



**Comments on the Revised Chairperson's text
for a protocol on illicit trade in tobacco products
(Document FCTC/COP/INB-IT/3/3)**

**Third session of the Intergovernmental Negotiating Body
on a protocol on illicit trade in tobacco products
28 June – 5 July 2009, Geneva, Switzerland**



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| <p style="text-align: center;"><i>Preamble</i></p> <p><i>The Parties to this Protocol,</i></p> <p><i>Considering</i> 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;</p> <p><i>Recognizing</i> 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;</p> <p><i>Noting</i> 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;</p> <p><i>Determined</i> to protect and assure the enjoyment of the highest attainable standard of health as a fundamental right of every human being without distinction of race, religion, political belief, economic or social condition;</p> <p><i>Determined also</i> to give priority and security to their right to protect public health;</p> <p><i>Deeply concerned</i> 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</p> | <p>FCA considers that the revised draft Preamble provides a strong introduction to the protocol, emphasizing the serious impacts of illicit trade in tobacco products on public health. FCA recommends the following amendments to clarify and strengthen the draft Preamble:</p> <ul style="list-style-type: none"> • in draft paragraph two, the word ‘ratified’ should be replaced with the word ‘embraced’, which would reflect the different means by which Parties to the Convention have become Parties, including ratification, acceptance, approval, formal confirmation and accession; • draft paragraph three, regarding the adoption of the Rules of Procedure of the Conference of the Parties, should be deleted. FCA does not consider that the adoption of the Rules of Procedure is of sufficient relevance to the background and context to the adoption of this protocol to be referenced in the Preamble; • draft paragraph eight should recognize the adverse effects of the increase in accessibility and affordability of illicitly traded tobacco products on the health and well-being of all people, not just young people, the poor and other vulnerable groups; • in draft paragraph 11, minor amendments should be made for clarity; • in draft paragraph 12, and throughout the protocol, the term ‘free-trade area’ should be replaced with the term ‘free-trade zone’, as detailed below in relation to draft Article 1 (Use of terms); • before draft paragraph 15, which emphasizes ‘the need to be alert to any efforts by the tobacco | <p style="text-align: center;"><i>Preamble</i></p> <p><i>The Parties to this Protocol,</i></p> <p><i>Considering</i> 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;</p> <p><i>Recognizing</i> that the WHO Framework Convention on Tobacco Control is one of the United Nations' most rapidly <i>embraced</i> ratified treaties and a fundamental tool for attaining the objectives of the World Health Organization;</p> <p><i>Noting</i> 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;</p> <p><i>Determined</i> to protect and assure the enjoyment of the highest attainable standard of health as a fundamental right of every human being without distinction of race, religion, political belief, economic or social condition;</p> <p><i>Determined also</i> to give priority and security to their right to protect public health;</p> <p><i>Deeply concerned</i> 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</p> |

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effective, appropriate and comprehensive domestic and international responses;

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

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

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

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

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

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

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’, as recognized, in respect of all tobacco control efforts, in paragraph 18 of the Preamble to the Convention, FCA recommends the inclusion of an additional paragraph emphasizing ‘the special contribution of nongovernmental organizations and other members of civil society not affiliated with the tobacco industry to efforts nationally and internationally to prevent and combat illicit trade in tobacco products and the vital importance of their participation in national and international efforts to eliminate all forms of illicit trade’, as also recognized, in respect of all tobacco control efforts, in paragraph 17 of the Preamble to the Convention; and

- in draft paragraph 19, which recognizes ‘the importance of other international agreements’, FCA recommends the addition of a further recognition of the valuable work of other organizations and bodies of the United Nations system and other international and regional intergovernmental organizations, as recognized, in respect of all tobacco control efforts, in paragraph 16 of the Preamble to the Convention.

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 *their populations, and particularly on* young people, the poor and other vulnerable groups;

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

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

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

Acknowledging also that, although free-trade ~~zones~~ ~~areas~~ are established to facilitate legal trade, they have been used to facilitate the globalization of the illicit trade in tobacco

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| <p>products and in the manufacture of illicit tobacco products;</p> <p><i>Recognizing also</i> that illicit trade in tobacco products undermines and adversely affects the economies of the Parties and threatens their stability, security and sovereignty;</p> <p><i>Also aware</i> 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;</p> <p><i>Emphasizing</i> 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;</p> <p><i>Mindful</i> 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;</p> <p><i>Recognizing in addition</i> that tobacco and tobacco products in transit find a channel for illicit trade;</p> <p><i>Taking into account</i> 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</p> | | <p>products, both in relation to the illicit transit of smuggled products and in the manufacture of illicit tobacco products;</p> <p><i>Recognizing also</i> that illicit trade in tobacco products undermines and adversely affects the economies of the Parties and threatens their stability, security and sovereignty;</p> <p><i>Also aware</i> 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;</p> <p><i>Emphasizing the special contribution of nongovernmental organizations and other members of civil society not affiliated with the tobacco industry to efforts nationally and internationally to prevent and combat illicit trade in tobacco products and the vital importance of their participation in national and international efforts to eliminate all forms of illicit trade;</i></p> <p><i>Emphasizing also</i> 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;</p> <p><i>Mindful</i> 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</p> |
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appropriate, illicit trade in tobacco and in manufacturing equipment used in the manufacture of tobacco products;

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

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

Recalling Article 15 of the WHO Framework Convention on Tobacco Control, in which Parties recognize, inter alia, that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacture and counterfeiting, is an essential component of tobacco control; and

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

Hereby agree as follows:

products, which are often diverted into illicit trade;

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

Taking into account that effective action to prevent and combat illicit trade in tobacco products requires a comprehensive international approach to, and close cooperation on, all aspects of illicit trade, including, as appropriate, illicit trade in tobacco and in manufacturing equipment used in the manufacture of tobacco products;

Recognizing still further the valuable work of other organizations and bodies of the United Nations system and other international and regional intergovernmental organizations, and the importance of other international agreements, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption;

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

Recalling Article 15 of the WHO Framework Convention on Tobacco Control, in which Parties recognize, inter alia, that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacture and counterfeiting, is an essential component of tobacco control; and

