



Council of the
European Union

Brussels, 25 October 2017
(OR. en)

5990/1/12
REV 1 DCL 1

UD 29
SAN 15
COPEN 27
DROIPEN 11

DECLASSIFICATION

of document:	ST 5990/12 REV 1 RESTREINT UE/EU RESTRICTED
dated:	26 March 2012
new status:	Public
Subject:	World Health Organization (WHO): Framework Convention on Tobacco Control - Draft Protocol to eliminate illicit trade in tobacco products (Article 1-49) - Consolidated text, "red lines" and tactics

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

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



COUNCIL OF
THE EUROPEAN UNION

Brussels, 26 March 2012

5990/1/12
REV 1

RESTREINT UE/EU RESTRICTED

UD 29
SAN 15
COPEN 27
DROIPEN 11

NOTE

from : General Secretariat
to : Working Party on Customs Union
No. prev. doc. : 17808/10 UD 344 SAN 302 COPEN 288 DROIPEN 152
Subject : World Health Organization (WHO): Framework Convention on Tobacco Control
- Draft Protocol to eliminate illicit trade in tobacco products (Article 1-49) -
Consolidated text, “red lines” and tactics

**DRAFT PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS
(ARTICLE 1-49) - CONSOLIDATED TEXT, “RED LINES” AND TACTICS**

The present document, including the introduction, constitutes the agreed coordinated position established in view of the fifth session of the Intergovernmental Negotiating Body (INB 5) that will take place in Geneva on 29 March - 4 April 2012.

This document has been amended in the light of the written comments send in by the delegations and the Commission, and in the light of the discussions which have taken place in the Working Party on Customs Union on 3 February 2012, 28 February 2012 and on 16 March 2012 and at the Customs Attachés meetings on 23 March and 26 March 2012. Minor clarifications and tidying up in the text have been done in order to have the best possible basis for the negotiations. Only topics raised by the delegations either in the written comments or at the above mentioned meetings have been reconsidered, otherwise the existing coordinated positions have remained unchanged.

The document furthermore contains the final result of the coordination that has taken place in the Group of the JHA Counsellors and among the Missions in Geneva.

Amendments compared with doc. 5990/10 are underlined, deletions are indicated by [...].

Introduction

The present document, including the introduction, constitutes a draft coordinated position to be established in view of the fifth session of the Intergovernmental Negotiating Body (INB 5). INB5 will take place in Geneva on 29 March - 4 April 2012.

The Presidency wishes to draw delegations' attention to the following elements:

- Any reference throughout the draft coordinated text to the position of the EU is without prejudice to the division of competence between the EU and its Member States;
- Although it is likely that the language suggested with regard to some of the definitions and with regard to the few remaining non agreed articles, will be amended in the course of negotiations at INB 5, such amendments must not compromise what is specifically indicated as “red lines”. The term “red line” is in turn only used in this document whenever the position is at the core of the EU position;
- In accordance with the statement given by the EU at the second Working Group meeting in September 2011, the EU can, in a spirit of compromise, accept the “package” (Art. 5-6, 8-11bis). This acceptance is given despite the fact that the “package” does not satisfactorily answer a number of important concerns expressed by the EU at the previous meetings of the Intergovernmental Negotiating Body (INB). Any attempt to modify the draft/”reopen the package” will unravel the agreement on the text which will make it extremely difficult to reach an agreement. Similarly will a reopening of text already agreed in plenary at previous sessions of the Intergovernmental Negotiating Body (INB) most likely prevent an agreement on a Protocol. The EU is therefore against reopening of INB agreed text and of the drafted text from the informal working group on the draft protocol to eliminate trade in tobacco products¹. If any other region is to reopen the text the most important former “red lines” which remain valid, can be found in the coordinated position;
- The insertion of a provision in Article 42 of the Protocol stating that Parties may reserve the right not to apply specific provisions of the Protocol insofar as they will not be compatible with their constitutional requirements, shall be proposed and defended². According to the negotiating directives for negotiating an international Framework Convention on Tobacco

¹ FCTC/COP/INB-IT/5/3.

² Doc. 7150/2/2010 REV 2 which constitutes the agreed coordinated position established in view of INB 4.

Control and related Protocols³, the Framework Convention itself should not allow for reservations to be made to its provisions by Contracting Parties. The Contracting Parties should, however, be allowed to enter reservations on the provisions of the Protocols to the Convention;

- In Article 38 of the draft Protocol attention should be drawn to the cost of the construction and maintenance of the Global Information Sharing Focal Point⁴;
- A coordinated position on the Chairperson's text⁵ shall be established at Working Party on Customs Union (CUG). In view of assisting CUG in coordinating its position, the Presidency may consult other technical bodies of the Council⁶. The procedure for establishing a coordinated position is described in doc. 7654/1/09 REV 1⁷, where it is e.g. stated that consensus of delegations in CUG (or at INB meetings) shall be sought on all matters;
- The document 15901/11 on General Agreement for EU Statements in multilateral organisations⁸.
- The EU coordination process is planned to take place in parallel in February and March in both Geneva (Missions)⁹ and in Brussels (JHA Counsellors and the Working Party on Customs Union (CUG));
- The final coordination of the coordinated positions takes place in the CUG just prior to the negotiations in Geneva. During the fifth session of the Intergovernmental Negotiating Body (INB 5) there will be on-the-spot coordination meetings in the CUG to be held in Geneva.

³ Decision of the Council of 22 October 1999 authorising the Commission to open negotiations, in the context of the World Health Organisation, on an International Framework Convention on Tobacco Control and related protocols (doc. 11959/99 STREINT and doc. 119595/99 ADD 1 STREINT). For more about the mandate and later amendments see the last pages of this document.

⁴ "Financial implications of measures contained in the draft protocol to eliminate illicit trade in tobacco products – Note by the Secretariat (FCTC/COP/4/INF.DOC./1 – 15 September 2010).

⁵ The most recent is the "Report of the Chairperson of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products to the fourth session of the Conference of the Parties" (FCTC/COP/4/4 – 14 May 2010).

⁶ The JHA Counsellors/Friends of the Presidency/COPEN are to coordinate the Member States positions on the criminal law aspects of the Chairperson's text (Art. 12-19 (PART IV) and Art. 20-33 (PART V)).

⁷ "Community" is now to be read as "Union".

⁸ In particular the following: "As per the General Agreement for EU Statements in multilateral organisations, should the statement express a position common to the European Union and its Member States, pursuant to the principle of unity of representation, it will be prefaced by "on behalf of the EU and its Member States". The introduction "on behalf of the EU and its Member States" does not preclude references to "the EU" or to "the Member States of the EU" later in the text, where such reference accurately reflects the factual situation."

⁹ The Preamble, Article 2 and Articles 34-49 will initially be coordinated by the Missions in Geneva. The CUG will make a final coordination of the Preamble (with a focus on the parts relevant for especially the Supply Chain Control (PART III of the protocol)) – after the Missions in Geneva have established their positions on relevant parts of the Preamble.

The basis for the coordination process and the references used in this document

In view of these upcoming negotiations delegations will find attached the consolidated text of all the provisions of the Protocol (regardless of consensus has been reached)¹⁰, remaining coordinated positions and remaining “red lines” concerning the above mentioned Protocol. When it’s been found useful additional former “red lines” which remain valid and tactical considerations have been added relevant sections of the text.

The text as it stood at the close of the fourth session of the Intergovernmental Negotiating Body (INB 4) which was held on 14-21 March 2010¹¹ [...] was the starting point for the coordination procedure.

The Preamble and Part III [...] was reproduced from doc. 15968/2/10 REV 2, in combination with doc. 7150/2/10 REV 2, with the exception of Article 5-6 and 8-11bis, which [...] was reproduced from doc. 13017/11 and 13766/11, 14107/1/11, 14008/1/11 REV 1, 14591/1/11 and 15221/1/11, with the exceptions of the review texts, which [...] was reproduced from the report “Informal working group on the draft protocol to eliminate illicit trade in tobacco products – Outcome of the two meetings of the working group”¹². [...]

Parts IV and V [...] was originally reproduced from doc. 7458/10 RESTREINT UE, with the exception of Article 12-14 and 30-32, which was reproduced from doc. 6839/10 RESTREINT UE (including the references to United Nations Convention against Transnational Organized Crime (UNTOC)).

