

Conference of the Parties

Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products

Fifth session
Geneva, Switzerland, 29 March – 4 April 2012
Provisional agenda item 3

FCTC/COP/INB-IT/5/4
28 November 2011

Draft protocol to eliminate illicit trade in tobacco products

Note by the Convention Secretariat

1. The Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products (INB) decided¹ at its fourth session (Geneva, 14–21 March 2010) to recommend to the Conference of the Parties (COP) that the draft protocol – as it stood at the end of that session – be considered by the COP at its fourth session (Punta del Este, Uruguay, 15–20 November 2010). The text of the draft protocol as submitted to the fourth session of the Conference of the Parties² is attached as an annex to the present document.
2. At its fourth session the COP acknowledged the progress made by the INB and extended the mandate of the INB to a final session to be held in early 2012,³ for the purpose of finalizing the text of the draft protocol, based on the draft text submitted for its consideration. The COP also established an informal working group to work prior to the final session of the INB.
3. Attention is also drawn to the following documents, which may be read in conjunction with the draft protocol:
 - the report of the Chairperson of the INB to the fourth session of the COP (document FCTC/COP/4/4);

¹ See decision FCTC/COP/INB-IT/4(1).

² Document FCTC/COP/4/5

³ See decision FCTC/COP4(11).

- the outcome of the work of the informal working group (document FCTC/COP/INB-IT/5/3);
and
- the annotated provisional agenda of the fifth session of the INB (document FCTC/COP/INB-IT/5/1 (annotated)), which contains in its annex an overview of the status of negotiations of each article of the draft protocol, including the proposals of the informal working group.

ANNEX

DRAFT PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS

(Text as it stood at the close of the twenty-second plenary meeting of the fourth session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products on 21 March 2010)

Preamble

The Parties to this Protocol,

Considering that on 21 May 2003, the Fifty-sixth World Health Assembly adopted by consensus the WHO Framework Convention on Tobacco Control, which came into force on 27 February 2005;

Recognizing that the WHO Framework Convention on Tobacco Control is one of the United Nations' most rapidly ratified treaties and a fundamental tool for attaining the objectives of the World Health Organization;

Noting that at the first session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control, which was held in Geneva on 6–17 February 2006, the “Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control” were adopted by consensus;

Determined to protect and assure the enjoyment of the highest attainable standard of health as a fundamental right of every human being without distinction of race, religion, political belief, economic or social condition;

Determined also to give priority and security to their right to protect public health;

Deeply concerned that the magnitude and pervasiveness of illicit trade in tobacco products is contributing to the spread of the tobacco epidemic, which is a global problem with serious consequences for public health that calls for effective, appropriate and comprehensive domestic and international responses;

Recognizing further that illicit trade in tobacco products undermines price and tax measures designed to strengthen tobacco control and thereby increases the accessibility and affordability of tobacco products;

Concerned by the adverse effects that the increase in accessibility and affordability of illicitly traded tobacco products has on the health and well-being of young people, the poor and other vulnerable groups;

Seriously concerned about the disproportionate economic and social implications of illicit trade in tobacco products on developing countries and countries with economies in transition;

Aware of the need to develop scientific, technical and institutional capacity to plan and implement appropriate national, regional and international measures to eliminate all forms of illicit trade in tobacco products;

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

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

Recognizing also that illicit trade in tobacco products undermines and adversely affects the economies of the Parties and threatens their stability, security and sovereignty;

Also aware that illicit trade in tobacco products generates huge financial profits that are used to fund transnational criminal activity, which penetrates, contaminates and corrupts government objectives and legitimate commercial and financial businesses at all levels;

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

Mindful of Article 6.2 of the WHO Framework Convention on Tobacco Control, which encourages Parties to prohibit or restrict, as appropriate, sales to and/or importation by international travellers of tax- and duty-free tobacco products, which are often diverted into illicit trade;

Recognizing in addition that tobacco and tobacco products in transit find a channel for illicit trade;

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 used in the manufacture of tobacco products;

Recognizing still further the importance of other international agreements, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption;

Intending to build strong links between the Convention Secretariat of the WHO Framework Convention on Tobacco Control and the United Nations Office on Drugs and Crime and other bodies, as appropriate;

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 manufacture and counterfeiting, is an essential component of tobacco control; and

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

Hereby agree as follows:

PART I: INTRODUCTION

Article 1

Use of terms

1. “Carton” means packaging for five or more unit packs of tobacco products.
2. “Cigarette” means any product that contains tobacco and is intended to be burnt or heated under ordinary conditions of use; the term includes, without limitation, any “roll-your-own” tobacco, which, because of its appearance, type, packaging or labelling is suitable for use by and likely to be offered to or purchased by consumers as tobacco for making cigarettes.
3. “Conference of the Parties” means the Conference of the Parties established by Article 23 of the WHO Framework Convention on Tobacco Control.
4. “Confiscation” means the permanent deprivation of property by a competent authority and includes forfeiture, where applicable.
5. “Controlled delivery” means allowing illicit or suspect consignments to pass out of, through or onto the territory of one or more States with the knowledge and under the supervision of their competent authorities, with a view to investigating an offence and identifying those involved in commission of the offence.
6. “Convention Secretariat” means the Secretariat to the WHO Framework Convention on Tobacco Control.
7. “Due diligence” means conducting a reasonable, state-of-the-art investigation 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 his or her legal obligations under this Protocol.
8. “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.
9. “Licence” means permission from a competent authority following submission of the requisite application or other documentation to the competent authority.
10. “Master case” means packaging for about 10 000 cigarettes.
11. “Party” means, unless the context indicates otherwise, a Party to this Protocol.
12. “Proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of a criminal offence under this Protocol.
13. “Seizure” means temporary prohibition of the transfer, conversion, disposition or movement of property or temporary assumption of custody or control of property by a competent authority.

14. “Serious crime” means conduct constituting an offence punishable by maximum deprivation of liberty for at least four years or a more serious penalty.
15. “Suspicious transactions” means transactions that do not correspond or conform to ordinary commercial practices.
16. “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.
17. “Tracing” means the re-creation by competent authorities or any other person acting on their behalf of the route or movement taken by tobacco, tobacco products or manufacturing equipment 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.
18. “Tracking” means systematic monitoring by competent authorities or any other person acting on their behalf of the route or movement taken by tobacco, tobacco products or manufacturing equipment 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.