Convinced that supplementing the WHO Framework

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| | | <p>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;</p> <p>Hereby agree as follows:</p> |
| <p>PART I: INTRODUCTION</p> <p><i>Article 1</i> <i>Use of terms</i></p> <p>1. “Carton” means packaging for five or more unit packs of tobacco products.</p> <p>2. “Cigarette” means any product that contains tobacco and is intended to be burnt or heated under ordinary conditions of use; the term includes, without limitation, any “roll-your-own” tobacco, which, because of its appearance, type, packaging or labelling is suitable for use by and likely to be offered to or purchased by consumers as tobacco for making cigarettes.</p> <p>3. “Conference of the Parties” means the Conference of the Parties established by Article 23 of the WHO Framework Convention on Tobacco Control.</p> <p>4. “Confiscation” means the permanent deprivation of property by a competent authority and includes forfeiture, where applicable.</p> <p>5. “Controlled delivery” means allowing illicit or suspect consignments to pass out of, through or onto the territory of one or more States with the knowledge and under the</p> | <p>FCA considers that amendments are required to clarify and strengthen draft Article 1, which will define the scope of many of the key provisions proposed to be included in the protocol. FCA recommends the following:</p> <ul style="list-style-type: none"> • definitions should be included to clarify the scope of key activities proposed to be covered by the provisions of Part III of the protocol, including ‘broker’, ‘commercial’, ‘retail’, ‘primary processing’, ‘warehouse’ and ‘wholesale’; • the definitions of ‘carton’ and ‘master case’ should be deleted and replaced with the term ‘bulk package’. Under the draft definitions of ‘carton’ and ‘master case’, any ‘master case’ (‘packaging for about 10,000 cigarettes’) would also be a ‘carton’ (‘packaging for five or more unit packs of tobacco products’). As the same obligations under draft Article 7 (Tracking and tracing) are proposed to apply with respect to master cases and cartons, the value of including these separate definitions is not clear. FCA considers that the broad definition of the term ‘carton’, which commonly applies to packaging of a relatively small size, may cause confusion, and recommends its replacement with the broader term ‘bulk package’, which should be defined as ‘a receptacle of any kind containing five | <p>PART I: INTRODUCTION</p> <p><i>Article 1</i> <i>Use of terms</i></p> <p>1. “<i>Broker</i>” means to act for profit as an intermediary between two or more parties to a commercial transaction.</p> <p>2. “<i>Bulk package</i>” means a receptacle of any kind containing five or more packs of tobacco products, whether packaged or packed for retail, wholesale or transport.</p> <p>1. “Carton” means packaging for five or more unit packs of tobacco products.</p> <p>2. “Cigarette” means any product that contains tobacco and is intended to be burnt or heated under ordinary conditions of use; the term includes, without limitation, any “roll-your-own” tobacco, which, because of its appearance, type, packaging or labelling is suitable for use by and likely to be offered to or purchased by consumers as tobacco for making cigarettes.</p> <p>3. “<i>Commercial</i>” means for a business purpose, rather than for the purpose of personal use or consumption.</p> <p>3. 4. “Conference of the Parties” means the Conference of</p> |

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supervision of their competent authorities, with a view to investigating an offence and identifying those involved in commission of the offence.

6. "Convention Secretariat" means the Secretariat to the WHO Framework Convention on Tobacco Control.

7. "Due diligence" means conducting a reasonable, state-of-the-art investigation before the commencement of, or during the course of, a business relationship for the purpose of ascertaining whether a business partner or prospective business partner is complying with or can reasonably be expected to comply with his or her legal obligations under this Protocol.

8. "Illicit trade" means any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity.

9. "Licence" means permission from a competent authority following submission of the requisite application or other documentation to the competent authority.

10. "Master case" means packaging for about 10 000 cigarettes.

11. "Party" means, unless the context indicates otherwise, a Party to this Protocol.

12. "Proceeds of crime" means any property derived from or obtained, directly or indirectly, through the commission of a criminal offence under this Protocol.

or more packs of tobacco products, whether packaged or packed for retail, wholesale or transport'. Provisions applicable to 'bulk packages' would then include what might ordinarily be understood as 'cartons' and 'master cases';

- the definition of 'cigarette' should be deleted, as any 'cigarette' is a 'tobacco product', and the only proposed application of obligations in respect of 'cigarettes' separate to 'tobacco products' is in 'master cases', which, as noted above, are proposed to be subject to the same obligations as 'cartons' and should be deleted from the text and replaced with a broader term;
- in the definition of 'due diligence':
 - the words 'before the commencement of, or during the course of, a business relationship' should be deleted, as the detail of the due diligence requirements, including when they should apply, should be set out in Article 6;
 - the words 'business partner or prospective business partner' should be replaced with the words 'legal or natural person', as the term 'business partner' may not be sufficiently broad to cover all persons falling under the due diligence requirements, as set out in Article 6; and
 - the words 'his or her legal obligations under this Protocol' should be replaced with the words 'all applicable laws and regulations relating to the elimination of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products', as

the Parties established by Article 23 of the WHO Framework Convention on Tobacco Control.

~~4-~~ 5. "Confiscation" means the permanent deprivation of property by a competent authority and includes forfeiture, where applicable.

~~5-~~ 6. "Controlled delivery" means allowing illicit or suspect consignments to pass out of, through or onto the territory of one or more States with the knowledge and under the supervision of their competent authorities, with a view to investigating an offence and identifying those involved in commission of the offence.

~~6-~~ 7. "Convention Secretariat" means the Secretariat to the WHO Framework Convention on Tobacco Control.

~~7-~~ 8. "Due diligence" means conducting a reasonable, state-of-the-art investigation ~~before the commencement of, or during the course of, a business relationship~~ for the purpose of ascertaining whether a *legal or natural person* ~~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~~ *all applicable laws and regulations relating to the elimination of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products.*

9. "*Free-trade zone*" means an area of the territory of a Party in which goods are generally not subject to duties, taxes, or related requirements otherwise applicable to goods within the Party's territory.