Part VI-X [...] was reproduced from an internal EU position paper on parts VI to X of the Draft Protocol on illicit trade in tobacco products (FCTC/COP/INB-IT/3/5 Rev.1) from the 10 March 2010. [...]

In Annex 2 is inserted the current mandate to the Commission to negotiate the above mentioned Protocol. The mandate is reproduced from doc. 11959/99 RESTREINT, doc. 7999/11 RESTREINT and doc. 16437/07 RESTREINT).

¹⁰ The consolidated text has been supplemented by the agreed texts from doc. FCTC/COP/4/5 – 14 May 2010 (after the fourth session of the Intergovernmental Negotiating Body (INB 4)). The most recent document containing a reproduction/reprint of the text of the draft protocol is FCTC/COP/INB-IT/5/4 – 28 November 2011.

¹¹ The most recent document containing a reproduction/reprint of the text of the draft protocol is FCTC/COP/INB-IT/5/4 – 28 November 2011 (the draft report has the following doc. number: FCTC/COP/4/5).

¹² Article 5(5) and Article 11bis(2) in doc. FCTC/COP/INB-IT/5/3 – 24 October 2011.

In Annex 3 is inserted the composition of the informal working group on the draft protocol (July and September 2011).

DECLASSIFIED

DRAFT PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS

*Preamble*¹³

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 is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition;

Coordinated position for INB 5

Reformulate to make it consistently with the corresponding Recital 20 of the FCTC:

"RECALLING [also] the Preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction

¹³ The Preamble was discussed and revised at the second session of the Intergovernmental Negotiating Body bearing in mind the nature of the Preamble, it is possible that there will be amendments until the negotiations are completed (doc. FCTC/COP/4/4). According to doc. 11242/1/09 Article 2 is to be coordinated in Geneva. The Preamble will initially be coordinated by the Missions in Geneva, and then it will be finally coordinated in the CUG (with a focus on the parts relevant for especially the Supply Chain Control (PART III of the protocol)). [...].

of race, religion, political belief, economic or social condition”.

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

Coordinated position for INB 5

Delete “and security” to make it consistent with the corresponding Recital 1 of the FCTC.

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;

Coordinated position for INB 5

The text is acceptable. In case of a reopening of the text, it should be reformulated: “SERIOUSLY CONCERNED” and “...health and well-being in particular of young people, the poor and other people in vulnerable situations.”

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;

Coordinated position for INB5

The text is acceptable. The formulation on sufficient financial and technical resources/assistance can be found in Recitals 13 and 15 in the FCTC.

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;

Coordinated position for INB 5

Replace “free-trade areas” by “free zones” to make it [...] consistent with the text drafted by the Informal working group in July 2011¹⁴.

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;

Coordinated position for INB5

Add a new recital: “RECOGNISING that the illicit trade [...] in tobacco products [...] undermines health objectives, impose additional strain on health systems and causes losses of revenue to the economies of the Parties.”

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;

¹⁴ FCTC/COP/INB-IT/5/3 – 24 October 2011.

RESTREINT UE/EU RESTRICTED

Coordinated position for INB5

The formulation corresponds to the formulation in Recital 18 in the FCTC. The text is acceptable.

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;

Coordinated position for INB5

Delete “which are often diverted into illicit trade” to make it consistently with the formulation of Article 6.2 of the FCTC.

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

Coordinated position for INB5

Reformulate to make it consistently with the text drafted by the Informal working group:

“RECOGNIZING in addition that tobacco and tobacco products in international transit or transshipment 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 products and in manufacturing equipment used in the manufacture of tobacco products.

Coordinated position for INB5

The text is acceptable. The formulation about international cooperation and cooperative action in connection with tobacco control in the FCTC can be found in Recitals 2 and 12 in the FCTC.

RECOGNIZING still further the importance of other international agreements, such as the United

RESTREINT UE/EU RESTRICTED

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

Coordinated position for INB 5

Substitute “manufacture” by “manufacturing” to make it consistent with the formulation of Article 15.1 of the FCTC.

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;

Coordinated position for INB 5

The Preamble needs to be reviewed in view of the final INB hence the above mentioned amendments. The amendments are kept at a minimum and are primarily adjustments to align the text to the FCTC and taking into account the wording used in the text drafted by the Informal working group¹⁵. The amendments are to be suggested in connection with the INB 5.¹⁶ [...]

Hereby agree as follows:

¹⁵ FCTC/COP/INB-IT/5/3 – 24 October 2011.

¹⁶ The text reproduced here is the text as it stood at the close of INB 4. [...]

PART I: INTRODUCTION

*Article 1*¹⁷

Use of terms^{18 19}

[...]

Coordinated position for INB 5

For the purpose of this Protocol, the following definitions shall apply:

1. “Blocked customers” (*not yet defined – awaiting proposal from Turkey*)

Coordinated position for INB 5 and “red line”

No definition is needed. No further introduction of the concept of blocked customer in the text.

2. “Brokering” means acting as an agent for others, as in negotiating contracts, purchases, or sales in return for a fee or commission. (*Agreed*)

Coordinated position for INB 5

The definition is acceptable.

3. “Cigarette” means any product, other than cigars, cigarillos, pipe tobacco and water pipe tobacco, that contains tobacco and is intended to be burned or heated under ordinary conditions of use, and includes, without limitation, any “roll-your-own” tobacco which, because of its appearance, type, packaging or labelling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. (*EU proposal*)

¹⁷ A working group to discuss the defined terms to be included in Article 1 was established at the fourth session of the Intergovernmental Negotiating Body. The report from the working group is attached as Annex 2 to the Chairperson’s report to the Conference of the Parties (doc. FCTC/COP4/4). The report was never presented at the plenary of INB 4.

¹⁸ The number reference is to Annex 2 in the „Report of the Chairperson of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products to the fourth session of the Conferences of the Parties” (Doc. FCTC/COP/4/4 – 14 May 2010). Annex 2 is the status of discussions on the use of terms as of the end of the second meeting of the working group on 20 March 2010. *Agreed* indicates agreement in this group. *Negotiating text* refers to, that the text has been part of the text send to INB, but without being discussed in the Plenary. Definitions indicated with a “x.” is new definitions (compared to the COP 4 Chairs Report) and therefore need to be introduced at INB 5.

¹⁹ The terms in Article 1 are the result of the work of the definition group [subgroup of the Working Party on Customs Union]. The mandate for the drafting group on draft definitions can be found in doc. 15221/1/11.

Coordinated position for INB 5 and “red line”

The EU proposal is the only acceptable of the 2 proposals. Inclusion of an exception for “cigars, cigarillos, pipe tobacco and water pipe tobacco” in order to fulfil the 5/10 year obligation in Article 7 Tracking and Tracing, is an absolute requirement.

The alternative text suggested in the COP 4 Chairs report is not sufficient due to the non-inclusion of the exception for “cigars, cigarillos, pipe tobacco and water pipe tobacco”.

4. “Commercial” means done with profit as the main objective, the evaluation of which should be based on criteria such as the status of the operator engaged in the activity, the nature and quantity of the products involved, the place where the products are located, the mode of transport used and the documents related to the products (*INB 4 EU proposal*)

Coordinated position for INB 5 and fall-back position

There is no need for defining “commercial quantities”. It is more appropriate just to define ‘commercial’, e.g. in Art. 8(4) is used the word “non-commercial”. [...]

The fall-back position of the EU is that the text on “Commercial Quantities” can be accepted if other regions insist on having that definition, providing it is in line with Directives 92/12 and 118/2008:

“Commercial quantities” means quantities intended to make profit, and excludes quantities that are intended for personal use, the evaluation of which should be based on criteria such as the status of the operator engaged in the activity, the nature and amounts of products involved, location, transportation and documentation related to the products.

(Agreed)

5. “Confiscation”, which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority. (*UNTOC*)
(Agreed)

Coordinated position for INB 5

[...] The definition is acceptable.

6. “Controlled delivery” means the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence. *(UNTOC) (Agreed)*

Coordinated position for INB 5

[...] The definition is acceptable.

7. “Due diligence” means conducting a reasonable 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. *(UNTOC amended) (Agreed)*

Coordinated position for INB 5

No definition is needed. The proposal for a text is however acceptable (if some other region insist on a definition).

8. “Free zone” means a Part of the territory of a Part y 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) (Agreed)*

Coordinated position for INB 5

The definition is acceptable.