[Article 2

Relationship between the Protocol and other agreements and legal instruments

1. The provisions of the WHO Framework Convention on Tobacco Control that apply to its protocols shall apply to this Protocol.
2. The Parties to the Protocol that have entered into the types of 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.
3. Parties to this Protocol that are not Parties to the United Nations Convention against Transnational Organized Crime shall endeavour to apply the relevant provisions of that Convention, as appropriate, to cases of illicit trade in tobacco products.]

or

[Article 2

Relationship between the Protocol and other agreements and legal instruments

1. The provisions of the WHO Framework Convention on Tobacco Control that apply to its protocols shall apply to this Protocol.
2. The Parties to the Protocol that have entered into the types of 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.
3. [[Parties to this Protocol that are also Parties to the United Nations Convention against Transnational Organized Crime shall [ensure the full application of] / **[[try to] / apply]** the provisions of the latter Convention that are relevant to illicit trade in tobacco products.] [Parties to this Protocol

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

or

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

or

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

or

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

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

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

4. [Nothing in this Protocol shall affect other rights, obligations and responsibilities of Parties under international law, in particular under, but not limited to, the United Nations Convention against Transnational Organized Crime.]

Article 3 (Consensus)¹

Objective

The objective of this Protocol is to eliminate all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO Framework Convention on Tobacco Control.

¹ Consensus reached in plenary at the third session of the Intergovernmental Negotiating Body.

PART II: GENERAL OBLIGATIONS

Article 4

General obligations (Consensus)¹

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

1. adopt and implement effective measures to control or regulate the supply chain of goods covered by the provisions of this Protocol in order to prevent, deter, detect, investigate and prosecute illicit trade in such goods and shall cooperate with one another to this end;
2. take any necessary measures in accordance with their national law to increase the effectiveness of their competent authorities and services, including customs and police responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods covered by this Protocol;
3. adopt effective measures for facilitating or obtaining technical assistance and financial support, capacity building and international cooperation in order to achieve the objectives of this Protocol and ensure the availability to, and secure exchange with, the competent authorities of information to be exchanged under this Protocol;
4. cooperate closely with one another, consistent with their respective domestic legal and administrative systems, in order to enhance the effectiveness of law enforcement action to combat the offences covered by this Protocol;
5. cooperate and communicate, as appropriate, with relevant regional and international intergovernmental organizations in the secure² exchange of information covered by this Protocol in order to promote the effective implementation of this Protocol; and
6. within the means and resources at their disposal, cooperate to raise financial resources for the effective implementation of this Protocol through bilateral and multilateral funding mechanisms.

¹ The one Party that had indicated a reservation regarding paragraph 1 of Article 4 lifted that reservation following the end of the session.

² A secure exchange of information between two parties is resistant to interception and tampering (falsification). In other words, the information exchanged between the two parties cannot be read or modified by a third party.

PART III: SUPPLY CHAIN CONTROL

Article 5

Licence, equivalent approval or control system

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

- (a) manufacture of tobacco products and manufacturing equipment; and
- (b) import or export of tobacco products and manufacturing equipment.

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

- (a) retailing of tobacco products;
- (b) growing of tobacco, except for traditional small-scale growers, farmers and producers;
- (c) transporting commercial quantities of tobacco products or manufacturing equipment; and
- (d) wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment.

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

- (a) establish or designate a competent national authority or authorities to issue, renew, suspend, revoke and/or cancel licences, subject to the provisions of this Protocol, and in accordance with its national legislation, to conduct the activities specified in paragraph 1 of this Article;
- (b) require that each application for a licence contains all the requisite information about the applicant, which should include, where applicable:
 - (i) where the applicant is a natural person, information regarding his or her identity, including full name, trade name, business registration number (if any), applicable tax registration numbers (if any) and any other information to allow identification to take place;
 - (ii) when the applicant is a legal person, information regarding its identity, including full legal name, trade name, business registration number, date and place of incorporation, location of corporate headquarters, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and of any designated representatives, including any other information to allow identification to take place;

- (iii) precise business location of the manufacturing unit(s), warehouse location and production capacity of the business run by the applicant;
 - (iv) details of the tobacco products and manufacturing equipment covered by the application, such as product description, name, registered trade mark if any, design, brand, model or make and serial number of the manufacturing equipment;
 - (v) description of where manufacturing equipment will be installed and used;
 - (vi) documentation or a declaration regarding any criminal records;
 - (vii) complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details; and
 - (viii) a description of the intended use and intended market of sale of the tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand;
- (c) monitor and collect, where applicable, any licence fees that may be levied and consider using them in effective administration and enforcement of the licensing system or for public health or any other related activity in accordance with national laws;
- (d) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;
- (e) undertake measures such as periodic review, renewal, inspection or audit of licences where appropriate;
- (f) establish, where appropriate, a time frame for expiration of licences and subsequent requisite reapplication or updating of application information;
- (g) oblige any legal or natural person licensed to inform the competent national authority in advance of any change of location of their business or any significant change in information relevant to the activities as licensed;
- [(h) each Party shall ensure that any manufacturing equipment or part thereof, which**
- (i) has been decommissioned for whatever reason,**
 - (ii) has become unserviceable, or**
 - (iii) has become obsolete**
- shall be declared to the licensing authority for the purposes of cancellation of licence, or destruction of such manufacturing equipment or part thereof; or reissuing of a licence as the case may be;**
- (i) Parties shall ensure that the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the licensing authority, and the cost of such destruction shall be borne by the holder of the licence;**

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

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

[Article 5 bis

International transit

Each Party shall [endeavour to] adopt and apply control and verification measures to the international transit, within its territory, of tobacco products and manufacturing equipment in conformity with the provisions of this Protocol in order to prevent illicit trade in such products.]¹

