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Protocol Consultations, Cape Town (South Africa), 4 - 6 October 2010

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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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# RESTREINT UE



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 18 October 2010**

**15112/10**

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**UD 283**

## **NOTE**

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from : General Secretariat of the Council  
to : Working Party on Customs Union (Customs Legislation and Policy)  
on: 21 October 2010

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Subject : World Health Organization (WHO): EURO/AFRO/AMRO informal FCTC  
Protocol Consultations, Cape Town (South Africa), 4 - 6 October 2010

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Delegations will find attached a report on the above meeting, transmitted by the Commission services.

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ANNEX

## Report on informal inter-regional consultations held in Cape Town, October 4 - 6 2010

The informal inter-regional discussions between certain parties of AFRO, and each of AMRO and EURO were held in Cape Town from Monday October 4<sup>th</sup> to Wednesday October 6<sup>th</sup> 2010. The discussions were chaired by Mrs. Nuntavarn Vichit-Vadakan of Thailand (SEARO).

The EU with the agreement of the other parties of the EURO and with AMRO had taken the initiative to convene the meeting to make some progress on certain outstanding articles in the Supply Chain Chapter namely Articles 6, 8 and 9 and with a view to indicate to CoP 4 that there might be sufficient reason to proceed to an INB 5 in March 2011

The following were present at the meeting: Brazil, Canada, Mexico and Panama representing AMRO; EU, Norway and Turkey, representing EURO; Islamic Republic of Iran, Kenya, Nigeria, South Africa, Tanzania, Thailand and Uganda.

The EU was represented by the EU Commission (OLAF and SANCO), Belgium (Presidency of the Council), France, Germany, and Sweden.

At the opening of the meeting the AFRO parties made it clear that they were participating as individual parties, and that they did not have a mandate from their region. Moreover following some lengthy discussion it was agreed that the informal session should be termed as a brain storming session without any decision making function.

The brain storming session first considered **Article 8 (Record Keeping)**. The participants from AFRO had indicated their willingness to work on the basis of the revised text proposed by AMRO and EURO, and the discussions largely followed this text. However, the issue of materials used in the manufacture of tobacco products ("key inputs") was raised by the AFRO participants who sought that the provisions of Article 8 should apply to the material used in the manufacture of cigarettes.

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The EU argued that since key inputs were utilised in other areas of normal business, that it would be draconian to subject such material to the provisions of Article 8. The EU also reminded the meeting that there was a study from the Secretariat of the FCTC which had shown that there was no correlation between the control of key inputs and tobacco product fraud.

AMRO expressed their view that any extension of the scope of the record keeping requirements of the Article might make the Article applicable to all retailers which they argued was not feasible and would lead to a disproportionate burden. This point was supported by the Chair who stated that she believed that this would also be the view of SEARO.

The AFRO Parties explained that their concern was overproduction and that therefore the manufactures of tobacco products should be required to reconcile the amount of materials (key inputs) with the output of tobacco products produced. A record keeping requirement on main components of the manufactured tobacco products would help to reveal any overproduction intended for illicit channels. In addition, the AFRO Parties stated that they only required that the issue of materials (key inputs) should be addressed in the context of Article 8.

In an effort to meet those concerns, AMRO proposed certain amendments to the text. EURO agreed to this amendment, but the EU insisted on the use of the words “as appropriate” to allow for flexibility in applying the provision.

Much consideration was given to the type of information that could be retained under Article 8 and for how long. The EU concern was with the wording “not less than five years”. Ultimately the EU reminded Parties that it had been stated by the EU at the conclusion of INB 4 that the issue of Data Protection would have to be revisited before overall agreement could be reached on any draft Protocol.

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The discussions on **Article 9 (Security and preventive measures)** were based on text on which the AFRO Parties had worked on overnight with the Chair and the representative of the Islamic Republic of Iran. All these Parties wished to adhere as closely as possible to the text of the Chair of INB 4, and had compared and contrasted this with the text supported by AMRO and EURO. As for other Articles of the protocol, the AFRO Parties' approach was that the Protocol should serve as the basis for establishing national legislation.

The compromise text which ultimately emerged left in suspense (underlined in the text) many important questions in particular the scope of the provisions. In the original AMRO / EURO draft text, the scope of Article 9 had been linked to Article 5. The AFRO parties argued nonetheless that the provisions of Article 9 should apply also to situations and persons outside the scope of Article 5 and notably to materials involved in the production of tobacco products (key inputs). In essence this meant that despite what had been said about the inclusion of raw materials in the context Article 8, the issue of key inputs was being raised yet again in Article 9. The EU response was that this would place a disproportionate burden on lawful business.

The EU sought to have the word "commercial" inserted in Article 9 (1) so that it would read *"engaged in the commercial sales of tobacco or COMMERCIAL manufacture, sales..."*.