The position of the EU has all along been that it’s crucial to have a prohibition of intermingling of tobacco products with non-tobacco products at the time of removal from free zones, in order to control free zones appropriately. The operators and the operations which are concerned in the EU are insignificant compared to the potential gain for the EU.

- x. “Global Information Sharing Focal Point”

Coordinated position for INB 5 and “red line”

No need for a definition, provided that there’s a reference in the EU coordination that stresses for tracking and tracing purposes, access to the manufacturers’ databases would meet our requirements of Article 7 (bear in mind that Article 7(12) states that “[o]bligations assigned to a Party shall not be performed by or delegated to the tobacco industry).

There should also be a link to Article 38 that makes sure no excessive costs are allowed. [...]

Concerning an EU unilateral statement delivered at the end of INB 5, some reliance can be put on a statement as long as its intention is to *clarify the interpretation of the text*. But no reliance whatsoever can be put on a statement which seeks to *modify the text*.

9. “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. *(WHO FCTC)(Agreed)*

Coordinated position for INB 5

The definition is acceptable.

10. ““Intermingling” or “Intermingled” means mixing together tobacco products with non-tobacco products.” *(Agreed) (COP 4 Chairs Report)*

Coordinated position for INB 5

The definition is acceptable, provided the terms are not reintroduced in Article 9.

If the term is reintroduced in Article 9, then a new definition is required e.g. something in line with the following:

“Means mixing together or mixed together. Intermingling of tobacco products means mixing together [undeclared / non-duty paid] tobacco

RESTREINT UE/EU RESTRICTED

products with [declared / ...] non-tobacco products with the intention of concealing or disguising the tobacco products. Intermingling of proceeds of crime means mixing together proceeds of crime with property acquired from legitimate sources.”

11. “Licence” means permission from a competent authority following submission of the requisite application or other documentation to the competent authority. *(Negotiating text)(Agreed)*

Coordinated position for INB 5 and “red line”

The definition is acceptable, provided the EU makes the statement mentioned on page 40 concerning Article 5 (License, equivalent approval or control system).
[...]

12. “Manufacturing equipment” means machinery which is designed to be used solely for the manufacture of tobacco products and is integral to the manufacturing process, and “any parts thereof” means any part that is unique to manufacturing equipment used in the manufacture of tobacco products. *(EU proposal taken from the COP4 Chairs Report – modified)*

Coordinated position for INB 5 and “red line”

Only a text that lives up to the following requirements is acceptable:

- Covers only machinery and parts solely designed for use in the production of tobacco products;
- The machinery needs to be integral to the process;
- “*And any parts thereof*” should be defined as well.

The scope must not be expanded in a way that might affect track and trace or destruction.

The alternative definitions of ‘manufacturing equipment’ are not sufficient. The definition of “*and any parts thereof*” is missing.

- x. “Packaging” – Unit packet and package of tobacco products and outside packaging and labelling of such products

RESTREINT UE/EU RESTRICTED

Coordinated position for INB 5

No need of a definition. Mentioned in Article 11(1)(b) in the FCTC.

13. “Party” means, unless the context indicates otherwise, a Party to this Protocol. *(Negotiating text) (Agreed)*

Coordinated position for INB 5

[...] The definition is acceptable, but not necessary. It has not been found necessary to define the term in the FCTC.

14. [“Personal data” means any information relating to an identified or identifiable natural person.] *(EU proposal)*

Coordinated position for INB 5

[...] A definition is needed. The above mentioned definition is acceptable.

15. “Primary processing means” the first major processes that took place on tobacco leaf after it had been [grown] / **[cured]**, such as **[re]**drying, [curing,] cutting and stem-removal.] *(Working group established at the third session of the Intergovernmental Negotiating Body, amended by China)*

Coordinated position for INB 5

No definition is needed, due to no references is made in the draft protocol anymore.

16. “Proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of an offence. *(UNTOC) (Agreed)*

Coordinated position for INB 5

[...] The definition is acceptable.

17. “Processing of personal data” means any operation or set of operations which is performed upon personal data, such as collection, recording, organization, storage, alteration, retrieval,

RESTREINT UE/EU RESTRICTED

consultation, use, disclosure, combination, blocking, erasure or destruction, as well as transfers of personal data across national borders. *(EU proposal)*

Coordinated position for INB 5

[...] The definition is acceptable.

18. “Property” means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets. *(UNTOC) (Agreed)*

Coordinated position for INB 5

[...] The definition is acceptable.

19. Secure (exchange of information) *(Not yet defined – awaiting proposal from Turkey)²⁰*

Coordinated position for INB 5

No definition is needed. In connection with Article 4(5) a footnote is inserted: “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.

See “Global Information Sharing Focal Point”.

20. “Seizure” or “Freezing” means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority. *(UNTOC) (Agreed)*

Coordinated position for INB 5

[...] The definition is acceptable.

21. “Smuggling” means Customs fraud consisting in the movement of goods across a Customs frontier in any clandestine manner *(Nairobi Convention 1977 – Customs offences) (Agreed)*

²⁰ After the report of the working group has been circulated as part of the draft report of the Chairperson of the Intergovernmental Negotiating Body to the Conference of the parties, Turkey expressed the view that there was no need to include this term in Article 1 “Use of terms” of the protocol.

Coordinated position for INB 5

No definition is needed. The proposal for a text is acceptable (if some other region insist on a definition).

x. "Supply Chain"

[...]

Coordinated position for INB 5

[...] The final definition of "Supply Chain" should strike a balance between giving a party the possibility of extending the obligations to other activities than listed in Article 5.1, namely the ones listed in Article 5.2, but without making every party obliged to do the same. The provision should therefore remain a "may" provision with regard to those activities mentioned in Article 5.2. If however in the course of negotiations the discussion falls upon including some or all of the activities in Article 5.2 under a "shall" provision, then it is a "red line" that only the activities listed in Article 5.2(d) can be included under a "shall" provision and only insofar as the products are not duty paid.

The first initial suggestion from the EU (but with the proviso that this is just the starting point for negotiations) could be the following:

"The Supply Chain means the chain of operators and their relevant activities as licensed in accordance with Article 5."

The end result, that would be acceptable, is as follows:

"The Supply Chain covers the activities listed in Article 5.1, and may be extended to activities listed in Article 5.2 when so decided by a Party".

The "red line" is that only the activities listed in Article 5.1 and Article 5.2(d) can be included under a "shall" provision, the latter however only insofar as the products are not duty paid.

22. "Tobacco products" means products entirely or partly made of leaf tobacco as raw material, which are manufactured to be used for smoking, sucking, chewing or snuffing. (*WHO FCTC*)

(Agreed)

Coordinated position for INB 5

The definition is acceptable.

[Article 2²¹

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.

Coordinated position for INB 5

Acceptable.

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.

Coordinated position for INB 5

Acceptable. [...]

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

[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*)

²¹ Article 2 is coordinated in Geneva (doc. 11242/1/09).

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)*

Coordinated position for INB 5

To include in the operative part:

3. The provisions of United Nations Convention against Transnational Organized Crime shall be made complementary applicable when implementing this Protocol by its Parties.

As [...] a fall-back position:

3. The provisions of United Nations Convention against Transnational Organized Crime shall be made complementary applicable for Parties to this Protocol that are also Parties to that Convention.

4. 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.

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.]]

Coordinated position for INB 5

Acceptable.

The result of the Informal working group meeting in September 2011^{22 23 24 25}:

The informal working group agreed that the Convention Secretariat should be requested to make the best possible use of existing resources and arrangements²⁶. This should involve close collaboration with intergovernmental agencies and other entities with specific expertise in matters relating to the implementation of the Protocol, including the World Customs Organization and the United Nations Office on Drugs and Crime, through key forums such as the Commission on Crime Prevention and Criminal Justice, the Conference of the Parties of UNTOC and the Conference of the States Parties of the United Nations Convention against Corruption.

To facilitate the discussions of Parties during the final session of the INB, the working group requested the Secretariat to prepare a document outlining possible options for collaboration with relevant agencies.

Regarding the question of the organizational location of the global information sharing focal point, the informal working group noted that this matter was addressed in Article 7 of the draft protocol.

Coordinated position (Brussels)²⁷

Avoiding overlapping and duplication with existing relevant agreements and arrangements should be the driving principle when discussing this issue.