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| <p>13. "Seizure" means temporary prohibition of the transfer, conversion, disposition or movement of property or temporary assumption of custody or control of property by a competent authority.</p> <p>14. "Serious crime" means conduct constituting an offence punishable by maximum deprivation of liberty for at least four years or a more serious penalty.</p> <p>15. "Suspicious transactions" means transactions that do not correspond or conform to ordinary commercial practices.</p> <p>16. "Tobacco products" means products entirely or partly made of the leaf tobacco as raw material, which are manufactured to be used for smoking, sucking, chewing or snuffing.</p> <p>17. "Tracing" means the re-creation by competent authorities or any other person acting on their behalf of the route or movement taken by tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products through their respective supply chains of manufacture, sale, distribution, storage, shipment, import or export, or any part thereof.</p> <p>18. "Tracking" means systematic monitoring by competent authorities or any other person acting on their behalf of the route or movement taken by tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products through their respective supply chains of manufacture, sale, distribution, storage, shipment, import or</p> | <p>persons participating in the trade in tobacco products will not be subject to legal obligations 'under the Protocol', but rather to laws and regulations relating to the elimination of illicit trade adopted and implemented by Parties to the protocol;</p> <ul style="list-style-type: none"> • as noted above in relation to the draft Preamble, a definition of the term 'free-trade zone' should be included, and this term should replace the term 'free-trade area' throughout the draft protocol. FCA notes that the Chairperson's Note on the Revised Chairperson's text, at paragraph 18, identifies the inclusion in the text of 'free-trade areas (sometimes referred to as "free-trade zones")'. FCA considers that the use of these terms as interchangeable may cause confusion. A free-trade area is commonly understood to refer to an area covering the territories of two or more states within which tariffs, quotas and preferences do not apply, or are significantly limited, by agreement between those states. In contrast, a free-trade zone is commonly understood to refer to an area within the territory of a state in which goods are generally not subject to duties, taxes, or related requirements otherwise applicable to goods within the state's territory. FCA understands the intention of the draft provisions referring to 'free-trade areas' to be to apply measures to free-trade zones, which are of particular concern because the lack of oversight of these areas by customs and other law enforcement authorities creates opportunities for illicit trade in tobacco products, including activities associated with smuggling and counterfeiting. To avoid confusion, | <p>8- 10. "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.</p> <p>9- 11. "Licence" means permission from a competent authority following submission of the requisite application or other documentation to the competent authority, <i>and includes a permit, registration, or any equivalent form of approval.</i></p> <p>10. "Master case" means packaging for about 10 000 cigarettes.</p> <p>12. "<i>Meeting of the Parties</i>" means the Meeting of the Parties established by Article 35 of this Protocol.</p> <p>11- 13. "Party" means, unless the context indicates otherwise, a Party to this Protocol.</p> <p>14. "<i>Primary processing</i>" means any processing of tobacco in preparation for use in manufacture of tobacco products.</p> <p>12. "Proceeds of crime" means any property derived from or obtained, directly or indirectly, through the commission of a criminal offence under this Protocol.</p> <p>15. "<i>Regional economic integration organization</i>" means an organization that is composed of several sovereign states, and to which its Member States have transferred competence over a range of matters, including the</p> |
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| <p>export, or any part thereof.</p> | <p>FCA therefore recommends the replacement of the term ‘free-trade area’ with the term ‘free-trade zone’, and the inclusion of a definition of this term;</p> <ul style="list-style-type: none"> • to avoid confusion between the definition of ‘licence’ and the terms of draft Article 5 (Licence or equivalent approval system), the definition of ‘licence’ should include ‘a permit, registration, or any equivalent form of approval’; • a definition of the term ‘Meeting of the Parties’ should be included, in addition to the definition of the term ‘Conference of the Parties’; • as draft Article 46 allows for formal confirmation or accession to the protocol by regional economic integration organizations, a definition of the term ‘regional economic integration organization’, as in Article 1 of the Convention, should be included; • the definition of ‘proceeds of crime’ should be deleted. As detailed below in relation to Pt IV, FCA does not consider that the protocol should include measures dealing specifically with proceeds of crime; • a definition of ‘remote means’ – which, as detailed below, FCA recommends be included within the scope of Article 10 as a prohibition on all remote sales of tobacco or tobacco products, including telecommunications-based sales – should be included; • the definition of ‘suspicious transactions’ should be deleted. As detailed below in relation to draft Article 6 (Customer identification and verification) and draft Article 9 (Security and preventive | <p><i>authority to make decisions binding on its Member States in respect of those matters.¹</i></p> <p><i>16. “Remote means” means any means of transacting by which the parties to the transaction are not in the same physical location.</i></p> <p><i>17. “Retail” means to sell directly to a consumer.</i></p> <p>13. <i>18. “Seizure” means temporary prohibition of the transfer, conversion, disposition or movement of property or temporary assumption of custody or control of property by a competent authority.</i></p> <p>14. <i>19. “Serious crime” means conduct constituting an offence punishable by maximum deprivation of liberty for at least four years or a more serious penalty.</i></p> <p>15. “Suspicious transactions” means transactions that do not correspond or conform to ordinary commercial practices.</p> <p><i>20. “Tobacco” means leaf tobacco as raw material, and includes all parts and subsets of leaf tobacco, including reconstituted tobacco.</i></p> <p>16. <i>21. “Tobacco products” means products entirely or partly made of the leaf tobacco as raw material, which are manufactured to be used for smoking, sucking, chewing or snuffing.</i></p> <p>17. <i>22. “Tracing” means the re-creation by competent authorities or any other person acting on their behalf of the</i></p> |
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| | <p>measures), FCA does not consider the concept of ‘suspicious transactions’ sufficiently broad to cover all the circumstances in which authorities should be notified, and recommends the inclusion of a broader notification requirement in Article 6; and</p> <ul style="list-style-type: none"> • a definition of ‘tobacco’ should be included. FCA notes that the working group on the scope of the protocol which met during INB-2 agreed in principle that ‘[f]or the purpose of the Protocol “tobacco” should be understood to be the leaf tobacco as raw material including all subsets of the leaf (for example, tobacco stems and/or refuse) up until the point the leaf becomes a tobacco product through manufacturing, and specifically excluding prior forms (e.g. seeds and seedlings)’. <p>FCA notes that a definition of the term ‘manufacturing equipment used in the manufacture of tobacco products’, the scope of which will require further consideration at INB-3, may also need to be included in Article 1. The working group on the scope of the protocol which met at INB-2 agreed in principle to include within the scope of the protocol ‘manufacturing equipment ... which shall include but is not limited to cigarette-making machines, whether or not equipped with an auxiliary packaging device [and specialized parts thereof]’, noting the identification of tobacco manufacturing equipment under the World Customs Organization’s Harmonized System under a specific code (84.78). The scope of the term ‘manufacturing equipment used in the manufacture of tobacco products’ in the Revised Chairperson’s text will require clarification.</p> | <p>route or movement taken by tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products through their respective supply chains of manufacture, sale, distribution, storage, shipment, import or export, or any part thereof.</p> <p>18. 23. “Tracking” means systematic monitoring by competent authorities or any other person acting on their behalf of the route or movement taken by tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products through their respective supply chains of manufacture, sale, distribution, storage, shipment, import or export, or any part thereof.</p> <p>24. “Warehouse” means to store in a controlled location before applicable taxes and duties are paid.</p> <p>25. “Wholesale” means to sell for resale.</p> <hr/> <p>¹ Where appropriate, national will refer equally to regional economic integration organizations.</p> |
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| <p style="text-align: center;"><i>Article 2</i> <i>Relationship between the Protocol and other agreements and legal instruments</i></p> | | <p style="text-align: center;"><i>Article 2</i> <i>Relationship between the Protocol and other agreements and legal instruments</i></p> |
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| <p>1. The provisions of the WHO Framework Convention on Tobacco Control that apply to its protocols shall apply to this Protocol.</p> <p>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.</p> <p>3. Parties to this Protocol that are also Parties to the United Nations Convention against Transnational Organized Crime shall ensure the full application of the provisions of the latter Convention that are relevant to illicit trade in tobacco products. Parties to this Protocol that have not become Parties to the United Nations Convention against Transnational Organized Crime shall consider 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.</p> <p>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.</p> | <p>FCA supports the inclusion in the protocol of a provision dealing with the relationship between the protocol and other agreements and legal instruments. However, FCA considers that such a provision should be limited to providing any necessary additions to Article 2 of the Convention, which, as noted in draft Article 2.1, will apply to this protocol. To strengthen and clarify draft Article 2 on this basis, FCA recommends that:</p> <ul style="list-style-type: none"> • the application of draft Article 2.2 should be restricted to agreements on issues relevant to the protocol, as not all agreements ‘on issues relevant or additional to the Convention’ should be required to be communicated to the Meeting of the Parties to the protocol; • in draft Article 2.3: <ul style="list-style-type: none"> - illicit trade in tobacco and manufacturing equipment used in the manufacture of tobacco products should be included in the requirement that Parties to the United Nations Convention against Transnational Organized Crime (UNTOC) ensure the full application of the provisions of that Convention, and in the encouragement to non-Parties to that Convention to apply its provisions as appropriate; - the provision should apply in respect of illicit trade ‘falling within the scope’ of UNTOC – ie illicit trade punishable by a maximum deprivation of liberty of at least four years or a more serious penalty, or illicit trade constituting participation in an organized criminal group, laundering of the proceeds of crime, corruption or obstruction of justice, where the offence is transnational in | <p>1. The provisions of the WHO Framework Convention on Tobacco Control that apply to its protocols shall apply to this Protocol.</p> <p>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 <i>on issues relevant to the Protocol</i> shall communicate such agreements to the Meeting of the Parties through the Convention Secretariat.</p> <p>3. 2. Parties to this Protocol that are also Parties to the United Nations Convention against Transnational Organized Crime shall ensure the full application of the provisions of the latter that Convention that are relevant to illicit trade in <i>tobacco</i>, tobacco products <i>and manufacturing equipment used in the manufacture of tobacco products falling within its scope</i>. Parties to this Protocol that have not become Parties to the United Nations Convention against Transnational Organized Crime shall consider applying <i>endeavour to apply</i> the relevant provisions of that Convention, as appropriate, to eases of illicit trade in <i>tobacco</i>, tobacco products <i>and manufacturing equipment used in the manufacture of tobacco products, including, in particular, they shall consider application of</i> Articles 5, 6, 8, 10– 13, 15, 16, <i>and</i> 18, 21-24 <i>and</i> 34.2 of the United Nations Convention against Transnational Organized Crime.</p> |

