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Control:
Protocol on illicit trade in tobacco products
-Intercessional drafting Groups

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

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

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THE EUROPEAN UNION**

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**DROIPEN 147
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NOTE

from	Presidency
to :	Delegations
Subject :	World Health Organisation (WHO) Framework Convention on Tobacco Control: Protocol on illicit trade in tobacco products -Intercessional drafting Groups

I. INTRODUCTION

The third round of negotiations on a new protocol on illicit trade in tobacco products (INB3) was held in Geneva from 28 June until 5 July 2009. The negotiations were based on the document FCTC/COP/INB-IT/3/ from 23 April 2009, “Revised Chairperson’s text for a protocol on illicit trade in tobacco products”. The work was conducted partly in plenary, partly in two Committees, Committee A and Committee B. Committee B dealt with issues involving criminal law and international cooperation (Title IV “Offences and sanctions” Articles 12-19 and Title V “International cooperation” Articles 20-33 in the draft protocol).

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The position of the Member States of the European Union, was coordinated in the Council amongst JHA Counsellors in a separate meeting and in joint meetings with the Working Party on Customs Union (Customs Legislation and Policy). Coordination meetings were also held during the negotiations in Geneva. The Presidency spoke on behalf of the Member States of the European Union.

II. OUTCOME OF THE THIRD ROUND OF NEGOTIATIONS (INB3)

During INB3 many issues were discussed, and many proposals were put forward. It was however difficult to reach consensus on certain key issues, such as which are the behaviours in the protocol that would constitute “criminal offences/serious criminal offences” and how this would affect the Articles on “extradition” and “mutual legal assistance”. Consensus was provisionally reached in Committee B but not in the Plenary, on Articles 12.1 (partly), 23, 25.1 and 28 (see document FCTC/COP/INB-IT/3/5).

The discussions were mostly focused on Article 12 of the Revised Chairperson’s text (“Offences”). The main result of the discussions was that the list of criminal conducts in 12.1 was merged with the list of unlawful conducts in 12.2, and that it was in principle decided to leave it to the Parties to decide which of these conducts would be criminalised. However, due to the lack of time, the content of the list was not be discussed. Once the content of Article 12 will be agreed upon, the content of remaining Articles can be further developed.

III. FOURTH ROUND OF NEGOTIATIONS (INB 4) AND INB DRAFTING GROUPS

A fourth Round of negotiations (INB4) is scheduled to take place in Geneva on 14-21 March 2010. Due to the difficulties experienced during the negotiations in INB3, it was decided to hold informal intersessional drafting meetings during autumn 2009. In this respect, and in view of the preparation of INB4, two working groups of 30 persons each, have been created. These working groups, named INB Drafting Groups 1 and 2, will meet twice in Geneva, to discuss pending issues.]

INB Drafting Group 2, which is the former Committee B, met on 7-9 October and will meet again on 26-28 November 2009. The group consists of representatives from 30 countries, five countries from each region.

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The European Community and the European Union Presidency are represented in both INB Drafting Groups. The remaining representatives for the European Region in the INB Drafting Group 2 are Israel, the Russian Federation and Turkey.

The task of INB Drafting Group 2 is to examine and propose new wording for Articles 12 (Unlawful conduct), 13 (Liability of legal persons), 14 (Sanctions), 30 (Mutual legal assistance), 31 (Measures to ensure prosecution or extradition), 32 (Prosecution of alleged offenders) and 33 (Extradition of alleged offenders).

In order for the Presidency to be able act in the common interest of the MS during the first intersessional drafting meeting 7–9 October, a position of the MS on certain issues was agreed upon by the JHA Counsellors (doc 13866/09 DROIPEN 111 UD 207 SAN249 COPEN 185 RESTREINT UE).

Attached to this document are a report of the outcome of the first Drafting Group meeting (Annex I and II) and a Presidency proposal for issues to be coordinated in view of the second Drafting Group meeting in Geneva 26–28 November (Annex III).

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OUTCOME OF DISCUSSIONS OF FIRST INTERSESSIONAL DRAFTING

This Annex contains a short report of the outcome of the first meeting of the Drafting Group. The new proposals drafted at the meeting are enclosed in Annex II.

Chapeau of Article 12.1 (Unlawful conduct)

An initial attempt was made by the Presidency to insert “when committed intentionally” into the chapeau of Article 12.1. As expected this was strongly opposed by several delegations. In the end it was agreed to insert a safeguard in the chapeau to address the concern of State Parties in favour of adding intent in the chapeau. While Parties still are obliged to make all conduct in Article 12.1 unlawful, the measures they adopt may now be in accordance with the basic principles of domestic law.

The list of unlawful conduct in Article 12.1

The various conducts in Article 12.1 (a)–(o) were discussed on a conceptual basis. The concrete wording will be discussed at the next Drafting Group meeting. The Presidency, supported by several delegations, expressed concerns on "*manufacturing equipment*". The Chair pointed out that the other drafting group had reached consensus on the inclusion of manufacturing equipment in Article 5 at its first meeting and that a redraft of article 12 therefore must await the final wording proposed by that group.

(a)–(e)

It was conceptually agreed that the conduct outlined in (a) should be considered unlawful. Regarding (b) and (c) there was conceptual agreement in relation to only tobacco products (but not manufacturing equipment etc.). The conduct in (d) and (e) was conceptually agreed without further comments.

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(f) and (g)

It was agreed that (f) and (g), being crimes in other legal instruments, should be taken out of the list of unlawful conduct and be reworded in a manner more consistent with wording in Article 6 of UNTOC, including the safeguards provided there. The final agreement was to include (f) and (g) in a new Article 12.3. In addition a new Article 12.4 about predicate offences was drafted.