[Article 6

Customer identification and verification

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

1. **all natural and legal persons (“first purchaser”) engaged in:**
 - (a) selling commercial quantities of [tobacco] or the manufacture, distribution, storage, shipment, import or export of tobacco products, [**raw materials and inputs**] excluding the final retailer and persons importing tobacco products for their personal consumption, and/or
 - (b) the manufacture, sale, distribution, storage, shipment, import or export of equipment used in the manufacture of tobacco products.
2. first purchaser who sells, distributes or ships [tobacco,] tobacco products, or equipment used in the manufacture of tobacco products to further natural or legal persons shall require such persons to conduct due diligence on the persons (other than final consumers) to which they subsequently sell, distribute or ship [**raw materials or inputs in the production of tobacco,**] [tobacco,] tobacco products, [**key inputs**] or equipment used in the manufacture of tobacco products.]
3. [Due diligence pursuant to paragraph 1 of this Article [shall] / [**should**] include requirements for] / [**conduct**] customer identification, such as obtaining [**and updating, whenever there is a material change in circumstances,**] information relating to, the following, to the extent reasonably available:

¹ Key elements to be clarified – discuss in context of Article 11.

(a) establishing that the legal or natural person holds a valid licence in accordance with Article 5, if applicable;

[(b) when 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, applicable tax registration numbers and copy of his or her official identification;

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

(d) documentation regarding any offences [**directly related to the tobacco trade**] 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 used in the manufacture of tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated [**legitimate**] demand; and

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

4. [Each Party [shall] / [**should**] obligate all natural and legal persons referred to in paragraph 1 of this Article to report periodically on their compliance with the obligations for customer identification and verification.]

[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 [while taking account of] / [**avoiding**] any unnecessary burden [**in particular,**] on small or medium-sized businesses and on Parties' administrations.]

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

[7. Each Party [shall] / [**may**] communicate to the Convention Secretariat the identity of the authority that it has designated to maintain the list of blocked customers. The Convention Secretariat

shall compile a list of the designated authorities of the Parties and make the list available on a web site.]

- [8. With regard to blocked customers, each Party [shall] / **[should]** require that:
- (a) suppliers immediately communicate the names of blocked customers to the designated authority, which will maintain a list of blocked customers;
 - (b) this list is made available on demand to all natural and legal persons referred to in paragraph 1 of this Article;
 - (c) once so designated, a customer will remain blocked for a period of five years following termination of a business relationship in accordance with paragraph 6 of this Article;
 - (d) all blocked customers shall be barred from conducting business, directly or indirectly, with the natural and legal persons referred to in paragraph 1 of this Article relating to the manufacture, sale, distribution or storage of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;
 - (e) if a blocked customer does not engage in illicit sale, distribution, storage or shipment of **[raw materials or inputs in the production of tobacco,]** tobacco, tobacco products[, **key inputs**] or manufacturing equipment 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 provisions for customer identification and verification; and
 - (f) if a currently or previously blocked customer engages in illicit sale, distribution, storage or shipment of **[raw materials or inputs in the production of tobacco,]** tobacco, tobacco products[, **key inputs**] or manufacturing equipment used in the manufacture of tobacco products or any other activity contrary to the provisions of this Protocol X number of times, the “blocked” designation shall be made permanent.]
- [9. Parties [shall] / **[should]** recognize “blocked” designations assigned to customers by other Parties to the Protocol.]
10. Each Party [shall] / **[should]** 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.]

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

or

[Article 6

Customer identification and verification

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

-
- (a) all natural and legal persons (“manufacturers”) engaged in:
- (i) selling commercial quantities of tobacco or the commercial manufacture, sale, distribution, storage, shipment, import or export of tobacco products, excluding the final retailer and persons importing tobacco products for their personal consumption, and/or
 - (ii) the commercial manufacture, sale, distribution, storage, shipment, import or export of equipment used in the manufacture of tobacco products;
- (b) any first purchaser who sells, distributes or ships tobacco, tobacco products, or equipment used in the manufacture of tobacco products to further natural or legal persons shall also require such persons to conduct due diligence on the persons (other than final consumers) to whom they subsequently sell, distribute or ship tobacco, tobacco products, or equipment used in the manufacture of tobacco products.
2. Due diligence pursuant to paragraph 1 of this Article shall include requirements for customer identification, such as obtaining information relating to, but not limited to, the following:
- (a) establishing that the legal or natural person holds a valid licence in accordance with Article 5;
 - (b) when the customer is a natural person, information regarding his or her identity, including but not limited to full name, business registration number (if any), applicable tax registration numbers and copy of his or her official identification;
 - (c) when the customer is a legal person, information regarding its identity, including but not limited to full name, business registration number, date and place of incorporation, corporate headquarters, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, complete names of its directors and [the names] 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 or competent authorities, including criminal records, to the extent reasonably available;
 - (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 sale of tobacco, tobacco products or manufacturing equipment 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 the location 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 periodically on their compliance with the obligations for customer identification and verification.
5. Each Party shall take necessary legislative, administrative or other measures to ensure that all natural and legal persons referred to in paragraph 1 of this Article comply with the above provisions while avoiding any unnecessary burden, in particular on small or medium-sized businesses and on Parties' administrations.
6. Each Party shall require that all natural and legal persons referred to in paragraph 1 of this Article terminate business relations, including the supply of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, with any customer if a competent authority provides information about the customer with sufficient evidence that the customer has knowingly engaged in the sale, distribution, storage or shipment of tobacco, tobacco products or equipment used in the manufacture of tobacco products in contravention of obligations of this Protocol or any other activity contrary to the obligations of this Protocol. Thereafter, to the extent permitted by national law and [upon a decision by the competent authorities, after the conclusion of at least primary adjudication proceedings], following an administrative procedure, such a customer shall be a "blocked customer".
7. Each Party shall communicate to the Convention Secretariat the identity of the authority that it has designated to maintain the list of blocked customers. The Convention Secretariat shall compile a list of the designated authorities of the Parties and make the list available on a web site.
8. With regard to blocked customers, each Party shall, subject to its national laws, require that:
 - (a) suppliers immediately communicate the names of blocked customers to the designated authority, which will maintain a list of blocked customers;
 - (b) this list is made available on demand to all natural and legal persons referred to in paragraph 1 of this Article;
 - (c) once so designated, a customer will remain blocked for a period of five years following termination of a business relationship in accordance with paragraph 5 of this Article;
 - (d) all blocked customers shall be barred from conducting business, directly or indirectly, with the natural and legal persons referred to in paragraph 1 of this Article relating to the manufacture, sale, distribution or storage of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;
 - (e) if a blocked customer does not engage in illicit sale, distribution, storage or shipment of tobacco, tobacco products or manufacturing equipment 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 provisions for customer identification and verification; and
 - (f) if a currently or previously blocked customer engages in illicit sale, distribution, storage or shipment of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products or any other activity contrary to the provisions of this Protocol [x] number of times, the "blocked" designation shall be made permanent.

