article is not clear. We also suggest to coordinate it with the phrase “all relevant transactions” used in paragraph 4 of the Article.
2. According to this Article, each Party shall require that persons licensed in accordance with this Protocol provide relevant information to the competent authorities in the country of departure. However, we are of the view that merely providing information to the country of departure is not enough. For the purpose of maximizing the effect of tracking and tracing,

information should also be provided to the next importing country. By obtaining and reviewing such information, importing country and exporting country then would be able to adopt clear and effective measures for international cooperation and enable effective tracking and tracing. We therefore suggest to obligate each Party to require legal or natural persons providing information not only to the country of departure but also to the next import country (or the intended destination) at the time of departure.

3. With regard to paragraph 4:
 - A. According to paragraph 1, each Party shall require natural and legal persons engaged in manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment to maintain complete and accurate records of all transactions. But in paragraph 4, tobacco growers and retailers are merely required to maintain complete and accurate records when “feasible.” We do not consider that it is necessary to include the term “feasible” as a requirement in paragraph 4.
 - B. Or if the feasibility requirement is still included, it might be desirable to clarify about the situations where tobacco growers and retailers will be allowed not to maintain records.
 - C. In addition, the term “all relevant transactions” used in paragraph 4 is not consistent with the term “transaction relevant to the object and purposes of this Protocol” used in paragraph 1. Considering that the term used in paragraph 4 is clearer and more definite, we suggest to use the term “all relevant transactions” also for paragraph 1.
4. With regard to paragraph 5: The meaning and content of the term “common format” is vague and indefinite. We suggest to establish a specific and detailed “common format” to enhance the sharing of information.
5. With regard to paragraph 6:
 - A. It is necessary to clarify differences and relationship between the record-keeping system described in this Article and “automated database” in paragraph 2 of the Article “Information Sharing: Statistical Data”.
 - B. Even if the record-keeping system functions as a platform of

information sharing between countries, such a system does not obligate the state to require natural or legal persons to provide information to the next import country. Since paragraph 3 of this Article obligate natural and legal persons duty to provide information to intended destination after departure, we therefore suggest to require Parties to provide information to authority of intended destination immediately.

- C. We suggest to encourage Parties to open their systems to non-Parties. And if Non-parties would like to provide information, Parties should also be encouraged to include the information into the system.

Security and preventive measures

1. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to require that all natural and legal persons engaged in selling more than X tonnes of tobacco per year or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment [or key inputs] used in the manufacture of tobacco products take all reasonably practicable measures to prevent the diversion of tobacco products into illicit trade channels.

2. Each Party shall ensure that any contravention of the measures adopted pursuant to paragraph 1 of this Article is subject to appropriate criminal, civil and/or administrative procedures and effective, proportionate and dissuasive sanctions, including, as appropriate, suspension or cancellation of a licence and prohibition of the licensee from re-applying for a licence during a five-year period.

3. Each Party shall adopt and implement effective legislative, executive, administrative and/or and 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, transportation, import and export.

4. Parties should require that individuals and businesses engaged in trade of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

5. Parties should require that payments for transactions relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and manufacturing equipment [or key inputs] used in the manufacture of tobacco products be allowed only in the currency and same

amount as the invoice for those products, and only by wire or cheque from financial institutions located in the territory of the intended market of retail sale of the tobacco products.

6. Each Party shall require that all natural and legal persons engaged in selling more than X tones of tobacco per year or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products shall supply such products only in amounts that are commensurate with legitimate consumption or use in the intended market of use or retail sale and shall refuse to supply in amounts that exceed such consumption or use.

7. Each Party shall require that all natural and legal persons engaged in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment [or key inputs] used in the manufacture of tobacco products report all suspicious transactions to the competent authorities.

Comments and recommendations:

1. The meaning of the phrase “take all reasonably practicable measures” is not clear. It should be further discussed and elaborated so that Parties would be able to strictly follow and enforce the provision.
2. We believe the term “diversion of tobacco products” is narrower than the term “illicit trade in tobacco products”. We suggest to avoid using the term “diversion of tobacco products” but to use the term “illicit trade in tobacco products” instead.
3. Paragraph 3 of the Article about “intermingled” is not clear enough. Thus examples should be made so as to illustrate it. 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 need clarification.
4. Paragraphs 4 and 5 use the term “should” instead of “shall” might not be appropriate. We suggest to replace the term “should” by the term “shall”.
5. Paragraph 4 requires individuals and businesses to report “the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments“. However, the meanings of “substantial” and “appropriate” are not clear enough. We suggest to require

them to report “all suspicious transactions” so as to make it consistent with paragraph 7.

Internet and other telecommunication-based modes of sale

Each Party shall require that all legal and natural persons engaged in selling more than *X* tones of tobacco per year or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment [or key inputs] used in the manufacture of tobacco products conducting business through internet or other telecommunication-based modes of sale comply with all relevant obligations covered by this Protocol.

PART IV: ENFORCEMENT

Offences

1. Each Party shall adopt appropriate legislative and other measures, as may be necessary, to establish the following conduct as unlawful under its domestic law when committed intentionally:

- (a) selling more than X tonnes of tobacco per year without a licence;
- (b) manufacturing tobacco products without a licence;
- (c) manufacturing the manufacturing equipment [or key inputs] used in the manufacture of tobacco products without a licence;
- (d) manufacturing, selling, distributing, storing, shipping, importing or exporting of tobacco products or manufacturing equipment [or key inputs] used in the manufacture of tobacco products without appropriate labelling, marking or stamping;
- (e) defacing, falsifying, removing, altering or otherwise interfering with labelling, stamping or marking of or for tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products;
- (f) obstructing inspectors, auditors or any other public official from performing their duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products;
- (g) failing to maintain records covered by this Protocol or maintaining false records;
- (h) making incomplete or false statements to an inspector, auditor, customs officer or any other authorized official performing his or her duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products;
- (i) obtaining, by a person licensed in accordance with Article XX (*Licence*), tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products from a person who should be, but is not, licensed in accordance with Article XX (*Licence*);
- (j) intermingling of tobacco products with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transportation, import and export; and

(k) using internet and other telecommunication-based modes of sale of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products, in contravention of the provisions of this Protocol.

