

# Analysis of the Draft Protocol to Eliminate Illicit Trade in Tobacco Products

March 2012





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## Executive Summary

This report analyses the Draft Protocol to Eliminate Illicit Trade in Tobacco Products (ITTP) (hereinafter Draft Protocol), currently under negotiation by an Intergovernmental Negotiating Body established by the Conference of the Parties to the World Health Organisation's Framework Convention on Tobacco Control (WHO FCTC).

The aim of the study was to **assess the impact of the Draft Protocol on the ITTP, identifying strong and weak points and possible improvements.**

The Draft Protocol contains a variety of measures, including ones for **a) the prevention of the ITTP and b) the improvement of law enforcement and international cooperation.** The introduction of preventive measures along with provisions on improved law enforcement and international cooperation is one of the most interesting aspects of the Draft Protocol. Indeed, this approach is **exceptional for an international instrument** mainly dealing with crime/illicit activities and should be welcomed as a positive development. If effectively implemented, the envisaged innovations will increase the transparency of the tobacco markets, allow identification of illicit activities, and reduce the opportunities for the ITTP.

**The analysis conducted for this study highlighted that the initiative for a Draft Protocol is to be welcomed.** Notwithstanding these important premises, **the current version of the text appears to require significant improvements in various respects.**

First, the **scope of the Draft Protocol may be too narrow.** At present, it is not clear whether its most innovative provisions will also apply to key inputs. This would allow better control over the production of tobacco products, enabling prevention of the ITTP from the production stage onwards. The current text of the Draft Protocol does not seem to include key inputs. If this does not change in the final negotiations, an important opportunity to prevent the ITTP may be missed.

Secondly, **the Draft Protocol is hybrid in nature:** on the one hand, it is strictly connected to the FCTC, which mainly deals with health issues; on the other, it draws most of its provisions on international cooperation from the UN Convention on Transnational Organized Crime (UNCTOC). This may duplicate existing measures and ultimately jeopardize international efforts.

Third, **the WHO does not have established experience in the field of international cooperation on criminal matters.** This has already impacted on the negotiations, causing difficulties in identifying a core list of crimes and in coordinating the Draft Protocol with the UNCTOC. Furthermore, it may entail substantial costs for supporting State Parties in the implementation of the Protocol.

Fourth, **the Draft Protocol fails to identify a set of core conducts that all State Parties should criminalize.** This limitation is one of the most serious problems of the Draft Protocol. There is the risk that State Parties may adopt very different solutions as to the criminalization of the ITTP. Given that both Parts IV and V of the Draft Protocol will mostly apply only to criminal offences, there is the risk that the Draft Protocol may prompt *à la carte* law enforcement and international cooperation, with very limited harmonisation among countries.

Fifth, **the actual implementation of the Protocol relates to the ability of governments to invest** in capacity building (both for regulatory and law enforcement agencies), technological equipment and international cooperation. This will probably depend on the availability of adequate financial resources. Developing countries may have difficulties in finding these resources or they may be faced with a trade-off between the fight against the ITTP and other important investments.

Furthermore, given that some states are directly involved in the manufacturing of tobacco products, and given that governments earn important revenues from taxes, different state interests (government revenues from tobacco taxation, citizens' health and public healthcare costs, profits of state-participated tobacco manufacturers) may complicate effective policies against the ITTP.

This report surveys the **existing measures falling within the scope of the Draft Protocol in four countries in different continents, the socio-economic background, and tobacco markets (Canada, Italy, Singapore and South Africa)**. The survey highlights that effective and successful practices have been introduced in several jurisdictions. Notwithstanding the introduction of effective legislation and the improvement of law enforcement measures, the ITTP remains, suggesting that traditional approaches, based on criminal law and law-enforcement, may not be able to solve the problem.

The survey points out that there are still important differences and incoherence among the countries surveyed in regard to nearly all the policy areas examined. The mentioned differences may have affected the negotiations on the Draft Protocol, inducing the removal of the most constraining measures in favour of a more flexible, but less effective, text.

All these issues suggest that the next session of the INB will be of crucial importance. In view of the last session of negotiations, it is important to raise the issue of the actual effectiveness and feasibility of the current version of the Draft Protocol. In particular, given the lack of agreement on a minimum core of ITTP crimes, the entire international cooperation framework may be negatively affected. **Unless radical innovations are made to the current text, there is the risk that the Draft Protocol will contain loopholes and be difficult to implement.**

# 1. Introduction

This report analyses the Draft Protocol to eliminate the illicit trade in tobacco products (hereinafter Draft Protocol), currently under negotiation by an Intergovernmental Negotiating Body established by the Conference of the Parties to the World Health Organisation's Framework Convention on Tobacco Control (WHO FCTC).

The aim of the study is to assess the impact of the Draft Protocol on the ITTP, identifying strong and weak points and possible improvements. This may contribute to the final negotiations on the Draft Protocol, which will take place during 2012.

The ITTP is one of the largest criminal markets in the world, and it may jeopardize tobacco control policies, for example by supplying cigarettes to minors or other protected groups, increasing smoking prevalence through the supply of cheap products, and causing significantly greater damage to human health given the reduced controls on quality standards of illicit products.

This study is a follow-up on the Research Agenda on the ITTP agreed by the participants in the Round Table on Proofing EU Regulation against the Illicit Trade in Tobacco Products, hosted by Università Cattolica del Sacro Cuore, Milan on 5 May 2011. The participants in the Round Table were researchers and policymakers invited to discuss the possible criminogenic effects of tobacco regulation and the application of the crime proofing of legislation to the EU tobacco regulation. Following the Round Table, participants agreed on a Research Agenda on the ITTP (Transcrime 2011). Topic 5 of the Research Agenda recommended "a study [...] on the proposal for a Protocol on illicit trade in tobacco products. The aim should be to assess the level of implementation and effectiveness of the measures in force and to assess the possible impact of the proposed protocol" (Transcrime 2011).

*As a concerned stakeholder in the fight against the illicit trade in tobacco products, Philip Morris International (PMI) welcomed Transcrime's initiative to conduct research on the Draft Protocol to eliminate illicit trade in tobacco products. PMI agreed to contribute to the research, with financial support and the provision of relevant information from a sample of countries. However, Transcrime retained full control and stands guarantor for the independence of the research and its results.*

This report is organized as follows. Section 2 provides some background information about the ITTP, the FCTC, and the Draft Protocol. Section 3 evaluates the impact of the measures currently provided for by the Draft Protocol on the ITTP. Section 4 analyses the existing measures in force and the expected impact of the Draft Protocol on a sample of four countries from different world areas (Canada, Italy, South Africa and Singapore). The conclusions are set out in Section 5. The annexes contain a working version of the Draft Protocol (Annex 1) and the relevant provisions of the FCTC (Annex 2) and of the United Nations Convention on Transnational Organized Crime (UNCTOC, Annex 3).

## 2. Background

This section provides an overview on the illicit trade in tobacco products, the WHO Framework Convention on Tobacco Control, and the negotiations on the Draft Protocol to Eliminate Illicit Trade in Tobacco Products.

### 2.1 The Illicit Trade in Tobacco Products

The tobacco market has a dual nature in that it is composed of a legitimate and an illegitimate part (K. Walsh 2011). The licit and illicit markets vary across countries and regions according to the cultural, social and economic factors affecting the structure of the tobacco market.

The concept of ITTP comprises a number of different activities, ranging from large-scale smuggling to the import of cigarettes beyond legal allowances. These activities vary significantly as to their causes, drivers, actors, *modi operandi* and output. It is important to distinguish the different types of ITTP, particularly in order to identify the most appropriate and efficient solutions. The ITTP includes the following activities:

- **Smuggling:** the unlawful movement or transportation (including online sale) of tobacco products (genuine or counterfeit) from one tax jurisdiction to another without the payment of applicable taxes or in breach of laws prohibiting their import or export (Joossens and Raw 2008). At the lowest level, smuggling is undertaken when an individual imports cigarettes in excess of national legal allowances for personal use. At the highest level, smuggling is the large-scale diversion of tobacco products into the illicit market which may occur between the production and retail phases. Another term often used in literature to indicate smuggled tobacco products is 'contraband'.
- **Counterfeiting:** the illegal manufacturing of a product bearing or imitating a trademark without the owner's consent. Illegally manufactured products can be sold in the source country or smuggled into another country. Excise tax is rarely, if ever, paid on counterfeit products (Joossens and Raw 2008).
- **Cheap Whites or Illicit Whites:** this more recent type of ITTP relates to cigarettes being produced legally in one country but normally intended for smuggling into countries where there is no prior legal market for them. Taxes in production countries are normally paid, while they are avoided/evaded in destination countries (Allen 2011).
- **Unbranded tobaccos:** these are manufactured, semi-manufactured and even loose leaves of tobacco (also known as "chop-chop" (Geis 2005)) being illegally sold by weight (e.g. in large plastic bags, also known as "baggies"), carrying no labelling nor health warnings and consumed in roll-your-own cigarettes or in empty cigarette tubes (R. A. Walsh, Paul, and Stojanovski 2006).
- **Bootlegging:** this consists in legally buying tobacco in a low-tax country and illegally reselling it in a high-tax country. This crime concerns individuals or small groups who smuggle smaller quantities of cigarettes, taking advantage of tax differentials, with the aim of making extra income (Hornsby and Hobbs 2007).
- **Illegal manufacturing:** this concerns cigarettes manufactured for consumption, which are not declared to the tax authorities. These cigarettes are sold without tax and may be manufactured in approved factories or illegal covert operations (Joossens et al. 2010).

Several studies have attempted to **estimate the ITTP** on the basis of different methodologies. The world share of the ITTP on total tobacco consumption was reported to be 6% in 1993, 8.5% in 1995, 10.7% in 2006, 11.7% in 2007 (Shafey et al. 2009; Merriman, Yurekli, and Chaloupka 2000). Given the difficulties of estimating illicit and undercover activities, further assessments are required, and the data and methodologies still need significant improvements. The above results show a fair level of consistency, which reinforces their reliability. There is evidence to suggest that the worldwide retail value of the ITTP may be comparable to the cocaine market. Estimates by a recent UN report on the cocaine market highlighted that the global retail value of consumed cocaine was 85 billion US\$ in 2009 (United Nations Office on Drugs and Crime (UNODC) 2011). A recent study estimated the worldwide government revenue losses from the ITTP at 40,5 billion US\$ in 2007 (Joossens et al. 2009, 2). Considering that the mean of taxes in percentage of retail price is approximately 50%, the global retail value of the ITTP for the same year equals to 81 billion US\$ on the legitimate market.<sup>1</sup>

As for the types of actors involved in the ITTP, existing studies show that **a variety of actors are involved in the ITTP**.

There are widespread allegations of the involvement of organised crime and terrorist groups in the ITTP. Extremely well-organized groups, such as the Italian mafias, have participated in the past and participate today in the ITTP (Griffiths 2004). Since World War II cigarette smuggling has been a crucial activity for the Neapolitan Camorra and the Sicilian Mafia, and it has also been crucial for the development of the so-called 'fourth mafia' (the Apulian *Sacra Corona Unita*) (Arlacchi 1992; Arlacchi 1994; Paoli 2007; Massari 1998).

Although numerous studies have argued that in some cases terrorist groups and networks may be involved in the ITTP (Shelley and Melzer 2008; Shelley and Picarelli 2005; Allen 2011; Coker 2003), there is still a lack of empirical evidence on the actual levels of involvement of organised criminals and/or terrorists in the ITTP. According to the literature, it seems that their participation is more exceptional than routine, particularly if one considers the overall size of the ITTP (von Lampe 2011; Shen, Antonopoulos, and Von Lampe 2010). The bulk of the criminological literature has argued that most ITTP is committed by small groups and/or independent criminal entrepreneurs (von Lampe 2006; Antonopoulos 2007; van Duyne 2003). These studies, conducted particularly at the retail level in the Netherlands, Germany, Greece and the UK, suggest that large and stable groups/networks are rare. When they exist, as in the case of large networks mainly composed of Vietnamese nationals in the Berlin area (von Lampe 2002), there is limited or no evidence of the creation of cartels or of violent mafia-type groups.

Contrarily, other studies have included the counterfeiting and smuggling of tobacco products among the main proceeds of traffickers (Seely 2002). These activities are related to drug trafficking, often because of the global scale of the two activities (Coker 2003). Criminal organizations are also reported to smuggle tobacco products across national borders (van Duyne, Von Lampe, and Passas 2002). As for counterfeiting, criminal organizations are reported to be involved in the production and manufacture of illegal cigarettes and loose tobacco (von Lampe 2005). As reported by OLAF, the European Anti-Fraud Office, criminal organizations (more or less structured) are often involved in managing the store where illicit tobacco is worked for the tobacco black market, particularly in Eastern Europe (Kegö, Leijonmarck, and Molcean 2011).

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<sup>1</sup> The mean tax proportion of final retail price was calculated on data from the Tobacco Atlas 2009 (Shafey et al. 2009, 105–113). The mean share is not weighted for the population, but the mean tax share for the first five countries in the world by population (China, India, USA, Indonesia and Brazil) is 49.75%, suggesting that the weighted mean share should not vary significantly. However, some world regions have significantly higher mean tax proportions. For example, in the European Union it amounts to 79.6% (European Commission 2011, 6).

The tobacco industry has also been cited as indirectly contributing to the smuggling of tobacco products, and in many countries governments have taken legal action for the fiscal losses caused by the exploitation of transit trade resulting in the smuggling of tobacco products (Beelman et al. 1992; Joossens and Raw 1998; Beare 2003; von Lampe 2006). For years, the industry's counter-argument was that it could not be required to control the product after its sale (Hornsby and Hobbs 2007). In recent years, however, the industry has increasingly agreed to monitor its sales and their destinations, and it has signed a number of binding agreements, particularly in the European Union (Framework Convention Alliance 2008a).

In light of the above considerations, it is clear that the ITTP is a serious problem for the effectiveness of tobacco control policies, for government revenues, and for the legitimate market. Its boundaries are not confined to organized crime and terrorism, and this is one of the factors which have prompted negotiation of the Draft Protocol as an international agreement separate from the main treaties on e.g. organized crime, corruption, or terrorist activities.

## ***2.2 The Framework Convention on Tobacco Control and the Draft Protocol***

The WHO Framework Convention on Tobacco Control (hereinafter FCTC) is a Convention adopted by the World Health Assembly in May 2003 and which entered into force on 27 February 2005. It has been ratified by 168 out of the 174 Signatories (February 2012).<sup>2</sup>

**The aim of the Framework Convention** is to respond to the globalization of the tobacco epidemic by reaffirming the right of all people to the highest standard of health. The strategy of this Convention is to address addictive substances and to assert the importance of reducing both the demand for and supply of tobacco products.

Notwithstanding its broad scope, **the FCTC also addresses the ITTP**. In the preamble the Parties recognize "that cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including smuggling, illicit manufacturing and counterfeiting". Furthermore, the very first definition provided by Article 1 ("Use of terms") of the Convention defines illicit trade as "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". Finally, Article 15 of the FCTC states that the Parties recognize the importance of eliminating the ITTP.<sup>3</sup> To achieve this objective, the following paragraphs of Article 15 provide a number of obligations and recommendations (See Annex 2).

**Article 15 of the FCTC is also the legal basis of the Draft Protocol**, as an agreement additional to the Convention and specifically dedicated to the ITTP. In July 2007 the Conference of the Parties (COP) established an Intergovernmental Negotiating Body (INB) for drafting a Protocol to Eliminate Illicit Trade in Tobacco Products, inviting all Parties to participate.

**The negotiations on the Draft Protocol were conducted by the INB in four sessions.** The first session was held on 11-16 February 2008. Following this session, the Chairperson of the INB delivered a first draft text (FCTC/COP/INB-IT/2/3). The second session of the INB, held on 20-25 October 2008, started the negotiations on the basis of the Chairperson's text for a Protocol on Illicit

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<sup>2</sup> Framework Convention on Tobacco Control, May 21, 2003, 42ILM518 (2003). Adopted by WRA Res. 56.1 (May 21, 2003). Convention, WHO press releases and fact sheets are available at: [www.who.int/tobacco](http://www.who.int/tobacco).

<sup>3</sup> "The Parties recognize the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to sub-regional, regional and global agreements, are essential components of tobacco control".

Trade in Tobacco Products (FCTC/COP/INB-IT/2/3). The third session of the INB was held on 28 June-5 July 2009. At the end of this session the INB decided to establish two drafting groups to work on the draft provisions of the Protocol in the period before its fourth session. The first drafting group made some amendments to the draft text of articles 5, 6, 8, 9, 10, 11 and 11bis, while the other group drafted articles 12, 13, 14 and 30, 31 and 32 (Decision FCTC/COP/INB-IT/3).