Specifically:

1. Direct references to UNTOC and UNCAC will be preferred when *drafting* the text of

²² The request concerning the existing relevant agreements and arrangements are included in the report “Informal working group on the draft protocol to eliminate illicit trade in tobacco products – Outcome of the two meetings of the working group” (doc. FCTC/COP/INB-IT/5/3 – 24 October 2011).

²³ The composition of the informal working group on the draft protocol (July and September 2011) is inserted as Annex 3 of this document.

²⁴ Between INB 3 and INB 4 2 separate working groups (WG) were set up: WG 2 looked at the legal issues and from the European Region the following Parties were represented: Russia, Israel, EU, Sweden and Turkey. WG 1 looked at the technical issues (Part III Supply Chain Control) and from the European Region the following Parties were represented: Armenia, EU, Sweden, Turkey and Spain. One Party never attended the meetings (doc. 9420/11).

²⁵ The Convention Secretariat has issued a note: “Possible cooperation of the Convention Secretariat with other international organizations in relation to the future protocol.” (FCTC/COP/INB-IT/5/INF.DOC./2 – 10 January 2012).

²⁶ The request concerning the existing relevant agreements and arrangements are included in the report “Informal Working Group on the draft protocol to eliminate illicit trade in tobacco products – Outcome of the two meetings of the working group” (doc. FCTC/COP/INB-IT/5/3 – 24 October 2011).

²⁷ Doc. 14008/1/11.

the Protocol as appropriate. Wherever needed, quotes from other Treaties (in particular, from the United Nations Convention against Transnational Organized Crime, UNTOC²⁸) should be used, in order to ensure consistency and complementarities in the body of international Treaties.

2. The Secretariat of the Protocol, currently foreseen to be the Convention Secretariat, shall ensure the necessary coordination with the competent international and regional intergovernmental organizations and other bodies when *implementing* the Protocol. This provision is already included in Article 36.2(e).

The Convention Secretariat has issued a note: “Possible cooperation of the Convention Secretariat with other international organizations in relation to the future protocol.”²⁹

Article 3 (Consensus³⁰)

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.

²⁸ All EU MS that have ratified the FCTC have also ratified the UNTOC.

²⁹ FCTC/COP/INB-IT/5/INF.DOC/2 – 10 January 2012.

³⁰ Consensus reached in plenary at the third session of the Intergovernmental Negotiating Body.

PART II: GENERAL OBLIGATIONS

Article 4

General obligations³¹

In addition to the provisions of Article 15 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 secure³² 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.

³¹ The one Party that had indicated a reservation regarding paragraph 1 of Article 4 lifted that reservation following the end of the session.

³² 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.

Article 4bis

Protection of personal data

Parties shall protect personal data of individuals regardless of nationality or residence in line with existing international standards, such as the United Nations guidelines for the regulation of computerized personal data files, and subject to national and/or domestic law regarding the protection of personal data when implementing this protocol.³³

A statement to be attached to the Protocol:

At the adoption of the Decision on the moment of ratification of the WHO FCTC Protocol by the EU and its Member States, a statement on Article 4bis (“Protection of personal data”) will be entered in the Council minutes. Member States and the European Commission have agreed that this statement will read as follows:

“In relation to the legally binding instruments within the meaning of Article 4bis of this Protocol, the application of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, signed on 28 January 1981 (ETS No.108) and the Additional Protocol to the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal data, regarding Supervisory Authorities and Transborder Data Flows, signed on 8 November 2001 (ETS No. 181) as well as specific binding legal EU instruments on data protection [as implemented in the EU Member States] remain unaffected for those Parties which are bound by those legal instruments.”(doc. 13766/11).

³³ The text is reproduced from the report “Informal working group on the draft protocol to eliminate illicit trade in tobacco products – Outcome of the two meetings of the working group” (FCTC/COP/INB-IT/5/3 – 24 October 2011). The EU proposal before the Informal working group can be found in doc. 13766/11.

PART III: SUPPLY CHAIN CONTROL³⁴

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;

³⁴ The text in PART III (except for Article 7) is reproduced from the report “Informal working group on the draft protocol to eliminate illicit trade in tobacco products – Outcome of the two meetings of the working group” (doc. FCTC/COP/INB-IT/5/3 – 24 October 2011).

RESTREINT UE/EU RESTRICTED

- (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 (Consensus³⁵)

Tracking and tracing

1. For the purpose 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.

³⁵ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

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.

RESTREINT UE/EU RESTRICTED

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

RESTREINT UE/EU RESTRICTED

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.³⁶
7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved systems for record-keeping.³⁷

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:

³⁶ This paragraph was agreed in Committee A at the third session of the Intergovernmental Negotiating Body.

³⁷ See footnote 36.

RESTREINT UE/EU RESTRICTED

- (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.

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)*

Position of JHA Counsellors

The JHA Counsellors consider that from a criminal law point of view Article 9(3) is not necessary in the light of Article 14(1). The JHA Counsellors invite the customs group to consider whether this provision should be maintained in the text.

The Working Party on Customs Union would however prefer to maintain the paragraph in Article 9.

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 zones³⁸ 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.

³⁸ “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).

RESTREINT UE/EU RESTRICTED

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.

DECLASSIFIED

“Red lines”

“The package” is draft proposals for Article 5-6 and 8-11*bis* which have been agreed upon at the Informal working group meetings in July and September 2011. Article 7 has been agreed upon at INB 4 (doc. FCTC/COP/4/5 – 14 May 2010) but will, by the EU, be considered as part of the above mentioned “package” (all a part of Part III on Supply Chain Control).

If any Party is to reopen the discussion on either Article 5-11*bis* the EU has to point out the following, as being unacceptable for the EU [...]:

- Article 7: the EU does not agree on the need to apply the provisions on tracking and tracing to [...] tobacco products other than cigarettes – even though the transition period is set to 10

The Statement given by the EU at the second working group meeting in September 2011:

- "The EU has conducted a detailed examination of the text of the supply chain provisions (Art. 5-6, 8-11 *bis*) which has been prepared by the Informal working group at its meeting in July 2011. Despite the fact that this text does not satisfactorily answer a number of important concerns expressed by the EU at the previous meetings of the Intergovernmental Negotiating Body, the EU, in a spirit of compromise, can accept it as a package.
- The EU is informed that the other Regions which can also support this text have indicated that any further amendments would unravel their agreement on this text. The EU shares this position, as any attempt to modify the draft on the table will make it extremely difficult to reach an agreement. Should that be the case, the EU will then reiterate its concerns, notably with regard to criminal records and the destruction of machinery."³⁹

Other points to remember, including former "red lines" which remain valid:

- Concerning the review clause in Article 5: If the discussion, on whether the review clause was intended to cover the whole Protocol or just Article 5, is reopened then refer to the discussions during the first Informal working group meeting where the final result Friday was that as a part of "the package" the Pakistan withdrew their proposal to insert an extra line in Article 5: "(e) supplying major components used in the manufacture of tobacco products." The EU therefore finds that the discussions on the review clause and the proposal from Pakistan were so intertwined that they represent their own part of the larger deal concerning "the package".

39

59
A

- If "the package" is to be reopened the following has to be remembered, so reintroductions can be avoided:

www.parlament.gv.at

- o The legality of the concept of "blocked customers" in the former Article 6, paragraphs 6-9,

A statement to be attached to the Protocol:

- At the adoption of the Decision on the signing and/or conclusion of the WHO FCTC Protocol by the EU and its Member States, a statement on Article 6 ("blocked customers") will be entered in the Council minutes. Member States and the European Commission have agreed that this statement will read as follows:

"Without prejudice to the right of initiative of the European Commission, the division of competences between the EU and its Member States, and in relation to Art. 6 of the WHO FCTC protocol to eliminate illicit trade in tobacco products, the European Commission and the Member States consider that the implementation of the concept of blocked customer is optional and legally not required when implementing the protocol within the EU. In this connection, the European Commission and the Member States consider that no further legislative action would be needed as regards the concept of blocked customer." (doc. 14591/11).

A statement to be attached to the Protocol:

- At the adoption of the Decision on the signing and/or conclusion and/or ratification of the WHO FCTC Protocol by the EU and its Member States, a statement on Article 7 (concerning the "Global Information Sharing Focal Point" mentioned in Art. 7(1), 7(8) and 7(9)) will be entered in the Council minutes. A text needs to be agreed and could go along the following lines (doc. 7150/1/10 REV 1):

"The global information sharing focal point, in paragraph 1 and 8-9, must not be [...] a global database system [...]. The EU understands that the provision on access to a manufacturer's database, by the competent authority in the jurisdiction of the tobacco manufacturer, shall be considered to fulfil the requirements of the Global Information Sharing Focal Point."