(h) and (i)

It was agreed in principle that (h) and (i) should be taken out of the list and be included in a new Article 12.5. It was also agreed to reword (h) in order to address?? to the concerns expressed by Parties the domestic law of which does not recognise the concept of conspiracy (essentially by including the concept of “association with” as in Article 6.1(b)(ii) UNTOC). Furthermore two safeguards were added: “subject to the basic principles of its domestic law” and “having regard to the nature and gravity of the offence” in order to avoid, inter alia, an obligation to establish criminalisation for attempt of a petty crime or a crime that in itself already consists of a preparatory conduct. The safeguards were also added to appease those who, like the Presidency, expressed concern regarding “conspiracy” and the inclusion of “association with” (which refers only to money laundering in UNTOC) and other forms of participation than “aiding and abetting”.

(j)–(o)

The conduct in letters (j)–(o) was conceptually agreed upon. The concern about self-incrimination in letter (l) should be addressed by the new safeguard included in the chapeau and by the fact that it is not mandatory to criminalise this conduct, merely to make it unlawful. The question whether to keep intermingling (n) as an unlawful conduct was not discussed in depth. Since Article 9 is not within the scope of Drafting Group 1 the final decision is pending the outcome of INB negotiations. It was however decided that it would be logical to include intermingling in the list of unlawful conduct if this concept is finally prohibited in Article 9.3 or elsewhere. It was also agreed that Article 11.2, which also prohibits intermingling, as a consequence could result in a new unlawful conduct to be included in the list.

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Article 12.2

It was agreed that Article 12.2 should be worded in a manner that leaves it up to the Parties to decide which conduct to criminalise (after the removal of letters (f)–(i)). A proposal to rephrase the paragraph in order to make it clear that the Parties should be obliged to criminalise at least one or more conduct did not gain any support. There was general consensus that the term “serious” should be deleted from the text. The Chair however urged delegations to continue discussing the list of unlawful conduct in the capitals with a view to reach consensus of additional conduct from the list which it would be mandatory to criminalise (i.e., to be removed from the list and put into Article 12.3), for example smuggling and counterfeiting. In this context the Chair referred to Article 15 of the Framework Convention.

Article 13 Liability of legal persons

It was agreed that it was logical that the Article on liability of legal persons should, in consistency with legal principles of Parties, cover criminal offences established by Parties as well as unlawful conduct. It was also agreed to remove the provision on sanctions for legal persons from Article 14, which should exclusively deal with sanctions for natural persons. It was not decided yet whether to create a separate article on sanctions for legal persons or to move it to the article on liability for legal persons.

Article 14 (Sanctions)

It was decided to phrase Article 14 in a way that would afford as much flexibility as possible to Parties. One delegation preliminary wishes for the inclusion of a specific subparagraph to deal with aggravated crime. This matter is to be discussed at next meeting. It was decided to add “endeavour to” in paragraph 2. Paragraph 4 should be deleted in the view of the Drafting Group.

Article 30 (Mutual legal assistance)

Some delegations proposed the deletion of Article 30. Since there was no consensus on deletion the Group was instructed by the Chair to work on the text.

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The possibility of bringing the wording more in line with Article 18 of UNTOC was raised as well as a conceived possible overlap of this Article and several other Articles of the Protocol, for example Articles 21 and 28. It was decided that the Chair would redraft this Article together with the Secretariat.

Extradition and related issues

Several Parties wanted to delete the Articles on extradition and instead rely on the system for extradition provided in UNTOC, but an equal number opposed a deletion. It was decided to work on the text bearing in mind that it is up to INB to make the final decision about this matter. As a first action it was decided to renumber the Articles placing Article 33 before Articles 31 and 32.

Article 31 (former 33) Extradition of alleged offenders

It was initially preliminarily decided to add a chapeau that would make it a condition that extradition can be applied only for criminal offences established in accordance with Article 12. The suitable threshold for extraditable offences was debated. Most delegations would be content with the standard wording, that is offences punishable by deprivation of liberty for a maximum period of at least one year or by a more severe penalty. A few delegations wanted a higher threshold, at least 4 years. The Chair invited Parties to put forward drafting suggestions to be discussed at the next meeting of the Drafting Group.

Article 32 Prosecution of alleged offenders

Two new options were presented. The first new option uses wording closer to Article 16.10 of UNTOC, but encompasses all grounds for refusal of extradition. The second option is in full accord with the UNTOC wording. That is, refusal only on the ground that the offender is one of the Party's nationals. It was also discussed whether the term "offence of a grave nature" should be used as in the relevant UNTOC provision or if it is better to use the word "similar". Parties were invited by the Chair to submit proposals to be discussed at the next meeting.

Article 33 (former 31) Measures to ensure prosecution or extradition

It was agreed that Article 33.1 should be redrafted in line with Article 16.9 of UNTOC. The second paragraph was left in brackets as one delegation wanted to keep either it or an alternative wording proposed by that delegation. It was agreed to discuss the issue again at the next meeting. The Chair invited delegations to submit proposals.

INB Drafting Group 21

First meeting

7-9 October 2009

Progress note

Conceptual questions and outcome of discussions

(Drafting proposals attached in the annex)

I Article 12.1

1. Does the chapeau of Article 12.1 require any amendments?

Yes.

2. Should the conduct set out in Article 12.1 (a-o) be considered unlawful under the protocol?

(a)

- It was agreed conceptually that the breach of Article 5 should be an unlawful conduct.
- It was agreed conceptually that tax evasion should also be included as an unlawful conduct in (a).