The **fourth session** was held on 14-21 March 2010. The negotiations took account of the proposals of the two drafting groups. Although consensus was gradually achieved on some provisions, final consensus on the Draft Protocol was not achieved. The INB recommended the COP to consider the issue at its fourth session (Punta del Este, Uruguay, 15-20 November 2010). The COP, while acknowledging the progress made, confirmed that further negotiations were necessary. Consequently, it extended the mandate of the INB for a further session and also established an informal working group with the mandate of elaborating articles on supply chain control and other matters.<sup>4</sup> The informal working group met twice in Geneva (4-8 July and 19-23 September 2011) and submitted a final report with specific proposals (FCTC/COP/INB-IT/5/3).

The **fifth and last meeting** of the INB is planned for 29 March-4 April 2012 (FCTC/COP/INB-IT/5/1). This session will be of particular importance because no further sessions are currently envisaged. The COP has requested the INB to submit a final Draft Protocol to the fifth session of the COP (to be held from 12 to 17 November 2012 at COEX Convention Centre in Seoul, Republic of Korea). Therefore, the INB will work on issues raised at the fourth negotiation session of the COP and on the proposals made by the informal working group, with the aim of achieving final consensus on the Draft Protocol (See FCTC/COP/INB-IT/5/3).

**The final version of the Protocol may be adopted at the end of 2012.** Thereafter, it would be submitted for signature and ratification by the countries. According to Article 47 of the Draft Protocol, it would enter into force “on the 90<sup>th</sup> day following the date of deposit of the 40<sup>th</sup> instrument of ratification [...]”. At present, however, it is hard to foresee the outcome of the negotiations. Although some progress has been made, finalization of the Draft Protocol would require significant improvements on the text in its present form.

## 2.3 Overview of the Draft Protocol

The **aim of the Draft Protocol** is to prevent and combat all forms of ITTP, addressing the ITTP and related criminal activities through the introduction of new measures and technologies in the tobacco market and the improvement of international cooperation.<sup>5</sup> Given the implications of these aims, both domestically and internationally, another purpose of the Draft Protocol is to enhance law enforcement measures against the ITTP. Overall, the Draft Protocol introduces both preventive and law enforcement measures against the ITTP.

As outlined in section 2.2, **there is currently only a draft text of the Protocol.** However, consensus on some provisions has already been reached during the negotiations.<sup>6</sup> At the same time, it was acknowledged during the fourth Session of the COP that some parts still needed further discussion before consensus could be reached. Moreover, the current draft texts of some other articles still provide for different options, which will be reduced to one during future

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<sup>4</sup> These include the financing method of the Draft Protocol; the need to retain in the Draft Protocol the existing provisions on mutual legal assistance and extradition; the protection of personal data in the Draft Protocol; relations with other relevant agreements, such as the UNCTOC. See, FCTC/COP4(11).

<sup>5</sup> Revised Chairperson’s text on a protocol on illicit trade in tobacco products, and general debate. Legal advice on the scope of the Protocol, third session, May 2009.

<sup>6</sup> For more details about the different provisions and the consensus in the negotiations see FCTC/COP/INB-IT/5/1 (annotated).

negotiations.<sup>7</sup> The last version of the Draft Protocol was drafted after the fourth session of the INB (held on 14-21 March 2010). In the meantime, however, the informal working group has delivered further draft proposals for some articles.<sup>8</sup> Therefore, the **most recent version consists of the combination of the text from the INB and the proposals of the informal working group**. This text is reported in Annex 1.

The text of the Draft Protocol is divided into ten parts: I Introduction; II General obligations; III Supply chain control; IV Offences; V International cooperation; VI Reporting; VII Institutional arrangements and financial resources; VIII Settlement of disputes; IX Development of the protocol; X Final provisions.

Part III aims to develop **specific preventive measures** against the ITTP, including e.g. licensing, tracking & tracing systems and security measures, with the goal of promoting their universal application.

Parts IV and V are more concerned with the **investigation, prosecution and sanctioning of the ITTP and international cooperation on criminal matters**. In particular, Part IV provides a list of unlawful conducts and elaborates on the definition of the ITTP provided by Article 1 of the FCTC and of the Draft Protocol;<sup>9</sup> it also contains a number of provisions as to e.g. the liability of legal persons, the sanctions for natural and legal persons. Part V contains obligations for international cooperation, ranging from information sharing to extradition and mutual legal assistance.

Part VI consists only of Article 34, which obliges State Parties to report periodically to the Convention Secretariat on the implementation of the Draft Protocol. Lastly, Parts VII to X contain provisions on collaboration, implementation and the ratification on the Draft Protocol.

**The Draft Protocol is strictly related to two other conventions.** Firstly, the provisions of the Draft Protocol often cross-refer to the FCTC.<sup>10</sup> This is not surprising, given the ancillary nature of protocols. Secondly, the Draft Protocol often refers to the **UNCTOC** as well, particularly for provisions relating to criminal law and procedure and international cooperation.<sup>11</sup> This is the result of the particular nature of the Draft Protocol, a protocol to a convention mainly dealing with health issues, but with the main focus on criminal activities. Hence, the Draft Protocol frequently refers to the UNCTOC, which is recognized as a leading international treaty establishing a general framework for the fight against organized crime (McClellan 2007; Boister 2010).<sup>12</sup> For ease of consultation, the referred provisions of both the FCTC and the UNCTOC are reported in Annexes 2 and 3, respectively.

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<sup>7</sup> See for example Article 2 (“*Relationship between the Protocol and other agreements and legal instruments*”), Article 15 (“*Search of premises and seizure of evidence*”), Article 16 (“*Confiscation and seizure of assets*” or “*Seizure and confiscation*”).

<sup>8</sup> See FCTC/COP/INB-IT/5/3. In particular, the articles mentioned are Article 5 (“*Licence, equivalent approval or control system*”), Article 6 (“*Due diligence*”), Article 8 (“*Record-keeping*”), Article 9 (“*Security and preventive measures*”), Article 10 (“*Sale by Internet, telecommunications or any other evolving technology*”), Article 11 (“*Free zones and international transit*”), Article 11bis (“*Duty free sales*”).

<sup>9</sup> “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”.

<sup>10</sup> The Draft Protocol explicitly refers to the following articles: 2 – “*relationship between convention and other agreements*”, 5 – “*general obligations*”, 6.2 about the implementation on taxes and the restrictions of sale, 13 – “*tobacco advertising, promotion and sponsorship*”, 23 – “*Conference of the Parties*”, 26 – “*final resources*”, 27 – “*settlement of disputes*”. The text of these Articles is reported in Annex 2.

<sup>11</sup> United Nations Convention against Transnational Organised Crime, General Assembly Resolution 55/25, 15 November 2000. The draft Protocol explicitly refers to the following articles: 5 – “*criminalization of participation in an organised criminal group*”, 6 – “*criminalization of the laundering of proceeds of crime*”, 8 – “*criminalization of corruption*”, 10 – “*liability of legal persons*”, 11 – “*prosecution, adjudication and sanctions*”, 12 – “*confiscation and seizure*”, 13 – “*international cooperation for purposes of confiscation*”, 15 – “*jurisdiction*”, 16 – “*extradition*”, 18 – “*mutual legal assistance*”. The text of these Articles is reported in Annex 3.

<sup>12</sup> The implications of this particular nature are discussed below in section 3.3.

## 3. Analysis of the Draft Protocol

This section analyses the potential impact and effectiveness of the Draft Protocol. In particular, it considers the main measures envisaged by the Protocol and discusses the problems related to the inclusion of key inputs within its scope (sections 3.1 and 3.2). Furthermore, it analyses the implications of some specific provisions (subsection 3.3). Finally, subsection 3.4 evaluates the enforceability of the Draft Protocol.

### 3.1 The measures of the Draft Protocol for the prevention and control of ITTP

The Draft Protocol contains a variety of measures, including **measures for a) the prevention of the ITTP and b) the improvement of law enforcement and international cooperation**. These range from licensing to supply chain control and from the introduction of offences and penalties to the enhancement of law enforcement and international cooperation (see Table 1).<sup>13</sup>

**Table 1. Main measures provided by the Draft Protocol to eliminate ITTP.**

Provisions	Measures	Nature
<b>Art. 5</b>	Licensing	Prevention
<b>Art. 6</b>	Customer identification and verification	Prevention
<b>Art. 7</b>	Tracking and Tracing	Prevention
<b>Art. 8</b>	Record-keeping	Prevention
<b>Part IV</b>	Offences (Illicit activities, penalties, investigation and prosecution)	Law enforcement
<b>Part V</b>	International cooperation	Law enforcement

#### 3.1.1 Preventive measures

The main measures to prevent the diversion of tobacco products into the illicit trade are:

- **Licensing** (Article 5) is a requirement for all the participants in the supply chain, such as manufacturers and primary processors, commercial importers and exporters, wholesalers, brokers, distributors. The provisions may be extended also to manufactures of equipment and key inputs. The Draft Protocol requires Parties to “establish a competent authority to issue, renew, suspend, revoke and cancel licenses” and “to apply control and verification measures to the international transit of tobacco, tobacco products and manufacturing equipment”. Licensing should contribute to the prevention of the ITTP, enabling the identification and control of legitimate market operators.

<sup>13</sup> See Parts III, IV and V of the Draft Protocol.

However, the literature has emphasised that “licensing and regulatory controls were only as effective as the enforcement capabilities underpinning these policies. As demonstrated by some of the case studies, if retailers or other entities in the tobacco market are not convinced that they will ever be caught, or sufficiently punished for breaking the law, licensing regimes prove futile” (Sweeting, Johnson, and Schwartz 2009, 28). Therefore, the actual effectiveness of these measures will mainly depend upon their enforcement in practice.

- **Customer identification and verification** (Article 6) is a further element in the regulation of the tobacco supply chain. The aim of this requirement is to ensure that all the participants in the supply chain conduct due diligence with respect to the customers and contractors with whom they transact. This includes obtaining information about their identity and business dealings, monitoring their activities to detect transactions that do not appear commensurate with product demand, reporting any suspicious transactions and terminating business relationships where relevant laws have been broken. Measures for customer identification and verification are likely to contribute to the establishment of transparent practices in the tobacco market and allow the authorities to follow suspicious transactions, which could lead to improved detection of illicit trafficking. Similar practices have been introduced in the financial sector with the aim of preventing and detecting money-laundering. If implemented properly, these measures may increase transparency, without establishing unreasonable obligations on legitimate market operators (Joossens and Raw 2008).

- **Tracking and tracing** (Article 7) is a system established by Parties and applied on all tobacco products and manufacturing equipment. For this, a *unique, secure and non-removable marking* are required to be affixed to all master cases, cartons and packs of cigarettes and any other tobacco products. These markings should enable the competent authorities rapidly to obtain information on the date and location of manufacture, the first customer, the identity of any known subsequent purchaser, the intended market of retailing, selling, etc. of the tobacco product. This information should be recorded and uploaded to a database accessible to national law enforcement agencies (Framework Convention Alliance 2008b). The effectiveness of tracking and tracing measures may be high, provided that it is introduced in a significant number of countries or, at least, used for any international operation. In particular, it may provide important support in the identification of the source of international diversion of tobacco products. For this reason, it would be important to implement tracking and tracing systems in countries with relatively low taxation on tobacco products or with particularly important duty-free markets. For other countries (high taxation countries) these systems may prevent round-tripping smuggling, i.e. the fake exportation of tobacco products to benefit from the export exemption and the subsequent reintroduction of the products in the same market. Furthermore, attention should be paid to creating a technological common standard for tracking and tracing systems, thus enabling swift interconnection of different databases upon necessity. If implemented only for minor markets or sectors, it may displace illicit trade towards less controlled distribution channels (McEwen 2011).

- **Record-keeping** (Article 8) obliges all the legal persons involved in the supply chain to keep records of all the transactions in which they participate. This measure should be effective in the identification of suspicious transactions, particularly in conjunction with the measures mentioned above. It does not seem to impose excessively onerous obligations upon legitimate market operators. Record-keeping should be applicable to all participants in the supply chain, so as to avoid loopholes in the information available which may jeopardize its usefulness (Joossens and Raw 2008).

- **Security and preventive measures** (Article 9) apply to all the participants in the supply chain. These are required to take measures to prevent the diversion of tobacco products into illicit trade channels, including restrictions on acceptable methods of payment and obligations not to supply products that exceed legitimate demand (Johnson 2012). These measures are supposed to strengthen the prevention of the ITTP through the involvement of private parties participating in the

supply chain. They are based on previous experiences of national and regional agreements between public authorities and the tobacco industry. These experiences provide new opportunities for cooperation, especially in the prevention and control of large-scale smuggling and counterfeiting. Their potential for success, however, largely depends on the practical implementation and on the level of cooperation between law enforcement agencies and the industry, as well as on the actual enforcement of the agreements by competent authorities (Sweeting, Johnson, and Schwartz 2009).

- **Enhanced enforcement measures and international cooperation** are general obligations for the Parties to cooperate and mutually exchange information and best practices, also including international organizations (Allen 2011). The effectiveness of those measures in the fight of ITTP will depend upon the level of implementation of the Draft Protocol among the State Parties and upon the eventual ratification of the UNCTOC definitions of illicit conducts. As demonstrated by some of the case studies, the countries should develop a comprehensive enforcement strategy to tackle illicit tobacco products (Allen 2011).

### 3.1.2 Law enforcement measures

Part IV (Article 12-19) contains various provisions relating to **unlawful conducts, including criminal offences, and their investigation, prosecution and sanctioning**. In particular, Article 12 defines a number of illicit conducts. This Article performs a fundamental function in the framework of the Draft Protocol, since it provides a practical/operational definition of the concept of ITTP as provided by Article 1 of the FCTC and of the Draft Protocol. Subsequent articles lay down a number of measures of substantive and procedural criminal law. Particularly, Article 15 (*Search of premises and seizure of evidence*) requires enablement of the search of premises and the seizure of evidence; Article 16 (*Confiscation and seizure of assets* or *Seizure and confiscation*) provides for the confiscation and seizure of illicit goods and identification of criminals, for the tracing and freezing of any property, equipment and assets, including proceeds of crime; Article 17 (*Seizure payments*) allows authorities to recover unpaid taxes and duties from the producer or manufacturer of seized products. Finally, Article 18 (*Destruction* or *Disposal*) ensures the destruction of confiscated property, the use of special investigative techniques, such as controlled delivery, electronic and other forms of surveillance and undercover operations for enhancing law enforcement capacity. It also ensures public education and awareness-raising campaigns on the dangers produced by the consumption of illicit tobacco products.

## 3.2 The inclusion of key inputs in the scope of the Draft Protocol

The introduction of the above-discussed preventive measures is one of the most interesting aspects of the Draft Protocol. These may significantly impact on the tobacco market (e.g. record-keeping, tracking and tracing, due diligence). If they are finally adopted, the Draft Protocol will go beyond a merely enforcement-based approach. This is exceptional for an international instrument mainly dealing with crime/illicit activities, and it should be welcomed as a positive development. If effectively implemented, the innovations envisaged will increase the transparency of the tobacco markets, allow identification of illicit activities, and reduce the opportunities for the ITTP.

Notwithstanding the positive attempt to achieve a better regulation of the tobacco market, the scope of the Draft Protocol is limited only to tobacco products and manufacturing equipment. This may exclude other elements whose control may significantly improve prevention of the ITTP. For example, several sources have advocated control over the so-called “key inputs” as an effective

way to reduce the risk of the ITTP (e.g. cigarette paper, acetate tow, cigarette filters and reconstituted tobacco) (Framework Convention Alliance 2010a; Sweeting, Johnson, and Schwartz 2009, 39; Johnson 2012) in the Draft Protocol. These elements should be subject to the preventive measures of licensing (Article 5), customer identification and verification (Article 6), record-keeping (Article 8) and security and preventive measures (Article 9).

