

**Comments and Recommendations  
on  
Draft Guidelines and Protocols for  
Tobacco Control under FCTC**

**Taiwan  
A Partner and Friend of the FCTC**

**Bureau of Health Promotion**

*in collaboration with*

**Asian Center for WTO and International Health Law and Policy  
National Taiwan University College of Law**

**June 2007**

## CONTENTS

<b>1. PREFACE.....</b>	<b>iii</b>
<b>2. COMMENTS AND RECOMMENDATIONS ON DRAFT GUIDELINES AND PROTOCOLS FOR TOBACCO CONTROL UNDER FCTC .....</b>	<b>1</b>
<b>3. “Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) -- Article 8: Protection from exposure to tobacco smoke” (A/FCTC/COP/2/7) .....</b>	<b>3</b>
<b>4. “Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) – Article 9: Product regulation” (A/FCTC/COP/2/8) .....</b>	<b>6</b>
<b>5. “Elaboration of protocols (decision FCTC/COP1(16)) – Elaboration of a template for a protocol on illicit trade in tobacco products” (A/FCTC/COP/2/9) .....</b>	<b>9</b>
<b>6. “Elaboration of protocols (decision FCTC/COP1(16)) – Elaboration of a template for a protocol on cross-border tobacco advertising, promotion and sponsorship” (A/FCTC/COP/2/10) .....</b>	<b>20</b>
<b>7. “Matters identified in decisions taken by the Conference of the Parties that call for action in the period between its first and second sessions – Establishment of a study group on alternative crops (decision FCTC/COP1(17))” (A/FCTC/COP/2/11) .....</b>	<b>26</b>
<b>8. “Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) –Article 11: Packaging and labeling of tobacco products; Article 12: Education, communication, training and public awareness; Article 13: Regulating cross-border advertising” (A/FCTC/COP/2/12) .....</b>	<b>28</b>

<b>9. Additional suggestion on the enactment of guidelines for the social responsibility of multinational tobacco companies.....</b>	<b>29</b>
<b>10. DRAFTING MEMBERS OF THESE COMMENTS AND RECOMMENDASTIONS.....</b>	<b>31</b>

## **PREFACE**

Taiwan has long participated in the research of health issues and played a positive role in the field of tobacco control. Both public sectors and civil communities in Taiwan actively engage in tobacco control campaigns and adopting relevant measures for the controlling purposes. Being a member in the international community, we truly hope to devote ourselves and contribute to global tobacco control efforts.

We thought one way of contributing our efforts to the international community is to participate in the discussions and exchanges of views and experiences through different forms during the process of formulating and enacting protocols and guidelines by FCTC Conference of Parties. This manual is written against this background. It is a research product under the collaboration of Bureau of Health Promotion of the Department of Health and the Asian Center of WTO & International Health Law and Policy of National Taiwan University College of Law. Recommendations for COP2 documents provided here are made through an overall and thorough review of relevant documents.

After examining these documents, we thought that there are rooms to improve. We thus would like to share our observations about the templates and matters discussed in the documents. We would be

happy if our observations are of help to the participants of COP2 in preparing, drafting and refining their documents and in formulating their strategies.

Finally, we would like to show our deep respect to the achievement of the WHO Framework Convention on Tobacco Control and to the works that have been done up to this stage. We believe that tobacco control will be greatly enhanced and tobacco hazards will be eventually eliminated in the future with such join efforts from around the world.

Mei-Ling Hsiao, RPh., M.P.H.  
Director-General,  
Bureau of Health Promotion,  
Department of Health, Taiwan  
June 2007

## **COMMENTS AND RECOMMENDATIONS ON DRAFT GUIDELINES AND PROTOCOLS FOR TOBACCO CONTROL UNDER FCTC**

1. After COP1 in 2006, relevant working groups have been engaging in drafting or deliberating guidelines and protocols to be proposed to COP2 for its adoption or consideration. The discussions and tentative suggestions indicated in the papers issued by the WHO as documents for the agenda items reflect the current developments and most up-to-date views about the methods and approaches of dealing with specific and difficult issues. These documents include the following:

- (1) “Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) – Article 8: Protection from exposure to tobacco smoke” (A/FCTC/COP/2/7)
- (2) “Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) – Article 9: Product regulation” (A/FCTC/COP/2/8)
- (3) “Elaboration of protocols (decision FCTC/COP1(16)) – Elaboration of a template for a protocol on illicit trade in tobacco products” (A/FCTC/COP/2/9)
- (4) “Elaboration of protocols (decision FCTC/COP1(16)) – Elaboration of a template for a protocol on cross-border tobacco advertising, promotion and sponsorship” (A/FCTC/COP/2/10)
- (5) “Matters identified in decisions taken by the Conference of the Parties that call for action in the period between its first and second sessions – Establishment of a study group on alternative crops (decision FCTC/COP1(17))” (A/FCTC/COP/2/11)

(6) “Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) –Article 11: Packaging and labeling of tobacco products; Article 12: Education, communication, training and public awareness; Article 13: Regulating cross-border advertising” (A/FCTC/COP/2/12)

2. After commenting on and making suggestions for these documents, we will also make additional suggestions on the desirability of enacting a set of guidelines for the social responsibility of multilateral tobacco companies.

3. Although we do not have full access to the discussions and all relevant documents, we feel that, as a friend of the FCTC and as a member of international health community, we are obligated to provide our views and comments through examining the documents and based on our previous experiences. This booklet is written with the hope that the prospective guidelines and protocols will be perfected through the participation of discussions also from non-members.

**“Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) -- Article 8: Protection from exposure to tobacco smoke” (A/FCTC/COP/2/7)**

4. Our comments concerning protection from exposure to tobacco control focus on ANNEX 1 of the above document “Draft guidelines on protection from exposure to tobacco smoke, as elaborated by the working group convened in accordance with decision FCTC/COP1(15) of the Conference of the Parties to the WHO Framework Convention on Tobacco Control at its first session”.