(b)

- There was conceptual agreement in relation to counterfeiting tobacco products.
- Concerns were expressed in relation to counterfeiting manufacturing equipment (to re draft after considering the text prepared by drafting group ¹ with regard to Article 5)

(c)

There was conceptual agreement in relation to manufacturing, selling, transporting, etc., of tobacco products.

(d)

There was conceptual agreement on this provision.

¹ Established by the Intergovernmental Negotiating Body (INB) for a protocol to eliminate illicit trade in tobacco products at its third session, decision FCTC/INB-IT/3(1).

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(e)

There was conceptual agreement on this provision.

(f) & (g)

- Conceptual agreement was reached that the unlawful conduct in paragraphs (f) and (g) should be treated as a criminal offence and should be moved out of Article 12.1.
- It was agreed that the language in the draft protocol should be consistent with the language used in UNTOC, Art. 6.1.

(h) & (i)

- It was conceptually agreed to include the phrase "in association with or conspiring/conspiracy to commit" at the beginning of the text, in order to cater to the concerns expressed by those Parties whose domestic law does not recognize the concept of conspiracy.
- It was agreed that the unlawful conduct in (h) & (i) should be deemed to be criminal offences in relation to the criminal offences established in accordance with Article 12.

(j)

There was conceptual agreement on this provision.

(k)

There was conceptual agreement on this provision.

(l)

There was conceptual agreement on this provision.

(m)

There was conceptual agreement on this provision.

(n)

There was conceptual agreement on this provision. However, the phrase "if intended to conceal or disguise tobacco products" has to be added the end of the provision.

(o)

There was conceptual agreement on this provision.

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3. Is there any other unlawful conduct contained in the protocol that should be added to Article 12.1?

- It was agreed that the outcome of the discussions in Drafting Group 1 will have to be considered in redrafting the list of unlawful conduct in Article 12.1.
- It was also agreed that other unlawful conduct, example: Article 11.2 will have to be added to the list.
- A new text for the chapeau of Article 12.1 was prepared and discussed on screen.
- The chapeau of Article 12.1 was amended and agreed upon.

4. Out of the unlawful conduct in Article 12.1, which do you consider to be criminal conduct/offence?

It was agreed that items (f), (g), (h) and (i) should be deemed to be criminal offences.

II Article 12.2

1. Should the determination of criminal offences be left to the discretion of the Parties?

The group agreed that such discretion should be left to the Parties.

2. Should the concept of serious criminal offence be retained in the text?

- There was general consensus that the term "serious" could be deleted from the text.
- It was agreed that the qualifier "when committed intentionally" does not have to appear in the text. The concerns of Parties who wished to include this language were catered to by the inclusion of the phrase "subject to the basic principles of its domestic law".

3. What are the threshold requirements for Article 12(2)?

- It was agreed that qualifiers did not have to be included in the text.

The text for Article 12.2, 12.3 12.4 and 12.5 was agreed upon.

III Article 13

- Paragraph 1 was amended and agreed upon.
- Paragraph 2 was agreed upon
- With regard to paragraph 3, one Party reserved the option to reconsider it.

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IV Article 14

- Alternative text to clarify liability and sanctions for natural and legal persons was proposed and agreed for paragraph 1.
- It remains to be decided where this alternative text will be placed.
- It was agreed to delete paragraphs 2 and 4.
- Paragraph 5 was discussed and amended.

V Article 30

- Concerns were raised regarding the inclusion of provisions on mutual legal assistance in the draft protocol.
- Several proposals were made to amend this article. The Chair of the drafting group, with the help of the Secretariat and experts will prepare a new draft provision for the consideration of the group.

VI Article 31 (former Article 33)

- Several Parties proposed the retention of the extradition provisions in the protocol, and an equal number opposed the retention. However, Parties agreed to redraft the provisions of this Article on the understanding that the fundamental issue of including 'extradition' will be raised at INB.
- Several Parties suggested draft text to be included in this Article while views were also expressed that this Article should be more comprehensive. Parties were invited to forward suggestions and draft text to be included in the document to be circulated.
- At the suggestion of Parties Articles 31 and 33 were renumbered in the following manner:
 - Article 31 as 33
 - Article 33 as 31

VII Article 32

- Article 32 was considered and the Parties decided to leave it in brackets and an alternative was drafted and considered.

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- A third option based on Article 16.10 of UNTOC was also included for the consideration of the Parties.
- However, Parties have undertaken to submit draft proposals.

VIII Article 33 (former Article 31)

- paragraph 1 was redrafted and agreed upon
- paragraph 2 was left in brackets, and there was an alternative proposal drafted following concerns expressed by Parties. However, Parties have undertaken to submit draft proposals.

Annex

Drafting proposals as per 9 October 2009

Article 12

Unlawful conduct

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: (*consensus*)
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. (*consensus*)
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: (*consensus*)
 - (a) Converting or transferring property, knowing that such property is the proceeds of a 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; (*consensus*)
 - (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; (*consensus*)

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- (c) Acquiring, possessing or using property, knowing, at the time of receipt, that such property is the proceeds of crime; (*consensus*)
4. For the purposes of implementing or applying paragraph 3 of this Article, each Party shall include as predicate offences all criminal offences established in accordance with paragraphs 2 and 5 of this Article as a result of which proceeds have been generated.
5. 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: (*consensus*)
- (a) Associating with or conspiring, and attempting to commit an offence; (*consensus*)
- (b) Organizing, managing, financing, directing, aiding, abetting, facilitating or counselling the commission of an offence; (*consensus*)

Article 13

Liability of legal persons

1. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for a criminal offence or any other unlawful conduct set out in Article 12 of this Protocol. (*consensus*)
2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative. (*consensus*)
3. Such liability shall be without prejudice to the [criminal] liability of the natural persons who have committed the criminal offences [or engaged in unlawful conduct].