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| | <p>nature and involves an organized criminal group – rather than in respect of provisions of UNTOC ‘that are relevant to illicit trade’;</p> <ul style="list-style-type: none"> - Parties to the protocol that are not Parties to UNTOC should agree to ‘endeavour’ to apply the provisions of UNTOC to illicit trade, as appropriate, rather than to ‘consider applying’ its provisions; - if specific Articles of UNTOC are to be mentioned for ‘application’ by non-Parties, all Articles that it would be useful to apply to illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products should be included in the list. FCA notes that, in addition to the Articles already included, Article 14 (Disposal of confiscated proceeds of crime or property), Article 21 (Transfer of criminal proceedings), Article 22 (Establishment of criminal record), Article 23 (Criminalization of obstruction of justice), Article 24 (Protection of witnesses) and Article 34.2 (Implementation of the Convention) may be of assistance; and • draft Article 2.4 should be deleted, as it is inconsistent with Article 2 of the Convention, which provides that the provisions of any protocol to the Convention ‘shall in no way affect the right of the Parties’ to enter into other bilateral or multilateral agreements on issues relevant or additional to the protocol ‘<i>provided that such agreements are compatible with their obligations under [the protocol]</i>’, and provides that ‘nothing in [the protocol] shall prevent a Party from imposing stricter | <p>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.</p> |
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| | <p>requirements <i>that are consistent with [its] provisions</i> and are in accordance with international law’. The inclusion of draft Article 2.4 in the protocol would, in conflict with Article 2 of the Convention, make Parties’ rights, obligations and responsibilities under the protocol subordinate to all their ‘other rights, obligations and responsibilities ... under international law’. This would apply in respect of <i>all</i> Parties’ agreements, whether bilateral or multilateral, and whether entered into before or after entry into force of the protocol.</p> | |
| <p style="text-align: center;">Article 3 <i>Scope of the Protocol</i></p> <p>This Protocol shall apply, in accordance with its terms, to the prevention, deterrence, detection, investigation and prosecution of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products.</p> | <p>FCA supports the inclusion in the protocol of a broad statement of the scope of application of the protocol. FCA reserves its position as to whether there are ‘key inputs’ used in the manufacture of tobacco products that should be included within the scope of the protocol. FCA notes that the working group on the scope of the protocol at INB-2 agreed in principle ‘to include key inputs within the scope of the protocol’, proposing that ‘the definition of “key inputs” include criteria to identify and select those that would be listed in an annex to the Protocol. These criteria should include factors such as uniqueness to tobacco production, the ability to identify the input, and the availability of an effective control mechanism (this annex would be subject to periodic review)’. The Chairperson’s Note on the Revised Chairperson’s text indicates at paragraph 6 that ‘key inputs’ were excluded from the scope of the Revised text on the basis of ‘expert advice on the technical aspects of the scope of this Protocol’ indicating that ‘there are no “key inputs” that are used <i>only</i> for the manufacture of tobacco products’. FCA awaits further explanation at</p> | <p style="text-align: center;">Article 3 <i>Scope of the Protocol</i></p> <p>This Protocol shall apply, in accordance with its terms, to the prevention, deterrence, detection, investigation and prosecution of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products.</p> |

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| | INB-3 of the technical advice received on this matter. | |
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| PART II: GENERAL OBLIGATIONS | | PART II: GENERAL OBLIGATIONS |
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| <p style="text-align: center;">Article 4 <i>General obligations</i></p> <p>In addition to the provisions of Article 5 of the WHO Framework Convention on Tobacco Control, Parties shall,</p> <ol style="list-style-type: none"> 1. adopt and implement appropriate measures to control or regulate the supply chain of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products in order to prevent, detect and investigate illicit trade and shall cooperate with one another to this end; 2. take appropriate measures to increase the effectiveness of customs, police and other relevant regulatory agencies responsible for preventing, deterring, detecting, investigating and eliminating all forms of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; 3. adopt clear and effective measures for technical assistance and financial support, capacity building and international cooperation in order to assure the availability to, and exchange with, the competent authorities of production and trade data for all forms of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products originating within their territory; 4. cooperate closely with one another, consistent with their respective domestic legal and administrative systems, in order to enhance the effectiveness of law enforcement | <p>FCA supports the inclusion in the protocol of general obligations additional to those applicable to Parties to the protocol under Article 5 of the Convention. To strengthen and clarify draft Article 4, FCA recommends that:</p> <ul style="list-style-type: none"> • draft Article 4.1 should refer to ‘effective measures’ rather than ‘appropriate measures’, and include a specific reference to tobacco, tobacco products and manufacturing equipment in transit. FCA notes that a general obligation to ‘apply control and verification measures to the international transit of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products in conformity with the provisions of this Protocol in order to prevent illicit cross-border trade in such products’ is proposed in draft Article 5.5 (Licence or equivalent approval system). FCA considers that, rather than being included with licensing obligations in Article 5, such a general obligation should be part of the obligation under Article 4 to adopt and implement effective measures to control or regulate the supply chain; • the reference to ‘other relevant agencies’ in draft Article 4.2 should not be limited to ‘regulatory’ agencies, as there may be a range of relevant non-regulatory agencies with responsibilities for preventing, deterring, detecting, investigating and eliminating illicit trade; • the data referred to in draft Article 4.3 should be broadened to include any relevant data on tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, not only | <p style="text-align: center;">Article 4 <i>General obligations</i></p> <p>In addition to the provisions of Article 5 of the WHO Framework Convention on Tobacco Control, Parties shall:-</p> <ol style="list-style-type: none"> 1. adopt and implement appropriate <i>effective</i> measures to control or regulate the supply chain of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, <i>including tobacco, tobacco products and manufacturing equipment in transit</i>, in order to prevent, detect and investigate illicit trade, and shall cooperate with one another to this end; 2. take appropriate measures to increase the effectiveness of customs, police and other relevant regulatory agencies responsible for preventing, deterring, detecting, investigating and eliminating all forms of illicit trade in tobacco, tobacco products <i>and</i> or manufacturing equipment used in the manufacture of tobacco products; 3. adopt clear and effective measures for technical assistance and financial support, capacity building and international cooperation in order to assure the availability to, and exchange with, the competent authorities of production and trade data <i>on</i> for all forms of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products originating within, <i>entering, or transiting through</i> their territory; 4. cooperate closely with one another, consistent with their |