9. Parties shall recognize “blocked” designations assigned to customers by other Parties to the Protocol.

10. 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 legitimate demand for such products within the intended market of sale or use.]

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

Article 7 (Consensus)¹

Tracking and tracing

1. For the purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products, the Parties to this Protocol agree to establish within five years of entry into force of this Protocol a global tracking and tracing regime, comprising national and/or regional tracking and tracing systems and a global information sharing focal point located at the Convention Secretariat of the WHO Framework Convention on Tobacco Control and accessible to all Parties, enabling Parties to make enquiries and receive relevant information.

2. Each Party shall establish, in accordance with this Article, a tracking and tracing system, controlled by the Party for all tobacco products that are manufactured in or imported onto its territory taking into account their own national or regional specific needs and available best practice.

3. With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets, packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party.

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

- (a) date and location of manufacture;
- (b) manufacturing facility;
- (c) machine used to manufacture tobacco products;
- (d) production shift or time of manufacture;
- (e) the name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer;

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

- (f) the intended market of retail sale;
- (g) product description;
- (h) any warehousing and shipping;
- (i) the identity of any known subsequent purchaser; and
- (j) the intended shipment route, the shipment date, shipment destination, point of departure and consignee.

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

4.3 Where the information in subparagraph (f) is not available at the time of marking, the Parties shall require the inclusion of such information in accordance with the provisions of Article 15.2(a) of the WHO Framework Convention on Tobacco Control.

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

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

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

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

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

- (a) have access to the information outlined in paragraph 4 in a timely manner by making a query to the global information sharing focal point;
- (b) request such information only where it is necessary for the purpose of detection or investigation of illicit trade in tobacco products;
- (c) not unreasonably withhold information;
- (d) answer the information requests in relation to paragraph 4, in accordance with its national laws; and

- (e) protect and treat as confidential, as mutually agreed, any information that is exchanged.
10. Each Party shall require the further development and expansion of the scope of the applicable tracking and tracing system up to the point that all duties, relevant taxes, and where appropriate, other obligations have been discharged at the point of manufacture, import or release from customs or excise control.
11. Parties shall cooperate with each other and with competent international organizations, as mutually agreed, in sharing and developing best practices for tracking and tracing systems including:
- (a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;
 - (b) support for training and capacity-building programmes for Parties that express such a need; and
 - (c) further development of the technology to mark and scan unit packs and packets of tobacco products to make accessible the information listed in paragraph 4 of this Article.
12. Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry.
13. Each Party shall ensure that its designated competent national authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of the provisions of this Article.
14. Each Party may require the tobacco industry to bear any costs associated with that Party's obligations under this Article.

Article 8

Record-keeping

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

or

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

- (a) maintain complete and accurate records of all transactions relevant to the objectives and purposes of this Protocol;**
- (b) provide general information on the market, where one exists, production volumes, imports, exports and/or sales, trends, forecasts, and other relevant information;**

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

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

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

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

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

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

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

(c) intended shipping routes and destination;

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

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

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

[(g) intended market of retail sale or use.]

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

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

- (a) maintained for a period of [**not less**] than [five years];
- (b) made available to the competent [authority or] authorit[**y**]/[ies]; and
- (c) kept in a common format, as far as possible, or as prescribed by the competent authorit[**y**]/[ies].

6. Each Party shall, as appropriate and subject to national laws, establish a system for sharing details contained in all records kept in accordance with this Article with other Parties. *(Consensus)*¹

7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved systems for record-keeping. *(Consensus)*¹

Article 9

Security and [other] preventive measures

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

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

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

or

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

¹ Agreed in Committee A at the Third Session of the Intergovernmental Negotiating Body.

- (a) requiring suspension or cancellation of a licence and prohibition of the licensee from re-applying for a license during a five-year period for contravention of the measures adopted pursuant to paragraph 1 of this Article;
- (b) requiring that tobacco products are not intermingled with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transport, import and export;
- (c) Establishing specific requirements relative to acceptable forms of payment and the reporting of cross-boarder transfers of substantial quantities of cash;
- (d) Requiring that all natural and legal persons engaged in commercial sale of leaf tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products shall supply such products only in amounts commensurate with legitimate consumption or use in the intended market of use or retail sale;
- (e) Requiring that persons involved in the trade in tobacco products be liable for reporting “suspicious activities” relative to the tobacco trade to its competent authorities.]

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

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

or

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

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

or

[The Parties require that all natural or legal persons engaged in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products shall supply such products only in the amounts recognized by the competent national authorities, commensurate with consumption or use on the local market.]

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

Article 10

Sale by Internet, telecommunication or any other evolving technology

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

or

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

or

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

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

or

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

Where a Party has not banned sales of tobacco products or manufacturing equipment through Internet-, telecommunication- or any other evolving technology-based modes of sale, that Party shall require that all legal and natural persons engaged in any transaction with regard to tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale comply with all relevant obligations covered by this Protocol,

and in full respect of the obligations arising under Article 13 of the WHO Framework Convention on Tobacco Control.]

[Article 11

Free zones

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

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

or

[Article 11

Free zones¹

1. Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective controls on all transactions in tobacco, tobacco products, in free zones, by use of all relevant measures as provided in this Protocol.
2. In addition, the intermingling of tobacco products with any non-tobacco products on imports to and exports from free zones shall be prohibited.]

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

[Article 11 bis

Duty free sales

Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective measures to prohibit any tax, regulatory or other advantages that apply in free-trade areas from applying to tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, including tax-reduced and duty-free sales to individual customers.]