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Article 14

Sanctions

1. **[Each Party shall ensure that the most serious instances of the conduct set out in Article 12, when committed intentionally and on a commercial scale, are considered [a serious crime]/ [as serious offences].]**

[Sanctions for unlawful conduct including criminal offences

Each State Party shall take the necessary measures to ensure that the unlawful conduct including criminal offences as set out in Article 12 is sanctioned by effective, proportionate, and dissuasive sanctions.] (*consensus*)

[Liability and Sanctions against legal persons

Each State Party shall take the necessary measures to ensure that a legal person held liable for a criminal offence or an unlawful conduct set out in Article 12 is sanctioned by effective, proportionate, and dissuasive sanctions.](*move to Article 13 or elsewhere*) (*consensus*)

3. Each Party shall **endeavour to** ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for [unlawful conduct including a criminal offence] established in accordance with Article 12 are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
5. Nothing contained in this Protocol shall affect the principle that the description of the **[unlawful conduct including a criminal offence]** / [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 offences shall be prosecuted and [punished] / **[sanctioned]** in accordance with that law.

Article 31 (former Article 33)

Extradition of alleged offenders

[1. This Article applies to criminal offences established according to Article 12(x) of this Protocol, punishable by a maximum period of at least [1]/[4] years of imprisonment or other forms of deprivation of liberty or by a more severe under the laws of both Parties.]

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2. To the extent that the crimes set out in Article 12.1 are not extraditable offences in any extradition treaty existing between Parties, they shall be deemed to be included as such therein. Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.
3. 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 at its option consider this Protocol as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the State to which the request is made.
4. Parties that do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves, subject to the conditions provided in the law of the requested State.
5. Each of those crimes shall be treated, for the purposes of extradition between 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 or 2 of Article 26.

[6. Extradition shall be subject to the conditions provided for by the national law of the requested Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirements for extradition and the grounds upon which the requested Party might refuse extradition.]

[provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting Party and the requested Party].

Article 32

Prosecution of alleged offenders

[The Party on the territory of which the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.]

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or

[The Party on the territory of which the alleged offender is present, if it does not extradite that person, shall, at the request of the Party seeking extradition and if the laws of the requested Party allow, submit the case to its competent authorities for the purpose of prosecution [, through proceedings in accordance with the law of that State.

Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a [grave]/[similar] nature under the law of that State].]

or

A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies [solely on the ground that he or she is one of its nationals], shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution. [*Article 16.10 UNTOC*]

Article 33 (former Article 31)

Measures to ensure [prosecution or] 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.**
(consensus)
- [2. Measures taken in accordance with paragraph 1 shall be notified, in conformity with national law and without delay, to:
 - (a) the State in which the crime was committed; and
 - (b) the State or States of which the alleged offender is a national or, if such person is a stateless person, on the territory of which that person has his or her habitual residence.]

or

RESTREINT UE

[Measures taken in accordance with paragraph 1 of this Article shall be notified, in conformity with national law and without delay, to the requesting Party.]

[In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations,¹ where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

(Article 16.5, Migrant Smuggling Protocol; Annex III)

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DRAFT POSITION OF THE MEMBER STATES OF THE EU IN VIEW OF THE SECOND INTERSESSIONAL DRAFTING MEETING

A coordinated position for the second meeting of Drafting Group 2 could have the following additional content.

Please note that the following text now is amended due to comments from delegations and on account of the new draft provided by the Chair of the drafting group on 2 November 2009, see Annex IV. References in the document now refer to the new draft. More important amendments to the draft position are underlined in the text below.

Article 12 Unlawful conduct

Considering the outcome of discussion of the first drafting group meeting, the basic structure of Article 12, including the different unlawful conduct set out in the list in Article 12.1, should be acceptable in principle.

If the idea to sort out additional behaviour from the list that should be mandatory to criminalise is further discussed, the Presidency should maintain the position that the Parties should have full flexibility. The Presidency should accordingly not support the proposal in Article 12.3 (c) and (d) to criminalise smuggling or counterfeiting (or any other unlawful conduct in Article 12.1). As a consequence the same goes for the option for Article 12.1 (b). On page 25 there is a proposal in a footnote that a definition for the term “counterfeiting” should be in line with TRIPS. The Presidency should not support this proposal.

Due to the difficulty to predict interventions from other delegations at the meeting the Presidency should be able to be flexible about the concrete wording of the various types of conduct as well as the options now presented in the text provided by the Chair unless otherwise stated below, while striving for a balanced text avoiding wording that unduly limits or extends the scope of list of conduct.

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Regarding the specific wording of the conduct in (a)–(g) the Presidency should work towards:

- introducing qualifiers that limit (b)(iii) to include only conduct that has been undertaken “without right” and “in the course of business activities”.
- making conduct in (g)(i) unlawful only when the false or incomplete statement is significant, that is, implies a risk that an incorrect decision is taken on basis of the misleading information. Furthermore, the Presidency should, in line with the position elaborated in view of the first drafting group meeting, work towards adding the following wording in the beginning: “Without prejudice to the privilege against self-incrimination, making...”.
- introducing a qualifier in (g)(ii) that limits the scope to conduct that has implied a risk that customs duties, other taxes or charges are avoided, incorrectly credited or repaid. However, attention needs to be drawn to (a) to avoid any possible overlapping.