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| <p>action to combat the offences covered by this Protocol;</p> <p>5. cooperate and communicate with relevant organizations and bodies in the exchange of information covered by this Protocol; and</p> <p>6. within the means and resources at their disposal, cooperate to raise financial resources for effective implementation of this Protocol through bilateral and multilateral funding mechanisms.</p> | <p>‘production and trade data’, and should include tobacco, tobacco products and manufacturing equipment entering or transiting through a Party’s territory, as well as those originating within its territory;</p> <ul style="list-style-type: none"> • draft Article 4.4 should require cooperation to enhance the effectiveness of law enforcement action to combat <i>all</i> forms of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, including, but not limited to, offences covered by the protocol; and • draft Article 4.5 should refer broadly to cooperation and communication in the exchange of information to achieve the objectives of the protocol, not only to cooperation and communication in ‘exchange of information covered by this Protocol’. | <p>respective domestic legal and administrative systems, in order to enhance the effectiveness of law enforcement action to combat <i>all forms of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, including</i> the offences covered by this Protocol;</p> <p>5. cooperate and communicate with relevant organizations and bodies in the exchange of information <i>to achieve the objectives of</i> covered by this Protocol; and</p> <p>6. within the means and resources at their disposal, cooperate to raise financial resources for effective implementation of this Protocol through bilateral and multilateral funding mechanisms.</p> |
| <p>PART III: SUPPLY CHAIN CONTROL</p> <p><i>Article 5</i> <i>Licence or equivalent approval system</i></p> <p>1. In light of the public health objectives of the WHO Framework Convention on Tobacco Control and with a view to eliminating illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, 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”) to conduct such activities granted by a competent authority:</p> | <p>FCA supports the proposed requirement that key participants in the tobacco product supply chain be required to hold a licence. This will enable authorities to collect information in relation to applicants and participants, restrict participation to those persons who can be expected to comply with relevant laws and regulations, and limit or cancel the licences of those that do not comply. FCA recommends the following amendments to clarify and strengthen the proposed licence system.</p> <p>In the title and draft Article 5.1, FCA recommends that:</p> <ul style="list-style-type: none"> • to avoid confusion, the concept of ‘equivalent approval’ should be removed, and included instead in | <p>PART III: SUPPLY CHAIN CONTROL</p> <p><i>Article 5</i> <i>Licence or equivalent approval system</i></p> <p>1. In light of the public health objectives of the WHO Framework Convention on Tobacco Control and with a view to eliminating illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, 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”) to conduct such activities granted by a competent authority:</p> |

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| <p>(a) manufacturing tobacco products;</p> <p>(b) manufacturing the manufacturing equipment used in the manufacture of tobacco products;</p> <p>(c) commercial import or export or wholesaling, brokering, warehousing or distribution of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;</p> <p>(d) transporting commercial quantities of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and</p> <p>(e) primary processing of tobacco.</p> | <p>the definition of ‘licence’ in draft Article 1 (Use of terms), and the words ‘granted by a competent authority’ be deleted, as this concept is already included in the definition;</p> <ul style="list-style-type: none"> • the ‘preambular’ comment on the objectives of the licence system should be deleted, as it applies across all provisions of the draft protocol and should be reflected in the Preamble, rather than as a preface to any particular Article; • the activities covered should be separated into clearer and more easily identifiable categories: <ul style="list-style-type: none"> - those activities relating to tobacco, those relating to tobacco products, and those relating to manufacturing equipment used in the manufacture of tobacco products should each be dealt with together; - definitions of the terms ‘broker’, ‘commercial’, ‘primary processing’, ‘retail’ and ‘wholesale’, and ‘warehouse’ (which should be limited to storage in a controlled location before applicable taxes and duties are paid) should be included in Article 1, as recommended above; - ‘distribution’ should be deleted. Without being defined, the meaning of ‘distribution’ is unclear. FCA considers that including the activity ‘wholesaling’, defined as proposed by FCA above (and, in the case of manufacturing equipment used in the manufacture of tobacco products, ‘retailing’) will cover the most important forms of distribution for the purposes of an effective licensing system; - ‘transporting commercial quantities’ should be | <p>(a) manufacturing, <i>commercial import, commercial export, warehousing, brokering or wholesaling</i> of tobacco products;</p> <p>(b) manufacturing, <i>commercial import, commercial export, brokering, wholesaling or retailing</i> of the manufacturing equipment used in the manufacture of tobacco products; <i>and</i></p> <p>(c) commercial import, <i>commercial</i> or export or, <i>warehousing, primary processing, wholesaling, or brokering</i>, warehousing or distribution of tobacco, <i>excluding wholesaling or primary processing by the legal or natural person responsible for growing the tobacco</i> tobacco products or manufacturing equipment used in the manufacture of tobacco products;</p> <p>(d) transporting commercial quantities of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and</p> <p>(e) primary processing of tobacco.</p> |
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| | <p>deleted. FCA notes that the meaning of the term ‘commercial quantities’ is unclear, but assumes it is intended to refer to quantities indicating the carrying out of commercial activity. FCA considers that it is unlikely to be practicable to apply licensing requirements to all entities that commercially transport tobacco, tobacco products or manufacturing equipment, for many of which – such as road haulage or courier services – the transport of tobacco, tobacco products or manufacturing equipment may constitute only a very small part of their business;</p> <ul style="list-style-type: none">- in relation to manufacturing equipment used in the manufacture of tobacco products, persons engaged in any sale of such equipment, whether wholesale or retail, should be covered, and ‘warehousing’ – which refers to storage in a controlled location before applicable taxes and duties are paid, and is not applicable to manufacturing equipment in the same way as it is to tobacco and tobacco products – should not be covered; and- in relation to tobacco, primary processing or wholesaling by the grower should be excluded from the requirement. As noted below in relation to draft Article 5.2, FCA supports the inclusion of a provision requiring Parties to endeavour to apply licensing requirements to commercial growing of tobacco. FCA recognizes that licensing of growers may not be practicable in all Parties. As growers will generally engage in ‘wholesaling’ of tobacco (ie sale for resale), and | |
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| | <p>in some ‘primary processing’ of tobacco, FCA recommends the inclusion of a specific exception in relation to these activities in Article 5.1.</p> | |
| <p>2. Each Party shall endeavour to license, to the extent considered appropriate, any legal or natural person engaged in commercial growing or retailing of tobacco and tobacco products.</p> | <p>FCA recommends minor adjustments to draft Article 5.2 for consistency with Article 5.1.</p> | <p>2. Each Party shall endeavour to <i>prohibit license</i>, to the extent considered appropriate, any legal or natural person <i>from engaged</i> in commercial growing <i>or retailing</i> of tobacco, <i>or retailing of tobacco or and</i> tobacco products, <i>except pursuant to a licence to conduct such activities.</i></p> |
| <p>3. With a view to ensuring an effective licensing system, each Party shall:</p> <p>(a) designate or establish a competent authority or authorities to issue, renew, suspend, revoke and/or cancel licences, subject to the provisions of this Protocol, irrespective of the nationality or residence of the licensee, to conduct the activities specified in paragraph 1 of this Article;</p> <p>(b) require that each application for a licence contains all the requisite information about the licensee, which should include but is not limited to:</p> <p>(i) when the applicant is a natural person, information regarding his or her identity, including but not limited to full name, business registration number (if any), date and place of birth, applicable tax registration numbers and copy of his or her official identification;</p> <p>(ii) when the applicant is a legal person, information regarding its identity, including but not limited to full</p> | <p>In draft Article 5.3, FCA recommends that:</p> <ul style="list-style-type: none"> • the words ‘subject to the provisions of this Protocol’ and ‘irrespective of the nationality or residence of the licensee’, which are unnecessarily limiting, should be deleted from draft subprovision (a); • amendments should be made to draft subprovision (b) to ensure that the requisite information is accurately and appropriately described, particularly in light of the different categories of activities covered, including: <ul style="list-style-type: none"> - broadening the chapeau to include information about the activities covered by the application, as well as information about the applicant; - in draft subprovision (b)(ii), adding the words ‘as appropriate’ to ‘corporate affiliates’, as a legal person may have a large number of corporate affiliates that would not be relevant to an application for a licence to engage in covered activities, and deleting unnecessary text; - in draft subprovision (b)(iii), broadening ‘business location’ to include the business | <p>3. With a view to ensuring an effective licensing system, each Party shall:</p> <p>(a) designate or establish a competent authority or authorities to issue, renew, suspend, revoke and/or cancel licences, subject to the provisions of this Protocol, irrespective of the nationality or residence of the licensee, to conduct the activities specified in paragraph 1 of this Article;</p> <p>(b) require that each application for a licence contains all the requisite information about the <i>applicant licensee and the activities covered by the application</i>, which should include, <i>inter alia</i> but is not limited to:</p> <p>(i) when the applicant is a natural person, information regarding his or her identity, including but not limited to full name, business registration number (if any), date and place of birth, applicable tax registration numbers and copy of his or her official identification;</p> <p>(ii) when the applicant is a legal person, information</p> |