This was rejected by AFRO

The discussions on Article 9 also dealt with anti money laundering provisions and the requirement to report to the designated national authorities cross-border transfer of cash in amounts defined by the national legislation. The AFRO parties proposed to include non cash payments in addition to cash payments. The justification was that in certain cases, the illicit activity could consist in payment by weapons, diamonds or similar products, and not in cash. Payment practice in the AFRO region was different and this must be understood and appreciated, they argued. The EU replied that such an approach would be a totally disproportionate measure for normal and lawful business in that all payments (cash and non cash) exceeding the amount specified in national law would require to be reported. In an effort to reach agreement the EU proposed the use of the word "non-monetary payments" but this did not find acceptance with the AFRO parties.

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The AFRO Parties also sought changes to the AMRO/EURO text by reintroducing the concept of prohibiting the intermingling of tobacco products and non tobacco products at all stages of the supply chain and even when the duty on the tobacco products had been paid.

Again this was seen as unacceptable by AMRO and EURO as being impractical and disproportionate for lawful business. Furthermore a suggestion from AFRO that the words "*if intended to conceal or disguise tobacco products*" was not accepted by AMRO / EURO as it would not be possible to implement by national law.

Ultimately three important issues of Article 9 were left open; inclusion of raw materials (key inputs), intermingling (of duty paid products with non tobacco products) and non cash payments (in effect all payments).

**Article 6 (Due Diligence)** was not discussed in detail because of time constraints.

The provisions of paragraph 6.1 of the AMRO/EURO text were accepted. In general the participants from the AFRO region acknowledged that the AMRO EURO text on Article 6 adhered to the concepts set out in the Chair of INB 4 text. (It should be noted however that Article 6 has yet to be agreed with Turkey in relation to the exclusion of Blocked Customers)

Islamic Republic of Iran and AFRO both raised the concept of due diligence applying in both directions (i.e. from seller to buyer and vice versa). This was not discussed in detail but may arise in future.

Islamic Republic of Iran also pointed to the fact that the term "*supply chain*" was first mentioned in this Article and that it may need to be defined in order to make it more precise.

**Closing Session:** At the end of the meeting a discussion took place on how to proceed from this brain storming session and how it should be reported to the FCTC Secretariat and to the Conference of the Parties.

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The AFRO Parties emphasised that they had no mandate from their region to agree any text. They were not therefore willing even as individual Parties of AFRO to be part of a joint presentation or submission of the revised text to the FCTC secretariat. It is apparent that there are acute divisions within the region. Nonetheless on a positive note it can be said that the brain storming session facilitated all parties, the AFRO Parties in particular, to clearly articulate their various concerns.

It is proposed that subject to agreement, Articles 6, 8 and 9 will be presented as text of an inter sessional discussion between AMRO and EURO. In relation to Article 6, the agreement of Turkey will be required. Meanwhile the AFRO parties who were present in Cape Town will discuss, within AFRO, the EURO AMRO text as revised, just before CoP 4 in Uruguay.

**To summarise** it can be said that the outcome of the Cape Town brain storming session was as follows:

- 1) The objective of reaching an accord with the AFRO region on the three Articles was not met. However accord was reached with certain Parties of AFRO on the provisions of Article 8. This achievement alone could save days of negotiations at a future INB 5.
- 2) The objective of expressing and understanding the very real concerns of each region, the AFRO in particular, was met. This can only help further negotiations and initiatives.
- 3) Some of the main difficulties were identified;

In particular it is clear that the AFRO Parties will insist on their position on supply chain controls applying to "key inputs". It should be noted however that AFRO is the only one of the six regions to take this approach to key inputs. This important issue must be resolved before a decision can be taken on an INB 5

There are also serious differences on Article 9 with regard to the issue of non cash payments and on the question of intermingling.

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- 4) EURO and AMRO proposed with the AFRO Parties that subject to agreement within their regions:
- a) EU (OLAF) would send a letter to each participant on the outcome of this brain storming session in Cape Town. The letter would be based on the paper discussed at the closing in Cape Town and attached to this report at Annex A. The letter should summarise the discussion and main issues.
  - b) EU (OLAF) would also send a letter to the FCTC Secretariat informing them that pursuant to their suggestion in their letter dated May 17<sup>th</sup> 2010, there had been a brain storming session in Cape Town.
  - c) EURO and AMRO would submit to the FCTC Secretariat the draft text on Articles 6,8 & 9 (See Annex B) which was agreed between them (and incorporating those amendments which were found to be acceptable from the brain storming session in Cape Town and subject to Turkey's agreement on Article 6). In addition efforts will be made to reach agreement between AMRO and EURO on text for Articles 10 and 11 which can be added to this text.

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## ANNEX TO THE ANNEX

### Annex A

#### *Article 6*

##### *Due Diligence*

1. Each Party shall require, in accordance with its national laws 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:
  - a) conduct due diligence before the commencement of and during the course of, a business relationship for the purpose of ascertaining whether a customer or prospective customer (both ways) is complying with or can be expected to comply with the provisions of this Protocol;
  - 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 this Protocol or is otherwise not compliant with its provisions.
  