In Article 38 of the Protocol attention should be drawn to the cost of the construction and maintenance of the Global Information Sharing Focal Point.

[...] Articles 12-19 (PART IV) and 20-33 (PART V) [...] are coordinated by the JHA Counsellors⁴⁰.

PART IV: OFFENCES

Article 12⁴¹

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;

⁴⁰ PART IV and V have previously been coordinated by JHA Counsellors/Friends of the Presidency/COPEN – first in separate meetings and then in joint meetings with the Working Party on Customs Union (CUG) (Doc. 7458/10 STREINT UE, 6839/10 STREINT UE and 15968/2/10 REV2).

⁴¹ Text as reflected in doc. FCTC/COP/INB-IT/4/4.

RESTREINT UE/EU RESTRICTED

- (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; (*UNTOC⁴², Article 6.1(a)(i), non-substantive modification⁴³*)
 - (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*)

⁴² United Nations Convention against Transnational Organized Crime.

⁴³ References to “non-substantive modifications” in this and the following Articles indicate that minor changes have been made to the original text, which are not considered to be substantive, such as replacing “State Party” with “Party”, “Convention” with “Protocol” and using the gerund instead of the infinitive of a verb.

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) modified⁴⁴*)
5. For the purposes of implementing or applying paragraph 3 of this Article, each Party shall [...] include as predicate offences, the serious criminal offences, as defined by national law, 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*)

[...]

Coordinated position for INB 5

The EU supports the current text, in which a distinction is made between "unlawful conduct" (in 12.1) and "criminal offences" (in 12.2). This distinction should be maintained, and subsequent Articles should put in line herewith.

If discussions on Article 12 are reopened, the EU would like to emphasize the necessity to limit the scope of the criminal provisions.

⁴⁴ References to which "modified" has been added indicate that the language in the original provision has been changed in a manner which may be regarded as substantive.

RESTREINT UE/EU RESTRICTED

Article 13 (Consensus⁴⁵)

Liability of legal persons

1. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the unlawful conduct including criminal offences established in accordance with Article 12 of this Protocol.
2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the liability of the natural persons who have engaged in the unlawful conduct or committed the criminal offences established in accordance with national law and regulations and Article 12 of this Protocol.

Article 14

Prosecutions and sanctions

1. Each Party shall adopt such measures as may be necessary, in accordance with national legislation, to ensure that legal and natural persons held liable for the unlawful conduct including criminal offences established in accordance with Article 12 are subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. (*Consensus⁴⁶*)
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. (*Consensus⁴⁷*)

⁴⁵ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

⁴⁶ See footnote 45.

⁴⁷ See footnote 45.

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. (*Paragraph 3 is to be reconsidered after discussion of Article 26*)

Coordinated position for INB 5

The EU can accept the current text of paragraph 3.

Article 15⁴⁸

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 preventive embargo or seize]** such evidence when found, in accordance with its [national] / **[domestic]** law.

[...]

Coordinated position for INB 5

The EU can agree with the wording of Article 15, on condition that the wording be aligned to the agreed text in Articles 12(1) and (2). Hence, the words "with respect to a commission of an offence under Article 12.1" should be modified as follows: "with respect to the commission of a criminal offence established in accordance with Article 12".

⁴⁸ Article 15 was placed in square brackets at the fourth session of the Governmental Negotiating Body because it was proposed deleted (page 7 in doc. FCTC/COP4/4).

The EU would prefer to make reference as well to the *suspected* commission of a criminal offence, so that the text would read: "with respect to the commission or the suspected commission of a criminal offence established in accordance with Article 12".

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 transferred, transformed

or converted, in part or in full, into other property or to another person who has knowledge or ought reasonably to have known of the commission of offences covered by this Protocol, such property shall be liable to the measures referred to in this Article instead of the proceeds.

4. If proceeds of crime **[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 and to hear or adjudicate civil claims of another Party against any licensee. 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.]

[...]

Coordinated position for INB 5

The EU can support the wording of Article 16. However, as regards paragraph 1, subparagraphs a) and b), the EU is of the opinion that in line with Article 12 reference should be made to criminal offences. Therefore, the EU considers that the second options mentioned in these subparagraphs should be adopted, so that the text reads as follows:

"Article 16

Seizure and confiscation

1. The Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
 - (a) proceeds of crime derived from criminal offences 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 criminal offences established in accordance with Article 12 of this Protocol. "

As regards paragraph 6, the EU is of the opinion that the issue of civil claims should be dealt with in a separate paragraph. As a consequence, it is proposed that paragraph 6 be divided in two different paragraphs, 6 and 6a, reading as follows:

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.

- 6a. For the purposes of this Article, each Party shall empower its courts or other competent authorities to hear or adjudicate civil claims of another Party against any licensee.

As regards paragraph 10, the EU is of the opinion that this paragraph does not provide added value in the light of Article 18. It is therefore suggested to delete this paragraph.

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], genuine tobacco products [or equipment] used in the production of tobacco products.

[...]

Coordinated position for INB 5

The EU can support the wording of Article 17.

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].**

[...]

Coordinated position for INB 5

The EU would prefer the following text:

1. All confiscated tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products ~~manufacturing equipment, tobacco, counterfeit and contraband cigarettes~~ and other tobacco products shall be destroyed. Such destruction shall be carried out 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 that referred to in paragraph 1 ~~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.

NB: The EU considers that "counterfeit and contraband cigarettes" are encompassed by the notion of "other tobacco products".

The EU considers that it is not necessary to explicitly provide in paragraph 3 that small quantities may be retained for evidence, which seems to be valid without this being explicitly stated. Paragraph 3 should therefore be deleted. However, if it proves to be necessary to provide wording on this issue in order to reach agreement, the EU suggest modifying paragraph 1 as follows:

1. Without prejudice to the possibility of retaining small quantities of tobacco and tobacco products as duly certified samples for evidence, all confiscated tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products manufacturing shall be destroyed. Such destruction shall be carried out by using environmentally friendly methods to the greatest extent possible upon completion of any legal process in relation to the tobacco products in question.

Article 19 (Consensus⁴⁹)

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 and 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.

⁴⁹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

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.

Coordinated position for INB 5

For reasons of consistency, the EU would prefer inserting in paragraph 2 the word "criminal" before "offences", it being understood that the rest of the text should be left unchanged.

DECLASSIFIED

PART V: INTERNATIONAL COOPERATION

Article 20

Information sharing: statistical data

1. The Parties shall, for the purpose of achieving the objectives of this Protocol, report, as part of the WHO Framework Convention on Tobacco Control reporting instrument relevant information, subject to domestic law, and where appropriate, inter alia, on matters such as: (*Consensus*⁵⁰)
 - (a) 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, description of entities involved, date and place of manufacture; *modi operandi* including means of transport, concealment, routing and detection; counterfeit and genuine brands; and taxes evaded; (*Consensus*⁵¹)
 - (b) Import, export, transit, tax-paid and duty-free sales and, quantity or value of production of tobacco, tobacco products, or manufacturing equipment used in the manufacture of tobacco products; (*Consensus*⁵²)
 - [(c) Data on the agricultural production of tobacco;]
 - (d) Trends, concealment methods, and *modi operandi* used in the illicit trade in tobacco, tobacco products, or manufacturing equipment used in the manufacture of tobacco products; and (*Consensus*⁵³)
 - (e) Any other relevant information, as agreed by the Parties. (*Consensus*⁵⁴)
2. Parties shall cooperate with each other and with competent international organizations to build the capacity of Parties to collect and exchange information. (*Consensus*⁵⁵)
3. The Parties shall deem the said information to be confidential and for the use of the

⁵⁰ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

⁵¹ See footnote 50.

⁵² See footnote 50.

⁵³ See footnote 50.

⁵⁴ See footnote 50.

⁵⁵ See footnote 50.

Parties only, unless otherwise stated by the transmitting Party. (*Consensus*⁵⁶)

Coordinated position for INB 5

The EU has a flexible approach on paragraph 1(c), although it would have a preference for deleting this paragraph (regarding "data on the agricultural production of tobacco").