2. Each Party shall adopt appropriate legislative and other measures, as may be necessary, to establish the following conduct as criminal under its domestic law when committed intentionally:

(a) manufacturing, selling, distributing, storing, shipping, importing or exporting of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products without payment of applicable duties, taxes or levies;

(b) counterfeiting tobacco products or manufacturing equipment [or key inputs] used in the manufacture of tobacco products or counterfeiting packaging, fiscal stamps, markings or labels;

(c) manufacturing, selling, distributing, storing, shipping, importing or exporting counterfeit tobacco products or counterfeit manufacturing equipment [or key inputs] used in the manufacture of tobacco products or counterfeit fiscal stamps;

(d) misdeclaring the description, quantity, or value of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products;

(e) acquiring, possessing, using, converting or transferring property or engaging in any activity that conceals or attempts to conceal the origin of said property, knowing that such property is the proceeds of an offence or offences covered by this Protocol;

(f) 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 derived from an offence or offences covered by this Protocol;

(g) conspiring or attempting to commit an offence established in accordance with this paragraph; and

(h) organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with this paragraph.

Comments and recommendations:

1. Since the definition of “offences” may also include civil and administrative responsibilities, it raises doubt regarding the appropriateness to the adoption of the requirement of “*mens rea*”. Under the legal principle of civil law and administrative law, offensive conducts shall be held liable only if committed with

intention or negligence. There seems to lack sufficient ground to confine the application of civil compensation and administrative fines within the category of “intentional commitment”. The system of “faultless responsibilities” referred to by the recommendations on FCTC/COP/INB-IT/1/7 is therefore worthy of consideration.

2. The concept of “unlawful” is ambiguous which is more apt to administrative punishment rather than civil responsibilities. Furthermore, most of the actions contained in this Article are in essence “intentional” conducts except for paragraph (g), (i) and (j). For instance, it seems difficult to interpret the actions of selling or manufacturing products without a license prescribed in paragraph (a) and (b) as “nonintentional” since licenses should be applied in advance before engaging the business of sale and manufacture. As a result, the importance to the existence of “intention” appears to be rather trivial. In addition, it is extremely difficult for competent authorities to prove the existence of “intention” or “mentality”; hence the mechanism of shift of burden of proof should be adopted if the current measure is to be maintained. The way to remove the ultimate cause of trouble, however, is to punish both willful and negligent conducts while differentiating the level of punishment between these two.
3. Is it necessary to retain the requirement of “more than X tonnes” in paragraph 1(a) since selling without a license *per se* is an offence?
4. The essence of paragraph 2(d) is more like “administrative responsibilities” instead of criminal obligations; therefore its location in this Article should be reconsidered.
5. The terms as well as the actions prescribed in paragraph 1(e) resembles those in paragraph 2(b), 2(c) and 2(d), containing the elements of deceit, falsification and misrepresentation. These types of offences are so serious that should be subject to criminal sanctions. In consequence, the regulation of paragraph 1(e) should be relocated to paragraph 2.
6. It raises question whether paragraph 2(g) is intended to penalize the crime of “conspiracy”, which is against the current trend of criminal policy. It seems obscure what does the word “conspiring” or “attempting to” really refer. As to the latter kind of offense, certain “objective conditions” are recommended to be

supplemented as evidences for the finding of “attempt”; otherwise, the determination of “attempt” or intention may be purely arbitrary. As to the former, it seems virtually impossible for us to determine “conspiracy”, since the plot only exists in the mind of the offender. Criminalizing this kind of action may well incur the concern of penalizing ideas or thoughts, which is contrary to the modern concept of criminal law.

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 offences established in accordance with Article XX (*Offences*).
2. Subject to the legal principles of the Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.

Comments and recommendations:

1. Liabilities imposed on legal persons will eventually be ascribed to natural persons. Therefore, the Protocol should specify the natural persons on whom it intends to enforce obligations, i.e. those who should take responsibility for the conducts of legal persons. Also, further concerns will arise regarding the kind of “natural person” this Article is really targeting. Is it the person in charge of that legal person, e.g. the CEO or the general manager, or the person actually committing the act (the actor), or both? The identification of the targets of regulation is especially pivotal under the circumstance of criminal offences, taking into consideration the principle “*nullum crimen sine lege, nulla poena sine lege*”.
2. If the target of the regulation is the actual actor, the definition of “actor” will require clarification. It is necessary to properly limit the scope of “actor” as this term may include the person actually committing the acts as well as any person involved in a broad sense. Punishing every person pertaining to the offence, however, would simply render the regulation unbearably strict and consume too much execution resource.

Sanctions

1. Each Party shall make the commission of an offence established in accordance with this Protocol liable to sanctions that take into account the gravity of that offence. Each Party shall, in particular, ensure that legal and natural persons held liable for offences established in accordance with Articles XX (*Offences*) are subject to effective, proportionate and dissuasive sanctions, including monetary sanctions.
2. Each Party shall ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences relevant to this Protocol are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
3. Each Party shall, where appropriate and in accordance with domestic law, establish under its domestic law a lengthy statute of limitations period in which to commence proceedings for any offence covered by this Protocol and a lengthier period where the alleged offender has evaded the administration of justice.
4. Nothing contained in this Protocol shall affect the principle that the description of the offences established in accordance with this Protocol and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in accordance with that law.