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

¹ “Free zones” means a part of the territory of a contracting Party where any goods introduced are generally regarded, in so far as import duties and taxes are concerned, as being outside the Customs territory (Revised Kyoto Convention, Specific Annex D, Chapter 2: Free Zones).

or

[Article 11 bis

Duty free sales

[Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective measures to ban duty free sales [in free zones].]

or

[Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective measures to prohibit any tax, regulatory or other advantages that apply in free zones from applying to tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, including tax-reduction and duty-free sales to individual customers.]

or

[Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective measures to subject any duty free sales to all provisions of this protocol.]]

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

PART IV: OFFENCES

Article 12¹

Unlawful conduct including criminal offences

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

- (a) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products contrary to the provisions of this Protocol;
- (b) (i) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels;

¹ Text as reflected in document FCTC/COP/INB-IT/4/4.

- (ii) any other acts of smuggling of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products not covered by paragraph (b)(i);
- (c)
 - (i) counterfeiting tobacco products or manufacturing equipment used in the manufacture of tobacco products or counterfeiting packaging, applicable fiscal stamps, unique identification markings, or any other markings or labels;
 - (ii) wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting counterfeit tobacco products or counterfeit manufacturing equipment used in the manufacture of tobacco products or counterfeit fiscal stamps or unique identification markings, or any other markings or labels;
 - (iii) defacing, falsifying, removing, altering or otherwise interfering with applicable fiscal stamps, unique identification markings, or any other required markings or labels affixed to tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products in order to, directly or indirectly, obtain any advantage, financial or other material benefit;
- (d) intermingling tobacco products with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transportation, import or export, for the purpose of concealing or disguising tobacco products;
- [(e) using Internet-, telecommunication- or any other evolving technology-based modes of sale of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, in contravention of the provisions of this Protocol;] *(Final formulation depends on outcome of the discussions on Article 10)*
- (f) obtaining, by a person licensed in accordance with Article 5, tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products from a person who should be, but is not, licensed in accordance with Article 5;
- (g) obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;
- (h)
 - (i) making any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products and when not contrary to the right against self incrimination;
 - (ii) mis-declaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products or any other information specified in the protocol to:
 - (a) evade the payment of applicable duties, taxes and other levies, or

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

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

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

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

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

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

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

4. With respect to criminal offences established in accordance with paragraphs 2 and 3 of this Article, each Party shall, subject to the basic principles of its domestic law, and having regard to the nature and gravity of the offence, adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

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

(b) attempting to commit an offence;

(c) aiding, abetting, or inciting the commission of an offence.

(*UNTOC*, Article 6.1(b)(ii) *modified*³)

¹ United Nations Convention against Transnational Organized Crime.

² References to “*non-substantive modifications*” in this and the following Articles indicate that minor changes have been made to the original text, which are not considered to be substantive, such as replacing “State Party” with “Party”, “Convention” with “Protocol” and using the gerund instead of the infinitive of a verb.

³ References to which “*modified*” has been added indicate that the language in the original provision has been changed in a manner which may be regarded as substantive.

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

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

Article 13 (Consensus)¹

Liability of legal persons

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

2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the liability of the natural persons who have engaged in the unlawful conduct or committed the criminal offences established in accordance with national laws and regulations and Article 12 of this Protocol.

Article 14

Prosecutions and sanctions

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

2. Each Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for the unlawful conduct, including criminal offences established in accordance with Article 12, are exercised to maximize the effectiveness of law enforcement measures in respect of such unlawful conduct including criminal offences, and with due regard to the need to deter the commission of such unlawful conduct including offences. (*Consensus*)¹

3. Nothing contained in this Protocol shall affect the principle that the description of the unlawful conduct including criminal 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 unlawful conduct including criminal offences shall be prosecuted and sanctioned in accordance with that law. (*To be reconsidered after discussion of Article 26.*)

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

[Article 15]*Search of premises and seizure of evidence*

Each Party shall adopt [such legislative, executive, administrative [and]/[or] other measures as may be necessary] / **[necessary measures]** / **[legislative and regulatory measures in compliance with its domestic law]** to authorize competent authorities to search a building, receptacle, means of transport or place for evidence **[related to criminal activities in accordance with Article 12.2 with the purpose of investigating whether criminal activities have been committed and to seize]** [including tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products **[with the purpose of ascertaining whether an offence has been committed]**, with respect to a **[suspected]** commission of an offence under Article [12.1]/**[12]** of this Protocol, and to seize] / **[and impose a preventative embargo or seize]** such evidence when found, in accordance with its [national law] / **[domestic law]**.

or

[Each Party shall adopt such legislative, executive, administrative or other measures as may be necessary for the collection and preservation of evidence with respect to a suspected commission of an offence under Article 12 of this Protocol.]

Article 16*[Confiscation and seizure of assets] / [Seizure and confiscation]*

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

or

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

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

or

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

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

or

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

2. Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this Article for the purpose of eventual confiscation.
3. If **[proceeds of crime as referred to in paragraph 1(a)]** have been transformed or converted, in part or in full, into other property such property shall be liable to the measures referred to in this Article instead of the proceeds.
4. If proceeds of crime **[as referred to in paragraph 1(a)]** have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to **freezing or** seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
5. Income or other benefits derived from proceeds of crime **[as referred to in paragraph 1(a)]**, 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. Parties shall not decline to act under the provisions of this paragraph on the grounds 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 and the provisions of Article 18, 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 by using environmentally friendly methods following such use.]

Article 17

Seizure payments

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

Article 18

[Destruction] / [Disposal]

1. All confiscated manufacturing equipment, tobacco, counterfeit and contraband cigarettes and other tobacco products [shall] / **[must]** / **[may]** be destroyed **[immediately]** **[or disposed of in accordance with [national] / [domestic] law]**. Such destruction [shall] / **[must]** be by using environmentally friendly methods **[to the greatest extent possible]** upon completion of any legal process in relation to the tobacco products in question.