Regarding Article 12.4 (a) the Presidency should as a first option stick to the previous position, that is, keeping only “attempt”. However it could also be acceptable to instead strive for replacing “associating with” with “participating in”. Also regarding Article 12.4 (b) the first option should be to stick to the previous position and only keep aiding and abetting, but if necessary the word “incitement” could be added.

Article 13 Liability of legal persons

The proposed wording of Article 13.1 and 13.2 should be acceptable considering the structure of Article 12. For the same reason it is logical to talk about “liability” (rather than “criminal liability”) as well as adding “or engaged in unlawful conduct” in Article 13.3. The Presidency should therefore support these options.

Article 14 Sanctions

The Presidency should work towards as much flexibility as possible to Parties regarding sanctions. The Presidency should therefore, as a first option, not support the inclusion of a specific paragraph on more severe criminal offences. A proposal from other delegations that envisages a minimum maximal penalty of imprisonment for 4 years or more for the most severe criminal offences should not be supported by the Presidency, even if it is supported by several other delegations.

RESTREINT UE

Article 30 International cooperation

The text is now in line with Article 18 of UNTOC. Accordingly the Presidency should be able to accept the proposed text.

Article 31 (former Article 33)

The text is now in line with Article 16 of UNTOC, which the Presidency should be able to accept. The Presidency should be able to be flexible as regards additional safeguards proposed by other delegations. If the draft proposal does not gain support from other delegations the Presidency should continue to work towards a solution that connects extradition to such criminal offences established in accordance with Article 12 that are punishable by deprivation of liberty for a maximum period of one year or more. The Presidency should also be able to accept a higher threshold of deprivation of liberty, but not higher than two years.

Article 32 Prosecution of alleged offenders

The text is now in line with Article 16 of UNTOC, which the Presidency should be able to accept, as long as “similar nature” is used in the penultimate sentence instead of “grave nature” (Now in square brackets). The Presidency should also be able to accept the option provided by the Chair of the Drafting Group. It could, however, be flexible when it comes to the inclusion of “solely on the ground that he or she is one of its nationals”.

Article 33 (former Article 31) measures to ensure prosecution and extradition

Article 33.1 is in line with the wording used in Article 16.9 of UNTOC and should be acceptable. The option regarding Article 33.2 in square brackets is too far reaching and cannot be supported. Option 2 deals with victims of crime and does not fit in the context. The Presidency should work towards deletion of Article 33.2 or, if this is not supported, opt for alternative 1 in the text or the “alternative alternatives” on pages 43-44.

PART IV: OFFENCES

Article 12

Unlawful conduct [and 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: (*consensus*¹)

- (a) manufacturing, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products in contravention of the provisions of this Protocol, or without the payment of applicable duties, taxes and other levies or bearing applicable fiscal stamps, [unique marking, any other] marking or labels; (*former paragraph 12.1 (a) modified*)

Suggestion for Parties:

Please consider whether smuggling of tobacco and tobacco products could be deemed to be a criminal offence under Art.12.3 (Please see Article 15(4)(b) of the FCTC). A proposal was included in this draft of Art. 12.3 for the consideration of Parties.

- (b) i) counterfeiting tobacco products [or manufacturing equipment used in the manufacture of tobacco products] or counterfeiting packaging, fiscal stamps, [unique marking, any other] markings or labels; (*former paragraph 12.1 (b)*)

¹ "*Consensus*" in this draft refers to the consensus reached by Drafting Group 2 at its first meeting (7-9 October 2009, Geneva).

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- ii) 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; *(former paragraph 12.1 (c))*

- iii) defacing, falsifying, removing, altering or otherwise interfering with labelling, stamping, unique marking or any [other] markings of or for tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; *(former paragraph 12.1 (e))*

Suggestion for Parties:

Please consider whether counterfeiting of tobacco products, packaging, fiscal stamps, unique markings etc. could be deemed to be a criminal offence under Art. 12.3 (a proposal was included accordingly in this draft of Art. 12.3 for the consideration of Parties) , so that Art. 12.1(b) could be modified in the following manner:

- (b)
 - i) [~~counterfeiting manufacturing equipment used in the manufacture of tobacco products~~]; *(former paragraph 12.1 (b) modified)*
 - ii) 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; *(former paragraph 12.1 (c))*
 - iii) defacing, falsifying, removing, altering or otherwise interfering with labelling, stamping, unique marking or any [other] markings of or for tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; *(former paragraph 12.1 (e) modified)*

- (c)
 - (i) intermingling tobacco products with non-tobacco products during the progression through the supply chain of tobacco products, including, during storage, warehousing, transit, transportation, import and export, if intended to conceal or disguise tobacco products; *(former paragraph 12.1 (n))*

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- (ii) intermingling tobacco products with non-tobacco products on import into and exports from free zones; *(new – to capture the unlawful conduct in Art.11.2)*

- (d) 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; *(former paragraph 12.1 (o))*

- (e) 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; *(former paragraph 12.1 (m))*

- (f) obstructing inspectors, auditors or any other public official from performing their 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; *(former paragraph 12.1 (j))*
An alternative –
obstructing any public officer or an authorized officer in the performance of the 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; *(former paragraph 12.1 (j) modified)*

- (g) (i) making incomplete or false statements to an inspector, auditor, customs officer or any other authorized official performing his or her 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; *(former paragraph 12.1 (l))*

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An alternative –

making incomplete or false statements 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; (*former paragraph 12.1 (l) modified*)

- (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; (*former paragraph 12.1 (d)*)
- (iii) failing to maintain records covered by this Protocol or maintaining false records; (*former paragraph 12.1 (k)*)

Please note: Former paragraphs (f), (g), (h) and (i) have been deleted from Article 12.1 as these provisions are incorporated into Article 12.5 (re-numbered 12.4 – please see the suggestion thereunder). As such, the Parties are vested with the discretion of deciding on the unlawful conduct in Art.12.1 which should be deemed to be criminal offences.