Comments and recommendations:

1. The new regulatory construction is more nimble and elastic while demonstrating high respect to the sovereignty and autonomy of each Contracting Party. Nevertheless, the terms “effective, proportionate and dissuasive” are too unclear so that Parties could have very different interpretations and approaches.
2. We hence recommend that the terms prescribed in this Article should be clarified. Also the criterion “proportionate” should be replaced by the term “detering”, for it is the preventive effect on serious tobacco-related crimes that we intend to achieve through this Protocol.
3. Moreover, we suggest that the nature and level of damage to public health caused by the offence could be taken into account as auxiliary standards in the determination of “gravity”. For

example, misdeclaration on tobacco products during customs clearance causes comparatively slight injury to public health; in contrast, smuggling counterfeit cigarettes into one country will certainly pose severe threat to the health of the vast amount of smokers in that country.

Search of premises and seizure of evidence

Each Party shall adopt such legislative and other measures as may be necessary to authorize competent authorities to search a building, receptacle, means of transport or place for evidence, including tobacco, tobacco products and manufacturing equipment [and key inputs] used in the manufacture of tobacco, with respect to a commission of an offence under Article XX (*Offences*) of this Protocol, and to seize such evidence when found, in accordance with national law.

Comments and recommendations:

1. Can “receptacles” or “means of transport” be searched and seized in the case of transit? Searching transit containers or vessels might incur the dispute of jurisdiction according to the different domestic law of each individual Contracting Party.
2. The competent authorities, mostly organs of the administrative branch, may not be vested with the power of search and seizure since in many jurisdictions this power is conferred only in criminal procedures to the judicial organs. Also, in the situation of paragraph 1 of Article XX (*Offences*), which also contains civil and administrative responsibilities, judicial organs may not always be able to employ the power of search and seizure, especially with respect to civil and administrative matters.
3. We recommend to clearly specifying in this provision that the “competent authorities” here includes administrative organs, e.g. the Customs or the Treasury, and that the power of search and seizure should be granted so that the authorities will also be able to exercise such power in procedures even other than criminal procedures. The main purpose of the suggested modification is to grant the sword to the currently unarmed government agencies in many countries in charge of the matters with necessary empowers to respond to unlawful conducts with efficiency and rapidity.

Confiscation and seizure

1. Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
 - (a) proceeds of crime derived from criminal offences covered by 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 criminal offences covered by this Protocol.
2. Parties shall adopt such measures as may be necessary to enable the identification, tracing or seizure of any item referred to in paragraph 1 of this Article for the purpose of eventual confiscation.
3. If proceeds of crime have been transferred, transformed or converted, in part or in full, into other property or to another person who has knowledge or should have knowledge of the commission of offences covered by this Protocol, such property shall be liable to the measures referred to in this Article instead of the proceeds.
4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this Article, in the same manner and to the same extent as proceeds of crime.
6. For the purposes of this Article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized and to hear/adjudicate civil claims of another Party against any licensee. Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy or any common law revenue rule or its equivalent.
7. Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.
8. The provisions of this Article shall not be construed to prejudice the rights of bona fide third parties.

9. Nothing contained in this Article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

10. Without prejudice to the provisions of this Article, Parties may allow retention of the property, equipment or other instrumentalities used in or destined for use in criminal offences covered by this Protocol for training and law enforcement purposes, provided that the confiscated materials are destroyed following such use.

Comments and recommendations:

1. It is reasonable to confiscate property used in criminal offences covered by this Protocol. However, the proposed rule seems very harsh when those confiscated property, equipment or other instrumentalities are simply “destined for” use in criminal offences covered by this Protocol.
2. It is our opinion that the scope of “property” raises the concern of ambiguity. In the real situation, for instance, can manufacturing factory and residence house contributing to the production of smuggling tobacco products be confiscated? Criminal laws in many countries prescribe that “object of criminal purpose” and proceeds of crime can be confiscated. However, the definition of “object of criminal purpose” could be diverse. Although the Protocol can specify assets which are suitable for confiscation and seizures, domestic legislations of each country should still be taken into consideration.
3. The definition of “other instrumentalities” should be clearly stated, so as to include means of transportation, such as fishing boats which are used in criminal offences covered by the Protocol.
4. Paragraph 1 only enables confiscation of proceeds of crime or property derived from criminal offences covered by the Protocol. It is suggested that counterfeit cigarettes should be confiscated and destroyed, not only limited to those acquired from criminal procedures.
5. It is hard to assess the value of the proceeds of crime that have been intermingled with property acquired from legitimate sources. We suggest Parties to further elaborate on this.

Seizure payments

For the purpose of eliminating illicit trade in tobacco products, the Parties shall 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 or manufacturer of seized tobacco, genuine tobacco products or genuine manufacturing equipment (or genuine key inputs) used in the production of tobacco products.

Comments and recommendations:

1. The duty of seizure payments imposed on the producer or manufacture is too slight to create deterrence effects against the engagement in illicit trade.
2. Furthermore, the substance of the duty is implicit. It is difficult for each Party to calculate the amount of “lost taxes and duties” according to this Protocol.
3. The enforceability of seizure payments remains in question.

Destruction

1. Tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products confiscated by a Party pursuant to Article XX (*Confiscation and seizure*) shall be destroyed by the Party upon completion of any legal process in relation thereto.

2. Without prejudice to the provisions of paragraph 1 of this Article, Parties may allow retention of the confiscated tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products for training and law enforcement purposes, provided that the confiscated goods are destroyed following such use.