[2. Confiscated material [other than tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products][,] may be retained[, **or could be transferred to other Parties,**] for the purposes of training and other law enforcement purposes **[upon completion of any legal process in relation to the material in question].]**

3. **[Without prejudice to the provisions of Article 18.1,]** Parties [shall] / **[may]** take necessary measures for the early destruction of seized tobacco and tobacco products and for the admissibility as evidence of duly certified samples of small quantities of such substances.] **[The retention of small quantities of such substances as duly certified samples for evidence is permitted].**

Article 19 (Consensus)¹

Special investigative techniques

1. If permitted by the basic principles of its domestic legal system, each Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems it appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities on its territory for the purpose of effectively combating illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products.

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

2. For the purpose of investigating the offences covered by this Protocol, Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using the techniques referred to in paragraph 1 of this Article in the context of cooperation at the international level.
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 cooperate, with each other and with international organizations, in developing capacity to achieve the goals of this Article.

PART V: INTERNATIONAL COOPERATION

Article 20

General information sharing

1. The Parties shall, for the purpose of achieving the objectives of this Protocol, report, as part of the WHO Framework Convention on Tobacco Control reporting instrument relevant information, subject to domestic law, and where appropriate, inter alia, on matters such as: *(Consensus)*¹
 - (a) in aggregate form, details of seizures of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, quantity, value of seizures, product descriptions, dates and places of manufacture; counterfeit and genuine brands; and taxes evaded; *(Consensus)*¹
 - (b) import, export, transit, tax-paid and duty-free sales and quantity or value of production of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; *(Consensus)*¹
 - [(c) data on the agricultural production of tobacco;]
 - (d) trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and *(Consensus)*¹
 - (e) any other relevant information, as agreed by the Parties. *(Consensus)*¹
2. Parties shall cooperate with each other and with competent international organizations to build the capacity of Parties to collect and exchange information. *(Consensus)*¹

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

3. The Parties shall deem the said information to be confidential and for the use of the Parties only, unless otherwise stated by the transmitting Party. *(Consensus)*¹

Article 21

Enforcement information sharing

The Parties shall, subject to domestic law or the provisions of any applicable international treaties, where appropriate, exchange, on their own initiative or on the request of a Party that 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 used in the manufacture of tobacco products,] the following information:

- (a) records of licensing for the legal and natural persons concerned; *(Consensus)*¹
- (b) information for identification, monitoring and prosecution of legal or natural persons involved in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; *(Consensus)*¹
- (c) records of investigations and prosecutions; *(Consensus)*¹
- (d) records of payment for import, export or duty-free sales of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and *(Consensus)*¹
- (e) details of seizures of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, including case reference information where appropriate, quantity, value of seizure, product description, entities involved, date and place of manufacture; modi operandi including means of transport, concealment, routing and detection. *(Consensus)*¹

Information received from Parties under this Article shall be used exclusively to meet the objectives of this Protocol. Parties may specify that such information may not be passed on without the agreement of the Party which provided the information. *(Consensus)*¹

Article 22 *(Consensus)*¹

Information sharing: confidentiality and protection of information

1. Each Party shall designate the competent national authorities to which data referred to in Articles 20, 21 and 24 are supplied and notify the Parties to this Protocol of such designation through the Convention Secretariat.

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

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

Article 23 (Consensus)¹

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

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

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

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

Article 24 (Consensus)²

Assistance and cooperation: investigation and prosecution of offences

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

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

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

² Consensus reached at the fourth session of the Intergovernmental Negotiating Body, pending the decision on inclusion of “manufacturing equipment” in this Article.

Article 25

Protection of/[Respect for]/[Protection of and respect for] sovereignty

1. Parties shall carry out their obligations under this Protocol in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. (*Consensus*)¹
2. Nothing in this Protocol entitles a Party to undertake **in** the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State [by its domestic law] / **[by its domestic or international law].**

Article 26

Jurisdiction

1. Each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 12.1 when:
 - (a) the offence is committed in the territory of that Party or
 - (b) [the offence is committed on board a vessel that is flying the flag of that Party] or an aircraft that is registered under the laws of that Party at the time that the offence is committed.
2. Subject to Article 25, a Party may also establish its jurisdiction over any such criminal offence when:
 - (a) the offence is committed against that Party;
 - (b) the offence is committed by a national of that Party or a stateless person who has his or her habitual residence on its territory; or
 - (c) the offence is:
 - (i) one of those established in accordance with Article [12.1]/[12] and is committed outside its territory with a view to the commission of a crime within its territory;
 - (ii) one of those established in accordance with Article 12.1 and is committed outside its territory with a view to the commission of an offence established in accordance with Article 12.1 within its territory.
3. For the purposes of Articles 31 and 33, each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences covered by this Protocol when the

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

alleged offender is present on its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each Party may also adopt such measures as may be necessary to establish its jurisdiction over the criminal offences covered by this Protocol when the alleged offender is present on its territory and it does not extradite him or her.

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

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

[Article 27

Joint investigations

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

Article 28 (Consensus)¹

Law enforcement cooperation

1. Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to:

- (a) enhance and, where necessary, establish channels of communication between the 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) ensure effective cooperation among the competent authorities, agencies, customs, police and other law enforcement agencies;
- (c) cooperate with other Parties in conducting enquiries in specific cases 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;

¹ Agreed in Committee B at the third session of the Intergovernmental Negotiating Body.

- (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;
- (d) provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;
- (e) facilitate effective coordination among its competent authorities, agencies and services and promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the Parties concerned, the posting of liaison officers;
- (f) exchange relevant 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; and
- (g) exchange relevant 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 accordingly. In the absence of such agreements or arrangements between the Parties concerned, the Parties may consider this Protocol as the basis for mutual law enforcement cooperation in respect of the offences covered by this Protocol. Whenever appropriate, Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.
3. Parties shall endeavour to cooperate within their means to respond to transnational illicit trade of tobacco products committed through the use of modern technology.