Article 21

Information sharing: operational data

The Parties shall, subject to domestic law or the provisions of any applicable international treaties, where appropriate, exchange, on their own initiative or on the request of a Party that provides due justification that such information is necessary for the purpose of detection or investigation of illicit trade in tobacco, tobacco products, [or manufacturing equipment used in the manufacture of tobacco products,] the following information:

- (a) Records of licensing for the legal and natural persons concerned; (*Consensus*⁵⁷)
- (b) Information for identification, monitoring and prosecution of legal or natural persons involved in illicit trade in tobacco, tobacco products, or manufacturing equipment used in the manufacture of tobacco products; (*Consensus*⁵⁸)
- (c) Records of investigations and prosecutions; and (*Consensus*⁵⁹)
- (d) Records of payment for import, export or duty free sales of tobacco, tobacco products, or manufacturing equipment used in the manufacture of tobacco products; and (*Consensus*⁶⁰)
- (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

⁵⁶ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

⁵⁷ See footnote 56.

⁵⁸ See footnote 56.

⁵⁹ See footnote 56.

⁶⁰ See footnote 56.

place of manufacture; modi operandi including means of transport, concealment, routing and detection. (*Consensus*⁶¹)

Information received from Parties under this Article shall be used exclusively to meet the objectives of this Protocol. Parties may specify that such information may not be passed on without the agreement of the Party which provided the information. (*Consensus*⁶²).

[...]

Coordinated position for INB 5

(Consensus on the entire text except the chapeau)

The EU has a flexible approach, although it would have a preference for deleting the words "or manufacturing equipment used in the manufacture of tobacco products".

Article 22 (*Consensus*⁶³)

Information sharing: confidentiality and protection of information

1. Each Party shall designate the competent national authorities to which data referred to in Article 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

⁶¹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body

⁶² See footnote 61.

⁶³ See footnote 61.

shall protect, as mutually agreed, any confidential information that is exchanged.

Article 23 (*Consensus*⁶⁴)

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.

⁶⁴ See footnote 61.

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 (Consensus⁶⁵)

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.

Coordinated position for INB 5

The EU has a flexible approach, although it would have a preference for deleting in paragraphs 1 and 2 the words

⁶⁵ Consensus reached at the fourth session of the Intergovernmental Negotiating Body, pending the decision on inclusion of “manufacturing equipment” in this Article.

"or manufacturing equipment used in the manufacture of tobacco products".

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*⁶⁶)
- [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].**]

[...]

Coordinated position for INB 5

(Consensus on paragraph 1; paragraph 2 yet to be agreed upon)

The EU would prefer deleting paragraph 2, which does not seem to have much added value in view of paragraph 1. If paragraph 2 were to be maintained, the words "by its domestic or international law" should be modified into "by its national law or international law".

Article 26

⁶⁶ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

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

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

5. If a Party exercising its jurisdiction under paragraph 1 or 2 of this Article has been notified, or has otherwise learned, that one or more other Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions.
6. Without prejudice to norms of general international law, this Protocol does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

[...]

Coordinated position for INB 5

The EU considers that the wording should be put in line with the agreed text in Articles 12.1 and 12.2 (see, similarly, Articles 14(1) and 14(2)). Hence, the references in the text to Article 12.1 should be modified into references to criminal offences in Article 12.

The non-binding text in paragraphs 2 and 4 ("may") should be kept.

[Article 27⁶⁷

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.

⁶⁷ Article 27 was placed in square brackets at the third session of the Intergovernmental Negotiating Body because it was proposed for deletion (page 6 in doc. FCTC/COP4/4).

In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The Parties involved shall ensure that the sovereignty of the Party in whose territory such investigation is to take place is fully respected.]

[...]

Coordinated position for INB 5

The EU would prefer to delete this provision, but has a flexible approach to maintain the text if this is necessary to reach an agreement. If the Article were to be maintained, the EU strongly prefers inserting the words "in accordance with national law" at the end of the second sentence (after "on a case-by-case basis").

Article 28 (Consensus⁶⁸)

Law enforcement cooperation

1. Each Party shall adopt effective measures to:
 - (a) Enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the criminal offences covered by this Protocol;
 - (b) Ensure effective cooperation among the competent authorities, agencies, customs, police and other law enforcement agencies;
 - (c) Cooperate with other Parties in conducting inquiries with respect to criminal

⁶⁸ Agreed in Committee B at the third session of the Intergovernmental Negotiating Body.

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 between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the Parties concerned, the posting of liaison officers;
- (f) Exchange information with other Parties on specific means and methods used by natural or legal persons in committing such offences, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;
- (g) Exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Protocol.

2. With a view to giving effect to this Protocol, Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the Parties concerned, the Parties may consider this Protocol as the basis for mutual law enforcement cooperation in respect of the offences covered by this Protocol. Whenever appropriate, Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

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

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.

Coordinated position for INB 5

The EU can accept the text with the following modifications:

- include the first words in brackets ("Consistent ... systems") in the text;
- delete the words "either on request or on their own initiative" in the second line;
- end the chapeau as follows: "Such information may inter alia include:";
- delete paragraph (d).

Article 30⁶⁹

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)

⁶⁹ Text as reflected in document FCTC/COP/INB-IT/4/4.

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 co-operation. *(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) deleted]

(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) deleted]
- (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 fulfil the request, the Parties shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne. (*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 31⁷⁰

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 request 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 of the requested and requesting Parties.

(UNTOC, Article 16.1, modified)

or

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

- (a) Criminal offences in paragraph 2 and 4 of Article 12 where the offence is punishable by a

⁷⁰ Text as reflected in document FCTC/COP/INB-IT/4/4.

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 paragraph 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 paragraph 1 and 2 of Article 26.] (*Article 33.4 of the negotiating text, document FCTC/COP/INB-IT/3/5 rev.1*)
3. Each of the criminal offences to which this Article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. (*UNTOC, Article 16.3, modified*)
2. 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*)
3. 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*)
4. 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*)
5. 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*)

6. 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 co-operate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution. *(UNTOC, Article 16.10, modified)*
7. 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)*
8. 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)*
9. 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)*
10. 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

RESTREINT UE/EU RESTRICTED

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*)

11. 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*)
12. 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*)
13. 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 32⁷¹

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

⁷¹ Text as reflected in document FCTC/COP/INB-IT/4/4.

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)

Coordinated position for INB 5

The EU is satisfied that the wording of Articles 30 to 32 has been aligned with UNTOC and can consequently accept the text. However, the withdrawal of these provisions could also be supported by the EU, if there is a large support by other Parties for such withdrawal

If the provisions remain, the EU has a preference for putting the threshold in Article 31(1)(c) at one year.

The alternative text for Article 31(1) is not acceptable, since it makes erroneously reference to criminal offences in paragraph 3 and 4 of Article 12, and since it must always be clear that 1 year threshold of imprisonment can be applied in the requested state.

The EU would prefer to delete Article 31(2), since it is not provided in Article 16 of UNTOC.

As regards the further refinements suggested in the Intercessional Working Group (pages 72 and 73 of doc 5990/12), the EU strongly supports point (ii) [Parties should be able to notify that they will not use the draft protocol as the legal basis for extradition (along the lines of Article 16.5 of UNTOC), and that any request for extradition should be subject to their domestic law].

As regards points (i) and (iii), regarding respectively the criteria for an "organized criminal group" and "threshold penalties", the EU considers that these suggestions

are difficult to understand and/or can lead to confusion. The EU would hence request to ignore these suggestions.

The result of the informal working group meeting in September 2011⁷²:

The informal working group agreed that provisions on mutual legal assistance and extradition should be included in the draft protocol. However, this agreement was, for a number of Parties, subject to the relevant articles of the United Nations Convention against Transnational Organized Crime (UNTOC).

Additional suggestions:

On the understanding that the suggestions below may not fall strictly within the mandate of the working group, some Parties considered it useful to bring certain issues to the attention of the INB.

At the invitation of the Chair of the working group, those Parties identified matters for possible consideration in the draft provisions on mutual legal assistance and extradition:

- (i) mutual legal assistance and extradition should not include the criteria for an "organized criminal group" as defined in Article 2(a) of UNTOC;
- (ii) Parties should be able to notify that they will not use the draft protocol as the legal basis for extradition (along the lines of Article 16.5 of UNTOC), and that any request for extradition should be subject to their domestic law; and
- (iii) given the difficulty of arriving at a consensus regarding the threshold penalties for extradition [and/or mutual legal assistance], one suggestion was that Parties could be permitted to notify that they will extradite [and/or afford mutual legal assistance] only in cases in which the wanted person [or suspect] would be subject to the penalty cited in Article 2(b) of UNTOC⁷³ or a stipulated lesser penalty⁷⁴.