Comments and recommendations:

1. We are of the view that counterfeit cigarettes should be destroyed without exception. However, with regard to genuine cigarettes, it is suggested that other effective measures could be taken into consideration, such as imposing obligations upon manufacturers to buy back the cigarettes at market prices.
2. If the manufacturing equipment used in the manufacture of illegal tobacco products can be used by legitimate manufacturing

plants, destruction may not be the best choice. It is suggested that such manufacturing equipment can be resell to other legitimate manufacturing plants at a reasonable price.

3. According to this Protocol, the destruction takes place upon completion of any legal process in relation thereto. However, since the legal process may take a long period of time, it may lead to the following problems:
 - A. Destruction might not be able to create imminent deterrence effects on illicit trade.
 - B. During the legal process, the costs of keeping such confiscated products and equipment could be high.
4. Consequently, we suggest that the timing of destruction shall be reconsidered, especially with regard to counterfeit cigarettes. Each Party may destroy the confiscated tobacco products upon the completion of certain stages of procedures in accordance with its domestic law.

Special investigative techniques

1. Each Party shall, subject to its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.
2. For the purpose of investigating the offences covered by this Protocol, Parties are encouraged to conclude 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.
3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this Article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.
4. The Parties recognize the importance of, and need for, international cooperation and assistance in this area and shall endeavour to cooperate,

with each other and with international organizations, in developing capacity to achieve the goals of this Article.

Comments and recommendations:

1. Regarding undercover operations, countries with better techniques and abilities should assist other countries with less investigative capability in utilizing relevant advanced techniques.
2. For the purpose of effectively combating against illicit trade in tobacco products, Parties to this Protocol should be encouraged to cooperate with non-Parties by concluding appropriate bilateral or multilateral agreements or arrangements.
3. The reason for Parties to consider “financial arrangements and understandings with respect to the exercise of jurisdiction” in paragraph 3 is not clear.
4. The Parties should also be encouraged to cooperate with non-Parties in developing capacity to achieve the goals of this Article.

PART V: INTERNATIONAL COOPERATION

Information sharing: Statistical data

1. The Parties shall, for the purpose of achieving the objectives of this Protocol, exchange relevant information on matters such as:

(a) details of seizures of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products, including case reference information where appropriate, quantity, value of seizure, product description, description of entities involved, date and place of manufacture; modi operandi including means of transport, concealment, routing and detection; counterfeit and genuine brands; and taxes evaded;

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

(c) data on the agricultural production of tobacco;

(d) information on trends, concealment methods, and modi operandi used in the illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products; and

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

2. The information referred to in paragraph 1(b-e) of this Article shall be placed in a secure, central, automated database managed by XXX. Information referred to in paragraph 1(a) of this Article shall be included in the database if it is non-nominal.

3. The communication of information by a Party to the central automated database shall be subject to that Party's legal and administrative provisions.

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

Comments and recommendations:

1. Whether the "database" referred to in this Article serve the same purpose as the "central point" established under paragraph 6 of Article XX (Tracking and Tracing) seems unclear. It merits further clarifications.
2. The requirement that information in paragraph 1 (a) be included in the database is limited to those of "non-nominal" nature under

paragraph 2 might negate the effect of the application of paragraph 1(a). If the protection of confidentiality and individual privacy is the main concern founded in this provision, we suggest that clearer wordings should be considered by explicitly indicating that information regarding confidentiality and privacy can be excluded from the database.

3. To achieve the end of the most efficient use of information collected and exchanged, we urge Parties also to cooperate with non-Parties.

Information sharing: Operational data

The Parties shall exchange, on their own initiative or on request where the requesting Party provides due justification that such information is necessary for the purpose of detection or investigation of illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products, the following information, subject to national law:

- (a) licensing records of the concerned legal and natural persons;
- (b) information for identification, monitoring and prosecution of legal or natural persons involved in illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products;
- (c) records of investigations and prosecutions; and
- (d) payment records of import, export, duty free sales of tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.

Comments and recommendations:

The phrase of “subject to national law” could lead to difficult situation. In the event that the exchange of information is precluded or restricted by domestic legislations of a Party, the Party is not obligated, under the current draft, to amend its law to ensure the effective exchange of operational data because of this condition “subject to national law”. This might not be a desirable result.

Information sharing: Confidentiality and protection of information

1. Each Party shall designate the domestic authority to which the

operational and statistical data are supplied and notify the Parties to this Protocol of such designation through the Convention Secretariat.

2. The exchange of information under this Protocol shall be subject to national law regarding confidentiality and privacy. The Parties shall protect, as mutually agreed, any confidential information that is exchanged.

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

1. The Parties shall cooperate, with each other and competent international organizations in providing training, technical assistance and cooperation in scientific, technical and technological matters, in order to achieve the objectives of this Protocol. Such assistance may include the transfer of expertise or state-of-the-art technology in the areas of intelligence collection, law enforcement capacity, tracking and tracing, information management, interdiction, electronic surveillance, forensic analysis, mutual legal assistance and extradition.

2. Parties shall enter into bilateral, multilateral or any other agreements or arrangements in order to promote cooperation and technical assistance and to stimulate discussion on issues and needs of mutual concern, including the special needs of developing-country Parties and Parties with economies in transition.

Comments and recommendations:

1. The cooperation taken by Parties in the matters of “mutual legal assistance and extradition” as mentioned in this Article seems not compatible with the ordinary understanding of “training and technical assistance”. It needs more clarifications.
2. Given that paragraph 1 has provided for various kinds of methods of technical assistance and cooperation, it should be a reasonable expectation to develop further disciplines under this Protocol about technical assistance and cooperation, rather than by recourse to other bilateral or multilateral agreements or arrangements, for the purpose of strengthening the effectiveness in the matters of training and technical assistance among Parties.