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. (*consensus*)
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: (*consensus*)
 - (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; (*consensus*)

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- (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; (*consensus*)
- (c) Acquiring, possessing or using property, knowing, at the time of receipt, that such property is the proceeds of crime; (*consensus*)
- [(d) Smuggling of tobacco or tobacco products¹]; (*new proposal*)
- [(e) counterfeiting tobacco products or counterfeiting² packaging, fiscal stamps, [unique marking, any other] markings or labels; (*former paragraph 12.1 (b) modified*)

Keeping in mind the flow and sequence of the provisions of this Article, it would be prudent to re-number sub-Article 12.4 as 12.5 and vice versa with the following minor amendment to the new Art. 12.5:

- 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: (*consensus*)
 - (a) Associating with or conspiring, and attempting to commit an offence; (*consensus*)
 - (b) Organizing, managing, financing, directing, aiding, abetting, facilitating or counselling the commission of an offence. (*consensus*)

¹ A possible definition for the term 'smuggling of tobacco or tobacco products': 'shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit by the illegal movement of tobacco or tobacco products into or out of the territory of a Party'. (Protocol against Smuggling of Migrants by Land, Sea and Air- modified)

² If necessary, a definition for the term 'counterfeiting' could be included. A possible text can be found in TRIPS.

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

(consensus)

Article 13

Liability of legal persons

1. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for a criminal offence or any other unlawful conduct set out in Article 12 of this Protocol. *(consensus)*

Suggestion: Although consensus was reached with regard to Art. 13.1, the following text is suggested with the intention of maintaining consistency in the language of this Article. Hence, the phrase 'a criminal offence or any other unlawful conduct' could be replaced with 'the unlawful conduct and criminal offences'.

Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for [a criminal offence or any other] the unlawful conduct and criminal offences set out in 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. *(consensus)*
3. Such liability shall be without prejudice to the [criminal] liability of the natural persons who have committed the criminal offences [or engaged in unlawful conduct.]

Suggestion: Two options are suggested for Art. 12.3. Option 1 is consistent with the provisions of Art. 12, which establishes unlawful conduct and criminal offences as well as with other provisions of the Protocol. Option 2 is the standard clause incorporated in Conventions which create criminal offences.

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Option 1:

Such liability shall be without prejudice to the liability of the natural persons who have committed the criminal offences or engaged in unlawful conduct.

Option 2:

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

- 4 Each Party shall take the necessary measures to ensure that a legal person held liable for a criminal offence or an unlawful conduct set out in Article 12 is sanctioned by effective, proportionate, and dissuasive sanctions. (*consensus*)

Suggestion: The new paragraph as drafted by DG2 at its first meeting under Art. 14 has been incorporated into Art. 13 as it deals with sanctions against legal persons. Accordingly, it is numbered as Art. 13.4.

Suggestion: Although consensus was reached on this paragraph, a minor amendment is suggested taking into consideration the flow of the language.

Each Party shall take [the] necessary measures to ensure that a legal person held liable for a criminal offence or an unlawful conduct set out in Article 12 is [sanctioned by] subjected to effective, proportionate, and dissuasive sanctions.

Article 14

[Prosecution, adjudication and sanctions]

Prosecutions and Sanctions

Suggestion: Since the re-drafted Art. 14 does not contain any provisions dealing with the adjudication procedure, the title could be amended to read as '*Prosecution and Sanctions*'.

Further, Art. 14.1 as appearing in the Negotiating Text (document FCTC/COP/INB-IT/3/5 Rev.1) was deleted as it no longer serves any purpose, especially in the light of the provisions of Art. 12.

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1. Each Party shall take the necessary measures to ensure that the unlawful conduct including criminal offences as set out in Article 12 is sanctioned by effective, proportionate, and dissuasive sanctions. (*consensus*)

Suggestion: Although consensus was reached with regard to Art. 14.1, the following text is suggested as it reads better.

Option 1

Each Party shall adopt such measures as may be necessary to ensure that the unlawful conduct and criminal offences set out in Article 12 is subjected to effective, proportionate and dissuasive sanctions.

Suggestion: A further option is suggested for consideration as a view has been expressed that the Protocol does not provide for the liability of natural persons.

Option 2

Each Party shall adopt such measures as may be necessary to establish the liability of natural persons for the unlawful conduct or any criminal offence set out in Article 12 and to ensure that such conduct is subjected to effective, proportionate, and dissuasive sanctions.

2. Each Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for unlawful conduct [including] and criminal offences established in accordance with Article 12 are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and unlawful conduct, and with due regard to the need to deter the commission of such offences and unlawful conduct. (*former paragraph 14.3 amended*)

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3. Nothing contained in this Protocol shall affect the principle that the description of the unlawful conduct [including] and 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 and criminal offences shall be prosecuted and sanctioned in accordance with that law.
(former paragraph 14.5 amended)

Article 30

Mutual Legal Assistance

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

(Article 7.1 of the 1988 Convention¹ modified, Article 18.1 of UNTOC² modified and Article 30.1 of the Negotiating Text, document FCTC/COP/INB-IT/3/5 Rev.1, modified)

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which legal persons may be held liable in accordance with Article 13 of this Protocol in the requesting Party.

(Article 18.2 of UNTOC)

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
- Taking evidence or statements from persons;
 - Effecting service of judicial documents;
 - Executing searches and seizures;

¹ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention).

² United Nations Convention Against Transnational Organized Crime (UNTOC).