⁷² The suggestions concerning Article 30-32 are included in the "Report of the informal working group on the draft protocol to eliminate illicit trade in tobacco products" (doc. FCTC/COP/IWG/2/7 – 22 September 2011. The Report is inserted as Annex 4 of this document).

⁷³ "Maximum deprivation of liberty of at least four years or a more serious penalty".

⁷⁴ Such an additional notification mechanism is not included in UNTOC.

Article 33⁷⁵

Extradition of alleged offenders

[...]

DECLASSIFIED

⁷⁵ Article 33 is proposed deleted (doc. 15968/2/10 REV 2). In doc. FCTC/COP/INB-IT/4/4 Article 33 is proposed for deletion.

The Preamble, Article 2 and Articles 34-49 [...] are coordinated by the Missions in Geneva.⁷⁶

PART VI: REPORTING

Article 34 (Consensus⁷⁷)

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 its 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

⁷⁶ [...] According to doc. 11242/1/09 Article 2 is to be coordinated in Geneva. The Preamble, Article 2 and Articles 34-49 have initially been coordinated by the Missions in Geneva. The CUG have made a final coordination of the Preamble (with a focus on the parts relevant for especially the Supply Chain Control (PART III of the protocol)) – after the Missions in Geneva had established their positions on relevant parts of the Preamble.

⁷⁷ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

of the Parties reporting mechanism, the Meeting of the Parties shall not duplicate the 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.

DECLASSIFIED

PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES

Article 35⁷⁸

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. *(Consensus⁷⁹)(WHO FCTC Article 23.1)*
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. *(Consensus⁸⁰) (Cartagena Protocol on Water and Health Montreal)*
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. *(Consensus⁸¹)*
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. *(Consensus⁸²)*
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. *(Consensus⁸³).*

[...]

Coordinated position for INB5

[...] Draft text agreed by consensus, but the issue of the method of financing of the protocol remains under discussion.

The informal working group (at its meeting in September) made the following

⁷⁸ The Intergovernmental Negotiating Body did not reach agreement regarding financial implications for Parties and recommended that the matter be considered by the Conference of the Parties. Text as it stood at the close of INB4.

⁷⁹ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

⁸⁰ See footnote 79.

⁸¹ See footnote 79.

⁸² See footnote 79.

⁸³ See footnote 79.

general observations:

- all decisions regarding the method of financing of the protocol should be first considered by the COP at its fifth session, prior to consideration by the MOP at its first session;
- regarding the period prior to the entry into force of the protocol, the group agreed that the COP should finance and support necessary activities. The Convention Secretariat should consider ways to reduce costs for meetings by making use of technology, where feasible, and of appropriate regional mechanisms;
- the first session of the MOP, which would be held in conjunction with a session of the COP, should be financed by the COP, governed by the administrative policies for travel support applicable to the COP.

Proposed EU position:

Support the (3) general observations made by the Informal working group.

On the financing:

- All Parties to the FCTC would finance the Protocol until its entry into force and including the first session of Meeting of the Parties. (*The Secretariat updated the anticipated budget for costs for this period: US\$ 680000 – US\$ 1075000 + possible around US\$ 500000 for staff and software*). This financing will be discussed and eventually agreed in COP 5.
- Only Parties to the Protocol will finance its implementation after the first MOP (*according to doc. FCTC/COP/INB-IT/4/5 of 13 January 2010, the reasonably expected costs for a biennium would amount to US\$ 5.25 million. See doc. for more details*).

Therefore, propose adding 2 new paragraphs:

- 6 The Meeting of the Parties shall decide on the scale and mechanism of the assessed voluntary contributions for the operation of this Protocol as well as on other possible resources for its implementation.

- 7 At each ordinary session, the Meeting of the Parties shall by consensus adopt a budget and work plan for the financial period until the next ordinary session, which shall be distinct from the FCTC budget and work plan.

The result of the Informal working group meeting in September 2011⁸⁴:

The informal working group made the following general observations:

- all decisions regarding the method of financing of the protocol should be first considered by the COP at its fifth session, prior to consideration by the MOP at its first session;
- regarding the period prior to the entry into force of the protocol, the group agreed that the COP should finance and support necessary activities. The Convention Secretariat should consider ways to reduce costs for meetings by making use of technology, where feasible, and of appropriate regional mechanisms;
- the first session of the MOP, which would be held in conjunction with a session of the COP, should be financed by the COP, governed by the administrative policies for travel support applicable to the COP.

The working group requested the Convention Secretariat to update the anticipated budget for costs for the period prior to entry into force, taking into account, inter alia, possible cost savings, and make it available for consideration by the INB at its final session.

Regarding the question of how the protocol should be financed following its entry into force, the working group suggested that the INB at its final session could consider the following possibilities with a view to making recommendations to the COP:

- all Parties to the WHO FCTC would finance the protocol; or
- only Parties to the protocol would finance the protocol; or
- all Parties to the WHO FCTC would finance the protocol for a period of five years after its entry into force; the COP would decide on the financing mechanism for the period thereafter.

⁸⁴ The general observations and recommendations concerning Article 35 are included in the “Report of the informal working group on the draft protocol to eliminate illicit trade in tobacco products” (doc. FCTC/COP/INB-IT/5/3 – 24 October 2011).

*Article 36*⁸⁵

Secretariat

1. The Convention Secretariat shall be the Secretariat of this Protocol. (*Consensus*⁸⁶)
2. The functions of the Convention Secretariat with regard to its role as the secretariat of this Protocol shall be to:
 - a) make arrangements for sessions of the Meeting of the Parties and any subsidiary bodies as well as working groups and other bodies and mechanisms established by the Meeting of the Parties and provide them with services as required; (*Consensus*⁸⁷)
 - 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;

[...]

Coordinated position for INB5

Ask for further clarification of the exact meaning of the proposed text. Possibility to better reformulate in two paragraphs as follows:

- b) analyse, as appropriate, and transmit reports received by it pursuant to this Protocol.
- c) establish and maintain the global information sharing focal point referred to in Article 7 of this Protocol in a manner to be decided by the Meeting of the Parties.

- c) provide advice and support to the Parties[,] **[on request in the compilation,**

⁸⁵ The text in the brackets stems from an internal EU position paper on parts VI to X of the Draft Protocol on illicit trade in tobacco products (FCTC/COP/INB-IT/3/5 Rev.1) from the 10 March 2010. The text has been added the result of the fourth session of the Intergovernmental Negotiating Body which was held on 14-21 March 2010.

⁸⁶ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

⁸⁷ See footnote 86.

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;

[...]

Coordinated position for INB5

[...] Better to use FCTC's agreed language:

c) provide support to the Parties, particularly developing country Parties and Parties with economies in transition, on request, in the compilation and communication of information required in accordance with the provisions of the Protocol.

As a fallback if needed:

- accept exchange of information
- no need to single out one specific Article (38.6). Only if really needed, add at the end "provisions of the Protocol, **including Art 36.6 (b)**"
- oppose Secretariat's support in "accessing" available resources.

d) prepare reports on its activities under this Protocol under the guidance of and for submission to the Meeting of the Parties;

[...]

Coordinated position for INB 5

Acceptable.

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;

[...]

Coordinated position for INB 5

Acceptable.

- 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;

[...]

Coordinated position for INB 5

Acceptable.

- 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

[...]

Coordinated position for INB 5

[...] 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 protect the implementation of the Protocol from commercial or other vested interests**, and present the **reviewed** 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.

[...]

Coordinated position for INB 5

Acceptable.

Article 37 (Consensus⁸⁸)

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. (*WHO FCTC Article 25*)

Article 38 (Consensus⁸⁹)

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.

⁸⁸ Consensus reached at the fourth session of the Intergovernmental Negotiating Body.

⁸⁹ See footnote 88.

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.

7. 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.

8. 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.