Assistance and cooperation: Investigation and prosecution of offences

1. The Parties agree to take all necessary measures to strengthen

cooperation by multilateral, regional or bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those engaged in illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products.

2. Each Party shall, without prejudice to provisions of this Protocol, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a designated authority to serve as a national centre for the collection, analysis and dissemination of information among the other authorities and with other Parties.

Comments and recommendations:

It is suggested that the relationship between the “national centre” in paragraph 2 of this Article and the “database” in paragraph 2 of Article XX (Information sharing: Statistical data) should be clarified. For instance, issues on whether they will serve the same purpose; whether they should be established under the same governmental framework; and how their functioning would be distinguished should further be elaborated.

Protection of sovereignty

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

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

Comments and recommendations:

Given that information sharing and judicial assistance will inevitably interfere with the integrity of state sovereignty to a certain degree, the emphasis on the protection of state sovereignty as provided for in

this Article seems inappropriate in the matters of international cooperation. That might make international cooperation onerous.

Jurisdiction

1. Each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article XX.2 (*Offences*) when:

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

2. Subject to Article XX (*Protection of sovereignty*), 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 in its territory; or
- (c) the offence is:
 - (i) one of those established in accordance with Article XX.2 (*Offences*) 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 XX.2 (*Offences*) and is committed outside its territory with a view to the commission of an offence established in accordance with Article XX.2 (*Offences*) within its territory.

3. For the purposes of Article XX (*Extradition*), 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 in 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 in 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 learned, 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 and recommendations:

1. The provisions concerning jurisdiction seem not make a large difference from those prevailing in national laws. There appears no need to repeat similar provisions in the Protocol.
2. An offence might be composed of a series of acts, such as committing transporting in more than one country, or committing one of the following acts: the manufacturing, exporting, transporting of illegal tobacco products. It seems not clear enough on the precise meaning of the phrase “the offence is committed in the territory of that Party” provided paragraph 1(a). We suggest to elaborate the provision to reflect such situation. Likewise, the scope of criminal offence covered by “on board a vessel” mentioned in paragraph 1(b) should also be elaborated so as to distinguish it from the manufacturing and transporting of illegal tobacco products.
3. According to paragraph 2(a), a Party may establish its jurisdiction over a case when the offence is committed “against” that Party. The wording “against” seems to be not precise enough, due to the facts that such a wording is commonly referred to the criminal infringement of the legal interest of the state and that the legal interest of the state being infringed usually does not cover tax evasion. We suggest Parties to reconsider paragraph 2(a).

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 in whose territory such investigation is to take place is fully respected.

Law enforcement cooperation

1. Each Party shall adopt effective measures to:
 - (a) enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the criminal offences covered by this Protocol;
 - (b) cooperate with other Parties in conducting inquiries with respect to criminal offences covered by this Protocol concerning:
 - (i) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
 - (ii) the movement of proceeds of crime or property derived from the commission of such offences; and
 - (iii) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences.
 - (c) provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;
 - (d) facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the Parties concerned, the posting of liaison officers;
 - (e) exchange information with other Parties on specific means and methods used by natural or legal persons in committing such offences, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;
 - (f) exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Protocol.
2. With a view to giving effect to this Protocol, Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. 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 enhance the cooperation between their law enforcement agencies.

3. Parties shall endeavour to cooperate within their means to respond to transnational illicit trade committed through the use of modern technology.

Comments and recommendations:

We suggest that the international cooperation in law enforcement should cover the fields other than criminal offences.

Mutual administrative assistance

Parties shall provide each other, either on request or on their own initiative, with information that helps to ensure proper application of customs and other relevant law and in the prevention, detection, investigation, prosecution and combating of illicit trade in tobacco, tobacco products, or manufacturing equipment [or key inputs] used in the manufacture of tobacco products. Such information may include:

- (a) new customs and other enforcement techniques that have demonstrated their effectiveness;
- (b) new trends, means or methods of committing offences, listed in Article XX;
- (c) goods known to be the subject of offences, listed in Article XX, as well as description, packaging, transport and storage details and methods used in respect of those goods;
- (d) persons known to have committed an offence listed in Article XX or suspected of being about to commit such an offence;
- (e) any other data that can assist designated agencies with risk assessment for supply chain control and other enforcement purposes.

Mutual legal assistance

1. Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the criminal offences covered by this Protocol as provided for in Article XX.2 (*Offences*) and shall reciprocally extend to one another similar assistance where the requesting Party has reasonable grounds to suspect that the offence referred to in Article XX.2 (*Offences*) is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested Party.

2. Mutual legal assistance shall be afforded to the fullest extent possible

under relevant laws, treaties, agreements and arrangements of the requested Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with Article XX.2 (*Offences*) in the requesting Party.

3. Mutual legal assistance to be afforded in accordance with this Article may be requested for any of the following purposes:

- (a) taking evidence or statements from persons;
- (b) effecting service of judicial documents;
- (c) executing searches and seizures, and freezing of assets;
- (d) examining objects and sites;
- (e) providing information, evidentiary items and expert evaluations;
- (f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) identifying or tracing the proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) facilitating the voluntary appearance of persons in the requesting Party; and
- (i) any other type of assistance that is not contrary to the domestic law of the requested Party.

4. Without prejudice to domestic law, the competent authorities of a Party may, without prior request, transmit information relating to criminal matters to a competent authority in another Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter Party pursuant to this Protocol.

5. The transmission of information pursuant to paragraph 4 of this Article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving Party shall notify the transmitting Party prior to the disclosure and, if so requested, consult with the transmitting Party. If, in an exceptional case, advance notice is not possible, the receiving Party shall inform the transmitting Party of the disclosure without delay.