RESTREINT UE

- d) Examining objects and sites;
- e) Providing information [, ~~and~~] evidentiary items [and expert evaluations];
- f) Providing originals or certified copies of relevant documents and records, including [government,] bank, financial, corporate or business records and
- g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes.

(Article 7.2 of the 1988 Convention modified and Article 18.3 of UNTOC)

4. The Parties may afford one another any other forms of mutual legal assistance that is not contrary to [~~allowed by~~] the domestic law of the requested Party.

(Article 7.3 of the 1988 Convention modified and Article 18.1(i) of UNTOC modified)

5. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

(Article 7.4 of the 1988 Convention and Article 18.1(h) of UNTOC modified)

6. Without prejudice to domestic law, the competent authorities of a Party may, without prior request, transmit information relating to criminal matters to a competent authority in another Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter Party pursuant to this Protocol.

(Article 18.4 of UNTOC)

7. The transmission of information pursuant to paragraph 6 of this Article shall be without prejudice to inquiries and criminal proceedings in the state of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving Party from disclosing in its proceedings information that is exculpatory to accused person.

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In such a case, the receiving Party shall notify the transmitting Party prior to the disclosure and, if so requested, consult with the transmitting Party. If, in an exceptional case, advance notice is not possible, the receiving Party shall inform the transmitting Party of the disclosure without delay.

(Article 18.5 of UNTOC)

8. 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 in criminal matters.

(Article 7.6 of the 1988 Convention and Article 18.6 of UNTOC)

9. Paragraphs 10 to 32 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 10 to 32 of this Article in lieu thereof. Parties are strongly encouraged to apply these paragraphs if they facilitate co-operation.

(Article 7.7 of the 1988 Convention modified and Article 18.7 of UNTOC)

Parties shall designate a central authority that [~~an authority, or when necessary authorities, which~~] shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.

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 Convention Secretariat [~~The authority designated for this purpose shall be notified to 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.

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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 channels of the International Criminal Police Organization, if possible.

(A modification of Article 7.8 of the 1988 Convention and Article 18.13 of UNTOC)

11. 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 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.

(Article 7.9 of the 1988 Convention modified and Article 18.14 of UNTOC)

12. 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.

(Article 7.10 of the 1988 Convention and Article 18.15 of UNTOC)

13. 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.

(Article 7.11 of the 1988 Convention and Article 18.16 of UNTOC)

RESTREINT UE

14. 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.

(Article 7.12 of the 1988 Convention and Article 18.17 of UNTOC)

15. 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 accused person. In such a 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 transmitting Party of the disclosure without delay.

(Article 7.13 of the 1988 Convention modified and Article 18.17 of UNTOC)

16. 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.

(Article 7.14 of the 1988 Convention and Article 18.20 of UNTOC)

17. A person who is being detained or is serving a sentence in the territory of one Party whose presence in another Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecution or judicial proceedings in relation to criminal offences covered by this Protocol may be transferred if the following conditions are met:

- (a) The person freely gives his or her informed consent;

RESTREINT UE

- (b) The competent authorities of both Parties agree, subject to such conditions as those Parties may deem appropriate.

(Article 18.10 of UNTOC)

18. For the purpose of paragraph 17 of Article:

- (a) Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the Party from which the person was transferred;
- (b) Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the Party from which the person was transferred as agreed before hand, or as otherwise agreed, by the competent authorities of both Parties;
- (c) The Party to which the person is transferred shall not require the Party from which the person was transferred to initiate extradition proceedings for the return of the person;
- (d) The person transferred shall receive credit for service of the sentence being served in the state from which he or she was transferred for time spent in the custody of the Party to which he or she was transferred.

(Article 18.11 of UNTOC)

19. Unless the Party from which a person is transferred in accordance with paragraphs 17 and 18 of this Article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the state to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure of the territory of the state from which he or she was transferred.

(Article 18.12 of UNTOC)

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20. 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.

(Article 18.18 of UNTOC)

21. Without prejudice to the application of paragraph 19 of this Article, a witness, expert or other person who, at the request of the requesting Party consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceedings in the territory of the requesting Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had for a period of 15 consecutive days or for any period agreed upon by the Parties, from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting Party or, having left it, has returned of his or her own free will.]

(Article 7.18 of the 1988 Convention and Article 18.27 of UNTOC)

22. 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) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

(Article 7.15 of the 1988 Convention and Article 18.21 of UNTOC)

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23. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy. *(Article 7.5 of the 1988 Convention modified and Article 18.8 of UNTOC)*
24. 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.
(Article 18.9 of UNTOC)
This paragraph was added to Article 30 as paragraph 1 bis during the discussions on MLA at the first meeting of Drafting Group 2.
25. Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
(Article 18.22 of UNTOC)
26. Reasons shall be given for any refusal of mutual legal assistance.
(Article 7.16 of the 1988 Convention and Article 18.23 of UNTOC)
27. 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.
(Article 18.24 of UNTOC)
28. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.
(Article 7.17 of the 1988 Convention and Article 18.25 of UNTOC modified)

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29. Before refusing a request pursuant to paragraph 19 of this Article or postponing its execution pursuant to Article 22 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.

(Article 18.26 of UNTOC)

30. 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.

(Article 18.29 of UNTOC)

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

(Article 7.19 of the 1988 Convention and Article 18.28 of UNTOC)

32. 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.

(Article 7.20 of the 1988 Convention and Article 18.30 of UNTOC)

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Article 31

Extradition

1. This Article shall apply to the criminal offences [~~covered by this Convention referred to~~] established according to [in] Article 12 paragraphs 2, 3 and 4 of this Protocol, when the person who is the subject of the request for extradition is located in the territory of the requested [State] Party, provided that the criminal offence for which extradition is sought is punishable under the domestic law of both the requesting [State] and the requested [State] Parties.