**Overall Comments**

5. We believe that these guidelines will be of great assistance to the Parties in protecting people from exposure to tobacco smoke to the maximum extent.

6. However, we should also point out that while Article 7 of the FCTC requires each Party to “adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13”, appropriate cooperation “with each other directly or through competent international bodies with a view to their implementation” is also emphasized. We do not find that the recommendations are being made in the draft guidelines to emphasize international cooperation between and among Parties as well as with non-Parties, to the extent possible. Although the principles for domestic enforcement have been clearly underlined, we suggest the guidelines further identifying the significance of international cooperation and arrange a cooperative mechanism to effectively protect people from exposure to tobacco smoke.

**Public awareness, education and training (paras. 28-30)**

7. As far as the enhancement of public awareness is concerned, we suggest that one of the focuses should be on campus. We believe that one of the effective ways to promote public awareness should be through the system of fundamental education to inculcate the young



with a sense of health risks of tobacco consumption and exposure to second-hand tobacco smoke. We also suggest making the campus as the first priority for creating a 100% smoke-free environment in each jurisdiction.

8. Moreover, the guidelines should concern more about the real threat to the health of children and adolescent and adopt stricter policy to prevent them from exposure to tobacco smoke.

9. In order to enhance public awareness, it could never be over emphasized the importance of mass media. Government might want to develop various methods to encourage mass media to produce relevant programs for enhancing public awareness.

**Incentive measures (paras. 31-44)**

10. The total ban on smoking and tobacco smoke in indoor places is indeed the most effective way to provide protection from exposure to tobacco smoke. In paragraph 42 of the document, it is mentioned that initial “soft enforcement” is suggested in many jurisdictions. We would like to remind that the duration of an initial period of “soft enforcement” recommended in paragraph 42 should be appropriate and not too long. Otherwise it might deteriorate the effectiveness and dignity of law.

11. Although creating a 100% smoke free environment is the ultimate purpose of the guideline, we must consider that, for most countries, it is not easy to achieve the goal immediately. Thus:

- (1) It is very important for countries to have a smooth and effective phase-in arrangement, with technical and financial assistances from other countries.
- (2) There must be principles or mechanisms to require and ensure progress and acceleration of the achievement of the ultimate goal of a 100% smoke free environment.
- (3) During the initial period, severe punishment may be of limited effect in many jurisdictions. Accordingly, in addition to punishment, it is necessary to adopt reward

measures that could encourage businesses to achieve certain higher standards in a shorter period of time.

12. We are of the view that certain incentive measures are effective approaches to enhance smoke free environment. For instance, in the initial phase, restaurants and other places carrying out smoke free policies could be given certain tax incentives or could be awarded certain prizes.

**Other penalties (paras. 32-34)**

13. In addition to the administrative sanctions mentioned in the guidelines such as suspension of business licenses, the requirement of attending certain classes similar to safety class for traffic violators could be taken into consideration. For business operators, taking out of their precious time and requiring them to attend classes should have both a deterrent effect and an effect of making them being reeducated so as to improve their awareness of tobacco hazards.

**Cooperation with non-governmental organizations (para. 45)**

14. Participation of private sectors is essential to enhance the effectiveness of the laws. In fact, non-governmental organizations often play a more or equally important role in promoting the tobacco free policies. Thus, governments should cooperate with these non-governmental organizations and provide programs to encourage such participation and cooperation. For example, certain amount of funds collected from tobacco taxes could be made available to those organizations selected under specified conditions to help implementing the public awareness or monitoring programs.

**“Elaboration of guidelines for implementation of the Convention  
(decision FCTC/COP1(15)) – Article 9: Product regulation”  
(A/FCTC/COP/2/8)**

15. For this document, we limit our observations to the issue of laboratory capacity and some aspects of the questions raised in the document inviting comments.

**Laboratory capacity (paras. 39-41)**

16. Regarding tobacco testing and measuring, different measures are in place in different jurisdictions concerning whether the governments are to verify data after cigarette manufacturers' performing the testing and measuring of contents and emissions. It is suggested in para. 40 of this document that the costs of testing and measuring for verification purposes could be borne by the tobacco industry via licence fees or via annual brand registration. However, when a licence is issued to a tobacco company, it is not likely to decide the exact amount of the costs of testing and measuring for verification purpose in regard to the products produced by this company in the years to come. If the costs of verifications are to be borne via licence fees, we suggest taking this aspect into account.

17. As mentioned in para. 40 of this document, independent laboratories for tobacco product contents are likely to be found in all regions. However, testing and measuring emissions from tobacco products requires very specialized laboratory staff and equipment. Independent laboratories that can perform testing and measuring emissions are not that readily available in all regions of the world. It might be necessary for WHO to establish certain kind of independent laboratory with verification capacity to meet the need of those jurisdictions which do not have emission testing and measuring capacity at this stage. Or at least certain help could be provided by WHO and the FCTC Secretariat to members and non-members the commercial or private independent laboratories in whose territories are currently incapable of carrying out such testing and measuring.

**Guidelines in Analytical Chemistry (para. 53)**

18. In para. 53 of the document, a guideline template is suggested. We suggest taking into consideration of the facts when developing the guidelines that the process of developing standard method takes time but there could be imminent needs of governments to begin to examine tobacco contents and emissions and that different capacities are among tobacco manufacturers in conducting the testing and measuring and among governments in dealing with the interpretation and disposal of the data reported by the manufacturers.