Interestingly, the Chairperson's text did not explicitly mention key inputs (FCTC/COP/INB-IT/2/3), but reference to "raw materials and inputs" was subsequently included in the Draft Protocols during the negotiations (FCTC/COP/INB-IT/3/5 Rev.1). An advice requested by the INB on the legal grounds for the extension of the scope of the Draft Protocol argued that "material elements that can be a key or essential component of illicit trade in tobacco products could reasonably come within the scope of the future protocol" (FCTC/COP/INB-IT/3/INF.DOC./6, p. 5). This confirms that there should be no legal barriers to the inclusion of key inputs in the Draft Protocol. Nevertheless, subsequent negotiations and revisions of the Draft Protocol gradually excluded explicit mention of key inputs. The main argument for this was that "there are no "key inputs" that are used only for the manufacture of tobacco products" (FCTC/COP/INB-IT/3/INF.DOC./2). Eventually, the draft provisions for Article 5, 6 and 9 elaborated by the informal working group deleted raw material and inputs from the text, except for Article 5 on licensing requiring the Meeting of the Parties (MOP) to consider appropriate action in respect of [...] key inputs [...] after having performed evidence-based research five years after the entry into force of the protocol" (FCTC/COP/INB-IT/5/3 p.3).

Overall, the current version of the Draft Protocol does not seem to include key inputs within the scope of the measures provided for tobacco products and tobacco manufacturing equipment. If the final version of the Draft Protocol retains the present solution, an important opportunity to prevent the ITTP may be lost. While some key inputs may not be exclusively produced for the tobacco market, there are clearly some exceptions. For example, ready-made cigarette filters are obviously used exclusively in the manufacture of tobacco products; similarly, the bulk of acetate tow (the main component of cigarette filters) is currently employed in the tobacco production industry. In particular, "more than 80% of world production is used in the manufacture of cigarettes. There are also only a handful of companies worldwide that manufacture acetate tow; seven are members of the Global Acetate Manufacturers Association (GAMA)" (Framework Convention Alliance 2010b, 4).

### **3.3 Expected impact of specific measures of the Draft Protocol on ITTP**

This subsection analyses the measures envisaged by the current version of the Draft Protocol and discusses the issues arising from specific provisions in relation to their effectiveness and possible impact on the ITTP.<sup>14</sup> *Part I Introduction*

*Article 1 – Use of terms.* The present formulation of Article 1 seems to lack some important definitions. In particular, it should include the definition of key inputs and any other main terms which are used recurrently in the Draft Protocol. As discussed in subsection 3.2 above, the inclusion of key inputs within the scope of the preventive measures of the Draft Protocol is still debated. For the successful prevention of the ITTP, however, it would be important for at least some key inputs, e.g. cigarette filters or acetate tow, to be subject to the measures of the Draft Protocol. In this case, they should also be appropriately defined in Article 1.

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<sup>14</sup> See Annex 1 for the full document.

Conversely, Article 1 provides a number of definitions which are not mentioned any further in the Draft Protocol. These are “Serious crime”, “Carton”, “Master Case”. It should be noted that definitions or specifications as to the use of terms should be reduced to the minimum in international treaties, since they frequently cause difficulties during the negotiations and, once adopted, they may be hardly compatible with national laws in practice. Accordingly, it appears advisable to remove the unnecessary definitions from Article 1 of the Draft Protocol.

*Article 2 – Relationship between the Protocol and other agreements and legal instruments.* Currently, there are multiple options for Article 2 of the Draft Protocol. The main issue concerning this provision is the relation between the Protocol and the United Nation Convention against Transnational Organized Crime (UNCTOC). As already mentioned, the Draft Protocol has a special nature: it is a protocol to the FCTC, whose main focus is on health issues, but it mainly deals with illicit/criminal activities. This implies that other treaties may be the main references for the provisions dealing with criminal law, law enforcement and international cooperation. The UNCTOC has served as the main reference for a number of reasons, including its “framework nature” (there are already three Protocols to the UNCTOC dealing with the smuggling of migrants, trafficking in persons, and trafficking in firearms<sup>15</sup>) and its extensive ratification.<sup>16</sup> However, a number of factors make this connection complicated. First, the policy context is different. The WHO is a specialised UN agency, and in practice it is an autonomous intergovernmental organization whose mandate includes tobacco control which, in turn, comprises the ITTP; conversely, the United Nations Office on Drugs and Crime (UNODC) is a UN body with a different status (it is classified among “Programmes and Funds”). Its competences have never included the ITTP (Boister 2010, 365). Second, the ITTP does not always involve criminal activity (e.g. bootlegging) nor organised crime groups (see above, section 2.1). Given that the UNCTOC deals with serious crimes, defined as any “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty” (Article 2 b) UNCTOC), “where the offence is transnational in nature and involves an organized criminal group” (Article 3 paragraph 1 UNCTOC), its scope may be too narrow to include all the possible forms of the ITTP. Third, the WHO does not seem to have the legal and operational expertise necessary to deal with international cooperation against illicit activity. To ensure support to the implementation of the Draft Protocol it will have to build new capacity and sustain further costs, currently estimated at approximately 5 million US\$ (Boister 2010, 390; Liberman et al. 2011).

These factors made it particularly difficult to strike a balance among the Draft Protocol, the FCTC, and the UNCTOC. During the negotiations, different options were discussed, including mandatory, flexible or selective reference to the UNCTOC. The main problem revolved around the only partial overlap among the State Parties to each treaty (e.g. Switzerland and the United States of America are not Parties to the FCTC), and namely the risk of imposing a further burden on the Parties to the UNCTOC which are not party to the Protocol. Arguably, a cross-reference to the provisions of the UNCTOC would have implied a significant reduction of financial costs thanks to the support of the UNDOC. However, it is possible that the direct reference to the UNCTOC would have required an agreement on a list of serious forms of ITTP, which the Parties should have agreed to criminalize and punish with more than four years of imprisonment. As further discussed in this report, this did not occur (See below, section 3.3.3).

At present, the link between the Draft Protocol and the UNCTOC is made by an explicit reference in one of the possible versions of Article 2 of the Draft Protocol to the application of Articles 5, 6,

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<sup>15</sup> General Assembly resolutions 55/25 of 15 November 2000 and 55/255 of 31 May 2001. Official texts are available at <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>.

<sup>16</sup> As of February 2012, the UNCTOC has 166 Parties.

10, 11, 12, 13, 15, 16 and 18. In addition, a number of provisions in Part V are drawn from the corresponding version of the UNCTOC. This is a sort of a “soft” reference to the UN Convention, which grants maximum flexibility to the State Parties, but partially duplicates existing provisions on international cooperation and fails to address the crucial issue of the identification of a core set of criminal offences.

### **3.3.2 Part III Supply Chain Control**

*Article 5 – Licence, equivalent approval or control system.* Article 5.1 requires State Parties to implement a licensing system for the manufacturing, import and export of tobacco products and manufacturing equipment. This may entail significant implementation costs for the Parties for the introduction of a number of requirements. Firstly, licensing will impose costs on market operators, which must incur the expense of registration and inspection, and also for governments, which must set up a system eventually requiring important investments of financial and human resources. Countries where the ratification of the Draft Protocol may bring significant changes are possibly those countries with a low level of law enforcement against the ITTP, probably due to limited resources. The new system may create risks of the forgery of licenses or falsification of the requirements by market operators who cannot afford the legal implementation of the licensing system or whose applications are rejected by the authorities. Secondly, the creation of a national authority with important discretionary powers as to licensing may also create unwanted risks of regulatory capture or corruption. Thirdly, the licensing systems may provide loopholes and/or inconsistencies among different national regimes, which would further increase the costs for the industry.

Furthermore, Article 5.2 enables Parties to implement, if considered appropriate, licensing for further activities related to tobacco products (retailing, growing, transporting products of manufacturing equipment, wholesaling, brokering, warehousing or distributing products or equipment). The current text excludes from licensing “traditional small-scale growers, farmers and producers”. This provision may be risky and does not appear necessary. It is risky because it may create exceptions to the licensing regime which may be exploited for illicit purposes, also considering that small-scale market operators are particularly involved in some forms of ITTP such as counterfeiting and illicit whites (see above 2.1). Furthermore, it should be noted that paragraph 2 is optional and gives the Parties discretionary powers to implement licensing as far as feasible and appropriate within their jurisdiction. Accordingly, an explicit waiver to licensing appears superfluous (Framework Convention Alliance 2010c, 21, 22).

*Article 6 – Due diligence or Customer identification and verification.* The current version of this Article does not seem to pose any particular problem. However, the version resulting from the fourth session of the INB requires that the implementation of the measures should be done “avoiding any unnecessary burden, in particular on small or medium-sized businesses and on Parties’ administrations”. Although minimization of the burden on enterprises and institutions appears reasonable, the focus on small or medium-sized enterprises seems unjustified. In particular, the implementation of a similar formula in the domestic legislation may create special regimes or exceptions which may be ultimately exploited for illicit purposes.

*Article 7 – Tracking and Tracing.* This system, already implemented in some national markets by tobacco companies, is likely to produce a crucial improvement in the identification of distribution channels and flows.

The application of a “unique, secure and non-removable marking”, as required by the Draft Protocol, does not seem to exclude the possibility that paper stamps or similar devices may be used. In general, even the most refined paper-based stamps can be more easily counterfeited (for a review of existing technologies and methods, see FCTC/COP/INB-IT/4/INF.DOC./1). The Draft Protocol should require State Parties to adopt digital marking systems, preferably directly printed on cigarette packs (Allen 2011, 22, 23).

*Article 8 – Record-keeping.* Paragraph 4 provides that State Parties may subject retailers and growers to record-keeping obligations. However, this may exclude “traditional growers working on a non-commercial basis”. Although the intent of the provision should be to avoid excessive burdens on small growers, the explicit exception should be removed from the text. Significantly, the provision is already optional (“If feasible, each Party...”) and clearly refers to domestic implementation measures (“in accordance with its national laws and regulations”). Explicit exceptions may create incentives for abuses and frauds committed to avoid any record-keeping obligation.

*Article 9 – Security and preventive measures.* This provision introduces a system of preventive controls, obliging market operators to report specific operations. This is certainly ambitious, but the obligations imposed should be clear. For this reason, the concept of “suspicious transactions” should be specified better in the Draft Protocol. Furthermore, it would be important to provide appropriate shields against the unwanted consequences of such reporting (e.g. civil or criminal legal actions) for the reporting market operators. Accordingly, the Draft Protocol may require State Parties to ensure effective protection similarly to the best practices adopted for whistle-blowers in the field of corporate crimes.

*Article 11 – Free zones and international transit.* The Draft Protocol does not apply a particularly incisive regulation to free trade zones. This may be problematic, since free trade zones are frequently exploited for illicit purposes (Allen 2011). The special regimes that they enjoy make them attractive not only for legal businesses but also for illegal activities. In regard to the ITTP, free trade zones may become hubs for the movement of illicit goods (including cigarettes) around the world (Allen 2011; FATF 2010). Owing to the relaxed controls and streamlined administrative procedures characterizing these areas, criminals may smuggle tobacco products or deal in counterfeit goods, disguising their origin or changing their final destination. They can also complete the production of unfinished goods within the zone – including the use of false trademarks or the repackaging of products – and subsequently re-export the so-counterfeit goods (Cooper 2010). It would be advisable to apply all the measures provided by the Draft Protocol to free trade zones, without exception.

### **3.3.3 Part IV Offences**

*Article 12 – Unlawful conduct including criminal offences.* The current version of Article 12 gives State Parties discretion as to the regulation of the unlawful conducts related to the ITTP. According to paragraph 2, State Parties are free to determine which conducts among the ones listed in paragraph 1 will constitute criminal offences. Paragraphs 3 and 4 establish more stringent requirements as to the criminalization of money-laundering and a number of specific conducts (participation in, association in, conspiracy for the purpose of committing, attempting, aiding, abetting or inciting the commission of an offence). This provision was the object of long debates during the negotiations. While the Chairperson’s draft text included a detailed list of conducts to be

criminalized, during the Third Session of the INB, the list was criticized and consensus emerged in favour of the current single list of unlawful activities. The main reasons for this choice were concern for the excessive length of the list of offences, which may have caused over-criminalization, and the differences among national legislations as to what conducts would be considered criminal offences. The Chair repeatedly stressed the necessity of a short list of offences, but the Parties did not take up this suggestion (FCTC/COP/INB-IT/3/REC/1).

Overall, the Draft Protocol appears relatively weak in relation to the criminalization of the ITTP. Remarkably, the negotiations have not produced a core list of unlawful conducts which should be criminalized by State Parties. This weakness may have significant impact on the practical effectiveness of the Draft Protocol.

Firstly, the current solution prevents transmission of a very important message, i.e. that some forms of ITTP are extremely dangerous activities, with major consequences for human health, government revenues, and tobacco control policies; and for these reasons they should be treated as criminal offences. Although the Preamble of the Draft Protocol clearly acknowledges the magnitude and importance of the ITTP, the current text appears to convey a different message. This is particularly problematic, because one of the main issues concerning the ITTP is that the general public rarely perceives it as a dangerous illicit activity. Similarly, law enforcement agencies and courts tend to give priority to other offences, with significant impacts on the actual levels of enforcement. **The Draft Protocol may miss an important opportunity to create international consensus on a common core of ITTP crimes.** The identification of a set of intentional illicit conducts as criminal offences would send a clear, unambiguous message as to the real nature of the ITTP.

Secondly, the **current solution leaves excessive discretionary powers to State Parties.** Some degree of discretion and flexibility is welcome in consideration of the range of conducts included in the concept of ITTP. However, without a common agreement on a core set of criminal conducts, it is likely that a medley of national solutions will arise. This may be undesirable for two reasons. The first is that it may lead to overcriminalization; some countries may opt for extensive criminalization, creating problems for investigation and prosecution due to a lack of staff and resources. The second reason is that other countries may avoid any criminalization, with the result that even the most extensive and dangerous forms of ITTP may not be regarded as criminal offences, including large-scale smuggling and counterfeiting, massive tax evasion schemes, and obstruction/interference with the prevention and detection of the ITTP. In practice, this may stimulate some governments not to take action against the ITTP – or even, in the worst possible scenario, support it indirectly.

Thirdly, the current solution may result in a range of different criminal provisions among the State Parties. This disparity could create **frictions and inconsistencies which significantly affect international cooperation** (Boister 2010). This is particularly important given that the ITTP is frequently international, or transnational, in its nature. The Draft Protocol subjects mutual legal cooperation and other measures to a number of conditions (see below 3.3.4). These provisions will evidently encounter significant difficulties whenever the scope of criminal laws on the ITTP varies considerably between the Parties involved. Given that the Draft Protocol does not even require the criminalization of a common core of criminal activities, problems, conflicts and frictions may occur also for the most dangerous forms of ITTP.

Lastly, Article 12 has an impact on the entire Draft Protocol. Reference to Article 12 para 2 (i.e. to the unlawful conducts regarded as criminal offences according to national legislations) or to the “offences established in accordance to this Protocol” are very frequent in the other provisions of the Draft Protocol, concerning both domestic and international cooperation measures. These references perform a crucial function in defining the scope of other important measures, including e.g. the liability of legal persons, penalties and/or sanctions, search of premises, confiscation, law

enforcement cooperation, mutual legal assistance, extradition. In fact, Article 12, and particularly the provisions on criminal offences, constitutes one of the cornerstones of the Draft Protocol. **The current provision leaves such discretion to State Parties, and this may deprive the Draft Protocol of most of its potential in practice.**

*Article 13 – Liability of legal persons.* The liability of legal persons appears to be an important means with which to counter the ITTP, given the records on the involvement of legitimate enterprises and other legal persons in the illicit trade. Unfortunately, this provision may have different impacts on the various national systems, because it applies only to the offences established in accordance with Article 12 of the Draft Protocol. As already mentioned, this Article gives State Parties almost complete discretion as to the conducts to be regarded as criminal offences. This, in turn will affect the liability of legal persons. Overall, there is a risk that this provision may prove particularly weak in effectively countering the ITTP.

*Article 16 – Confiscation and seizure of assets.* There is not yet consensus on the text of this provision. If, however, the final text applies only to the offences established in accordance with Article 12, the provision may be affected by the variety of solutions adopted by the national legislators.

### **3.3.4 Part V International Cooperation**

Part V contains important rules for improving international cooperation against the ITTP. Most of the provisions have been directly inspired by the corresponding provisions of the UNCTOC. However, unlike this Convention, the scope and extent of international cooperation will be extremely flexible, and they will ultimately depend on national legislative options as to the criminalization of one or more of the activities listed in Article 12. As already mentioned, this extreme flexibility is likely to create serious complications in the everyday practice of international cooperation against the ITTP. The problems already discussed concerning Article 12 (see above 3.3.3) are largely applicable to all the provisions on international cooperation in the Draft Protocol.