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| <p>name, business registration number, date and place of incorporation, corporate capital, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its officers and directors and the names of any designated representatives, including but not limited to the representatives’ complete names and copies of their official identification;</p> <p>(iii) precise business location of the manufacturing unit(s) and production capacity of the business run by the applicant;</p> <p>(iv) details of the tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products covered by the application, such as product description, name, registered trade mark, if any, design, brand, model or make;</p> <p>(v) a description of where manufacturing equipment for use in the manufacture of tobacco products will be installed and used;</p> <p>(vi) documentation regarding any offences committed or charges filed by government agencies, including criminal records;</p> <p>(vii) complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details; and</p> <p>(viii) a description of the intended use and intended market of retail sale of the tobacco or tobacco products,</p> | <p>locations of all covered commercial activities, not just ‘manufacturing unit(s)’, and adding the words ‘as applicable’ to ‘production capacity’, as not all of the covered activities will involve ‘production’;</p> <ul style="list-style-type: none"> - in draft subprovision (b)(iv), including ‘type’, in addition to ‘product description’, in the list of relevant details of tobacco, tobacco products or manufacturing equipment; - broadening draft subprovision (b)(v) to require information about the intended market/s of retail sale or use of manufacturing equipment – rather than a description of where particular equipment ‘will be installed and used’, which is unlikely to always be known at the time of application for a licence – and to include the information in draft subprovision (b)(viii) with respect to the intended market/s of retail sale or use of tobacco or tobacco products; - broadening draft subprovision (b)(vi) to include information regarding <i>any</i> engagement by the applicant – and, if the applicant is a legal person, its corporate affiliates, officers, directors or designated representatives – in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, not only offences committed or charges filed by government agencies. <p>Additional relevant information may include, for example, infringement notices or penalties issued by government agencies, proceedings other than criminal charges brought by government agencies, and relevant proceedings</p> | <p>regarding its identity, including but not limited to full name, business registration number, date and place of incorporation, corporate capital, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates <i>as appropriate</i>, names of its officers and directors and the names of any designated representatives, including but not limited to the representatives’ complete names and copies of their official identification;</p> <p>(iii) <i>information regarding the precise business location or locations of the manufacturing unit(s) and production capacity of the business run by the applicant, and, where applicable, the production capacity of the business;</i></p> <p>(iv) details of the tobacco, tobacco products and or manufacturing equipment used in the manufacture of tobacco products covered by the application, such as <i>type</i>, product description, name, registered trade mark, if any, design, brand, model or make;</p> <p>(v) a description of where <i>details of the intended market or markets of retail sale or use of the tobacco, tobacco products or manufacturing equipment for</i> used in the manufacture of tobacco products covered by the application will be installed and used;</p> <p>(vi) documentation <i>information</i> regarding <i>any engagement by the applicant, and, if the applicant is a legal person, its corporate affiliates, officers, directors or designated representatives, in illicit trade in tobacco, tobacco products or manufacturing equipment</i></p> |
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| <p>with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand;</p> <p>(c) monitor and collect 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;</p> <p>(d) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;</p> <p>(e) undertake measures such as periodic review, renewal, inspection or audit of licensees;</p> <p>(f) establish a time frame for expiration of licences and subsequent requisite reapplication or updating of application information; and</p> <p>(g) oblige licensed or equivalently approved manufacturers of tobacco products and manufacturing equipment used in the manufacture of tobacco products to inform the competent authority six months in advance of any change of location of their business.</p> | <p>brought by entities other than government agencies, such as actions for trademark or copyright infringement;</p> <ul style="list-style-type: none"> - in draft subprovision (b)(vii), amending the words ‘relevant transactions’ to ‘activities covered by the application’, and deleting the words ‘other relevant payment details’, which FCA does not consider to be useful without further explanation; - including an additional subprovision requiring the provision of information regarding any previous denial, suspension or cancellation of a relevant licence to the applicant, and, if the applicant is a legal person, its corporate affiliates, officers, directors or designated representatives; <ul style="list-style-type: none"> • an additional subprovision should be included following subprovision (b) to require that competent authorities refuse to grant a licence to an applicant if the application information or any other information available to the authorities indicates that the applicant is unfit to carry out the activities covered by the application; • the words ‘monitor and collect’, which are unnecessary, should be deleted from draft subprovision (c); • the word ‘or’ in draft subprovision (e) should be amended to ‘and/or’; and • draft subprovisions (f) and (g) should be amended to clarify requirements for ‘updating of application information’ for all licensees, replacing the more | <p><i>used in the manufacture of tobacco products, including any offences committed or charges or proceedings filed by government agencies, including criminal records;</i></p> <p><i>(vii) complete identification of the bank accounts intended to be used by the applicant in relation to the activities covered by the application relevant transactions and other relevant payment details; and-</i></p> <p><i>(viii) information regarding any previous denial, suspension or cancellation of a licence to the applicant, and, if the applicant is a legal person, its corporate affiliates, officers, directors or designated representatives, to conduct activities included in paragraph 1 of this Article.</i></p> <p><i>(viii) a description of the intended use and intended market of retail sale of the tobacco or tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand;</i></p> <p><i>(c) provide that the competent authority or authorities shall refuse to grant a licence to conduct the activities specified in paragraph 1 of this Article if the information provided in the licence application or any other information available to the authority or authorities indicates that the applicant is unfit to carry out the activities covered by the application;</i></p> <p><i>(e) (d) monitor and collect consider using any licence fees that may be levied and consider using them in effective administration and enforcement of the licensing</i></p> |
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| | <p>limited requirement with respect to change of business location by manufacturers.</p> | <p>system or for public health or any other related activity;</p> <p>(d) (e) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;</p> <p>(e) (f) undertake measures such as periodic review, renewal, inspection <i>and/or</i> audit of licensees;</p> <p>(f) (g) establish a time frame for expiration of licences and subsequent requisite reapplication or updating of application information; and</p> <p>(g) (h) oblige <i>licensees licensed or equivalently approved manufacturers of tobacco products and manufacturing equipment used in the manufacture of tobacco products</i> to inform the competent authority <i>or authorities</i> six months in advance <i>as soon as practicable</i> of any material change to the information provided in the licence application of location of their business.</p> |
| <p>4. Each Party shall ensure that no licence shall be assigned and/or transferred without prior approval from the designated or established competent authority.</p> | <p>FCA supports the proposed requirement that licensees be required to obtain approval for the assignment or transfer of a licence to another person.</p> | <p>4. Each Party shall ensure that no licence shall be assigned and/or transferred without prior approval from the designated or established competent authority.</p> |
| <p>5. Each Party shall endeavour to adopt and apply control and verification measures to the international transit of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products in conformity with the provisions of this Protocol in order to prevent illicit cross-border trade in such products.</p> | <p>As noted above in relation to draft Article 4 (General obligations), FCA fully supports the application of supply chain control measures to the international transit of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products. However, a general requirement to ‘adopt and apply control and verification measures’ to international transit does not appear to belong in Article 5. Each of the</p> | <p>5. Each Party shall endeavour to adopt and apply control and verification measures to the international transit of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products in conformity with the provisions of this Protocol in order to prevent illicit cross border trade in such products.</p> |