**Question 3 (para. 60)**

19. We agree that “contents and emissions” could be understood to comprise the characteristics of the tobacco product itself, such as design and structure, as long as the characteristics have direct or indirect effects or implications on the contents and emissions. Thus it is necessary to take the characteristics of the tobacco product into consideration when testing and measuring the contents and emissions if we are to achieve a more accurate outcome.

20. Besides, since the industrial design of tobacco products is sometimes a highly sensitive trade secret, the working group might want to take this into account.

**Question 4 (para. 68)**

21. The International Organization for Standardization (ISO) is an institute with high reputation and credibility and is notable for its expertise on establishing standards which are widely accepted by the international community. However, as the core convention for tobacco control, the FCTC is the most eligible framework to establish its own standards and methods for testing and measuring tobacco products. We are of the view that the FCTC should cooperate with other international institutes, including as the ISO, to expedite the whole process of formulating a widely accepted standard or method. Through close and interactive cooperation, the FCTC can also benefit from the valuable experience and capable experts provided by the ISO. The development process can be shortened, and the standard and measure can be unified for the benefit of tobacco control worldwide. Therefore, we recommend that communication should be vitalized between the FCTC and ISO to further possible cooperation.

**Global data repository (paras. 61-63)**

22. The “global data repository” can provide abundant information for rulemakings regarding tobacco products. However, information restored in the repository may have different legal status in various jurisdictions. Governments may face issues regarding various legal effects when citing or utilizing relevant information within their jurisdictions to support government actions or measures. We suggest requiring countries to have their domestic legislation granting legal status for such “global data repository” to allow best functioning of the arrangement.

**“Elaboration of protocols (decision FCTC/COP1(16)) –  
Elaboration of a template for a protocol on illicit trade in tobacco  
products” (A/FCTC/COP/2/9)**

23. Our comments concerning illicit trade in tobacco products focus on ANNEX 1 of the above document “Template for a protocol on illicit trade, as proposed by the expert group convened in accordance with decision FCTC/COP1(16) of the Conference of the Parties to the WHO Framework Convention on Tobacco Control at its first session”.

**General obligations (paras. 4-5)**

24. It is stated in paragraph 5 of the ANNEX that the relations between Parties and non-Parties may be included in the proposed protocol. We share the view that such relations are of importance. Illicit tobacco trade involves cross-border tobacco movement, making it become a matter of public health of global concern. In order to achieve the purpose of the eliminating illicit trade in tobacco products, the cooperation with non-Parties should never be neglected. However, there are no concrete provisions included under the proposed protocol. We suggest including a provision encouraging and facilitating cooperation and assistance between Parties and non-Parties.

**Licensing (paras. 6-10)**

25. We note that Article 15.7 of the FCTC itself does not impose obligations on Parties to adopt and implement licensing system to control or regulate the production and distribution of tobacco products. By using the terms “endeavour” and “where appropriate”, the provision merely imposes a very soft “best-effort” obligation upon Parties. However, it is not readily clear as to whether the proposed protocol is to impose obligation on the Parties to establish a licensing system in their respective jurisdictions. If Parties are required or expected to establish their licensing systems, we suggest that the special needs and the insufficient administrative capacities of developing countries or countries in transition should be taken into account.

26. With regard to the term “major supplier” used in paragraph 10(a) in the ANNEX, we are of the view that the term does not correspond to the wording in the same paragraph that “all participants” in the tobacco business should hold licences. We thus suggest changing the term “major supplier” into “all suppliers” or “suppliers” so as to avoid possible controversy which may arise in the implementation of the protocol.

27. “Tobacco leaf dealers” are required to hold licences before engaging in the tobacco business as required in paragraph 10(a). Yet “raw material suppliers” are not subject to the same requirements based on paragraph 10(e). In practice, a “tobacco leaf dealer” might also serve as a “raw material supplier” when conducting their businesses. Thus, it is possible that paragraph 10(a) and paragraph 10(e) would overlap in their respective coverage. We suggest taking into account of such overlapping situation when finalizing the protocol.

28. Although retailers (merchants), raw material suppliers and machine makers’ suppliers are not required to have licences due to the cost-effective concern as laid down in paragraph 9, we are still of the view that these parties might have important roles to play in the regulation of tobacco trade. Therefore, we suggest that whenever it is financially and administratively feasible, countries should endeavour to include retailers, raw material suppliers and machine makers’ suppliers in their licencing systems.

**Anti-money laundering provisions (paras. 11-12)**

29. We suggest adding a provision to require Parties to request banks and other financial institutions within their jurisdictions to establish monitoring systems. We also agree with the view that “know-your-customer rules” as indicated in paragraph 11 should be considered and included in Parties’ Anti-money laundering policies.

**Tracking and tracing (paras. 13-20)**

30. We are of the opinion that provisions on tracking and tracing would play vital a role in the efforts of controlling illicit trade. However, in paragraph 20 of the ANNEX, it merely refers to the

coding system which may be provided as a means to identify the product. We suggest to add concrete provisions on the operation and systems of the tracking and tracing into the proposed proposal to help the achievement of the purpose of this protocol.

31. In addition, it is desirable for Parties to set common standards to put the coding system into practice. In our view, by unifying the system, it would not only help to accurately and efficiently identify the products of real origin, but also to decrease any possible ineffectiveness caused by the different use of markings or identity.

**Record-keeping (paras. 21-24)**

32. We share the view that a well-established system of information-sharing between Parties is valuable in combating against illicit trade in tobacco. We are also of view that the role non-Parties can play in such an information-sharing chain are also of equal importance and should be taken into proper account. Including non-Parties into information-sharing systems would make the system more complete and efficiently operational.

33. We also suggest clarifying the application between the paragraph 21, which stresses the manufacturers' obligation to keep record and to share information and paragraph 54, which is more linked to general statistics.