6. The provisions of this Article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this Article shall apply to requests made pursuant to this Article if the Parties in question are not bound by a treaty of mutual legal assistance. If those Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 9 to 29 of this Article in lieu thereof. Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

8. Parties shall not decline to render mutual legal assistance pursuant to this Article on the ground of bank secrecy.

9. Parties may decline to render mutual legal assistance pursuant to this Article on the ground of absence of dual criminality. However, the requested Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested Party.

10. A person who is being detained or is serving a sentence in the territory of one Party whose presence in another Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Protocol may be transferred if the following conditions are met:

- (a) the person freely gives his or her informed consent;
- (b) the competent authorities of both Parties agree, subject to such conditions as those Parties may deem appropriate.

11. For the purposes of paragraph 10 of this Article:

- (a) the Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the Party from which the person was transferred;
- (b) the Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both Parties;
- (c) the Party to which the person is transferred shall not require the Party from which the person was transferred to initiate extradition proceedings for the return of the person;
- (d) the person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the Party to which he or she was transferred.

12. Unless the Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this Article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or

subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Head of the Convention Secretariat shall be notified of the central authority designated for this purpose at the time each Party deposits its instrument of ratification, acceptance or approval of or accession to this Protocol. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the Parties. (This requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the Parties agree, through the International Criminal Police Organization, if possible.)

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested Party, under conditions allowing that Party to establish authenticity. The Head of the Convention Secretariat shall be notified of the language or languages acceptable to each Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Protocol. In urgent circumstances and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

- (a) the identity of the authority making the request;
- (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) a description of the assistance sought and details of any particular procedure that the requesting Party wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned;

(f) the purpose for which the evidence, information or action is sought.

16. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a Party and has to be heard as a witness or expert by the judicial authorities of another Party, the first Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting Party. Parties may agree that the hearing shall be conducted by a judicial authority of the requesting Party and attended by a judicial authority of the requested Party.

19. The requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested Party. Nothing in this paragraph shall prevent the requesting Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting Party shall notify the requested Party prior to the disclosure and, if so requested, consult with the requested Party. If, in an exceptional case, advance notice is not possible, the requesting Party shall inform the requested Party of the disclosure without delay.

20. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

21. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this Article;

(b) if the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) if the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any

similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) if it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

22. Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting Party and for which reasons are given, preferably in the request. The requested Party shall respond to reasonable requests by the requesting Party on progress of its handling of the request. The requesting Party shall promptly inform the requested Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this Article or postponing its execution pursuant to paragraph 25 of this Article, the requested Party shall consult with the requesting Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this Article, a witness, expert or other person who, at the request of the requesting Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner

in which the costs shall be borne.

29. The requested Party:

(a) shall provide to the requesting Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) may, at its discretion, provide to the requesting Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

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

Comments and recommendations:

1. Since the level of contributions made by each country in the matters of legal assistance might vary, we suggest to delete the word “reciprocally” in paragraph 1 so as to avoid possible conflicting interpretations of the provision.
2. Whether paragraphs 1 and 2 are merely applicable to criminal offences seem unclear. In contrast, the application of paragraph 3 seems to refer to criminal offences only. Nevertheless, not only there is a need to have legal assistance in criminal procedures, for many countries there is also a need to have legal assistance in administrative procedures concerning taking evidence and making statements from persons. We suggest that mutual legal assistance should extend beyond criminal investigations.
3. Paragraph 6 states that the provisions of this Article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance. It seems that the Protocol encourages separate mutual legal assistance arrangements. For the purpose of enhancing the effectiveness of mutual assistance on illicit trade in tobacco, we suggest Parties to consider relying more on mutual assistance mechanism as provided in the Protocol for the matter of illicit trade in tobacco products, instead of relying on other bilateral or multilateral treaties.
4. The scope and content of “bank secrecy” should be clearly stated. Moreover, apart from banks, with a view to facilitating mutual

legal assistance, whether there are other relevant financial entities to be included under this Protocol merits further considerations.

5. The wording of “dual criminality” referred to in paragraph 9 seems ambiguous and needs clarification.
6. With regard to paragraph 10, since a person who is serving a sentence in the territory of the requested Party will not be likely to be transferred to the territory of the requesting Party without a domestic legal basis in the requested Party, we suggest to require Parties to enact necessary legislation to enable the transferring of persons under the conditions set forth in this paragraph.
7. Paragraph 21(b) allows a Party to refuse mutual assistance on the ground of possible prejudice to its “sovereignty”. Since mutual assistance is always about the exercise of sovereign power and thus concerns sovereignty, to allow Parties to exclude mutual assistance based on “sovereignty” seems to have given Parties too broad powers and could impair the effectiveness of mutual assistance.
8. The contents of the official informing documents stipulated under paragraph 27 should include the accompanying legal effects in the event that the notified party has not left the territory of the requesting Party in the period of fifteen days.
9. The scope and methods of the calculation of “the ordinary costs of executing a request” referred to in paragraph 28 should be clearly laid down. Also, such costs should be borne by the requesting Party, rather than the requested Party. Given that this provision is designed to assist the requesting Party, it seems unreasonable that the requested Party is required to assume all the related costs. We suggest that a balanced allocation of costs incurred merits more considerations.

Extradition

1. This Article shall apply to criminal offences covered by this Protocol.
2. If the request for extradition includes several separate criminal offences, some of which are not covered by this Protocol, the requested Party may apply this Article also in respect of the latter offences.
3. Each of the offences to which this Article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties undertake to include such offences as extraditable

offences in every extradition treaty to be concluded between them.

4. If a Party, for which extradition is conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Protocol the legal basis for extradition in respect of any offence to which this Article applies.