9. Parties shall endeavor, 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 (Consensus⁹⁰)

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 (Consensus⁹¹)

Amendments to this Protocol

1. Any Party may propose amendments to this Protocol.
2. Amendments to this Protocol shall be considered and adopted by the Meeting of the Parties. The text of any proposed amendment to this Protocol shall be communicated to the Parties by the Convention Secretariat at least six months before the session at which it is proposed for adoption. The Convention Secretariat shall also communicate proposed amendments to the signatories of this Protocol and, for information, to the Depository.
3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment to this Protocol. If all efforts at consensus have been exhausted and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For purposes of this Article, “Parties present and voting” means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the Convention Secretariat to the Depository, who shall circulate it to all Parties for acceptance. (*WHO FCTC Article 28.3*)
4. Instruments of acceptance in respect of an amendment shall be deposited with the

⁹⁰ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

⁹¹ See footnote 90.

Depository. 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 Depository of an instrument of acceptance by at least two thirds of the Parties to this Protocol.

5. The amendment shall enter into force for any other Party on the 90th day after the date on which that Party deposits with the Depository 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.

[...]

Coordinated position for INB 5

Acceptable.

2. Annexes shall be restricted to lists, forms and any other descriptive material relating to procedural, scientific, technical or administrative matters.

[...]

Coordinated position for INB 5

Acceptable.

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.

[...]

Coordinated position for INB 5

[...] Acceptable.

PART X: FINAL PROVISIONS

Article 42

Reservations

No reservations may be made to this Protocol. (*WHO FCTC Article 30*)

[...]

Coordinated position for INB 5

[to be further discussed]

[...] Option 1:

In principle agreeable, but keep it opened until the end of INB 5, once the substantial parts have been agreed.

[Please note that this position requires coordination and decision on this issue on-the-spot before the end of INB 5 on 4 April].

Option 2:

As coordinated position for INB 4 (Brussels 11 March 2011):

“The insertion of a provision in Article 42 of the Protocol stating that Parties may reserve the right not to apply specific provisions of the Protocol insofar as they will not be compatible with their constitutional requirements, shall be proposed and defended.”

According to the Legal Service advice, the reference to the Constitution seems to be of a “general character”. It would then not be possible to ensure compliance of such general reservation with Article 19(c) of the Vienna Convention. Such a reference should either be deleted, or be reformulated in order to,

- provide a precise indication of the internal provision(s) at stake;
- ensure that any such reservation cannot be incompatible with the object and purpose of the protocol, i.e. with one of its essential elements or with its general economy.

Option 3:

Delete this article.

Articles 19-23 of the Vienna Convention on the Law of Treaties will apply.

Particularly relevant to this proposal would be Article 19(c) indicating that reservations compatible with the object and purpose of the Protocol would be allowed.

From the "Guide to practice on reservations Treaties. 2011": The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the Preamble of the treaty.

Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

[Member States to provide with the identification of the problematic Articles (Articles 21 and 31 so far identified.)]

Article 43 (Consensus⁹²)

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

⁹² Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

its withdrawal from the WHO Framework Convention on Tobacco Control.

Article 44 (Consensus⁹³)

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 (Consensus⁹⁴)

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.

Coordinated position for INB 5

Only open to determine place and date.

Article 46 (Consensus⁹⁵)

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

⁹³ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

⁹⁴ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body, subject to place and dates to be determined.

⁹⁵ See footnote 93.

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 those organizations, one or more of whose Member States is a Party to this Protocol, the organization and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the Member States shall not be entitled to exercise rights under this Protocol concurrently.
3. Regional economic integration organizations shall, in their instruments relating to formal confirmation or in their instruments of accession, declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification to the extent of their competence.

Article 47 (Consensus⁹⁶)

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

⁹⁶ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

Members of that organization.

Article 48⁹⁷

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 (Consensus⁹⁸)

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.

=====

DECLASSIFIED

⁹⁷ The negotiations on this Article weren't finalized at the fourth session of the Intergovernmental Negotiating Body (page 6 in doc. FCTC/COP4/4).

⁹⁸ Consensus reached in Plenary at the third session of the Intergovernmental Negotiating Body.

The current mandate to negotiate:

The original mandate to the Commission to negotiate an International Framework Convention on Tobacco Control and related protocols was given in 1999⁹⁹. The mandate was amended in 2001 to include matters within the Community field of competence which require unanimity in the Council. Paragraph 2 in the negotiating Directives were then modified (see quotation below)¹⁰⁰. In the original mandate was moreover inserted a review clause for when the outline of the Protocols would become clear. In 2007 the Commission recommended to the Council – in view of the review clause – an addition to the negotiating directives for a protocol to eliminate illicit trade in tobacco products¹⁰¹. Paragraph 3.a as quoted below was added¹⁰².

“NEGOTIATING DIRECTIVES FOR NEGOTIATING AN INTERNATIONAL FRAMEWORK CONVENTION ON TOBACCO CONTROL AND RELATED PROTOCOLS

1. The aim of the negotiations shall be the creation of a Framework Convention on Tobacco Control composed of the following main elements:
 - i) general obligations, including a declaration, recognising the scale of the harmful effects on human health of tobacco consumption, and the intention to develop agreed international responses to reduce such effects;
 - j) the agreed international responses referred to above should be set out in separate Protocols. Contracting Parties to the Framework Convention should be able to accede to individual Protocols;

⁹⁹ Decision of the Council of 22 October 1999 authorising the Commission to open negotiations, in the context of the World Health Organisation, on an International Framework Convention on Tobacco Control and related protocols (doc. 11959/99 STREINT and doc. 119595/99 ADD 1 STREINT).

¹⁰⁰ Decision of the Council of 21 April 2001 giving the Commission additional authorisation to negotiate WHO Framework Convention on Tobacco Control and related protocols (doc. 7999/01 STREINT).

¹⁰¹ Recommendation from the Commission to the Council on the addition of negotiating directives for a protocol on illicit trade in tobacco products and for a protocol on cross-border advertising promotion and sponsorship (doc. 15752/07 STREINT).

¹⁰² Decision of the Council of 20 December 2007 on addition to the negotiation directives in the Council Decision authorising the Commission to open negotiations, in the context of the World Health Organisation Framework Convention of Tobacco Control, on a related protocol (doc. 16437/07 STREINT).

- k) the Framework Convention itself should not allow for reservations to be made to its provisions by Contracting Parties. The Contracting Parties should, however, be allowed to enter reservations on the provisions of the Protocols to the Convention;
 - l) a permanent technical committee of the Convention, composed of Contracting Parties and observers should be established to review progress achieved in implementing its objectives, and to continue its development, in particular to review the state of reservations entered by Contracting Parties to provisions of the Protocols.
 - m) Contracting Parties should be given the option to adopt stricter rules than those provided for in the Convention of its Protocol.
2. The negotiations must aim to base operational provisions of the Framework Convention and its protocols on existing Community legislation.
3. The Framework Convention and its individual Protocols should allow the European Community to become a Contracting Party.
- 3.a The aim of the negotiations shall be the creation of a protocol providing for appropriate measures to combat the illicit production of and trade in tobacco products.
4. Meetings of the special Committee referred to in Article 300 (1) of the Treaty shall be held to apply the above-mentioned directives to the texts proposed also during meetings of the Working Group within the WHO and the Intergovernmental negotiating body.
5. The Commission shall regularly inform the Council of the progress achieved in the negotiation.”

Composition of the Informal working group on the draft protocol

<u>Region</u>	<u>Parties</u>
<u>African Region (AFR)</u>	<u>Algeria</u>
	<u>Kenya</u>
	<u>Nigeria</u>
	<u>Senegal</u>
	<u>Swaziland</u>
<u>Region of the Americas (AMR)</u>	<u>Brazil</u>
	<u>Canada</u>
	<u>Mexico</u>
	<u>Nicaragua</u>
	<u>Panama</u>
<u>Eastern Mediterranean Region (EMR)</u>	<u>Egypt</u>
	<u>Islamic Republic of Iran</u>
	<u>Pakistan</u>
	<u>Saudi Arabia</u>
	<u>United Arab Emirates</u>
<u>European Region (EUR)</u>	<u>European Union</u>
	<u>Georgia*</u>
	<u>Israel**</u>
	<u>Poland</u>
	<u>Russian Federation</u>
	<u>Turkey</u>
<u>South-East Asia Region (SEAR)</u>	<u>Bhutan</u>
	<u>India</u>
	<u>Maldives</u>
	<u>Nepal</u>
	<u>Thailand</u>
<u>Western Pacific Region (WPR)</u>	<u>Australia</u>
	<u>China</u>
	<u>Cook Island</u>
	<u>Japan</u>
	<u>Mongolia</u>

*Georgia attended the first meeting of the informal working group in July 2011.

**Israel attended the second meeting of the informal working group in September 2011.