**Security and preventive measures (paras. 25-26)**

34. In order to prevent tobacco from being diverted in the course of transportation in an efficient manner, we consider that the tobacco dealers, wholesalers and importers, as a part of supply chain of tobacco, should also assume certain obligations similar to those assumed by tobacco manufacturers. In other words, all entities involved in the entire process of the sale of tobacco should carry out responsibility and take appropriate measures averting the occurrence of tobacco smuggling.

**Internet sales (paras. 27-28)**

35. Allowing tobacco products sales on internet might cause too



much problem in controlling tobacco. For instance, due to the intrinsic anonymity on the internet, it is unlikely to identify the true buyers using the internet. As a result, preventing the teenagers from buying tobacco products through the internet might become difficult. In addition, sales on internet might be used as a tool of averting the disciplines of tax control measures for tobacco. It might further negatively impact on the tax measures adopted by countries in controlling tobacco product transaction. Given that such problems cannot be dealt with only by a licensing system, we thus suggest that a total ban on tobacco product sales on internet shall be seriously considered. If there is a ban on tobacco sales on internet, at least there should be dissuasive civil penalties against offenders.

**Enhanced law enforcement capacity (paras. 29-42)**

36. Offences

- (1) It is stated in paragraph 33(a) that growing and retailing tobacco products without license would be regarded as a criminal offense. However, the provision on “Licensing” as mentioned above seems to be unclear as to whether growers or retailers should be subject to licence requirement. Clarification might be needed to avoid such potential conflicts.
- (2) In cases where criminal punishment system is to be established, it is important to include imprisonment and/or fines sufficient to provide deterrent effect. Additionally, the amount and extent of fines should be decided taking into account of the interests gained and potential interests that can be acquired so as to eliminate any possible motive to commit such crimes.

37. Sanctions and penalties

- (1) We fully agree with the view that the gravity of the offence should be considered in the formation of sanctions, as stipulated in paragraph 36. In addition to this, it is also important to take into consideration of the offender’s intention, the legal interest and value being deprived, and

the potential damages arising from the offences.

- (2) Additionally, the phrase “take into consideration any previous conviction...in criminal proceeding” appears in the same paragraph seems not very clear. We consider that using the relevant information obtained from the previous conviction to determine the intention of an offender or the existence of offences might be inconsistent with the basic principles prevalent in criminal laws, such as the principle of presumption of innocence. Our view is that the previous conviction may only be useful in assessing the gravity of sanction. We suggest that relevant information with respect to previous convictions should be cautiously treated and it is advisable to set up some reasonable limitation on the scope of use.

#### 38. Search, confiscation and seizure

- (1) It is mentioned in paragraph 38 that competent authorities should be authorized to enable the confiscation of tobacco products, property, equipment, conveyances or other instrumentalities used in or destined for use in offenses covered by this protocol. We concur with such view. However, the term “property” might not be clear enough and might give rise to confusion. For instance, whether the factory buildings used as the base for manufacturing or producing tobacco for smuggling and whether the private house or lands provided not purely for the purpose of criminal offences are covered in the scope of “property” need more elaboration.
- (2) Besides, we are of the view that the scope of property subject to the confiscation might constitute a significant impact on the property rights enjoyed by private parties. Thus, we suggest that the members of the Convention might want to limit the scope of the application of confiscation.

#### 39. Destruction and disposal

- (1) With respect to the issue of sale of seized tobacco products back to the manufacturer mentioned in paragraph 42, we propose to require the manufacturers to purchase the seized tobacco products back with a view to achieving the aim of controlling illicit trade. More specifically, the manufacturer concerned in a specific illicit trade shall purchase back the seized tobacco products at the prices prevalent in marketplace, convey the seized tobacco products back to the original exporting place, and assume the absolute liability (a liability-without-fault obligation) for others within the supply chain of its products concerning illicit trade.
- (2) Provided that seized products are counterfeit goods, we suggest making clear in the protocol that such products shall be subject to complete destroy and not to be sold back to the manufacturer or to any other parties. This method would help avoiding the release of infringing goods into free circulation in the market again.

**Proceeds of crime and seizure of assets (paras. 43-47)**

40. Ill-gotten gains, such as money, is often remitted to and deposited in those financial institutions with good management and reputation for their treatment of confidential information, by the offender. Under such a situation, countries may find it uneasy to carry out the task of monitoring and disposing such proceeds of crime. In this regard, we consider that Article 7 of the UN Convention against Transnational Organized Crime might provide for a useful reference. We propose that countries should establish an integrated management system coordinating all financial institutions, including banks, to their fullest possible extent. In addition, Parties should prohibit their financial institutions from denying access to the account information on criminals solely on the basis of confidential agreements concluded between them and the offender. Financial institutions should also be obligated to provide assistance to the authorities concerned with respect to the proceeds of crimes.

41. In addition, we note that proceeds of crime might be located

within a non-Party. Paragraph 45(f) only mentions the case of arrangements of asset-sharing between Parties, but leaves the possible arrangements or cooperation between Parties and non-Parties untouched. In practical terms, the issues of whether the asset-sharing arrangements should be made between Parties and non-Parties or whether non-Parties should provide for assistance to freeze the assets at the request of Parties, in our view, need more elaborations. We consider that a reasonable mechanism should be established in order to deal with the international collaboration between Parties and non-Parties.

42. We also note that there is no provision on the meaning of “asset-sharing arrangements”. In the application of “asset-sharing arrangements”, we consider that the allocation of the shares in assets should be made taking into account of all relevant factors, including public health risk caused by the smuggled tobacco products in the consuming market.