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| | <p>Articles in Part III, including Article 5, already cover key aspects of the international transit of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, including warehousing and commercial import and export. FCA recommends that a general obligation of the kind proposed in draft Article 5.5 be included in draft Article 4.1 and deleted from Article 5.</p> | |
| <p style="text-align: center;">Article 6 <i>Customer identification and verification</i></p> <p>1. Each Party shall:</p> <p>(a) obligate all natural and legal persons engaged in:</p> <p>(i) selling commercial quantities of tobacco or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products, excluding the final retailer and persons importing tobacco products for their personal consumption, and/or</p> <p>(ii) the manufacture, sale, distribution, storage, shipment, import or export of equipment used in the manufacture of tobacco products,</p> <p>to conduct due diligence with respect to any natural or legal person (“first purchaser”) with which they engage in a commercial transaction; and</p> <p>(b) require that any first purchaser who sells, distributes or ships tobacco, tobacco products, or equipment used in the manufacture of tobacco products to further natural or</p> | <p>FCA supports the proposed requirement that key participants in the tobacco product supply chain be required to conduct due diligence with respect to other participants in the supply chain before engaging in commercial transactions with those persons. Due diligence obligations require participants in the supply chain to exercise responsibility with respect to those with whom they transact, and therefore for what happens to tobacco, products, or manufacturing equipment under their control once they part with them. FCA recommends the following amendments to clarify and strengthen the proposed due diligence requirements.</p> <p>In the title and throughout the draft provision, FCA recommends that the concept of ‘customer identification and verification’ be removed. The term ‘customer’ is not broad enough to cover the range of persons dealt with by the draft provision, and the concept of ‘identification and verification’ is only part of the broader concept of ‘reasonable investigation’ included in the definition of due diligence. FCA recommends that, to avoid confusion, the provision refer only to ‘due diligence’, and the definition of ‘due diligence’ in draft Article 1 (Use of terms) be clarified and refined.</p> | <p style="text-align: center;">Article 6 <i>Due diligence Customer identification and verification</i></p> <p>1. Each Party shall (a) obligate <i>require</i> all natural and legal persons engaged in <i>activities included in Article 5.1</i> :(i) selling commercial quantities of tobacco or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products, excluding the final retailer and persons importing tobacco products for their personal consumption, and/or (ii) the manufacture, sale, distribution, storage, shipment, import or export of equipment used in the manufacture of tobacco products, to conduct due diligence with respect to any <i>other</i> natural or legal person <i>engaged in activities included in Article 5.1 (“first purchaser”)</i> with which they before <i>engageing</i> in a commercial transaction <i>or transactions with that person in pursuance of the activities;</i> and (b) require that any first purchaser who sells, distributes or ships tobacco, tobacco products, or equipment used in the manufacture of tobacco products to further natural or legal persons shall also require such persons to conduct due diligence on the persons (other than final consumers) to which they subsequently sell, distribute or ship tobacco, tobacco products, or equipment used in the manufacture of tobacco</p> |

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| <p>legal persons shall also require such persons to conduct due diligence on the persons (other than final consumers) to which they subsequently sell, distribute or ship tobacco, tobacco products, or equipment used in the manufacture of tobacco products.</p> | <p>In draft Article 6.1(a), FCA recommends that:</p> <ul style="list-style-type: none">• the categories of persons to which due diligence requirements are proposed to apply should be clarified. FCA supports the application of due diligence requirements to all key participants in the tobacco product supply chain, but is concerned that inconsistencies in language between the activities covered by draft Article 6 and the activities covered by draft Article 5 will lead to confusion and difficulties in application. As recommended in relation to licensing requirements in Article 5.1, FCA recommends that Article 6.1 cover persons engaged in:<ul style="list-style-type: none">- manufacturing of tobacco products;- commercial import and commercial export of tobacco products. FCA notes that that ‘export’ without the limitation of the term ‘commercial’ appears to be unintentionally broad, and that ‘import ... excluding ... persons importing tobacco products for their personal consumption’ is a less precise expression of ‘commercial import’;- warehousing of tobacco products. FCA notes that ‘storage’ may cover a broad range of activities to which it would be difficult to apply due diligence requirements, and considers that ‘warehousing’, defined according to FCA’s recommendation in relation to draft Article 1, is the most important form of storage to include;- brokering of tobacco products. FCA considers that this activity, which is covered by the proposed licensing requirements in Article 5.1, | <p>products.</p> |
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FCA Comments