*Article 30 – Mutual legal assistance.* As already mentioned, this provision applies to the offences established in accordance with Article 12 of the Draft Protocol. Given the discretion in establishing criminal offences relating to the ITTP, the practical improvement of mutual legal assistance will depend on the national approaches in criminalizing specific conducts of the ITTP. In addition, Article 30 paragraph 14 allows a Party to refuse assistance if the requested actions would be impossible under domestic legislation. Furthermore, Article 30 paragraph 18 conditions mutual cooperation to dual criminality (the conduct would be a criminal offence also in the requested State Party). In light of these issues, it seems that the regime introduced by the Draft Protocol may face a number of problems. Consequently, international cooperation may prove very difficult and dependent on national policies on the ITTP.

## **3.4 Overall assessment of the Draft Protocol**

Like any international treaty, most of the success of the Protocol will depend on the number of ratifications that it receives once adopted. Firstly, at least forty ratifications will be required for the entry into force of the Draft Protocol. Secondly, the higher the number of ratifications, the wider will be the application of the Draft Protocol in relation to space and markets.

Although the number of ratifications of the FCTC is a positive predictor of the number of ratifications of the Protocol, at present it is not possible to predict whether the Draft Protocol will be finally adopted and whether it will actually enter into force.

The above analysis pointed out that the current version of the Draft Protocol seems to require further consideration. The following issues appear particularly critical.

First, the scope of the Protocol may be too narrow. At present, it is not clear whether its most innovative provisions will apply to key inputs as well. This would allow better control over the production of tobacco products, enabling prevention of the ITTP from the production stage onwards.

Secondly, the Draft Protocol is hybrid in its nature: on the one hand, it is strictly connected to the FCTC, which mainly deals with health issues; on the other, it draws most of its provisions on international cooperation from the UNCTOC. This may duplicate existing measures and ultimately jeopardize international efforts.

Third, as recognized by the literature, the WHO does not have established experience in these fields (Boister 2010; Liberman et al. 2011). This has already impacted on the negotiations, with the already-mentioned difficulties in identifying a core list of crimes and in coordinating the Draft Protocol with the UNCTOC. Furthermore, it may imply substantial costs for supporting State Parties in the implementation of the Protocol.

Fourth, notwithstanding long negotiations, the current text fails to identify a set of core conducts that all State Parties should criminalize. This limitation is one of the most serious problems of the Draft Protocol. There is the risk that State Parties may adopt very different solutions as to the criminalization of the ITTP. Given that both Parts IV and V will mostly apply only to criminal offences, there is the risk that the Draft Protocol may prompt *à la carte* law enforcement and international cooperation, with very limited harmonisation among countries.

Fifth, the actual implementation of the Protocol relates to the ability of governments to make investments in capacity building (both for regulatory and law enforcement agencies), technological equipment and international cooperation. This will probably depend on the availability of adequate financial resources. Developing countries may have difficulties in finding these resources or they may be faced with a trade-off between the fight against the ITTP and other important investments. Furthermore, given that some states are directly involved in the manufacturing of tobacco products, and given that governments earn important revenues from taxes, different interests (government revenues from tobacco taxation, citizens' health and public healthcare costs, profits of state-participated tobacco manufacturers) may complicate effective policies against the ITTP.

All these issues suggest that the next session of the INB will be of crucial importance. Unless some radical innovations are made to the current text, there is the risk that the Draft Protocol may have significant loopholes and create difficulties in its adoption. The next chapter provides further information on the expected impact of the measures envisaged in the Draft Protocol, on the basis of a survey on the existing measures in a sample of countries.

## 4. Survey of the existing measures in a sample of countries

International treaties are rarely based on a comparative analysis of gaps and differences among different countries. This may cause problems in the implementation of the Draft Protocol since Parties may have to comply with requirements which are difficult to put into practice. To furnish better understanding of the expected impact of the Draft Protocol, this chapter reports a comparative survey conducted on a sample of countries.

The survey focused on four countries in different areas of the world: Canada, Italy, Singapore and South Africa. The analysis concentrated on national policy measures and regulations concerning the control of the supply chain of tobacco products (particularly on licensing and marking requirements and record-keeping) and criminal law measures. Table 2 synthetises the availability in the national legislation of the above-mentioned policy measures.

**Table 2. Availability of the measures in the sample countries**

Measures	Canada	Italy	Singapore	South Africa
Licensing	X	X	X	X
Marking	X	X	X	
Record-keeping	X	X		X
Enforcement	X	X	X	

### 4.1 Existing measures in Canada

**Table 3. Preventive measures in Canadian legislation**

Measures	Regulation	Content
Licensing	Excise Tax Act	Licensing of manufacturers, tobacco dealers and warehouses
Marking	Excise Tax Act	Stamping (duty-paid), marking (non-duty-paid) and package requirements
Record-Keeping	Excise Tax Act	Recording of all transactions by all the participants in the supply chain
Enforcement	See below, Table 4	

#### 4.1.1 Licensing system

The Excise Tax Act<sup>17</sup> requires tobacco manufacturers, tobacco dealers and also warehouses containing non-duty-paid tobacco to be licensed. All these licensees are required to file returns concerning their production and distribution activities. Further specific information is required in regard to the packaging of tobacco products, which must include the name and the address or the

<sup>17</sup> Excise Tax Act (R.S.C., 1985, c. E-15).

license number of the manufacturer of the tobacco product. The purpose is to enable the competent authorities to determine the place of origin of suspect products.

In addition to the federal regulations, all provinces and territories require in their respective jurisdictions that wholesalers and retailers possess a permit or a license to sell tobacco products.

#### 4.1.2 Marking system

The Excise Act directly addresses tobacco in Part 3.<sup>18</sup> Sections 32 to 38 of this Act cover the stamping (duty-paid), marking (non-duty-paid), and packaging requirements for products which are manufactured in Canada, imported into Canada or exported from Canada.

In 2010 the Canada Revenue Agency announced the release of a new tax stamp to be applied on cigarettes for retail outlets, to be applied starting from April 2011 on all tobacco products manufactured domestically or imported into Canada for the duty-paid market (Sweeting, Johnson, and Schwartz 2009, 31).

#### 4.1.3 Record-keeping

All the participants in the supply chain, from raw material producers to manufacturers and retailers, must keep up-to-date records so that it can be verified that the producers are not producing surplus materials, and so that the source of the products can be determined. For retailers, the record-keeping requirement is limited to documented sales, especially to tax-exempt citizens (Sweeting, Johnson, and Schwartz 2009).

#### 4.1.4 Criminal Law

**Table 4. Criminal law measures in Canadian legislation**

ITTP	Reference	Penalty
<b>Illegal Manufacturing of tob. products</b>	Excise Act	Fine of not more than ten thousand dollars, and in default of payment of the fine, a term of imprisonment of not more than twelve months
<b>Smuggling of tob. products</b>	Excise Act	Fine of not more than fifty thousand dollars or imprisonment for a term not exceeding six months, or both that fine and that imprisonment; or a fine of not more than five hundred thousand dollars or imprisonment for a term not exceeding five years, or both that fine and that imprisonment
<b>Counterfeiting of trademarks</b>	Criminal Code	Imprisonment for a term not exceeding fourteen years

In Canada, the criminal law response to the ITTP is covered by three pieces of legislation: the Excise Act, the Customs Act, and the Criminal Code.

The Excise Act regulates the sale and manufacturing of tobacco products without the licence required, and it punishes anyone who operates without a licence with a “fine of not more than ten thousand dollars, and in default of payment of the fine, a term of imprisonment of not more than

<sup>18</sup> Excise Act, 2001.

twelve months”.<sup>19</sup> In addition, the premises in which this offence is committed can be forfeited “to Her Majesty in right of Canada and shall be seized by any officer and dealt with accordingly”.<sup>20</sup> The same punishment is provided for the unlawful manufacturing of tobacco and tobacco products,<sup>21</sup> for the unlawful removal of tobacco or cigars,<sup>22</sup> and the unlawful possession of manufactured tobacco or cigars.<sup>23</sup> The same penalty is also provided for those who receive goods from manufacturers not duly licensed, of fraudulently stamped, and for those who receive for sale goods not packaged and stamped.<sup>24</sup> The Excise Act also covers the unlawful packaging or stamping of tobacco or cigars or tobacco products and punishes this conduct with a fine of not less than ten thousand dollars and not more than one million dollars, or imprisonment for a term not exceeding five years.<sup>25</sup> The following rules also provide for the forfeiture of the illicit goods.

The Customs Act<sup>26</sup> broadly concerns prosecution for the smuggling of tobacco products, punished with a fine of not more than fifty thousand dollars, or with imprisonment for a term not exceeding six months, or with both that fine and that imprisonment; or a fine of not more than five hundred thousand dollars or imprisonment for a term not exceeding five years or both that fine and that

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<sup>19</sup> Article 226 Excise Act, RSC 1985, c E-14. Operating without a licence. Every person who, without having a licence under this Act then in force, (a) manufactures any tobacco or cigars except as permitted by this Act, (b) claiming to have grown any tobacco and manufactured it solely for his own use, sells or barter away any tobacco so manufactured, or (c) having purchased any raw leaf tobacco grown in Canada from the cultivator thereof, in any way unlawfully manufactures that tobacco and sells it, or offers it for sale in a manufactured state, is guilty of an offence punishable on summary conviction and liable to a fine of not more than ten thousand dollars, and in default of payment of the fine to a term of imprisonment of not more than twelve months, and all goods subject to excise found on the premises in which the offence is committed shall be forfeited to Her Majesty in right of Canada and shall be seized by any officer and dealt with accordingly.

<sup>20</sup> Ibid.

<sup>21</sup> Article 227 Excise Act, RSC 1985, c E-14. Unlawfully manufacturing home produced tobacco. Every person who, without having a licence under this Act then in force, manufactures any tobacco grown on his own land or property (a) for the purpose of sale, or for any purpose other than use by himself and such members of his family as are resident with him on the farm or premises on which the tobacco was grown, (b) into any product other than Canada twist, or (c) in excess of fifteen kilograms (15 kg) for each adult member of the family resident on the farm or premises, is guilty of an offence punishable on summary conviction and liable to a fine of not more than ten thousand dollars, and in default of payment of the fine to a term of imprisonment of not more than twelve months, and all goods subject to excise found on the premises in which the offence is committed shall be forfeited to Her Majesty in right of Canada and shall be seized by any officer and dealt with accordingly.

<sup>22</sup> Article 235 Excise Act, RSC 1985, c E-14. Unlawful removal of tobacco or cigars (1) Every person who removes or permits the removal from any manufactory, or from any place where tobacco or cigars are made, any manufactured tobacco or cigars (a) without the manufactured tobacco or cigars being packaged, (b) without the manufactured tobacco or cigars being stamped with tobacco stamps or cigar stamps in accordance with this Act and the ministerial regulations, where the tobacco or cigars are entered for consumption, or (c) without having printed on, or affixed to, the packages, cartons, boxes, crates or other containers containing the manufactured tobacco or cigars tobacco markings in accordance with this Act and the regulations, where the tobacco or cigars are removed in bond, is guilty of an offence punishable on summary conviction and liable to a fine of not more than ten thousand dollars or to both that fine and imprisonment for a term not exceeding twelve months.

<sup>23</sup> Article 240 Excise Act, RSC 1985, c E-14. Unlawful sale or possession of manufactured tobacco or cigars (1) Subject to subsections (2) and (3), every person who sells or offers for sale or has in the person's possession any manufactured tobacco or cigars, whether manufactured in or imported into Canada, not put up in packages and stamped with tobacco stamps or cigar stamps in accordance with this Act and the ministerial regulations, (a) is guilty of an indictable offence and liable to (i) a fine of not less than the amount determined under subsection (1.1) and not more than the amount determined under subsection (1.2), or (ii) both the fine described in subparagraph (i) and imprisonment for a term not exceeding 5 years; or (b) is guilty of an offence punishable on summary conviction and liable to (i) a fine of not less than the amount determined under subsection (1.1) and not more than the lesser of \$500,000 and the amount determined under subsection (1.2), or (ii) both the fine described in subparagraph (i) and imprisonment for a term not exceeding two years.

<sup>24</sup> Article 237 Excise Act, RSC 1985, c E-14. Receiving goods from manufacturers not duly licensed. Every person who purchases or receives for sale any manufactured tobacco or cigars from any manufacturer not duly licensed under this Act is guilty of an offence punishable on summary conviction and liable to a fine of not more than ten thousand dollars, and in default of payment of the fine to imprisonment for a term not exceeding twelve months, and shall, in addition thereto, forfeit all the manufactured tobacco or cigars so purchased or received for sale, or the full value of the manufactured tobacco or cigars including all duties and taxes that were payable under this Act or any other Act in respect of the manufactured tobacco or cigars.

<sup>25</sup> Article 233 Excise Act, RSC 1985, c E-14. Unlawful packaging or stamping. (1) Every person who packages or stamps tobacco or cigars in such a way as to indicate that the duties of excise have been paid in respect of the tobacco or cigars or, in the case of imported tobacco or cigars, that the additional customs duty has been paid under the Customs Act and the Customs Tariff in respect of the tobacco or cigars, and who is not a licensed tobacco manufacturer, a licensed cigar manufacturer or a tobacco packer or, where the tobacco or cigars have been reported under the Customs Act and released under that Act, the importer or owner of the tobacco or cigars, (a) is guilty of an indictable offence and liable to (i) a fine of not less than ten thousand dollars and not more than one million dollars, or (ii) both the fine described in subparagraph (i) and imprisonment for a term not exceeding five years; or (b) is guilty of an offence punishable on summary conviction and liable to (i) a fine of not less than one thousand dollars and not more than one hundred thousand dollars, or (ii) both the fine described in subparagraph (i) and imprisonment for a term not exceeding two years.

<sup>26</sup> Customs Act, RSC 1985, c 1 (2nd Supp).

imprisonment.<sup>27</sup> This Act also contains a rule on imported goods which obliges to report all legally and illegally imported goods to the nearest customs office, as well as complete description of the goods imported in the accounting documents, without faults.

The Criminal Code<sup>28</sup> generally criminalizes the counterfeiting of stamps and marks of all products with imprisonment not exceeding fourteen years.<sup>29</sup>

There are also provisions directed to the prosecution of the laundering of proceeds of crime with a prison term not exceeding ten years.

#### **4.1.5 Enforceability of the Draft Protocol**

Overall, the Canadian government has developed solutions that anticipate some of the measures envisaged by the Draft Protocol. In particular, these solutions concern the licensing system and the marking system. They are currently used in the identification of tax-paid tobacco products, but they may provide support also in the identification of illicit products.

Another innovative strategy adopted by Canada against the ITTP is the introduction of the export taxation applied on products destined to a jurisdiction with a lower taxation rate than that of the starting jurisdiction. This strategy, combined with the efforts on tax harmonization, has discouraged round-tripping (i.e. the fictive and/or simulated export of tobacco products to benefit of the tax exemption on exports and the subsequent reintroduction in Canada). The added value of the last two strategies is their consideration of the particular features of the Canadian case, namely the presence of native reserves in the country. The reserves, with differences in the applicable legislation, are often exploited to introduce illicit tobacco products into Canada (Sweeting, Johnson, and Schwartz 2009).<sup>30</sup>

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<sup>27</sup> Articles 159 and 160 Customs Act, RSC 1985, c 1 (2nd Supp). Smuggling 159. Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament. General offence and punishment 160. (1) Every person who contravenes section 11, 12, 13, 15 or 16, subsection 20(1), section 31 or 40, subsection 43(2), 95(1) or (3), 103(3) or 107(2) or section 153, 155, 156 or 159.1 or commits an offence under section 159 or knowingly contravenes an order referred to in subsection 107(11)

<sup>28</sup> Criminal Code, (R.S.C. 1985, c C-46).

<sup>29</sup> Criminal Code - R.S.C., 1985, c. C-46. Section 376. (1) Every one who (a) fraudulently uses, mutilates, affixes, removes or counterfeits a stamp or part thereof, (b) knowingly and without lawful excuse, the proof of which lies on him, has in his possession (i) a counterfeit stamp or a stamp that has been fraudulently mutilated, or (ii) anything bearing a stamp of which a part has been fraudulently erased, removed or concealed, or (c) without lawful excuse, the proof of which lies on him, makes or knowingly has in his possession a die or instrument that is capable of making the impression of a stamp or part thereof, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. Counterfeiting mark (2) Every one who, without lawful authority, (a) makes a mark, (b) sells, or exposes for sale, or has in his possession a counterfeit mark, (c) affixes a mark to anything that is required by law to be marked, branded, sealed or wrapped other than the thing to which the mark was originally affixed or was intended to be affixed, or (d) affixes a counterfeit mark to anything that is required by law to be marked, branded, sealed or wrapped, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. Definitions (3) In this section, "mark" « marque » "mark" means a mark, brand, seal, wrapper or design used by or on behalf of (a) the government of Canada or a province, (b) the government of a state other than Canada, or (c) any department, board, commission or agent established by a government mentioned in paragraph (a) or (b) in connection with the service or business of that government; "stamp" « timbre » "stamp" means an impressed or adhesive stamp used for the purpose of revenue by the government of Canada or a province or by the government of a state other than Canada.