43. As to paragraph 45(a), it is stated that possessing property derived from the proceeds of crime would be regarded as criminal offences. Article 6 of the UN Convention against Transnational Organized Crime might be a relevant reference. We suggest including a subjective requirement of “intention” from the offender in paragraph 45(a) for the purpose of establishing a crime so as to avoid too broad imposition of criminal penalties.

44. As to paragraph 45(e), we are of the view that the creation of a reverse onus obligation on the offender to prove is a proper arrangement. However, the provisions are not very clear about the scope of the “property” which needs to be proved by the offender as not proceeds of crime. For instance, whether the account of the offender’s close relatives or that of the company controlled by the offender should be included in the coverage of property appear to be vague. We are of the opinion that more clarification is needed on this point.

***Special enforcement techniques (paras. 48-50)***

45. For the purpose of increasing the effectiveness of such enforcement techniques and strengthening the capacity of combating

against criminal offences, we suggest that each Party should reinforce the links of international collaborations in the areas of information exchange and assistance matters. Procedure of these special enforcement techniques should also be put in place.

**Jurisdiction (paras. 51-53)**

46. We note that the wording of paragraph 53 appears not clear and might cause misunderstanding. According to the provisions of paragraph 53, Parties agree “not to oppose extradition” solely on the grounds that he or she is one of its nationals. This does not help the establishment of their jurisdiction over the relevant offences. As a comparison, it is stated in paragraph 3 of Article 15 of the above said UN Convention against Transnational Organized Crime that a State party “not extraditing” such person solely on the ground that he or she is one of its national may adopt measures to establish its jurisdiction over the offences when the alleged offender is present in its territory. We consider that the approach adopted by the UN Convention appears to be more practicable. We suggest the Conference of the Parties to consider the establishment of jurisdiction based on non-extradition and the presence of the offender in its territory.

In addition, different countries have their own different criminal laws and regulatory systems. As a result, despite that a Party’s jurisdiction over the relevant offences may be established under the proposed protocol, it may not necessarily be able to prosecute such “offence” under its domestic criminal laws based on the principle of *Nullum crimen sine lege* (meaning that a person shall not be criminally responsible under the criminal law unless the conduct in question constitutes, at the time it takes place, a crime under the law). Our suggestion is to modify paragraph 53 so that a Party should first establish its jurisdiction over the relevant offences based on the conditions laid down in paragraph 52 and prosecute the offence; and if it is unable to do so, it will have to extradite the offender.

47. We also suggest adding a provision addressing the issue of the establishment of jurisdiction on Parties’ own initiatives. In other words, when an alleged offender is present in the territory of one

Party and no other Parties make an extradition request, that Party shall adopt necessary measures to establish their own jurisdiction without regard to the conditions set out by paragraph 52.

48. In order to avoid and resolve possible conflicts arising from overlapping jurisdictions, we suggest adding a provision dealing with this issue. We propose to require countries to consult with each other when a conflict of jurisdiction arises so as to find a mutually agreeable solution to best achieve the goal of the Convention.

**Information sharing (paras. 54-62)**

49. Statistical trade data: In order to achieve the purpose of information-sharing and the combat against illicit tobacco trade, we share the view that law enforcement and customs agencies need access to timely, comprehensive and reliable information. Except provided for in paragraph 55 about the periodic reports submitted by each Party, we suggest that a public platform or mechanism should be established so as to allow Parties to have readily available access to the relevant information on tobacco trade. Given that much of the data to be shared are routinely available in the public domain and non-sensitive in nature according to the provisions of paragraphs 55 and 56, we consider that it should be feasible and practically reasonable to allow access to the information to the highest extent. In this regard, we also note that the information which is confidential shall not be disclosed in light of Article 21.4 of the FCTC.

50. Operational investigation data: We concur with the view that the timely sharing of relevant information and specific intelligence about tobacco-related illegal activity between Parties and between Parties and non-Parties about tobacco-related illegal activity as indicated in paragraph 59 are of importance in the curb of illicit trade. We also consider that non-Parties should not be excluded from the system of timely sharing of data and information such as “common profiling programmes” and “methods of exchanging information” as proposed in paragraph 60. In our view, there would be a need to establish contact channels between the competent authorities, institutions and sectors in the territories of Parties and non-Parties, with a view to promoting the exchange information.

**Technical assistance and cooperation in scientific, technological and technological matters (paras. 63-65)**

51. In order to ensure the goal of combating against illicit tobacco trade being effectively achieved, developing countries, countries in transition and some non-Parties might need technical assistance. We suggest including a provision to encourage Parties to deliver technical assistances to these countries.

**Cooperation and mutual legal and administrative assistance (paras. 70-72)**

52. With respect to cooperation and mutual legal and administrative assistance, we propose that a provision dealing with the matters of cooperation between the Parties and non-Parties shall be included. This is also to achieve the aim of curbing illicit trade in a more effective manner.

**Designated central authority and other enabling provisions for mutual legal assistance (paras. 73-74)**

53. It seems to us that the mandated task “designated central authority” would carry out might be quite similar to the function of “contact points” which is assigned to it by Parties under proposed protocol on cross-border advertising, promotion and sponsorship. Although different contact agencies or authorities may involve in matters of controlling illicit tobacco trade and cross-border advertising activities, we are of the view that the relevant provisions of these two proposed protocols should be coordinated.

**Extradition (paras. 75-77)**

54. We suggest the inclusion of a provision to require a Party in whose territory an alleged offender is found and which refuses to extradite such a person solely on the ground that he or she is its national to initiate and conduct prosecution at the request of the Party seeking extradition. In such a circumstance, Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

**Committees (paras. 80-81)**

55. As has been mentioned under the proposed Protocol, the value of international cooperation and information sharing are of great importance to the combat against illicit tobacco trade. We consider that a global cooperation system and information sharing network in particular require international collaboration between all countries, including Parties and non-Parties. The function of such a global system might be greatly lessened without the participation of non-Parties. Thus, for the purpose of the protocol, we suggest that non-Parties shall be provided with the opportunity to serve as an observer and to participate in relevant activities.