(Article 16.1 of UNTOC)

Option

This Article shall apply to the criminal offences [~~covered by this Convention referred to~~] established according to [in] Article 12 paragraphs 2, 3 and 4 of this Protocol when :

- (a) the person who is the subject of the request for extradition is located in the territory of the requested [State] Party;
- (b) the criminal offence for which extradition is sought is punishable under the domestic law of both the requesting [State] Party and the requested [State] Party; and
- (c) such offence is punishable by [a maximum period of at least 1/4 years of] imprisonment or other forms of deprivation of liberty [or by a more severe penalty.]

(Article 16.1 of UNTOC modified)

Suggestion : The provisions of this sub-Article proposed as an option should be considered together with the provisions of paragraph 6. Hence, the retention of sub-paragraph (c) above without the square brackets will not affect the requirements/minimum standards of domestic law when dealing with requests for extradition. Such standards are preserved in this text and appear to meet the concerns of those Parties who flagged it.

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2. Each of the criminal offences to which this Article applies shall be treated, for the purposes of extradition between the Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the Parties that have established their jurisdiction in accordance with paragraphs 1 and 2 of Article 26.

(Former Article 33.4 of the Negotiating Text, document FCTC/COP/INB-IT/3/5 Rev.1, - renumbered Article 31.5 of Drafting Group Text)

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 [State] Parties. The [State] Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

(Article 6.2 of 1988 Convention, Article 16.3 of UNTOC and former Article 33.2 of the Negotiating Text, document FCTC/COP/INB-IT/3/5 Rev.1, - renumbered Article 31.2 of Drafting Group Text)

4. If a [State] Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another [State] Party with which it has no extradition treaty, it may consider this Protocol [Convention] as the legal basis for extradition in respect of any criminal offence to which this Article applies.

The Parties which require detailed legislation in order to use this Protocol as a legal basis for extradition shall consider enacting such legislation as may be necessary.

(Article 6.3 of 1988 Convention, Article 16.4 of UNTOC modified and former Article 33.2 of the Negotiating Text, document FCTC/COP/INB-IT/3/5 Rev.1, - renumbered Article 31.3 of Drafting Group Text)

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5. [State] 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.

(Article 6.4 of 1988 Convention, Article 16.6 of UNTOC and former Article 33.3 of Negotiating Text, document FCTC/COP/INB-IT/3/5 Rev.1, - renumbered Article 31.4 of Drafting Group Text)

6. Extradition shall be subject to the conditions provided for by the domestic law of the requested [State] Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested [State] Party may refuse extradition.

(Article 6.5 of 1988 Convention and Article 16.7 of UNTOC)

7. [State] 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.

(Article 6.7 of 1988 Convention and Article 16.8 of UNTOC)

8. Nothing in this [Convention] Protocol shall be interpreted as imposing an obligation to extradite if the requested [State] Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

(Article 6.6 of 1988 Convention and Article 16.14 of UNTOC)

9. [State] Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(Article 16.15 of UNTOC)

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10. Before refusing extradition, the requested [State] Party shall, where appropriate, consult with the requesting [State] Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

(Article 16.16 of UNTOC)

11. [State] Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(Article 6.11 of 1988 Convention and Article 16.17 of UNTOC)

Article 32

Prosecution of alleged offenders

1. A [State] 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 [State] Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a similar [grave] nature under the domestic law of that [State] Party. The [State] Parties concerned shall co-operate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

(Article 16.10 of UNTOC)

Suggestion: An option to this sub-Article is found in Article 6.9 of the 1988 Convention.

2. Whenever a [State] Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that [State] Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that [State] Party and the [State] Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph [2] 1 of this Article.

(Article 16.11 of UNTOC)

RESTREINT UE

3. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested [State] Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof. *(Article 6.10 of 1988 Convention and Article 16.12 of UNTOC)*
4. 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 [State] Party in the territory of which that person is present. *(Article 16.13 of UNTOC)*

Article 33

Measures to ensure extradition

1. Subject to the provisions of its domestic law and its extradition treaties, the requested [State] Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting [State] Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.
(Article 6.8 of 1988 Convention and Article 16.9 of UNTOC)
- [2. Measures taken in accordance with paragraph 1 shall be notified, in conformity with national
 - (a) law and without delay, to:
 - (b) the State in which the crime was committed; and
the State or States of which the alleged offender is a national or, if such person is a stateless person, on the territory of which that person has his or her habitual residence.]

RESTREINT UE

Option 1

[Measures taken in accordance with paragraph 1 shall be notified, in conformity with national law and without delay, to the requesting Party.] (Drafting Group Text - first meeting)

Option 2

In the case of a detention of a person who has been the object of the [conduct] measures set forth in [Article 6] paragraph 1 of this Protocol, each [State] Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

(Article 16.5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air and option to Article 33.2 suggested by the Drafting Group)

Alternative to paragraph 2 options

2. When a Party, pursuant to paragraph 1 of this Article, takes a person into custody, it shall, in conformity with national law and without delay, notify :
 - (a) the requesting Party; and
 - (b) the State or States of which the alleged offender is a national or, if such person is a stateless person, on the territory of which that person has his or her habitual residence.

3. Any person regarding whom the measures in accordance with paragraph 1 of this Article are being taken, shall be entitled to:
 - (a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or, if that person is a stateless person, the State in the territory of which that person habitually resides;
 - (b) Be visited by a representative of that State.

RESTREINT UE

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

Suggestion : These provisions were included to address the concerns expressed by a Party.

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