Article 29

Mutual administrative assistance

[**Consistent with their respective domestic legal and administrative systems,**] Parties shall provide each other, either on request or on their own initiative, with information to ensure proper application of customs and other relevant law in the prevention, detection, investigation, prosecution and combating of illicit trade in tobacco, tobacco products or equipment used in the manufacture of tobacco products. The Parties shall deem the said information to be confidential and for restricted use, unless otherwise stated by the transmitting Party. Such information may include:

- (a) new customs and other enforcement techniques of demonstrated effectiveness;
- (b) new trends, means or methods of committing offences listed in Article 12;
- (c) goods known to be the subject of offences listed in Article 12, as well as details of description, packaging, transport and storage and methods used in respect of those goods;

[(d) **[physical or legal]** persons known to have committed or to be a party to an offence listed in Article 12 [or suspected of being about to commit such an offence; and]]

(e) any other data that would assist designated agencies in risk assessment for supply chain control and other enforcement purposes.

Article 30¹

Mutual legal assistance

1. The Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with [paragraphs 2, 3 and 4 of] Article 12 of this Protocol. (*UNTOC, Article 18.1 modified*)

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 legal persons may be held liable in accordance with Article 13 of this Protocol in the requesting Party. (*UNTOC, Article 18.2 modified*)

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;
- (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 proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) facilitating the voluntary appearance of persons in the requesting Party;
- (i) any other type of assistance that is not contrary to the domestic law of the requested Party.

(*UNTOC, Article 18.3, non-substantive modification*)

¹ Text as reflected in document FCTC/COP/INB-IT/4/4.

4. The provisions of this Article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance. (*UNTOC, Article 18.6 modified*)

5. Paragraphs 6 to 24 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 the Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 6 to 24 of this Article in lieu thereof. Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation. (*UNTOC, Article 18.7, non-substantive modification*)

6. Parties shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to their respective competent authorities for execution. When 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. Each Party shall notify the Head of the Convention Secretariat at the time of accession, acceptance, approval, formal confirmation or ratification of this Protocol of the central authority designated for this purpose. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between 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 the diplomatic channel and, in urgent circumstances, where the Parties agree, through appropriate international organizations, if possible. (*UNTOC, Article 18.13 modified*)

7. 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 the Party to establish authenticity. The language or languages acceptable to each Party shall be notified to the Head of the Convention Secretariat at the time of accession, acceptance, approval, formal confirmation or ratification of this Protocol. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith. (*UNTOC, Article 18.14 modified*)

8. 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 the functions of the authority conducting such investigation, prosecution or judicial proceeding;
- (c) a summary of the relevant facts, except in respect of 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;

[(g) the provisions of the domestic law relevant to the criminal offence and the punishment therefor.]

(UNTOC, Article 18.15 modified)

9. 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. *(UNTOC, Article 18.16, non-substantive modification)*

10. 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. *(UNTOC, Article 18.17, non-substantive modification)*

11. 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. *(UNTOC, Article 18.19, non-substantive modification)*

12. 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. *(UNTOC, Article 18.20, non-substantive modification)*

13. 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. *(UNTOC, Article 18.18, non-substantive modification)*

14. 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) where the request involves matters of a *de minimis* nature;] *(Article 46.9(b) United Nations Convention against Corruption)*

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

(UNTOC, Article 18.21, non-substantive modification)

15. Reasons shall be given for any refusal of mutual legal assistance. *(UNTOC, Article 18.23, non substantive modification)*

16. A Party shall not decline to render mutual legal assistance under this Article on the ground of bank secrecy. *(UNTOC, Article 18.8)*

17. Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters. *(UNTOC, Article 18.22, non-substantive modification)*

18. 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. *(UNTOC, Article 18.9, non-substantive modification)*

19. 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 regarding progress in its handling of the request. The requesting Party shall promptly inform the requested Party when the assistance sought is no longer required. *(UNTOC, Article 18.24, non-substantive modification)*

20. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding. *(UNTOC, Article 18.25, non-substantive modification)*

21. Before refusing a request pursuant to paragraph 14 of this Article or postponing its execution pursuant to paragraph 20 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. *(UNTOC, Article 18.26, non-substantive modification)*

22. 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 fulfill 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. *(UNTOC, Article 18.28, non-substantive modification)*

23. In the event of a request, 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.

(UNTOC, Article 18.29 modified)

24. The 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. *(UNTOC, Article 18.30, non-substantive modification)*

Article 31¹

Extradition

1. [This Article shall apply to the criminal offences established in accordance with paragraphs 2, 3 and 4 of Article 12 of this Protocol when:

- (a) the person who is the subject of the request for extradition is located in the territory of the requested Party;
- (b) the criminal offence for which extradition is sought is punishable under the domestic law of both the requesting Party and the requested Party; and
- (c) the offence is punishable by a maximum period of imprisonment or other forms of deprivation of liberty of at least [one]/[four] years or by a more severe penalty.

(UNTOC, Article 16.1 modified)

or

1. [This Article shall apply to the following criminal offences established in accordance with Article 12 of this Protocol, when the person who is a subject of the request for extradition is located in the territory of the requested Party and provided that the criminal offence for which extradition is sought is punishable under the domestic law of both the requesting and the requested Parties:

- (a) criminal offences in paragraphs 2 and 4 of Article 12 where the offence is punishable by a maximum period of imprisonment or other forms of deprivation of liberty of at least [one]/[four]years or by a more severe penalty;
- (b) criminal offences in paragraphs 3 and 4 as it pertains to the offences in paragraph 3 of Article 12.]

[2. Each of the criminal offences to which this Article applies shall be treated, for the purposes of extradition between the Parties, as if it had been committed not only in the place in which it occurred

¹ Text as reflected in document FCTC/COP/INB-IT/4/4.

but also in the territories of the Parties that have established their jurisdiction in accordance with paragraphs 1 and 2 of Article 26.] (*Article 33.4 of the negotiating text, document FCTC/COP/INB-IT/3/5 Rev.1*)

3. Each of the criminal offences to which this Article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. (*UNTOC, Article 16.3 modified*)

4. If a Party that makes extradition 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 as the legal basis for extradition in respect of any criminal offence to which this Article applies. (*UNTOC, Article 16.4 modified*)

5. Parties that do not make extradition conditional on the existence of a treaty shall recognize the criminal offences to which this Article applies as extraditable offences between themselves. (*UNTOC, Article 16.6 modified*)

6. 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. (*UNTOC, Article 16.7, non-substantive modification*)

7. Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any criminal offences to which this Article applies. (*UNTOC, Article 16.8 modified*)

8. A Party in whose territory an alleged offender is present, if it does not extradite such person in respect of a criminal 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 similar 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. (*UNTOC, Article 16.10 modified*)

9. 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 8 of this Article. (*UNTOC, Article 16.11, non-substantive modification*)

10. 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. (*UNTOC, Article 16.12, non-substantive modification*)

11. Any person regarding whom proceedings are being carried out in connection with any of the criminal 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. (*UNTOC, Article 16.13 modified*)
12. 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. (*UNTOC, Article 16.14, non-substantive modification*)
13. Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters. (*UNTOC, Article 16.15, non-substantive modification*)
14. 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. (*UNTOC, Article 16.16, non-substantive modification*)
15. Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition. (*UNTOC, Article 16.17, non-substantive modification*)

Article 32¹

Measures to ensure extradition

1. 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. (*UNTOC, Article 16.9, non-substantive modification*)
2. Measures taken in accordance with paragraph 1 shall be notified, in conformity with national law, as appropriate and without delay, to the requesting Party.
3. Any person regarding whom the measures in accordance with paragraph 1 of this Article are being taken, shall be entitled to:
 - (a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or, if that person is a stateless person, the State in the territory of which that person habitually resides;
 - (b) be visited by a representative of that State.

(International Convention for the Suppression of the Financing of Terrorism, Article 9.3 modified)

¹ Text as reflected in document FCTC/COP/INB-IT/4/4.

*Article 33*¹*Extradition of alleged offenders***PART VI: REPORTING***Article 34 (Consensus)*²*Reporting and exchange of information*

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

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

4. The Meeting of the Parties, pursuant to Articles XX and XX, shall consider arrangements to assist developing-country Parties and Parties with economies in transition, at their request, in meeting their obligations under this Article.
5. The reporting of information under those Articles shall be subject to national law regarding confidentiality and privacy. The Parties shall protect, as mutually agreed, any confidential information that is reported or exchanged.

¹ Article proposed for deletion as reflected in document FCTC/COP/INB-IT/4/4.

² Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES

Article 35¹

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 in conjunction with the next regular session of the Conference of the Parties following the entry into force of this Protocol. *(Consensus)*²
2. Thereafter, regular sessions of the Meeting of the Parties shall be convened by the Convention Secretariat, in conjunction with regular sessions of the Conference of the Parties. *(Consensus)*²
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. *(Consensus)*²
4. The Rules of Procedure and the Financial Rules of the Conference of the Parties to the WHO Framework Convention on Tobacco Control shall apply, mutatis mutandis, to the Meeting of the Parties to this Protocol until the Meeting of the Parties decides otherwise. *(Consensus)*²
5. The Meeting of the Parties shall keep under regular review the implementation of the Protocol and take the decisions necessary to promote its effective implementation. *(Consensus)*²

Article 36

Secretariat

1. The Convention Secretariat shall be the Secretariat of this Protocol. *(Consensus)*²
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 established by the Meeting of the Parties and provide them with services as required; *(Consensus)*²
 - (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 and to establish and maintain a clearing-house mechanism in a manner to be decided by the Meeting of the Parties to facilitate the exchange of information among Parties;

¹ The Intergovernmental Negotiating Body did not reach agreement regarding financial implications for Parties and recommended that the matter be considered by the Conference of the Parties.

² Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

- (c) provide advice and support to the Parties[,] **[on request in the compilation, communication and exchange of information required in accordance with the provisions of the Protocol and in]** particular[ly] **[to]** developing-country Parties and Parties with economies in transition[, on request, in the compilation, communication and exchange of information][, **in accordance with the provisions of Article 38.6(b);] / [required in accordance with the provisions of the Protocol] / [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 **[be accredited as observers 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.

*Article 37 (Consensus)*¹

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.

*Article 38 (Consensus)*¹

Financial resources

1. The Parties recognize the important role that financial resources play in achieving the objective of this Protocol, and acknowledge the importance of Article 26 of the WHO Framework Convention on Tobacco Control in achieving the objectives of the Convention.

¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

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. Without prejudice to Article 18, Parties are encouraged, subject to national laws and policies and where appropriate, to use any confiscated proceeds of crime related to this Protocol, as well as other proceeds of the implementation of this Protocol to achieve the objectives set out under this Protocol.
5. 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.
6. 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 objective 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 implementation of their obligations under this Protocol.
7. Parties may require the tobacco industry to bear any costs associated with a Party's obligations to achieve the objectives of this Protocol, in compliance with Article 5.3 of the WHO Framework Convention on Tobacco Control.
8. Parties shall endeavour, subject to their domestic law, to achieve self-financing of the implementation of the Protocol including through the levying of taxes and other forms of charges on tobacco products.

PART VIII: SETTLEMENT OF DISPUTES

*Article 39 (Consensus)*¹

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

*Article 40 (Consensus)*¹

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 Depositary.
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 Depositary, who shall circulate it to all Parties for acceptance.
4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 of this Article shall enter into force for those Parties having accepted it on the 90th day after the date of receipt by the Depositary 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 90th day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

¹ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

Article 41*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 40.

PART X: FINAL PROVISIONS**Article 42***Reservations*

No reservations may be made to this Protocol.

Article 43 (Consensus)¹*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 its withdrawal from the WHO Framework Convention on Tobacco Control.

¹ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

Article 44 (Consensus)¹*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.

Article 45 (Consensus)²*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*.

Article 46 (Consensus)¹*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 that 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 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 to the extent of their competence.

¹ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

² Consensus reached in plenary at the third session of the Intergovernmental Negotiating Body, subject to place and dates to be determined.

*Article 47 (Consensus)*¹*Entry into force*

1. This Protocol shall enter into force on the 90th day following the date of deposit of the 40th 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 that organization.

*Article 48**Depositary*

The Secretary-General of the United Nations shall be the Depositary of this Protocol and amendments thereto [**and of annexes**] adopted in accordance with Article[s] 40 [**and 41**].

*Article 49 (Consensus)*¹*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.

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¹ Consensus reached in plenary at the third session of the Intergovernmental Negotiating Body.