<sup>30</sup> The export taxation has affected the legitimate market, discouraging exports by Canadian manufacturers. The introduction of tracking and tracing system may improve the prevention and identification of the ITTP (it would allow to identify the source of illicit products, including supposed to be exported) and avoid distortion of the legitimate market.

## 4.2 Existing measures in Italy

Table 5. Preventive measures in Italian legislation

Measures	Legislation	Content
Licensing	D.M. 67/1999	Licensing of tobacco retailers
Marking	Law 50/1994	Marking of master cases
Record-Keeping	Law 50/1994	Record and keep information regarding any large seizure of the tobacco products
Enforcement	See below, Table 6	

In Italy the control of production, distribution and sale of tobacco products is carried out by the Amministrazione Autonoma dei Monopoli di Stato (AAMS), an agency of the Ministry of Economy and Finance. The AAMS is competent for monitoring the proper classification of the product (denominations of cigarettes, cigars or fine-cut tobacco), applying the appropriate excise tax rate, ensuring that tobacco products meet packaging and labelling standards (e.g. size of health warnings) and that the ingredients of cigarettes comply with the regulations in force.

The European Union Directive 2001/37/EC<sup>31</sup> on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products was implemented by Legislative Decree no.184 of 24 June 2003.

### 4.2.1 Licensing system

According to Ministerial Decree 67/1999, the distribution of tobacco products is undertaken by dealers authorized by AAMS and which handle the goods through the tax warehouses (the so called “Depositi Fiscali”) supplied by the manufacturers and, in turn, supplying the authorized retailers of tobacco products. In order to issue authorization to establish tax warehouses, AAMS requires the fulfilment of several requirements.

Moreover, tobacco products can be sold to the public only by authorized and licensed retailers, which must fulfil numerous requirements in order to obtain a licence from AAMS (e.g. one condition for the opening of a tobacco shop is a minimum distance from the nearest retailer. Moreover, there must be a certain proportion between the resident population and the number of retailers).

### 4.2.2 Marking system

Pursuant to article 1 of Law 50/1994,<sup>32</sup> in order to combat the smuggling of tobacco products into the country, the AAMS and cigarette manufacturers must monitor that tobacco products are effectively marketed in the countries of official destination. To this purpose, the manufacturers of

<sup>31</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJ L 194, 18.7.2001, p. 26–35.

<sup>32</sup> Legge 18 gennaio 1994, n. 50, Modifiche alla disciplina concernente la repressione del contrabbando dei tabacchi lavorati. G.U. 26 gennaio, n. 20. Articolo 1: “Al fine di combattere il contrabbando dei tabacchi lavorati nel territorio nazionale e le collegate organizzazioni criminali anche internazionali, l'Amministrazione autonoma dei monopoli di Stato nonché i produttori di sigarette che abbiano stipulato contratti con l'Amministrazione autonoma dei monopoli di Stato per l'importazione, la produzione, la distribuzione o la vendita dei loro prodotti nel territorio dello Stato, ovvero facciano ricorso ai depositi di cui all'art. 1 della legge 10 dicembre 1975, n. 724, anche in caso di cessione della utilizzazione di marchi, devono vigilare sulla effettiva immissione al consumo della merce nel Paese dichiarato come destinatario finale. A tal fine, con decreto del Ministro delle finanze, sentiti i produttori interessati, sono stabiliti appositi sistemi di identificazione dei prodotti i cui confezionamenti non siano già dotati di specifici elementi di individuazione dei mercati finali, affinché i produttori medesimi possano individuare il primo acquirente dei prodotti introdotti di contrabbando nel territorio dello Stato”.

tobacco products must adopt a product identification system with which to identify from a single packet of cigarettes, with regard to tobacco smuggled into the country, the date and place of production, the machinery, the shift of production, the shipment's country of origin, the final destination market, and the first buyer of the product. This identification system has been developed for the monitoring of the movement of lawfully manufactured tobacco products by the marking of master cases with "machine scannable barcode labels" (Joossens and Raw 2008).

### 4.2.3 Record-keeping

Tax warehouses are obliged to register and record all loading and unloading operations in an account book, as well as to periodically report all movements of goods to the AAMS.

Article 6 of the cited Law 50/1994 regulates the accounting and recording of information concerning tobacco products smuggled or seized within the country.<sup>33</sup> In particular:

- a) for every seizure of 2,000 kilos (or more), the tobacco products must be analysed and registered within 30 days from the date of the seizure, with the indication of: the brand and type of product, identification code, quantity and date of seizure, and other information deemed useful for identifying the first buyer;
- b) the information indicated at letter a) must be communicated to manufacturers within 15 days from the recording of the information;
- c) within 15 days from receipt of the communication indicated at letter b), the manufacturers must inspect the goods. For seizures amounting to less than 2,000 kilos, the seized goods will be aggregated until the total quantity is 50,000 kilos, and inspection by manufacturers will be carried out within 60 days from receipt of the inventory;
- d) the information gathered during such inspections must be communicated to the Financial Administration within 15 days.

On the basis of the information reported, the Ministry of Finance and the manufacturers must examine and study the most effective actions and measures to eliminate the smuggling of tobacco products into the country.

Finally, the Law establishes sanctions for manufacturers which do not comply with the identification system described above.

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<sup>33</sup> Articolo 6, Legge 50/1994. 1. Ai soggetti sorpresi ad acquistare sigarette ed altri tabacchi lavorati esteri di contrabbando, oltre alle sanzioni penali previste dal citato testo unico approvato con decreto del Presidente della Repubblica n. 43 del 1973, o da altre leggi speciali, è irrogata anche una sanzione amministrativa nella misura fissa di lire centomila. In deroga alla legge 7 gennaio 1929, n. 4 e successive modificazioni, ed alla legge 24 novembre 1981, n. 689 e successive modificazioni, non è ammessa alcuna forma di pagamento in misura ridotta. 2. Le violazioni di cui al comma 1 sono accertate e le relative sanzioni sono rimosse nei modi di cui agli articoli 13 e seguenti della citata legge n. 689 del 1981. L'ufficio competente a ricevere il rapporto di cui all'art. 17 e ad emettere l'ordinanza-ingiunzione di pagamento di cui all'art. 18 della medesima legge n. 689 del 1981 è individuato negli ispettorati compartimentali dell'Amministrazione autonoma dei monopoli di Stato. 3. L'ispettorato compartimentale di cui al comma 2 dispone inoltre la pubblicazione della sanzione comminata a spese del soggetto sanzionato, su uno o più giornali. 4. Qualora le violazioni di cui al comma 1 siano commesse all'interno di un ufficio pubblico da parte di pubblici dipendenti, la Guardia di finanza provvede a segnalare la contestazione al responsabile dell'ufficio per l'adozione di idonei provvedimenti disciplinari. Il responsabile dell'ufficio, qualora non dimostri entro novanta giorni di aver provveduto ad instaurare un procedimento disciplinare, è soggetto alla sanzione amministrativa di cui al comma 1.

#### 4.2.4 Criminal Law

Table 6. Criminal law measures in Italian legislation

ITTP	Reference	Penalty
<b>Counterfeiting of trade marks</b>	Criminal Code	Detention from six months to three years and a fine amounting to between two thousand five hundred and twenty-five thousand euros. If there are aggravating circumstances, imprisonment from one to four years and a fine from two thousand five hundred to twenty-five thousand euros
<b>Smuggling of tob. products</b>	Law 43/1973	Five euros for each gram of product and imprisonment from two to five years
<b>Criminal association for the purpose of smuggling foreign tobacco products</b>	D.P.R. 43/1973	Fine of fifty thousand lira (twenty-six thousand euros) for every ounce of conventional product and imprisonment from three to seven years

The Italian legislation addresses the counterfeiting of tobacco products through general provisions on counterfeiting in the Criminal Code<sup>34</sup> and with specific laws on tobacco products. The Criminal Code, at Article 473, punishes the counterfeiting, forgery and falsification of distinctive signs of industrial products owned by third parties with imprisonment from six months to three years and with a fine of between 2,500 and 25,000 euros.<sup>35</sup> Article 474 criminalizes the introduction into the country of any intellectual property or industrial product whose trademark or distinctive signs are counterfeited or falsified with the purpose of making a profit. The penalty for this offence ranges from one to four years of imprisonment and a fine from 2,500 to 25,000 euros.<sup>36</sup> Article 474ter increases the penalties provided by article 474 if the offence is committed by an organized crime group. In this case, imprisonment ranges from two to six years and the fine ranges from 5,000 to 50,000 euros.<sup>37</sup> Furthermore, Article 459 of the Criminal Code punishes the alteration and/or falsification of any kind of duty stamp, as well as the commercialization of counterfeited stamps.<sup>38</sup>

The Criminal Code at Article 648 punishes with imprisonment from two to eight years and a pecuniary sanction from 516 to 10,321 euros whoever “acquires, receives or conceals” proceeds of crime. At article 649 the Criminal Code punishes concealment of the illicit origin of money or of other proceeds of crime. Article 379 punishes with imprisonment of up to five years or a pecuniary penalty from 51 to 1,032 euros whoever helps another person “to obtain the proceeds of a crime”.

The Italian legislation has few specific provisions concerning the smuggling of tobacco products. Article 291bis of the Italian Law 43/1973 punishes the smuggling of more than ten kilos of tobacco with a sanction of 5 euros for each gram of product and with imprisonment from two to five years.<sup>39</sup>

<sup>34</sup> Codice Penale, Regio Decreto 19 ottobre 1930, n. 1398.

<sup>35</sup> Article 473 Criminal Code Forgery, alteration or use of distinctive signs of intellectual or industrial products. Whoever, being in the condition to know the existence of an industrial property right, counterfeits or forges or falsifies distinctive signs of industrial products owned by third parties is punished with detention from 6 months to 3 years and with a fine from 2,500 to 25,000 euros.

<sup>36</sup> Article 474 Criminal Code Introduction into the state and the market of products with false marks Whoever introduces into the territory of the state, in order to make a profit, industrial products bearing counterfeited or falsified trademarks or other distinctive signs is punished with detention from 1 to 4 years and a fine from 3,500 to 35,000 euros.

<sup>37</sup> Article 474ter Criminal Code If the above-indicated crimes are executed systematically or with organized activities, the detention is raised from 2 to 6 years and the sanction from 5,000 to 50,000 Euros

<sup>38</sup> Article 459 Criminal Code Forgery of stamps, introduced into the state, purchase, possession or circulation of forged stamps. The provisions of Articles 453, 455 and 457 also apply to the alteration and/or falsification of duty stamps, as well as to the introduction within the territory of the state, the purchase, detention and commercialization of counterfeited stamps.

<sup>39</sup> Article 291bis Law 43/73 Smuggling of foreign tobacco 1. Whoever introduces, sells, transports, purchases or holds within the State more than 10 kilos of contraband T.L.E. (tobacco) is punished with a fine of five euros for each gram of product, as defined by the article

Article 291ter provides for a number of aggravating circumstances, including e.g. the use of arms, obstruction of law enforcement agencies, use of special vehicles. In these cases, the fine is 25 euros for each gram of product and imprisonment ranges from three to seven years.<sup>40</sup>

Lastly, Article 291quater punishes criminal association for the purpose of smuggling foreign tobacco products. The penalties range from three to eight years for leaders and from one to six years for participants. The penalty is increased if the number of members exceeds ten, or the association is armed, or any aggravating circumstance provided by Article 291ter is present.<sup>41</sup>

#### 4.2.5 Enforceability of the Draft Protocol

The Italian legislation takes a very strict approach to licensing. Furthermore, given the past experiences with the ITTP, today preventive and criminal law measures against the ITTP are relatively highly developed in Italy. The existing measures exceed the obligations envisaged by the Draft Protocol, particularly in regard to the criminalization of large-scale organized cigarette smuggling.

### 4.3 Existing measures in Singapore

Table 7. Preventive measures in Singaporean legislation

Measures	Regulation	Content
Licensing	Tobacco (Control of Advertisements and Sale of Tobacco Act) (Chapter 309) No.10 of 1993 Tobacco (Control of Advertisements and Sale) Licensing of Importers, Wholesalers and Retailers) Regulations 2010	Licensing requirement for importers, distributors and retailers.
Marking	Singapore Customs rule	Duty-paid stamp on all cigarettes boxes
Record-Keeping	No information available	
Enforcement	See below, Table 8	

9 of Law n. 76 dated March 7, 1985, and with detention from 2 to 5 years. 2. When the facts concern an amount of less than 10 kilos of T.L.E. (tobacco), the sanction is limited to a fine of five euros for each gram of product (minimum 516 euros).

<sup>40</sup> Article 291ter Law 43/73 Aggravating circumstances of the crime of smuggling of foreign tobacco 1. If the act provided for in Article 291-bis are committed using vehicles belonging to persons not involved in the crime, the penalty is increased. 2. In cases provided for in Article 291-bis, it is applied a fine of twenty-five euros for each gram of conventional product and with the detention from three to seven years, when: a) in committing the crime or in the conduct aimed at ensuring the price, product, profit or the impunity of the crime, the perpetrator holds them in the execution of the crime: b) in committing the crime or immediately after, the perpetrator is surprised with two or more persons in conditions that obstruct the police officers; c) the fact is connected with another crime against the public faith or against public administration, d) in committing the crime, the prosecutor has used means of transport, which, compared to the certified characteristics, have been altered or modified as to obstruct the operation of the police or to cause danger to the public safety.

<sup>41</sup> Article 291quater Law 43/73. Criminal association aimed at tobacco smuggling foreign manufactured. 1. When three or more 'persons associate to commit more' crimes including those under Article 291-bis, those who promote, provide, manage, organize or finance the association shall be punished, for this' only, with imprisonment from three to eight years. 2. Who participates in the association and 'punished with imprisonment from one year to six years. 3. The punishment 'if they increased the number of members and' ten or more '. 4. If the association and 'armed or whether it fulfills the conditions laid the letters d) or e) of paragraph 2 of Article 291-ter, shall be punished imprisonment from five to fifteen years in the cases provided for in paragraph 1 of this article, and from four to ten years in cases provided for in paragraph 2. The association is considered armed when participants have the availability ', to achieve the purpose' of the association; weapons or explosive materials, even if hidden or kept in a storage location. 5. The penalties provided for in Articles 291-bis, 291-ter, and in this article decreased by one third to half 'that the accused, dissociating himself from the others, works to prevent the activities' criminal is scope to further consequences concretely helping the authorities' police or the authorities' court in the collection of elements crucial to the findings of fact and for the identification or capture of the authors of the offence or the identification of relevant resources for the commission of crimes.

Legislative measures against smoking in Singapore began in the early 1970s, and in 1986, with the launch of the National Smoking Control Programme (NSCP). A National Smoking Control Coordinating Committee was set up to consider legislation and fiscal measures. Since then, the legislation has been regularly and systematically reviewed and revised, and new laws have been recommended to strengthen the national smoking control efforts. Concurrently, penalties and other strategies to improve law enforcement have also been updated.

#### **4.3.1 Licensing system**

Chapter 309 of the Smoking (Control of Advertisements and Sale of Tobacco) Act was amended in 2010 to add a new regime on the licensing of importers, wholesalers and retailers. The main provisions regard: the prohibition for importers, wholesalers and retailers to import, sell and arrange in any way tobacco products without a licence. This licence is not disposable, and its assignation or transfer to someone else is prohibited. All licences must be registered by the Chief Executive in “a register containing the particulars of every holder of a license” and it “shall be kept up to date” by the same Chief Executive (Article 14). Chapter 309 of the Smoking (Control of Advertisements and Sale of Tobacco) Act contains a number of penalties, listed in Article 17, provided for certain behaviours: sale without licence or licence abuse, lack of notification to the Chief Executive of any change in the licence, non-surrender of the licence in the case of revocation or suspension, transfer or assignment or disposal of the licence, failure to furnish information by the holders of import and wholesaler licences, non-surrender to the Chief Executive of suspected illegal products. All the behaviours are punished “on conviction with a fine not exceeding \$2,000 or imprisonment for a term not exceeding 12 months, or both”.