**“Elaboration of protocols (decision FCTC/COP1(16)) –  
Elaboration of a template for a protocol on cross-border tobacco  
advertising, promotion and sponsorship” (A/FCTC/COP/2/10)**

56. Our comments concerning cross-border tobacco advertising, promotion and sponsorship focus on ANNEX 1 of the above document “Elaboration of protocols (decision FCTC/COP1(16)) – Elaboration of a template for a protocol on cross-border tobacco advertising, promotion and sponsorship”.

**Definition of “cross-border”**

57. Under the mandate of Article 13.8 of the FCTC, this protocol aims to facilitate international cooperation for a comprehensive ban on cross-border tobacco advertising, promotion, and sponsorship (hereinafter “cross-border tobacco advertising”). As a key term of the protocol, a definition of “cross-border” will govern not only the interpretation of Article 13 of the FCTC (e.g. Articles 13.2, 13.6 and 13.7), but also the scope of implementation of the future protocol. However, neither the FCTC nor the draft protocol itself provides a clear definition on this term. Furthermore, the protocol focuses more on the international cooperation than on the details of the technical measures against cross-border tobacco advertising. Therefore, the term “international affairs” should also be clearly defined because it is of great importance to the implementation and clarification of the FCTC.

58. We refer to major contemporary conventions such as “The United Nations Convention against Transnational Organized Crime” and the “Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal”, and notice that they all give the term “cross-border” a clear definition. Nonetheless, it would be difficult to define the term “cross-border” by transplanting the definitions set out in those conventions into this protocol because of the different foundation and attentiveness among them. For example, identifying the originating location of cross-border advertising could be more difficult than locating a criminal scene. Since cross-border advertisement is trade in service in

nature, we also look at the General Agreement on Trade in Services under WTO. But we do not find useful definition on the term “cross-border” for our reference.

59. Our general suggestions are that when defining the term “cross-border” in the protocol, we should focus more on the effect of the illegal conduct, rather than that on the conduct itself and that the scope of the definition should be broad enough to include any adverse effect of illegal advertising on receiving countries. The term “international affairs” could also be broadly defined to encompass cooperation in any matter regarding cross-border tobacco advertising between countries, including originating countries of the offending corporation.

**General obligation (paras. 5-6)**

60. Despite a clear reference to the wording in the Cartagena Protocol suggesting each party to take necessary and appropriate legal, administrative and other measures to implement its obligation under the protocol, we would regard the proposed terms “necessary” and “appropriate” as giving Parties broad and unnecessary discretion to determine how to implement the FCTC and even causing Parties’ confusion over compliance due to the vagueness of these two terms.

61. Therefore, clearer guidelines should be made to determine what could be considered a necessary measure. We suggest identifying factors for the purpose of determining the necessity of the measures, including the degree of imminence, the ambit of hazard to public health and the possible effects of the measure adopted.

**Identification of contact points (paras. 7-8)**

62. In this section, it is stated that a contact point is to serve as an initial point of contact for all matters relating to cross-border tobacco advertising. In our view, the concept of “initial point of contact” might not be enough to require countries to adequately equip such contact point. We suggest considering enhancing the function of the contact point so that it would be responsible and capable of answering all reasonable and follow-up questions from other countries.

**Information collection and sharing (paras. 9-11)**

63. The success of international cooperation depends largely on the effective mechanism of information sharing. The duty to share should not be limited to the situations where Parties are requested for needed information. Parties could indeed play more active role in information sharing. We suggest setting out in the future protocol situations where Parties have the obligation to share useful information voluntarily and promptly even without the request from other Parties.

**Scientific and technical cooperation (paras. 12-14)**

64. We find potential inconsistency between Article 13.6 of the FCTC and paragraph 14 of the template protocol. Under Article 13.6, Parties are only obligated to cooperate to facilitate the elimination of *cross-border advertising*, whereas under the proposed protocol, Parties are supposed to collaborate with respect not only to cross-border advertising but also to cross-border *promotion and sponsorship*. Clarification might be needed in this regard.

**Technical and financial assistance (paras. 15-16)**

65. Considering the need of developing countries or countries with economics in transition, we suggest requiring developed countries to provide, on request by developing countries or by countries with economics in transition and on mutually agreed terms and conditions, technical and financial cooperation and assistance in order to facilitate its implementation.

**Investigation and pursuit of legal action (paras. 17-21)**

66. Unlike other conventions, the template protocol established some creative principles which imposed the Parties with more obligations concerning the issues of judicial cooperation. Such obligations will not only form more close relationship among countries, but also facilitate the control over tobacco products. We agree with such positive comity arrangement. As a matter of fact, such arrangement can even be reinforced by changing the words “will assist their counterpart in other Parties” in paragraph 19 to “shall

assist their counterpart in other Parties”. For non-members, the protocol can apply softer rule by requiring the Parties “to consider” assisting their counterpart in non-Parties with the investigation of possible breaches of the law and the bringing of enforcement proceedings.

67. Paragraph 20 suggests establishing a mechanism on evidence cooperation so as to enable the court to use evidence obtained in other countries. This is of great significance for cross-border tobacco advertising especially when a witness or the evidence is located in a country other than the country investigating or taking enforcement action. However, the legal systems vary among Parties. For example, common law and civil law systems may have different rules or principles of evidence, and it will be sometimes difficult to reconcile. We recommend that the future protocol should pay attention to the difference of legal system among Parties, and offer a more flexible alternative for members to consider.