5. Parties for which extradition is conditional on the existence of a treaty shall:

(a) at the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Protocol, inform the Head of the Convention Secretariat whether they will take this Protocol as the legal basis for cooperation on extradition with other Parties to this Protocol;

(b) if they do not take this Protocol as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other Parties to this Protocol in order to implement this Article.

6. Parties for which extradition is not conditional on the existence of a treaty shall recognize offences to which this Article applies as extraditable offences between themselves.

7. Extradition shall be subject to the conditions provided for by the domestic law of the requested Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested Party may refuse extradition.

8. Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this Article applies.

9. Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

10. A Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this Article applies solely on the ground that he or she is one of its nationals, shall, at the request of the Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that Party. The Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

11. Whenever a Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that Party and the Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this Article.

12. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

13. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this Article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the Party in the territory of which that person is present.

14. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite if the requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

15. Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

16. Before refusing extradition, the requested Party shall, where appropriate, consult with the requesting Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

17. Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Comments and recommendations:

Paragraph 4 of Extradition seems to point out that there should be a separate extradition treaty in existence before an extradition can be requested from another Party. However, given that this Protocol already has comprehensive extradition provisions, we believe that this Protocol itself could be a proper legal basis for Parties to undertake extraditions without a need to have a separate extradition treaty. Additionally, we suggest that the wording "may" in the same paragraph should be

changed into “shall” so as to strengthen the effectiveness of extradition.

PART VI: REPORTING

Reporting and exchange of information

1. Each Party shall submit to the Meeting of the Parties, periodic reports on its implementation of this Protocol, through the Convention Secretariat.
2. The reporting mechanism shall be determined by the Meeting of the Parties.
3. The Meeting of the Parties shall determine the content of the periodic reporting, referred to in paragraph 1 of this Article, which should include 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 its implementation of this Protocol, and on the measures taken to overcome these barriers;
 - (c) information, as appropriate, on financial and technical assistance provided or received for activities related to the elimination of illicit trade in tobacco products; and
 - (d) information specified in Articles XX, XX, XX, XX and XX.

In those cases where relevant data are already being collected as part of the Conference of the Parties reporting mechanism, the Meeting of the Parties shall not duplicate 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 this Article shall be subject to national law regarding confidentiality and privacy. The Parties shall protect, as mutually agreed, any confidential information that is reported.

Comments and recommendations:

1. In order to expand the positive effect of reporting and exchange of information system, we urge Parties to consider to afford non-parties the opportunity to participate in the reporting systems.
2. For the purpose of enhancing public awareness and assisting enforcement activities, we suggest including in this article some

kind of mechanism which would allow the general public to provide relevant information and to have certain degree of access to such information.

3. Having complete and sufficient information irrespective of its source of Parties or non-Parties is of great value. It should be equally important to have the information being properly used by both Parties and non-Parties to achieve the end of effective implementation of this Protocol to prevent illicit trade in tobaccos. We suggest that non-Parties should be encouraged to provide relevant information to enrich the contents of database. Based on the same line of argument, relevant information should also be made available to non-Parties.

PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES

Meeting of the Parties

1. A Meeting of the Parties to this Protocol is hereby established. The first session of the Meeting of the Parties shall be convened by the Convention Secretariat not later than one year after the entry into force of this Protocol.
2. Thereafter, regular sessions of the Meeting of the Parties may be convened by the Convention Secretariat, wherever possible and desirable, in conjunction with sessions of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.
3. Extraordinary sessions of the Meeting of the Parties shall be held at such other times as may be deemed necessary by the Meeting, or at the written request of any Party, provided that, within six months of the request being communicated to them by the Convention Secretariat it is supported by at least one-third of the Parties.
4. Funds required for the operation of this Protocol, including the funds required for secretariat services, shall be charged against contributions from the Parties. The Convention Secretariat is authorized to receive voluntary extrabudgetary contributions for matters relating to this Protocol.
5. The Rules of Procedure and the Financial Rules of the Conference of the Parties to WHO Framework Convention on Tobacco Control shall apply, *mutatis mutandis*, to the Meeting of the Parties.
6. Article 23.5 of the WHO Framework Convention on Tobacco Control shall apply *mutatis mutandis* to this Protocol, subject to any modifications decided by the Meeting of the Parties.

Comments and recommendations:

For the purpose of the enhancement of international cooperation and the achievement of the objective pursued by this Protocol, we believe that it would be useful to establish a mechanism in the Protocol to allow non-parties to participate in relevant activities as observers.

Secretariat

1. The Convention Secretariat shall be the Secretariat of this Protocol.
2. The functions of the Convention Secretariat with regard to its role as the

secretariat of this Protocol shall be to:

- (a) make arrangements for sessions of the Meeting of the Parties and any subsidiary bodies as well as working groups and other bodies and mechanisms established by the Meeting of the Parties and provide them with services as required;
- (b) receive, analyse, transmit and provide feedback to Parties concerned and to the Meeting of the Parties on reports received by it pursuant to this Protocol;
- (c) provide advice and support to the Parties, particularly developing country Parties and Parties with economies in transition, on request, in the compilation, communication and exchange of information, and in identifying and accessing available resources and mechanisms to facilitate the implementation of their obligations under this Protocol;
- (d) prepare reports on its activities under this Protocol under the guidance of and for submission to the Meeting of the Parties;
- (e) ensure, under the guidance of the Meeting of the Parties, the necessary coordination with the competent international and regional intergovernmental organizations and other bodies;
- (f) enter, under the guidance of the Meeting of the Parties, into such administrative or contractual arrangements as may be required for the effective discharge of its functions as secretariat to this Protocol;
- (g) receive and review applications by intergovernmental and nongovernmental organizations wishing to enter into official relations with the Meeting of the Parties, in order to present the applications to the Meeting of the Parties for its consideration; and
- (h) perform other secretariat functions specified by this Protocol and such other functions as may be determined by the Meeting of the Parties.