#### **4.3.2 Marking system**

Singapore legislation is particularly strict on the marking of tobacco products and imposes the marking of single sticks. Under the Customs Act of January 2009, every single cigarette sold must bear a stamp (positioned close to the filter), and all duty-paid cigarettes must be marked with the letters "SDPC" (Singapore Duty-Paid Cigarettes). The purpose of the marking is to deter the market of contraband cigarettes and help Singapore officers in their enforcement efforts. This rule, issued by Singapore Customs, means that anyone found buying, selling or smoking cigarettes without the "SDPC" marking may be jailed or fined. For every packet of duty-unpaid cigarettes, the offender may be fined 500 S\$ (approximately 350 US\$).

Furthermore, license holders are required to provide information about the import, sale or supply of any tobacco product being dealt with under the authority of his/her license.

#### **4.3.3 Record-keeping**

It has not been possible to identify any specific measure concerning record-keeping in the tobacco market.

#### 4.3.4 Criminal Law

**Table 8. Criminal law measures in Singaporean legislation**

ITTP	Reference	Penalty
<b>Smuggling</b>	Customs Act	A fine of not less than fifteen times the amount of the customs duty, excise duty or tax the payment of which would have been evaded by the commission of the offence and not more than twenty times the amount of the customs duty, excise duty or tax the payment of which would have been so evaded or \$10,000, whichever is the greater amount; or imprisonment for a term not exceeding three years, or both
	GST Act	Penalty of three times the amount of tax which has or would have been undercharged in consequence of the offence or which would have been undercharged if the offence had not been detected, and a fine not exceeding \$10,000 or imprisonment for a term not exceeding seven years, or both
<b>Counterfeiting</b>	Trade Marks Act	A fine not exceeding \$10,000 for each item to which the trade mark is falsely applied (but not exceeding in the aggregate \$100,000) or imprisonment for a term not exceeding five years, or both
<b>Making false statements</b>	Customs Act	A fine not exceeding \$5,000 or imprisonment for a term not exceeding twelve months, or both
<b>Dealing with proceeds of crime</b>	Corruption, Drug Trafficking and Other Serious Crime (Confiscation of Benefits) Act	A fine not exceeding \$500,000 or imprisonment for a term not exceeding seven years, or both; or, for legal persons, to a fine not exceeding \$1 million

The smuggling of tobacco products is treated by Section 15 of the Customs Act and by Section 62 of the Goods and Service Tax Act.<sup>42</sup> Both provide fines and imprisonment for the offence of smuggling, but the Customs Act prosecutes in particular the smuggling of tobacco products,<sup>43</sup> while the GST Act prosecutes each product sold without duty having been paid.<sup>44</sup>

<sup>42</sup> Customs Act (Chapter 70). Goods and Services Tax Act (Chapter 117A).

<sup>43</sup> Customs Act (Chapter 70 ) Penalty for various offences 128L. 4. Any person who is guilty of any specified offence involving goods consisting wholly or partly of relevant tobacco products shall, if such tobacco products exceed 2 kilograms in weight, be liable on conviction (a) to a fine of (i) not less than 15 times the amount of the customs duty, excise duty or tax the payment of which would have been evaded by the commission of the offence; and (ii) not more than 20 times the amount of the customs duty, excise duty or tax the payment of which would have been so evaded or \$10,000, whichever is the greater amount; or (b) to imprisonment for a term not exceeding 3 years, or to both.

<sup>44</sup> Goods And Services Tax Act (Chapter 117a) Penalty provisions relating to fraud, etc. 62. (1) Any person who wilfully with intent to evade or to assist any other person to evade tax (a) omits or understates any output tax or overstates any input tax in any return made under this Act; (b) makes any false statement or entry in any return, claim or application made under this Act; (c) gives any false answer, whether verbally or in writing, to any question or request for information asked or made in accordance with the provisions of this Act; (d) prepares or maintains or authorises the preparation or maintenance of any false books of account or other records or falsifies or authorises the falsification of any books of account or records; or (e) makes use of any fraud, art or contrivance whatsoever or authorises the use of any such fraud, art or contrivance, shall be guilty of an offence and shall on conviction (i) pay a penalty assessed under section 48 of 3 times the amount of tax which has or would have been undercharged in consequence of the offence or which would have been undercharged if the offence had not been detected; and (ii) be liable to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 7 years or to both. (2) Whenever in any proceedings under this section it is proved that any false statement or entry is made in any return, claim or application furnished under this Act by or on behalf of any person or in any books of account or other records maintained by or on behalf of any person, that person shall be presumed, until the contrary is proved, to have made that false statement or entry with intent to evade tax. (3) A reference in this section to a person who makes use of any fraud, art or

Trade mark protection is also available both under the Trade Marks Act and under the common law. Those two systems are independent of each other, but both deal with the counterfeiting of products in general. Under the Trade Mark Act, there are several criminal offences, including falsely applying a registered trade mark to goods or services; making or possessing articles for committing offences; importing or selling goods with falsely applied trade mark. Further, counterfeiting in general is punished as an offence by the Section 49 of the Trade Marks Act.<sup>45</sup> In addition, at common law there is the tort of “passing off” whenever anyone represents that his/her products or services are those of another. This is a civil remedy which is additional to measures provided by the Trade Mark Act.

Singapore courts take a very serious view of trade mark offences, punishing with a fine of up to S\$100,000 and/or imprisonment for a maximum term of five years the conducts provided by the Trade Mark Act.

Concerning criminal procedure, making false statements in declaration or documentation is punished by the Penal Code and by the Customs Act.<sup>46</sup>

The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, introduced into the Singaporean legislation in 1992 deals with crimes related to drug trafficking. The Act includes general provisions on the proceeds of crime. Those offences are listed and punished by article 27.<sup>47</sup>

Chapter 309 of the Tobacco Control of Advertisement and Sale Act<sup>48</sup> deals with the licensing of importers, wholesalers and retailers, and it provides a number of penalties, listed in Article 17, for some criminal conducts: sale without licence or licence abuse, lack of notification to the Chief Executive of any change in the licence, non-surrender of the licence in the case of revocation or suspension of the licence, transfer or assignment or disposal of the licence, failure to furnish information by the holder of import and wholesaler licences, non-surrender to the Chief Executive

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contrivance whatsoever or authorises the use of any such fraud, art or contrivance includes a reference to a person who, without the authority of the Comptroller (a) destroys, damages, erases or otherwise manipulates data stored in, or used in connection with, a computer; or (b) introduces into, or records or stores in, a computer by any means data for the purpose of (i) destroying, damaging, erasing or altering other data stored in that computer; or (ii) interfering with, interrupting or obstructing the lawful use of that computer or the data stored in that computer; or (c) otherwise uses a computer, the purpose or effect of which is to evade tax. (4) For the purposes of subsection (3), “data” includes any computer program or part of a computer program being a program approved by the Comptroller for use in relation to the electronic service or for use under section 43, 44 or 46 or any regulations made under section 41. (5) A reference in this section to evading tax includes a reference to obtaining any of the following: (a) a payment under section 19 (5); (b) credit for input tax under section 19 or 20 or any regulations made thereunder; (c) a refund under any regulations made under section 25 (1), in circumstances where the person concerned is not entitled to that payment, credit or refund.

<sup>45</sup> Trade Marks Act (TMA) (Chapter 332). Section 49 Importing or selling, etc., goods with falsely applied trade mark. Any person who (a) imports into Singapore for the purpose of trade or manufacture; (b) sells or offers exposes for sale; or (c) has in his possession for the purpose of trade or manufacture, any goods to which a registered trade mark is falsely applied shall, unless he proves that (i) having taken all reasonable precautions against committing an offence under this section, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark and on demand made by or on behalf of the prosecution, he gave all the information in his power with respect to the persons from whom he obtained the goods; or (ii) he had acted innocently, be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 for each goods or thing to which the trade mark is falsely applied (but not exceeding in the aggregate \$100,000) or to imprisonment for a term not exceeding 5 years or to both.

<sup>46</sup> Customs Act (Chapter 70 ) Penalty on refusing to answer questions or on giving false information or false document 129 (1) Any person who, being required by this Act to answer any question put to him by any proper officer of customs, or to give any information or produce any document which may reasonably be required of him by the officer and which it is in his power to give (a) refuses to answer the question or does not truly answer the question; (b) refuses to give such information or produce such document; or (c) furnishes as true information or document which he knows or has reason to believe to be false, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months or to both. (2) When any such answer or any such information or any such document is proved to be untrue or incorrect in whole or in part, it shall be no defence to allege that such answer or such information or such document or any part thereof was made or furnished or produced inadvertently or without criminal or fraudulent intent, or was misinterpreted or not fully interpreted by an interpreter provided by the informant. (3) Nothing in this section shall oblige a person to answer any question which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

<sup>47</sup> Corruption, Drug Trafficking And Other Serious Crimes (Confiscation Of Benefits) Act (Chapter 65a) Acquiring, possessing, using, concealing or transferring benefits of criminal conduct 47. (6) Any person who commits an offence under this section shall be liable on conviction (a) if the person is an individual, to a fine not exceeding \$500,000 or to imprisonment for a term not exceeding 7 years or to both; or (b) if the person is not an individual, to a fine not exceeding \$1 million.

<sup>48</sup> Smoking (Control Of Advertisements And Sale Of Tobacco) Act (Chapter 309), Act 10 of 1993, revised in 1994 and in 2003.

of suspected illegal products. All these behaviours are punished “on conviction to a fine not exceeding S\$2,000 or to imprisonment for a term not exceeding 12 months or to both”.<sup>49</sup>

#### 4.3.5 Enforceability of the Draft Protocol

In Singapore the large demand for illicit tobacco products is mainly caused by the high prices of cigarettes. As for the criminal law the law enforcement, Singapore has developed a tough approach against the ITTP. Furthermore, it has already introduced a licensing schemes and marking of tobacco products, including the unprecedented stick marking. However, the control over the supply chain is limited to the obligation of providing information to the Chief Executive and does not include any duty of first purchaser to monitor the sale of tobacco products in the subsequent steps of the supply chain and/or to provide details of his/her business, accounts or other data. If the Draft Protocol enters into force and Singapore becomes a Party to it, the tracking and tracing and record-keeping requirements will demand the introduction of new measures and controls which at present are not present. However, the limited size of the country and the availability of financial, technological and human resources suggest that these reforms may be implemented in a reasonable short delay and with success.

### 4.4 Existing measures in South Africa

**Table 9. Preventive measures in South African legislation**

Measures	Regulation	Content
<b>Licensing</b>	Customs & Excise Act 91 of 1964	Registration of manufacturers and licensing of tobacco importers
<b>Marking</b>	No requirement	
<b>Record-Keeping</b>	Standard Operating Procedure	Requirement for all licensees to maintain and keep records of all raw materials received for use in the manufacture of tobacco products
<b>Enforcement</b>	See below, Table 10	

In South Africa, the issue of the ITTP was not particularly significant before 1993. In that year, a new government tobacco tax policy, enacted with the intention of reducing tobacco consumption, had the effect of increasing the retail prices of tobacco products by 50%. According to the Tobacco Institute of Southern Africa (2009), the ITTP in South Africa has significantly grown in recent years, possibly due to increased retail prices and the growth of demand for cheap tobacco products. This demand has been satisfied by the supply of illicit tobacco products. In general, most illicit cigarettes entering the borders of South Africa are smuggled without the payment of duty taxes.

<sup>49</sup> Article 17 Smoking (Control Of Advertisements And Sale Of Tobacco) Act (Chapter 309), Act 10 of 1993. Health warnings and labelling (1) The Minister may by regulations impose requirements for securing that such tobacco products, and such of their packaging, as may be specified in those regulations be marked with, labelled or accompanied by any warning relating to health, information or description as may be prescribed and control or prohibit the supply of tobacco products with respect to which such requirements are not complied with. (2) Any person who contravenes the requirements imposed under subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 6 months or to both and, in the case of a second or subsequent conviction, to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 12 months or to both.

#### **4.4.1 Licensing system**

In South Africa the licensing requirement is structured on three levels. One level is for the manufacturers, another for the importers, and the third one for transporters of tobacco products.

Section 59A of the Customs & Excise Act<sup>50</sup> (C&E Act) stipulates that any person or any class of persons who participates in any activity regulated by the Act may be required by the Commissioner to register.

A local or foreign manufacturer must apply for a SA “Diamond Stamp” which must be imprinted on the packaging of the product before it may be distributed in the Southern African Customs Union (SACU) (Republic of South Africa, Botswana, The Kingdom of Lesotho, The Republic of Namibia; and The Kingdom of Swaziland). Section 54(2)(b) of the C&E Act provides that no person may import cigarettes unless the Diamond Stamp is applied to such goods, if entered for storage in a customs and excise warehouse for export.

As regards importers, the C&E Act does not provide for the licensing or control of importers of tobacco products. However, section 59A of the C&E Act provides that importers in general are required to be registered as importers with the South African Revenue Service, Customs & Excise, when importing goods of any nature whatsoever.

For manufacturers, under section 18(1)(f) of the C&E Act, any person transporting tobacco products (e.g. warehouses) by road must have a licence. Moreover, according to section 64(D) a Remover of Goods in Bond (ROG) must be a licensee of a customs & excise warehouse using his/her own vehicle. Furthermore, section (18)(12) of the Act states that the Commissioner may determine the roads and routes and the means of carriage of any goods removed in bond or any class or kind of such goods or any such goods carried in circumstances specified by him.

The C&E Act also contains the following provision in section 18(13), in respect of transporters of goods in bond: “(13) (a) (i) No person shall, without the permission of the Commissioner, divert any goods removed in bond to a destination other than the destination declared on entry for removal in bond or deliver such goods or cause such goods to be delivered in the Republic except into the control of the Controller at the place of destination”.

#### **4.4.2 Marking system**

While there have been suggestions that a tracking and tracing system may be implemented by SARS in the near future, as yet there is no legislative requirement for such a system.

#### **4.4.3 Record-keeping**

Under paragraph 2.9.4 of the Standard Operating Procedure (SOP), all licensees (in special warehouses) are required to maintain and keep records on all raw materials initially received for use in the production of tobacco products removed from the warehouse. In addition, paragraph 2.9.1.d of the SOP provides that all licensees must maintain and keep records on all production of tobacco products which must afford SARS traceability from the final product back to the input raw materials, and such records must be made available on request. The SOP also makes the following provisions:

- The licensee of a manufacturing warehouse must keep records on (i) raw materials received, used in the production process, and/or removed; (ii) yield from raw materials; (iii)

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<sup>50</sup> Customs & Excise Act N. 91 of 1964.

production;(iv) stock on hand; (v) receipts of bonded product; (vi) removal of bonded product; (vii) removal of rebated product; (viii) removal for home consumption; (ix) returns of duty paid stock; and (x) exports;

- The licensee of a special storage warehouse must keep records on (i) stock on hand; (ii) receipts of bonded product; (iii) removal of bonded product; (iv) removal of rebated product; and (v) exports; and
- All excise related documents must be retained for a period of 5 years.

Section (2)(a)(i) of the C&E Act states that goods imported and stored must pay customs duty and must be recorded and stored by the licensee, who must also keep an accurate inventory of such goods.

#### 4.4.4 Criminal Law

**Table 10. Criminal law measures in South African legislation**

ITTP	Reference	Penalty
<b>Duty Evasion</b>	Customs and Excise Act	fine up to R8,000.00/treble the value of the goods
<b>Counterfeiting of goods</b>	Counterfeiting Good Act	imprisonment not exceeding three years or a R5,000 fine or both

The penalties in the South African system are related to contravention of the duty rules provided by the Customs and Excise Act,<sup>51</sup> which deals with customs duty and levies applicable to all goods imported into, manufactured locally in, or exported from, the South African Republic.

Section 78 of this Act provides a punishment for the contravention of the duty offences of a fine up to R8,000.00 or three times the value of the goods (whichever is the greater) or imprisonment up to four year or both.<sup>52</sup>

Section 79(1)(f) of the C&E Act provides that is an offence for any person to resist or hinder an officer in performance of his duties in terms of the Act, and that person shall be liable to both a fine not exceeding R8,000.00 and imprisonment not exceeding two years.<sup>53</sup>

Furthermore, the unlawful use of government stamps is punished under Section 82 with imprisonment not exceeding five years or a fine, or both.<sup>54</sup> Section 83 of the Customs and Excise

<sup>51</sup> Customs and Excise Act No. 91 of 1964.