68. Paragraph 21 elaborate on the administrative mechanism for cooperation. Such mechanism might be designed to deal with mutual assistance on investigating or other legal action among Parties when cross-border advertising occurred. However, there might be differences between domestic laws of Parties with respect to their enforcement procedures. The domestic authorities could be quasi-judicial or independent regulatory agencies in some countries. For instance, in Taiwan if it has to do with internet, the National Communications Commission (NCC), which is an independent agency that bears a unique quasi-judicial function, might be involved. These agencies are usually required to independently follow only domestic laws, and not to follow policies. Attention must be paid to such different arrangements in domestic legal systems in order to prevent possible legal obstacles and conflicts.

69. Cooperation with non-Parties is important in making international cooperation more effective. We suggest putting more emphasis on the cooperation with non-Parties so as to eliminate possible loophole arising from leaks and defects of cooperation network caused by ignoring the positive roles that can be played by non-Parties.

**Exercise of jurisdiction (paras. 22-26)**

70. The principles of territoriality and nationality have been included as the criteria to exercise jurisdiction in this template protocol. However, as for the corporate body, such criteria seem to be insufficient, especially for the paper companies and big business groups. We suggest adopting the concept of “substantial control” so that a company with substantial control of another company will also be subject to the jurisdiction of the country having the jurisdiction of controlled company.

**Non-parties (paras. 32-36)**

71. With regard to the relations between Parties and non-Parties, we suggest establishing a mechanism to encourage non-Parties to adhere to the terms of the protocol, under some conditions, so as to ensure non-Parties to act toward the direction in achieving the objectives of the protocol.

72. If non-Parties are willing to adhere to the terms, Parties should provide non-Parties with the opportunities to acquire related rights, and should also be encouraged to provide assistance and adequate information to them.

73. When non-Parties request Parties to exercise jurisdiction, Parties should be encouraged to cooperate with them to the maximum extent possible for the purpose of effective elimination of cross-border tobacco advertising.

**Sanctions against cross-border tobacco advertising, promotion and sponsorship (paras. 41-42)**

74. In light of the irreversible impact on people’s health, countries should be allowed to take precautionary steps to prevent possible cross-border tobacco advertisement. They should not be required to wait until cross-border advertisement is actually put in place before they can take appropriate actions against such imminent activities.

75. Because pecuniary penalty (such as fine) alone could be limited in its effect to correct the acts and to prevent the acts from happening,

we suggest the Conference of the Parties considering adopting other effective and efficient measures, such as injunctions, for the purpose of preventing and eliminating the damages that could be caused by cross-border tobacco advertising.

**Education, training and public awareness (paras. 45-46)**

76. Appropriate measures should not be taken merely based on selective or ordinary education and training programs. Instead, each country should devote comprehensive resources to establish a regular and extensive mechanism for education and training against pervasive tobacco advertisement, and to gradually and progressively reinforce public awareness on the hazard of tobacco.

**Institutional arrangement (paras. 47-48)**

77. We would like to remind that non-Parties can play vital roles in the efforts of tackling the problem of cross-border tobacco advertising effectively. The participation of non-Parties as observers to the FCTC and the protocol also facilitates the implementation of this protocol. We suggest setting flexible criteria for non-Parties to participate in this protocol as observers in order to encourage the participation of non-Parties and to help the implementation of the protocol.

**Committees**

78. We suggest that the future protocol should contain a provision outlining and mandating the establishment of a committee for this particular protocol. Parties could coordinate themselves and collaborate between each other under this committee with respect to the promotion of international cooperation and information sharing in order to achieve the objectives of this protocol as well as those of the FCTC. Furthermore, bearing in mind the possible roles non-Parties can play in the achievement of the objectives of this protocol and the FCTC, we suggest that non-Parties should not be excluded from participating in the committee in a proper form and under certain proper arrangement.

**“Matters identified in decisions taken by the Conference of the Parties that call for action in the period between its first and second sessions – Establishment of a study group on alternative crops (decision FCTC/COP1(17))” (A/FCTC/COP/2/11)**

**Overall comments**

79. We would like to remind the study group that Article 17 of the FCTC requires Parties to promote, as appropriate, economically viable alternatives for tobacco workers, growers and, as the case may be, individual sellers. Thus, the scope of Article 17 is not limited to “alternative crops” nor “alternative uses”. We suggest the study group to conduct a more comprehensive research on all possible economically viable alternatives for all relevant parties, including workers, growers and individuals, instead of limiting its studies on alternative crops for farmers.

80. Regarding government subsidies used to promote tobacco cultivation being redirected toward diversification and rural development, we would like to remind that there are strict rules under the Agreement on Subsidies and Countervailing Measures of the WTO. And there is no exception allowing subsidies for alternative crops of tobacco in the Agreement on Agriculture. In order to make possible for government to have greater discretion in providing for subsidies, there might be a need to have the WTO subsidies rules changed to meet such situation. This is also to avoid potential disputes between the WTO and the FCTC. Thus coordination between WTO and the FCTC might be desirable in this regard.

81. When choosing an alternative suitable for it from a wide variety of possible economic activities, a country will have to consider its particular conditions. Different climates, different situations of the lands and different economic conditions would definitely affect the choice of the alternative crops best suitable for the growers in different countries. Thus a single formula for all countries might give little help to them. We suggest considering establishing individual task force for each country in need to formulate a tailor-made approach for it so as to better cope with its specific problems.

82. In order to have successful adoption of alternative crops or alternative activities, the role that a government can play is also vitally important. It should be appropriate to impose certain degree of responsibility on respective government in the future guidelines in helping its farmers to choose appropriate alternatives.