2. *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) 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;

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- (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, 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) documentation or a declaration regarding any criminal records;
  - (e) identification of the bank accounts intended to be used in transactions;
  - (f) a description of the intended use and intended market of sale of tobacco, *tobacco products* or manufacturing equipment used in the manufacture of *tobacco products*; and
  - (g) a description of the location where manufacturing equipment for use in the manufacture of *tobacco products* will be installed and used.
3. Each Party shall, on the basis of the information reported in paragraph 1(c), take all the necessary measures to ensure compliance with this Protocol.

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## *Article 8*

### *Record-keeping*

1. Each Party shall require, as appropriate, that all natural and legal persons engaged in the commercial sale of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment maintain complete and accurate records of all such transactions. Such records must allow for the full accountability of materials used in the production of their tobacco products.
2. Each Party shall require persons licensed in accordance with Article 5 to provide the following information to the designated competent authorities, on request:
  - 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 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 on the territory of the Party, each Party shall, as appropriate, require that persons licensed in accordance with Article 5, provide 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, on request:
  - a) date of shipment from the last point of physical control of the products;
  - b) details concerning the products shipped (including brand, amount, warehouse); intended shipping routes and destination;
  - c) identity of the natural or legal person(s) to whom the products are being shipped;

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- d) mode of transportation, including the identity of the transporter;
  - e) expected date of arrival of the shipment at the intended shipping destination; and
  - f) 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 not less than five 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.
7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved systems for record-keeping.

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## *Article 9*

### *Security and preventive measures*

1. Each Party shall, in accordance with its national laws, require that all natural and legal persons subject to Article 5, take necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, amongst others:
  - a) Reporting to the designated competent national authorities the cross-border transfer of cash in amounts stipulated in national laws or regulations
  - 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; and
  - c) Reporting to the designated competent national authorities all suspicious transactions.

### **Alternative**

1. Each Party shall adopt, in accordance with its national laws and regulations, and implement effective legislative, executive, administrative or other measures to require that all natural and legal persons engaged in commercial sales of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and manufacturing equipment used in the manufacture of tobacco products, take effective measures to prevent the diversion of tobacco products, manufacturing equipment and the materials used in the production of tobacco products, into illicit trade channels including among others:
  - a) Reporting to the designated competent national authorities the cross-border transfer of cash and non-cash/monetary payments as stipulated in national laws or regulations;

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- b) Supplying tobacco products or manufacturing equipment only in quantities commensurate with the demand for such products within the intended market of retail sale or use; and
  - c) Reporting all suspicious transactions to the designated competent national authorities.
2. Each Party shall require, in accordance with its national laws, that payments for transactions relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and manufacturing equipment be allowed only in the currency and in the same amount as the invoice for those products, and only by wire or cheque from financial institutions located on the territory of the intended market of retail sale of the tobacco products and shall not be operated through any other alternative remittance system.

### Alternative

2. Parties shall require that payments for transactions relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products, materials and equipment used in the production of tobacco products, be allowed only in the currency and in the same amount as the invoice for those products, and only through legal modes of payment from the financial institutions located in the territory of the intended market of sale of the tobacco products, and should not be operated through any other alternate remittance system.

### New provision

- 2 bis.** Each Party shall adopt and implement effective legislative, executive, administrative or other measures to require that tobacco products are not intermingled with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transport, import and export, if intended to conceal or disguise tobacco products.

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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 license and prohibition of the licensee from re-applying for a license during a stipulated period.

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## Annex B

### Discussion Paper

Based on the Secretariat note dated 17 May 2010 which *inter alia* encouraged the Parties to interact with each other to take forward the process of negotiation on the draft Protocol on illicit trade, the EU took the initiative to convene a brainstorming session on Articles 6, 8 and 9 of the draft Protocol.

Of the 22 invited Parties, the following were present at the brainstorming session: Brazil, Canada, Mexico and Panama representing the AMRO Region; EU, Norway and Turkey representing the EURO Region; Islamic Republic of Iran, Kenya, Nigeria, South Africa, Tanzania, Thailand and Uganda.

Ms. Nuntavarn Vichit-Vadakan (Thailand) chaired the brainstorming session.

The session took place in Cape Town, South Africa from 4 – 6 October 2010 based on the following understanding:

- The participants took part in this session in their own national or regional capacity;
- The meeting was not a drafting or negotiating exercise but a brainstorming session;
- Text proposed by the EURO (except Turkey) and AMRO on the said Articles as well as the draft Protocol as laid down in document FCTC/COP/4/5 formed the basis of these discussions; and
- The draft Protocol as laid down in document FCTC/COP/4/5 was recognised as the basis for future negotiations.

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