<sup>52</sup> Section 78 of the Customs and Excise Act No. 91 Of 1964. Offences not expressly mentioned (1) Any person who contravenes any provision of this Act or who fails to comply with any such provision with which it is his duty to comply, shall, even where such contravention or failure is not elsewhere declared an offence, be guilty of an offence. (2) Any person guilty of an offence under this Act shall, where no punishment is expressly provided for such offence, be liable on conviction to a fine not exceeding R8 000 or treble the value of the goods in respect of which period not exceeding two years, or to both such fine and such imprisonment. [Sub-s. (2) amended by s. 10 (a) of Act 52 of 1986 and by s. 6 (a) of Act 105 of 1992.] (3) A person who is convicted of an offence referred to in subsection (2) within a period of three years after he was convicted of any offence referred to in that subsection shall be liable to a fine not exceeding R16 000 or treble the value of the goods in respect of which such offence was committed, whichever is the greater, or to imprisonment for a period not exceeding four years, or to both such fine and such imprisonment. [Sub-s. (3) amended by s. 10 (b) of Act 52 of 1986 and by s. 6 (b) of Act 105 of 1992.]

<sup>53</sup> Section 79 (1) (f) of the Customs and Excise Act No. 91 Of 1964. Less serious offences and their punishment (1) Any person who- (a) supplies the means or materials for, or assists in establishing, repairing, maintaining or working any still being made or made, imported, used, set up or in the possession or custody of any person without lawful authority; (b) is found without lawful excuse in any place where distillation is illegally carried on; (c) ..... [Para. (c) deleted by s. 56 of Act 45 of 1995.] (d) ..... [Para. (d) deleted by s. 2 of Act 64 of 1974.] (e) falsely holds himself out to be an officer; (f) resists or hinders an officer in the exercise of his powers or the performance of his functions under this Act; or (g) rescues any persons apprehended for any offence under this Act, or prevents the apprehension of any person who has committed any such offence, shall be guilty of an offence and liable on conviction to a fine not exceeding R8 000 or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment. [Sub-s. (1) amended by s. 11 (a) of Act 52 of 1986 and by s. 7 (a) of Act 105 of 1992.] (2) A person who is convicted of an offence referred to in subsection (1) within a period of three years after he was convicted of any offence referred to in that subsection shall be liable to a fine not exceeding R16 000 or to imprisonment for a period not exceeding four years, or to both such fine and such imprisonment.

Act criminalizes anyone “who deals or assists in dealing” with any goods liable to forfeiture for unpaid duty, punishing this conduct with a fine not exceeding R20,000. If the value of the goods is higher than the value of the fine (more than R20,000), the penalty may be imprisonment for a maximum of five years or both imprisonment and the fine. The same section punishes the smuggling of any products with the pecuniary penalty of R20,000 or more if the value of the goods is higher, or with the imprisonment for five years and the forfeiture of illicit imported goods.

Section 84 punishes false statements and declarations to any public officer with “a fine not exceeding R40,000 or treble the value of the goods to which such statement, declaration or document relates, whichever is the greater, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture”.<sup>55</sup>

The Counterfeiting Goods Act<sup>56</sup> generally concerns all the counterfeited goods in the country. Section 2 (1) expressly prohibits to import, distribute, sale, barter, exchange, offer or expose counterfeit goods or possess them for trade purposes. The punishments for the illicit conducts are stated by Section 2 (2), and they are imprisonment not exceeding three years or a R5,000 fine, or both.<sup>57</sup>

The Prevention of Organised Crime Act<sup>58</sup> prosecutes in Section 5 anyone who knows that any other person has obtained in any way the proceeds of some crime and prosecutes anyone who make agreements with someone who engages with proceeds of crime. The punishment provided is a fine not exceeding R100 million or imprisonment for a period not exceeding thirty years.<sup>59</sup> The following Section punishes with a fine not exceeding R100 million or imprisonment for a period not

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<sup>54</sup> Section 82 of the Customs and Excise Act No. 91 Of 1964. Prohibition with regard to stamps (1) Any person who without lawful excuse (the onus of proof of which shall be upon him) uses, or has under his control or in his possession, any stamp or makes available to another person any stamp- (a) which is used under the authority of the Commissioner; [Para. (a) substituted by s. 34 (1) of Act 34 of 1997.] (b) the imprint of which is identical to or resembles the imprint of a stamp referred to in paragraph (a) or of any stamp used by a governmental authority in a foreign country under any law of such country relating to customs or excise or to the import or export of goods, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. (2) Any person who without lawful excuse (the onus of proof of which shall be upon him) manufactures or has in his possession or under his control any stamp the imprint of which depicts the name of a company, firm or other business entity in a foreign country, or any signs or letters which could be reasonably understood to be a reference to such company, firm or business entity, shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

[S. 82 repealed by s. 8 of Act 89 of 1984 and inserted by s. 9 of Act 98 of 1993.]

<sup>55</sup> Section 84 of the Customs and Excise Act No. 91 Of 1964. False documents and declarations (1) Any person who makes a false statement in connection with any matter dealt with in this Act, or who makes use for the purposes of this Act of a declaration or document containing any such statement shall, unless he proves that he was ignorant of the falsity of such statement and that such ignorance was not due to negligence on his part, be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or treble the value of the goods to which such statement, declaration or document relates, whichever is the greater, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture. [Sub-s. (1) amended by s. 15 of Act 52 of 1986 and by s. 11 of Act 105 of 1992.] (2) For the purposes of subsection (1), any invoice or other document relating to any denomination, description, class, grade or quantity of goods shall be deemed to contain a false statement if the price charged by the exporter or any value, price, commission, discount, cost, charge, expense, royalty, freight, duty, tax, drawback, refund, rebate, remission or other information whatever declared therein which has a bearing on value for the purposes of payment of any duty or on classification in terms of any Schedule to this Act or on antidumping duty, countervailing duty or safeguard duty or on extent of rebate, refund or drawback of duty - (a) is not, except in so far as may be otherwise specified, exclusively related to goods of the denomination, description, class, grade or quantity declared in such invoice or document; (b) is influenced, adjusted or amended as a result of any separate transaction, arrangement, agreement or other consideration of any nature whatever particulars of which are not specified in such invoice or document; (c) represents any average or adjustment or amendment, particulars of which are not disclosed in such invoice or document, of such values, prices, commissions, discounts, costs, charges, expenses, royalties, freight, duties, taxes, drawbacks, refunds, rebates, remissions or other information in respect of goods of the same or of different denominations, descriptions, classes, grades or quantities supplied by the same supplier. [Sub-s. (2) added by s. 11 of Act 57 of 1966 and amended by s. 28 of Act 105 of 1969, by s. 29 of Act 112 of 1977 and by s. 14 of Act 61 of 1992.]

<sup>56</sup> Counterfeit Goods Act No. 37 of 1997.

<sup>57</sup> Sections 2 (1) and 2 (2) of Counterfeit Goods Act No. 37 of 1997.

<sup>58</sup> Prevention of Organized Crime Act (POCA) n. 121 of 1998.

<sup>59</sup> Section 5 of Prevention of Organized Crime Act (POCA) n. 121 of 1998.

exceeding thirty years anyone who knowingly “acquires, uses or possesses” goods that are proceeds of crime.<sup>60</sup>

#### ***4.4.5 Enforceability of the Draft Protocol***

Overall, increased taxes and subsequently higher retail prices have resulted in declining cigarette consumption in South Africa. However, a part of this decline may be due to increased ITTP. Given this risk, the South African government has played a particularly active role in the negotiations for the Draft Protocol. South Africa already provides for a licensing mechanism and licensees are required to keep records of some activities and data. However, there is currently no provision regarding the tracking and tracing of tobacco products. This issue will need to be implemented to be in line with the requirements of the Draft Protocol. As for the law enforcement, although there is no specific provision tackling the ITTP, the South African legislation contains rules designed to prevent and punish the circulation of smuggled and counterfeit products along with severe legislation against organised crime and money-laundering activities.

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<sup>60</sup> Section 6 of Prevention of Organized Crime Act (POCA) n. 121 of 1998.

## 5. Conclusions

This report has analysed the measures envisaged by the Draft Protocol to eliminate the illicit trade in tobacco products, and it has assessed their impact on ITTP.

Chapter 2 provided background information on the ITTP, the FCTC, and the Draft Protocol. Chapter 3 analysed the scope of the Draft Protocol, its coverage, and the impact of specific provisions. Finally, Chapter 4 conducted an exploratory survey on four countries in different parts of the world in order to provide further information on the diversity of measures and policies in this policy area.

The analysis conducted for this study highlighted that the initiative for a Draft Protocol is to be welcomed. The Draft Protocol aims at merging preventive and law enforcement measures with an approach innovative with respect to many other international treaties on illicit/criminal matters. Notwithstanding these important premises, the current version of the text appears to require significant improvements in several respects.

Firstly, the scope of the Draft Protocol could be enlarged to cover key inputs (e.g. ready-made cigarette filters and/or acetate tow). Secondly, the negotiations of the Draft Protocol have so far encountered difficulties in striking a balance between the health objectives of the FCTC and the law enforcement objectives of the UNCTOC. In particular, the latest version of the Draft Protocol gives State Parties total freedom in the identification of the conducts concerning the ITTP which should be criminalized in their domestic legal systems. While this solution grants important flexibility, it may result in a criminalization *à la carte* whereby significant inconsistencies and frictions emerge among countries. The objective of creating a common international understanding of the ITTP may be jeopardized by this outcome. Even more importantly, international cooperation, which is based on the criminal offences as provided in the requesting and requested country, may be significantly impeded by the lack of a common core of "ITTP crimes" in the Draft Protocol.

The survey conducted in four countries highlighted that effective and successful practices have been introduced in several jurisdictions. Notwithstanding the introduction of effective legislation and the improvement of law enforcement measures, the ITTP remains, suggesting that traditional approaches, based on criminal law and law-enforcement, may not be able to solve the problem. The survey points out that there are still important differences and incoherence among the countries surveyed in regard to nearly all the policy areas examined. The mentioned differences may have affected the negotiations on the Draft Protocol, inducing the removal of the most constraining measures in favour of a more flexible, but less effective, text.

In view of the last session of negotiations, it is important to raise the issue of the actual effectiveness and feasibility of the current version of the Draft Protocol. In particular, given the lack of agreement on a minimum core of ITTP crimes, the entire international cooperation framework may be undermined.

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# ANNEX 1: DRAFT PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS

For ease of reference and analysis, the most recent version of the Draft Protocol is reported below. It is the result of the combination of the text as it stood at the end of the fourth session of the INB (21 March 2010, annexed to FCTC/COP/INB-IT/5/4), integrated with the proposals of the informal working group delivered on 24 October 2011 (FCTC/COP/INB-IT/5/3).

## 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 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.

## **PART II: GENERAL OBLIGATIONS**

### **Article 4 General obligations**

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

1. adopt and implement effective measures to control or regulate the supply chain of goods covered by the provisions of this Protocol in order to prevent, deter, detect, investigate and prosecute illicit trade in such goods and shall cooperate with one another to this end;

2. take any necessary measures in accordance with their national law to increase the effectiveness of their competent authorities and services, including customs and police responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods covered by this Protocol;

3. adopt effective measures for facilitating or obtaining technical assistance and financial support, capacity building and international cooperation in order to achieve the objectives of this Protocol and ensure the availability to, and secure exchange with, the competent authorities of information to be exchanged under this Protocol;

4. cooperate closely with one another, consistent with their respective domestic legal and administrative systems, in order to enhance the effectiveness of law enforcement action to combat the offences covered by this Protocol;

5. cooperate and communicate, as appropriate, with relevant regional and international intergovernmental organizations in the secure<sup>3</sup> exchange of information covered by this Protocol in order to promote the effective implementation of this Protocol; and

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

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

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

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

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

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

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

#### **Article 6 Due diligence**

1. Each Party shall require, in accordance with its national law or legally binding and enforceable agreements, that all natural and legal persons engaged in the supply chain (needs definition) of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products to:

- (a) conduct due diligence before the commencement of and during the course of, a business relationship;
- (b) monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use; and
- (c) report to the designated competent national authorities any evidence that the customer is engaged in activities in contravention of its obligations deriving from this Protocol.

2. Due diligence pursuant to paragraph 1 of this Article shall, as appropriate, and in accordance with its national laws or legally binding and enforceable agreements, include, among others, requirements for customer identification, such as obtaining and updating information relating to the following:

- (a) establishing that the legal or natural person holds a licence in accordance with Article 5;
- (b) when the customer is a natural person, information regarding his or her identity, including full name, business registration number (if any), applicable tax registration numbers and verification of his or her official identification;
- (c) when the customer is a legal person, information regarding its identity, including full name, business registration number, date and place of incorporation, corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, complete names of its directors and any designated legal representatives, including the representatives' complete names and verification of their official identification;
- (d) a description of the intended use and intended market of sale of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and
- (e) a description of the location where manufacturing equipment for use in the manufacture of tobacco products will be installed and used.

2bis Due diligence pursuant to paragraph 1 of this Article may include requirements for customer identification, such as obtaining and updating information relating to the following:

- (a) documentation or a declaration regarding any criminal records; and
- (b) identification of the bank accounts intended to be used in transactions.

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

#### **Article 7 Tracking and tracing**

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

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

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

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

- (a) date and location of manufacture;
- (b) manufacturing facility;
- (c) machine used to manufacture tobacco products;
- (d) production shift or time of manufacture;

- (e) the name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer;
- (f) the intended market of retail sale;
- (g) product description;
- (h) any warehousing and shipping;
- (i) the identity of any known subsequent purchaser; and
- (j) the intended shipment route, the shipment date, shipment destination, point of departure and consignee.

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

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

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

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

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

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

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

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

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

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

- (a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;
- (b) support for training and capacity-building programmes for Parties that express such a need; and
- (c) further development of the technology to mark and scan unit packs and packets of tobacco products to make accessible the information listed in paragraph 4 of this Article.

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

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

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

## **Article 8 Record-keeping**

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

2. Each Party shall, as appropriate, require persons licensed in accordance with Article 5 to provide, on request, the following information to the designated competent authorities:

- (a) general information on market volumes, trends, forecasts and other relevant information; and
- (b) the quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock, in tax and customs warehouses under the regime of transit or transshipment or duty suspension as of the date of the request.

3. With respect to tobacco products and manufacturing equipment sold or manufactured on the territory of the Party for export, or subject to duty-suspended movement in transit or transshipment on the territory of the Party, each Party shall, as appropriate, require that persons licensed in accordance with Article 5, provide, on request, to the designated competent authorities in the country of departure (electronically, where the infrastructure exists) at the time of departure from their control with the following information:

- (a) the date of shipment from the last point of physical control of the products;
- (b) the details concerning the products shipped (including brand, amount, warehouse);
- (c) the intended shipping routes and destination;
- (d) the identity of the natural or legal person(s) to whom the products are being shipped;
- (e) the mode of transportation, including the identity of the transporter;
- (f) the expected date of arrival of the shipment at the intended shipping destination; and
- (g) intended market of retail sale or use.

4. If feasible, each Party shall require that retailers and tobacco growers, except for traditional growers working on a non-commercial basis, maintain complete and accurate records of all relevant transactions in which they engage, in accordance with its national 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 at least four years;
- (b) made available to the designated competent authorities; and
- (c) maintained in a format, as required by the designated competent authorities.

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.<sup>1</sup>

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

#### **Article 9 Security and preventive measures**

1. Each Party shall, where appropriate and in accordance with its national laws or legally binding and enforceable agreements, require that all natural and legal persons subject to Article 5 take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, among others:

- (a) reporting to the designated competent national authorities:
  - (i) the cross-border transfer of cash in amounts stipulated in national laws or regulations or of cross-border payments in kind; and
  - (ii) all "suspicious transactions";
- (b) supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use.

2. Each Party shall, where appropriate and in accordance with its national laws or legally binding and enforceable agreements, require that payments for transactions carried out by natural or legal persons subject to Article 5 be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system.

<sup>1</sup> This paragraph was agreed in Committee A at the third session of the Intergovernmental Negotiating Body.

2bis A Party may require that payments carried out by natural or legal persons subject to Article 5 for materials used for the manufacture of tobacco products in its jurisdiction be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system.

3. Each Party shall ensure that any contravention of the requirements of this Article is subject to appropriate criminal, civil or administrative procedures and effective, proportionate and dissuasive sanctions including, as appropriate, suspension or cancellation of a licence. (Placement of this paragraph needs further discussion)

#### **Article 10 Sale by Internet, telecommunication or any other evolving technology**

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

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

#### **Article 11 Free zones and international transit**

1. Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective controls on all manufacturing of, and transactions in, tobacco and tobacco products, in free zones, by use of all relevant measures as provided in this Protocol.
  2. In addition, the intermingling of tobacco products with non-tobacco products in a single container or any other such similar transportation unit at the time of removal from free zones shall be prohibited.
  3. Each Party shall, in accordance with national law, adopt and apply control and verification measures to the international transit or transshipment, 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 "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).