Relations between the Meeting of the Parties and intergovernmental organizations

In order to provide technical and financial cooperation for achieving the objective of this Protocol, the Meetings of the Parties may request the cooperation of competent international and regional intergovernmental organizations including financial and development institutions.

Financial resources

1. The Parties recognize the important role that financial resources play in

achieving the objective of this Protocol.

2. Each Party shall provide financial support in respect of its national activities intended to achieve the objective of this Protocol, in accordance with its national plans, priorities and programmes.

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

4. Parties represented in relevant regional and international intergovernmental organizations, and financial and development institutions shall encourage these entities to provide financial assistance for developing country Parties and for Parties with economies in transition to assist them in meeting their obligations under this Protocol, without limiting the rights of participation within these organizations.

5. The Parties agree that:

(a) to assist Parties in meeting their obligations under this Protocol, all relevant potential and

existing resources available for activities related to the objectives of this Protocol, should be mobilized and utilized for the benefit of all Parties, especially developing country Parties and Parties with economies in transition; and

(b) the Convention Secretariat shall advise developing country Parties and Parties with economies in transition, upon request, on available sources of funding to facilitate the implementation of their obligations under this Protocol.

Comments and recommendations:

Since financial resources are deeply concerned with the countries' ability to prevent and combat against illicit trade in tobacco products, we suggest to require Parties to prioritize their domestic allocation of financial resources to the prevention and combat against illicit trade in tobacco products.

PART VIII: SETTLEMENT OF DISPUTES

Settlement of disputes

The settlement of disputes between Parties concerning the interpretation or application of this Protocol is governed by Article 27 of the WHO Framework Convention on Tobacco Control.

PART IX: DEVELOPMENT OF THE PROTOCOL

Amendments to this Protocol

1. Any Party may propose amendments to this Protocol.
2. Amendments to this Protocol shall be considered and adopted by the Meeting of the Parties. The text of any proposed amendment to this Protocol shall be communicated to the Parties by the Convention Secretariat at least six months before the session at which it is proposed for adoption.

The Convention Secretariat shall also communicate proposed amendments to the signatories of this Protocol and, for information, to the Depository.

3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment to this Protocol. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the Convention Secretariat to the Depository, who shall circulate it to all Parties for acceptance.

4. Instruments of acceptance in respect of an amendment shall be deposited with the Depository. An amendment adopted in accordance with paragraph 3 of this Article shall enter into force for those Parties having accepted it on the [XX] day after the date of receipt by the Depository of an instrument of acceptance by at least two-thirds of the Parties to this Protocol.

5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depository its instrument of acceptance of the said amendment.

Adoption and amendment of annexes to this Protocol

1. Any Party may make proposals for an annex to this Protocol and may propose amendments to annexes to this Protocol.
2. Annexes shall be restricted to lists, forms and any other descriptive material relating to procedural, scientific, technical or administrative matters.
3. Annexes to this Protocol and amendments thereto shall be proposed, adopted and enter into force in accordance with the procedure set forth in Article XX (*Amendments to this Protocol*).

PART X: FINAL PROVISIONS

Reservations

No reservations may be made to this Protocol.

Withdrawal

1. At any time after two years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the WHO Framework Convention on Tobacco Control shall also be considered as having withdrawn from this Protocol, with effect as of the date of such withdrawal from the WHO Framework Convention on Tobacco Control.

Right to vote

1. Each Party to this Protocol shall have one vote, except as provided for in paragraph 2 of this Article.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States that are Parties to the Protocol. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice versa.

Signature

The Protocol shall be open for signature by all Parties to the WHO Framework Convention on Tobacco Control at *place to be determined* from *date to be determined*.

Ratification, acceptance, approval, formal confirmation or accession

1. This Protocol shall be subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations that are Party to the WHO Framework Convention on Tobacco Control. It shall be open for accession from the day after the date on which the Protocol is closed for signature. Instruments of ratification, acceptance, approval, formal confirmation or accession shall be deposited with the Depositary.
2. Any regional economic integration organization which becomes a Party to this Protocol without any of its Member States being a Party shall be bound by all the obligations under this Protocol. In the case of those organizations, one or more of whose Member States is a Party to this Protocol, the organization and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the Member States shall not be entitled to exercise rights under this Protocol concurrently.
3. Regional economic integration organizations shall, in their instruments relating to formal confirmation or in their instruments of accession, declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

Entry into force

1. This Protocol shall enter into force on the XX day following the date of deposit of the XX instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.
2. For each Party to the WHO Framework Convention on Tobacco Control that ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the conditions set out in paragraph 1 of this Article for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval, accession or formal confirmation.
3. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States Members of the organization.

Depositary

The Secretary-General of the United Nations shall be the Depositary of this Protocol and amendments thereto adopted in accordance with Article XX (*Amendments to this Protocol*).

Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Comments and recommendations:

We share the view that a well-established system that deals with the relationship between Parties is valuable in combating against illicit trade in tobacco products. We are of the view that the role that non-Parties can play in achieving the objective of this Protocol is also of equal importance and should be taken into proper account. Including non-Parties into the cooperation system would make the Protocol more complete and efficiently operational.

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DRAFTING MEMBERS
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THE COMMENTS AND RECOMMENDATIONS

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Comments and Recommendations on
**CHAIRPERSON'S TEXT FOR A PROTOCOL ON
ILLICIT TRADE IN TOBACCO PRODUCTS**



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