83. There are some successful examples of alternative crops in Taiwan. Mei-nong, is a small town in the south of Taiwan. People there used to live on tobacco farming started to cultivate other crops such as organic rice, papaya, guava and banana. Papayas growing there are branded “Moonlight Mountain”, which are nationally famous and had been awarded the best prize among all fruits in Taiwan from 2004 to 2006. In 2004, “Moonlight Mountain” papaya succeeded to export to Japan, which is the first kind of papaya in Taiwan exported to Japan. Moreover, some farmers grow lavenders to develop recreational agriculture and promote local farm tourism. The role of government is essential to encourage tobacco farmers to take the initiative step to cultivate alternative corps with thorough considerations of local economic, market, environmental characteristics and conditions as well as the farming system.

84. Moreover, we notice that the issue of “alternative uses” is mentioned in this document (decision FCTC/COP1(17)). We would like to remind that although possible alternative uses might be a viable approach, it may not be able to resolve the hazards arising from the contacts of tobacco leaves causing adverse health effects on tobacco workers and growers. The problem of unequal status between tobacco farmers and industries is also the one that cannot be directly solved purely by adopting alternative uses approach. Therefore, we are of the view that the priority should be considering possible alternative crops, instead of seeking alternative uses and maintaining the production of tobacco. We believe that this would more be in line with the spirit of the preamble of the FCTC.



**“Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15)) –Article 11: Packaging and labeling of tobacco products; Article 12: Education, communication, training and public awareness; Article 13: Regulating cross-border advertising” (A/FCTC/COP/2/12)**

**Overall comments**

85. The guidelines for the implementation of Articles 11 to 13 are yet to be completed. We hope that the draft guidelines can be finalized as soon as practicable, more preferably soon after the COP2. We suggest establishing a mechanism to allow non-members and private parties to have early participation in certain forms of discussion of the guidelines.

## **Additional suggestion on the enactment of guidelines for the social responsibility of multinational tobacco companies**

### **Reasons**

86. We suggest having a set of guidelines on corporate social responsibility of multinational tobacco companies enacted under the FCTC. The reasons are rather strait forward. Although hard rules in the form of convention, protocols and guidelines are useful in instructing or urging governments to implement their obligation in certain manner, tobacco companies always have their ways in creating their promotional activities and advertisement to get around the requirements by government or by law. What we need are not merely drafting comprehensive rules to be followed, but also certain recommendations that would encourage tobacco companies to adopt self-restraint policies and measures when they engage in tobacco businesses.

### **Nature of the guidelines**

87. The guidelines that we suggest here should be voluntary in nature, seeking to advance universal principles on corporate social responsibility of multinational tobacco corporations. The aim of the guidelines should be to encourage the positive responses and contributions that multinational tobacco corporations can make to human rights and social progress and to minimize the risks to which their various operations may give rise.

88. Consistent with the provisions of the FCTC and the intentions of the Conference of the Parties, the guidelines should be to assist parties in enhancing tobacco control. Corporations are encouraged to use the Guidelines not only to fulfill their social duties, but also to follow best practices in protecting public health.

### **Contents of the guidelines**

89. We suggest incorporating at least the following components in the guidelines:

- (1) Urging multinational tobacco corporations to support and respect the protection of internationally proclaimed human rights and make sure that they are not complicit in human rights abuses.
- (2) Recommending multinational tobacco corporations to ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, products, structure, financial situation and performance.
- (3) Requiring multinational tobacco corporations to disclose material information mainly on: all types of cigarette product information, including ingredients, tar and nicotine numbers; governance structures and policies; influence on governments; material foreseeable risk factors; and costs and profits of products; company strategies.
- (4) Urging multinational tobacco corporations to respect the principles and spirits set forth in the FCTC and its respective guidelines and protocols; to respect different legislations in the places where they conduct their businesses and where they have their tobacco products sold; and to apply the highest standard set forth in a national jurisdiction where they have their business to the practices of its activities in all other jurisdictions where they operate.

90. We hope that such guidelines would be of useful help for countries to implement relevant protocols and other guidelines under the FCTC.

## **DRAFTING MEMBERS OF THESE COMMENTS AND RECOMMENDATIONS**

**Bureau of Health Promotion, Department  
of Health, R.O.C. (Taiwan)**

<http://www.bhp.doh.gov.tw/english/>

Tel:+886-2-29978616 Ext.410

Fax:+886-2-29941124

**Asian Center for WTO and International  
Health Law and Policy, National Taiwan  
University College of Law**

Website:

<http://www.law.ntu.edu.tw/center/wto/01acwh.asp>

E-Mail: [wtoctr@ntu.edu.tw](mailto:wtoctr@ntu.edu.tw)

Tel:+886-2-23519641 Ext.681

Fax:+886-2-23519777

*Professor Chang-fa Lo*  
*Professor Chi-pang Wen*  
*Professor Tsai-yu Lin*  
*Assistant Professor Pei-kan Yang*

*Research Assistant Yu-chien Chang*  
*Research Assistant Yu-an Chen*  
*Research Assistant Hsin-i Chien*  
*Research Assistant Ching-fu Lin*  
*Research Assistant Han-min Su*

**Comments and Recommendations on Draft  
Guidelines and Protocols for Tobacco  
Control under FCTC**

**Bureau of Health Promotion  
Department of Health**

**<http://www.bhp.doh.gov.tw/english/>**

**tel:+886-2-29978616 Ext.410**

**fax:+886-2-29941124**

***in collaboration with***

**Asian Center for WTO and International  
Health Law and Policy, National Taiwan  
University College of Law**

**[http://www.law.ntu.edu.tw/center/wto/01a  
cwh.asp](http://www.law.ntu.edu.tw/center/wto/01a<br/>cwh.asp)**

**mail: [wtocenter@ntu.edu.tw](mailto:wtocenter@ntu.edu.tw)**

**tel:+886-2-23519641 Ext.681**

**fax:+886-2-23519777**