#### **Article 11bis Duty free sales**

1. Each Party shall implement effective measures to subject any duty free sales to all relevant provisions of this protocol, taking into consideration Article 6 of the WHO FCTC.
2. Five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain the extent of illicit trade in tobacco products related to duty free sales of such products. On the basis of such research, the Meeting of the Parties shall consider appropriate action.

### **PART IV: OFFENCES**

#### **Article 12 Unlawful conduct including criminal offences**

1. Each Party shall adopt, subject to the basic principles of its domestic law, such legislative and other measures, as may be necessary, to establish all of the following conduct as unlawful under its domestic law:
  - (a) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products contrary to the provisions of this Protocol;
  - (b) (i) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels;
  - (ii) any other acts of smuggling of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products not covered by paragraph (b)(i);
  - (c) (i) counterfeiting tobacco products or manufacturing equipment used in the manufacture of tobacco products or counterfeiting packaging, applicable fiscal stamps, unique identification markings, or any other markings or labels;
  - (ii) wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting counterfeit tobacco products or counterfeit manufacturing equipment used in the manufacture of tobacco products or counterfeit fiscal stamps or unique identification markings, or any other markings or labels;
  - (iii) defacing, falsifying, removing, altering or otherwise interfering with applicable fiscal stamps, unique identification markings, or any other required markings or labels affixed to tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products in order to, directly or indirectly, obtain any advantage, financial or other material benefit;
  - (d) intermingling tobacco products with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transportation, import or export, for the purpose of concealing or disguising tobacco products;
  - [(e) using Internet, telecommunication or any other evolving technology-based modes of sale of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, in contravention of the provisions of this Protocol;] (Final formulation depends on outcome of the discussions on Article 10)
  - (f) obtaining, by a person licensed in accordance with Article 5, tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products from a person who should be, but is not, licensed in accordance with Article 5;
  - (g) obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;
  - (h) (i) making any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products and when not contrary to the right against self incrimination;
  - (ii) mis-declaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products or any other information specified in the protocol to:
  - (a) evade the payment of applicable duties, taxes and other levies, or

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

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

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

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

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

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

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

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

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

(b) attempting to commit an offence;

(c) aiding, abetting, or inciting the commission of an offence. (UNTOC, Article 6.1(b)(ii) modified<sup>3</sup>)

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 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. (UNTOC, Article 10.1 modified)

2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative. (UNTOC, Article 10.2 modified)

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 Article 12 of this Protocol. (UNTOC, Article 10.3 modified)

### **Article 14 Prosecutions and sanctions**

1. Each Party shall adopt such measures as may be necessary 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 sanctions. (UNTOC, Article 10.4 modified)

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 those unlawful conduct including criminal offences, and with due regard to the need to deter the commission of such unlawful conduct including offences. (UNTOC, Article 11.2 modified)

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. (UNTOC, Article 11.6 modified)

### **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 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.

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:

(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;

(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;

[(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

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

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

3. 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.

#### **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;

(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;

(c) records of investigations and prosecutions;

(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

(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. 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.

#### **Article 22 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.
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 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 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.

#### **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*)<sup>1</sup>
- [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 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 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;
    - (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 30 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)

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 therefore.] (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 on progress of its handling of the request. The requesting Party shall promptly inform the requested Party when the assistance sought is no longer required. (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 31 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

[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 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/INBIT/ 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 32 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)

### **Article 33 Extradition of alleged offenders**

## **PART VI: REPORTING**

### **Article 34 Reporting and exchange of information**

1. Each Party shall submit to the Meeting of the Parties, through the Convention Secretariat, periodic reports on its implementation of this Protocol.

2. The format and content of such reports shall be determined by the Meeting of the Parties. These reports shall form part of the regular Framework Convention on Tobacco Control reporting instrument.

3. The content of the periodic reports referred to in paragraph 1 of this Article, shall be determined having regard, inter alia, to the following:

(a) information on legislative, executive, administrative or other measures taken to implement this Protocol;

(b) information, as appropriate, on any constraints or barriers encountered in the implementation of this Protocol and on the measures taken to overcome those barriers;

(c) information, as appropriate, on financial and technical assistance provided, received, or requested for activities related to the elimination of illicit trade in tobacco products; and

(d) the information specified in Articles XX, XX, XX, XX and XX.

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

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

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

## **PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES**

### **Article 35 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.

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.

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*)<sup>2</sup>
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.
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.

#### **Article 36 Secretariat**

1. The Convention Secretariat shall be the Secretariat of this Protocol.
2. The functions of the Convention Secretariat with regard to its role as the secretariat of this Protocol shall be to:
  - (a) make arrangements for sessions of the Meeting of the Parties and any subsidiary bodies as well as working groups and other bodies established by the Meeting of the Parties and provide them with services as required;
  - (b) receive, analyse, transmit and provide feedback to Parties concerned and to the Meeting of the Parties on reports received by it pursuant to this Protocol 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;
  - (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 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 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.
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 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 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.

### **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 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.

### **Article 44 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 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 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 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 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.

## ANNEX 2: FCTC PROVISIONS TO WHICH THE TEXT OF THE FCTC PROTOCOL MAKES EXPLICIT REFERENCE

The text of the Protocol to eliminate illicit trade in tobacco products makes specific reference to certain provisions of the FCTC. This document, which in fact constitutes the legal basis of the Protocol, is set out in the rules below. For the full text of the FCTC, see [www.who.int/fctc/](http://www.who.int/fctc/).

### **Article 2** *Relationship between this Convention and other agreements and legal instruments*

1. In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.
2. The provisions of the Convention and its protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its protocols, provided that such agreements are compatible with their obligations under the Convention and its protocols. The Parties concerned shall communicate such agreements to the Conference of the Parties through the Secretariat.

### **Article 5** *General obligations*

1. Each Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party.
2. Towards this end, each Party shall, in accordance with its capabilities:
  - (a) establish or reinforce and finance a national coordinating mechanism or focal points for tobacco control; and
  - (b) adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.
3. In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.
4. The Parties shall cooperate in the formulation of proposed measures, procedures and guidelines for the implementation of the Convention and the protocols to which they are Parties.
5. The Parties shall cooperate, as appropriate, with competent international and regional intergovernmental organizations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties.
6. The Parties shall, within means and resources at their disposal, cooperate to raise financial resources for effective implementation of the Convention through bilateral and multilateral funding mechanisms.

### **Article 6** *Price and tax measures to reduce the demand for tobacco*

1. The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.
2. Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include:
  - (a) implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption; and
  - (b) prohibiting or restricting, as appropriate, sales to and/or importations by international travellers of tax- and duty-free tobacco products.
3. The Parties shall provide rates of taxation for tobacco products and trends in tobacco consumption in their periodic reports to the Conference of the Parties, in accordance with Article 21.

### **Article 13** *Tobacco advertising, promotion and sponsorship*

1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.

2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, within the period of five years after entry into force of this Convention for that Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.
3. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles shall apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21.
4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:
  - (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;
  - (b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship;
  - (c) restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;
  - (d) require, if it does not have a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties, pursuant to Article 21;
  - (e) undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and
  - (f) prohibit, or in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein.
5. Parties are encouraged to implement measures beyond the obligations set out in paragraph 4.
6. Parties shall cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising.
7. Parties which have a ban on certain forms of tobacco advertising, promotion and sponsorship have the sovereign right to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship originating from their territory in accordance with their national law. This paragraph does not endorse or approve of any particular penalty.
8. Parties shall consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship.

#### **Article 15** *Illicit trade in tobacco products*

1. The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.
2. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to ensure that all unit packets and packages of tobacco products and any outside packaging of such products are marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status. In addition, each Party shall:
  - (a) require that unit packets and packages of tobacco products for retail and wholesale use that are sold on its domestic market carry the statement: "Sales only allowed in (insert name of the country, subnational, regional or federal unit)" or carry any other effective marking indicating the final destination or which would assist authorities in determining whether the product is legally for sale on the domestic market; and
  - (b) consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.
3. Each Party shall require that the packaging information or marking specified in paragraph 2 of this Article shall be presented in legible form and/or appear in its principal language or languages.
4. With a view to eliminating illicit trade in tobacco products, each Party shall:
  - (a) monitor and collect data on cross-border trade in tobacco products, including illicit trade, and exchange information among customs, tax and other authorities, as appropriate, and in accordance with national law and relevant applicable bilateral or multilateral agreements;
  - (b) enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes;

(c) take appropriate steps to ensure that all confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products are destroyed, using environmentally-friendly methods where feasible, or disposed of in accordance with national law;

(d) adopt and implement measures to monitor, document and control the storage and distribution of tobacco products held or moving under suspension of taxes or duties within its jurisdiction; and

(e) adopt measures as appropriate to enable the confiscation of proceeds derived from the illicit trade in tobacco products.

5. Information collected pursuant to subparagraphs 4(a) and 4(d) of this Article shall, as appropriate, be provided in aggregate form by the Parties in their periodic reports to the Conference of the Parties, in accordance with Article 21.

6. The Parties shall, as appropriate and in accordance with national law, promote cooperation between national agencies, as well as relevant regional and international intergovernmental organizations as it relates to investigations, prosecutions and proceedings, with a view to eliminating illicit trade in tobacco products. Special emphasis shall be placed on cooperation at regional and subregional levels to combat illicit trade of tobacco products.

7. Each Party shall endeavour to adopt and implement further measures including licensing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.

### **Article 23** *Conference of the Parties*

1. A Conference of the Parties is hereby established. The first session of the Conference shall be convened by the World Health Organization not later than one year after the entry into force of this Convention. The Conference will determine the venue and timing of subsequent regular sessions at its first session.

2. Extraordinary sessions of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to them by the Secretariat of the Convention, it is supported by at least one-third of the Parties.

3. The Conference of the Parties shall adopt by consensus its Rules of Procedure at its first session.

4. The Conference of the Parties shall by consensus adopt financial rules for itself as well as governing the funding of any subsidiary bodies it may establish as well as financial provisions governing the functioning of the Secretariat. At each ordinary session, it shall adopt a budget for the financial period until the next ordinary session.

5. The Conference of the Parties shall keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation and may adopt protocols, annexes and amendments to the Convention, in accordance with Articles 28, 29 and 33. Towards this end, it shall:

(a) promote and facilitate the exchange of information pursuant to Articles 20 and 21; methodologies for research and the collection of data, in addition to those provided for in Article 20, relevant to the implementation of the Convention;

(c) promote, as appropriate, the development, implementation and evaluation of strategies, plans, and programmes, as well as policies, legislation and other measures;

(d) consider reports submitted by the Parties in accordance with Article 21 and adopt regular reports on the implementation of the Convention;

(e) promote and facilitate the mobilization of financial resources for the implementation of the Convention in accordance with Article 26;

(f) establish such subsidiary bodies as are necessary to achieve the objective of the Convention;

(g) request, where appropriate, the services and cooperation of, and information provided by, competent and relevant organizations and bodies of the United Nations system and other international and regional intergovernmental organizations and nongovernmental organizations and bodies as a means of strengthening the implementation of the Convention; and

(h) consider other action, as appropriate, for the achievement of the objective of the Convention in the light of experience gained in its implementation.

6. The Conference of the Parties shall establish the criteria for the participation of observers at its proceedings.

### **Article 26** *Financial resources*

1. The Parties recognize the important role that financial resources play in achieving the objective of this Convention.

2. Each Party shall provide financial support in respect of its national activities intended to achieve the objective of the Convention, 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 the development and strengthening of multisectoral comprehensive tobacco control programmes of developing country Parties and Parties with economies in transition. Accordingly, economically viable alternatives to tobacco production, including crop diversification should be addressed and supported in the context of nationally developed strategies of sustainable development.

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

5. The Parties agree that:

- (a) to assist Parties in meeting their obligations under the Convention, all relevant potential and existing resources, financial, technical, or otherwise, both public and private that are available for tobacco control activities, should be mobilized and utilized for the benefit of all Parties, especially developing countries and countries with economies in transition;
- (b) the Secretariat shall advise developing country Parties and Parties with economies in transition, upon request, on available sources of funding to facilitate the implementation of their obligations under the Convention;
- (c) the Conference of the Parties in its first session shall review existing and potential sources and mechanisms of assistance based on a study conducted by the Secretariat and other relevant information, and consider their adequacy; and
- (d) the results of this review shall be taken into account by the Conference of the Parties in determining the necessity to enhance existing mechanisms or to establish a voluntary global fund or other appropriate financial mechanisms to channel additional financial resources, as needed, to developing country Parties and Parties with economies in transition to assist them in meeting the objectives of the Convention.

**Article 27** Settlement of disputes

1. In the event of a dispute between two or more Parties concerning the interpretation or application of this Convention, the Parties concerned shall seek through diplomatic channels a settlement of the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation, or conciliation. Failure to reach agreement by good offices, mediation or conciliation shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it.
2. When ratifying, accepting, approving, formally confirming or acceding to the Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts, as compulsory, ad hoc arbitration in accordance with procedures to be adopted by consensus by the Conference of the Parties.
3. The provisions of this Article shall apply with respect to any protocol as between the parties to the protocol, unless otherwise provided therein.

## ANNEX 3: UNCTOC PROVISIONS TO WHICH THE TEXT OF THE FCTC PROTOCOL MAKES EXPLICIT REFERENCE

The text of the Protocol to eliminate illicit trade in tobacco products makes specific reference to certain provisions of the UNCTOC, reported below. This document represents a reference standard for the suppression of crime, particularly organized and international, and for the strengthening of the cooperation and enforcement measures. For the full text of the UNCTOC, see <http://www.unodc.org/unodc/en/treaties/CTOC/>.

### **Article 5** Criminalization of participation in an organized crime group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

### **Article 6** Criminalization of the laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of 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;

(ii) The concealment or disguise of 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;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

#### **Article 8** Criminalization of corruption

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.

3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

4. For the purposes of paragraph 1 of this article and article 9 of this Convention, "public official" shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

#### **Article 10** Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.

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

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

#### **Article 11** Prosecution, adjudication and sanctions

1. Each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence.

2. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

3. In the case of offences established in accordance with articles 5, 6, 8 and 23 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

4. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.

5. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.

6. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

#### **Article 12** Confiscation and seizure

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

(a) Proceeds of crime derived from offences covered by this Convention 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 this Convention.

2. States 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 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 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, 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 and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

7. States 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 State Party.

#### **Article 13** International and cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 18 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 18, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.
6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.
7. Cooperation under this article may be refused by a State Party if the offence to which the request relates is not an offence covered by this Convention.
8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.
9. States Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this article.

#### **Article 15 Jurisdiction**

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:
  - (a) The offence is committed in the territory of that State Party; or
  - (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.
2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:
  - (a) The offence is committed against a national of that State Party;
  - (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
  - (c) The offence is:
    - (i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;
    - (ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.
3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.
4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.
5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.
6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

#### **Article 16 Extradition**

1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.
2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.
3. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
4. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.
5. States Parties that make extradition conditional on the existence of a treaty shall:
  - (a) At the time of deposit of their instrument of ratification, acceptance, approval or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and
  - (b) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.
6. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

7. Extradition shall be subject to the conditions provided for by the domestic law of the requested State 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 State Party may refuse extradition.
8. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.
9. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.
10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.
11. Whenever a State 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 State 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 State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.
12. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.
13. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.
14. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.
15. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.
16. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.
17. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

#### **Article 18 Mutual legal assistance**

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.
3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
  - (a) Taking evidence or statements from persons;
  - (b) Effecting service of judicial documents;
  - (c) Executing searches and seizures, and freezing;
  - (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 State Party;
  - (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.
5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.
6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.
7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.
8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.
9. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State 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 State Party.
10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:
- (a) The person freely gives his or her informed consent;
  - (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.
11. For the purposes of paragraph 10 of this article:
- (a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;
  - (b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;
  - (c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;
  - (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.
12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.
13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.
14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In

urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- (e) Where possible, the identity, location and nationality of any person concerned; and
- (f) The purpose for which the evidence, information or action is sought.

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

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

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State 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 State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

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

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

21. Mutual legal assistance may be refused:

- (a) If the request is not made in conformity with the provisions of this article;
- (b) If the requested State 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 State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

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

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

24. The requested State 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 State Party and for which reasons are given, preferably in the request. The requested State Party shall respond to reasonable requests by the requesting State Party on progress of its handling of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

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

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

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

longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

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

29. The requested State Party:

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

30. States 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.