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| | <p>should also be covered by due diligence requirements under Article 6.1;</p> <ul style="list-style-type: none">- wholesaling of tobacco products. FCA notes that ‘sale ... excluding the final retailer’ overlaps with, but is less precise than, ‘wholesaling’. As noted above in relation to draft Article 5.1, FCA considers that ‘distribution’ – the meaning of which is unclear – should not be included, and does not consider that it would be practicable to require ‘shipment’ or ‘transporting’ to be covered;- manufacturing, commercial import, commercial export, brokering, wholesaling or retailing of manufacturing equipment used in the manufacture of tobacco products. As above, FCA notes that ‘import’ and ‘export’ without the limitation of the term ‘commercial’ appear to be unintentionally broad, recommends the inclusion of ‘brokering’, and considers that ‘distribution’, ‘storage’ and ‘shipment’ should not be included;- primary processing and wholesaling of tobacco, excluding primary processing and wholesaling by the person responsible for growing the tobacco. FCA notes that ‘selling commercial quantities of tobacco’ overlaps with, but is less precise than, the term wholesaling, and would include the selling of tobacco by tobacco growers, which is likely to be impracticable in many Parties and is not proposed to be covered by licensing requirements. FCA considers that ‘primary processing’, which is covered by the proposed licensing requirements in Article 5, should also be covered by due diligence | |
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| | <p>requirements under Article 6;</p> <ul style="list-style-type: none">- commercial import, commercial export, warehousing and brokering of tobacco. FCA considers that each of these activities, which are covered by the proposed licensing requirements in Article 5, should also be covered by due diligence requirements under Article 6; and• the categories of persons in relation to which due diligence must be undertaken should be refined and limited. FCA does not consider that it would be practicable to require due diligence to be undertaken with respect to ‘any natural or legal person’ with which a ‘commercial transaction’ is engaged in by the persons covered. This would mean, for example, that due diligence would be required in commercial transactions with persons not engaged in covered activities – such as persons engaged in providing cleaning or hospitality services to a covered person – and in commercial transactions unrelated to the covered activities – such as in a separate and unrelated business engaged in by a covered person. FCA recommends that due diligence be required only when transactions are to be engaged in in pursuance of the covered activities with other persons who are covered by the requirements (ie those who are engaged in manufacturing, commercial import, commercial export, warehousing, brokering or wholesaling of tobacco products; manufacturing, commercial import, commercial export, brokering, wholesaling or retailing of manufacturing equipment used in the manufacture of tobacco products; or commercial import, commercial export, warehousing, primary processing, wholesaling or | |
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| | <p>brokering of tobacco (excluding primary processing or wholesaling by the grower)).</p> <p>FCA recommends the deletion of draft Article 6.1(b), which proposes requiring ‘any natural or legal person’ who engages in a commercial transaction with a person covered by 6.1(a), and who ‘sells, distributes or ships tobacco, tobacco products or equipment used in the manufacture of tobacco products’ to further persons, to ‘require’ those further persons to conduct due diligence on all other persons, other than ‘final consumers’, to which the further persons ‘sell, distribute or ship’ tobacco, products or equipment. FCA does not consider this proposed requirement to be necessary. ‘Further’ persons that engage in activities included in Article 6.1(a) will already be directly required to conduct due diligence, and do not need to be ‘required’ to do so by other persons with which they engage in commercial transactions. It is difficult to understand why persons engaged in activities not covered by Article 6.1(a) – who will not be directly required by Parties to conduct due diligence – should be required to do so by private persons with which they engage in commercial transactions, and, if such a requirement were to be made, how it would work in practice.</p> <p>FCA notes that the recommended amendments would clarify that due diligence obligations are intended to apply in respect of all relevant transactions engaged in by covered persons, including both with respect to persons <i>from whom</i> a covered person obtains tobacco, tobacco products or manufacturing equipment and persons <i>to whom</i> a covered person supplies tobacco,</p> | |
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| | <p>tobacco products or manufacturing equipment. FCA considers that it is essential that due diligence obligations apply in both directions. FCA understands this to be the intention of draft Article 6 – which refers to ‘any natural or legal person with which they engage in a commercial transaction’ – but notes that the use of the term ‘first purchaser’ may suggest that the obligations would apply only in one direction.</p> | |
| <p>2. Due diligence pursuant to paragraph 1 of this Article shall include requirements for customer identification, such as obtaining information relating to, but not limited to, the following, to the extent reasonably available:</p> <p>(a) establishing that the legal or natural person holds a valid licence in accordance with Article 5, if applicable;</p> <p>(b) when the customer is a natural person, information regarding his or her identity, including but not limited to full name, business registration number (if any), date and place of birth, applicable tax registration numbers and copy of his or her official identification;</p> <p>(c) when the customer is a legal person, information regarding its identity, including but not limited to full name, business registration number, date and place of incorporation, corporate capital, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its officers and directors and the names of any designated representatives, including but not limited to the representatives’ complete names and copies of their official identification;</p> | <p>FCA recommends that the components of due diligence set out in draft Article 6.2 be simplified and clarified:</p> <ul style="list-style-type: none"> • FCA supports the proposed requirement in draft subprovision (a) that the persons covered be required to establish that the person with whom they are transacting holds a valid licence, if applicable, and the proposed requirements in draft subprovisions (f) and (g) that the persons covered be required to obtain information about the purpose of the transaction or transactions (including, as applicable, the intended use and/or intended market of retail sale of the tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, and the location where manufacturing equipment used in the manufacture of tobacco products will be installed), with particular attention to ensuring that production or supply is commensurate with reasonably anticipated demand. • FCA considers that draft subprovisions (b)-(e), which duplicate the information required to be submitted to competent authorities in a licence application (as set out in Article 5.3(b)) should be deleted with the restriction of the due diligence requirements to those | <p>2. Due diligence pursuant to paragraph 1 of this Article shall include requirements for customer identification, such as obtaining information relating to, but not limited to, the following, to the extent reasonably available:</p> <p>(a) establishing that the legal or natural person holds a valid licence <i>to engage in activities included in Article 5.1</i> in accordance with Article 5, if applicable; and</p> <p>(b) when the customer is a natural person, information regarding his or her identity, including but not limited to full name, business registration number (if any), date and place of birth, applicable tax registration numbers and copy of his or her official identification;</p> <p>(c) when the customer is a legal person, information regarding its identity, including but not limited to full name, business registration number, date and place of incorporation, corporate capital, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its officers and directors and the names of any designated representatives, including but not limited to the representatives’ complete names and copies of their</p> |

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| <p>(d) documentation regarding any offences committed or charges filed by government agencies;</p> <p>(e) complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details;</p> <p>(f) a description of the intended use and intended market of retail sale of the tobacco products or manufacturing equipment used in the manufacture of tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand; and</p> <p>(g) a description of the location where manufacturing equipment for use in the manufacture of tobacco products will be installed and used.</p> | <p>categories of persons required to hold a licence. In a supply chain subject to an effective licensing system, this information should be collected by competent authorities, rather than private persons.</p> | <p>official identification;</p> <p>(d) documentation regarding any offences committed or charges filed by government agencies;</p> <p>(e) complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details;</p> <p>(f) (b) obtaining information about the purpose of the transaction or transactions, including, as applicable, a description of the intended use and/or intended market of retail sale of the tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, and the location where manufacturing equipment used in the manufacture of tobacco products will be installed, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand.; and</p> <p>(g) a description of the location where manufacturing equipment for use in the manufacture of tobacco products will be installed and used.</p> |
| <p>3. Each Party shall obligate all natural and legal persons referred to in paragraph 1 of this Article to conduct further due diligence, including the requirements in paragraph 2 of this Article, in order to verify and update customer information whenever there is a material change in circumstances.</p> | <p>FCA recommends that the proposed obligation in draft Article 6.3 ‘to conduct further due diligence’ whenever there is a ‘material change in circumstances’ be replaced with an obligation to monitor commercial transactions in pursuance of the covered activities. It is difficult to understand what the term ‘material change in circumstances’ refers to and whether, in the absence of an obligation to monitor their transactions, a person would necessarily be aware of a change in the</p> | <p>3. Each Party shall obligate <i>require</i> all natural and legal persons referred to in paragraph 1 of this Article to <i>monitor their commercial transactions in pursuance of activities included in Article 5.1, and to notify the competent authority or authorities of any activities or omissions which could reasonably indicate engagement in or intention to engage in illicit trade by any natural or legal person, including contravention of or intention to contravene any laws or regulations adopted by a Party in pursuance of its</i></p> |

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| | <p>circumstances of the other party to the transaction. Moreover, a ‘change in circumstances’ would not usually necessitate a complete new investigation. As recommended above in relation to draft Article 5.3, FCA considers that each licensed party to a commercial transaction should be required to notify competent authorities of any material change in their own circumstances, as described in the information provided in their application for a licence. Under Article 6.3, covered persons should be required to monitor their commercial transactions and to notify competent authorities of any activities or omissions which could reasonably indicate engagement in or intention to engage in illicit trade by any person, including contravention of or intention to contravene any laws or regulations adopted by a Party in pursuance of its obligations under the protocol. FCA considers that this broad notification requirement should replace the proposed requirement under draft Article 9 (Security and preventive measures) that all persons engaged in ‘manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products’ report all ‘suspicious transactions’ to competent authorities. FCA does not consider the concept of ‘suspicious transactions’ sufficiently broad to cover all the circumstances in which authorities should be notified.</p> | <p>obligations under this Protocol conduct further due diligence, including the requirements in paragraph 2 of this Article, in order to verify and update customer information whenever there is a material change in circumstances.</p> |
| <p>4. Each Party shall obligate all natural and legal persons referred to in paragraph 1 of this Article to report periodically on their compliance with the obligations for customer identification and verification.</p> | <p>As noted above, FCA recommends that, to avoid confusion, the concept of ‘customer identification and verification’ be replaced with the broader concept ‘due diligence’.</p> | <p>4. Each Party shall obligate <i>require</i> all natural and legal persons referred to in paragraph 1 of this Article to report periodically on their compliance with <i>due diligence requirements</i> the obligations for customer identification and verification.</p> |

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| <p>5. Each Party shall take all necessary legislative, administrative and other measures to ensure that all natural and legal persons referred to in paragraph 1 of this Article comply with the above provisions while taking account of any unnecessary burden on small or medium-sized businesses and on Parties’ administrations.</p> | <p>FCA recommends the deletion of draft Article 6.5. FCA does not consider that it is necessary to include an additional requirement that Parties ‘take all necessary legislative, administrative and other measures’ to ensure that the covered persons comply with the provisions of Article 6. The commitment in Article 6.1 to require the covered persons to conduct due diligence is a commitment to take all measures necessary to do so. Further, FCA does not consider that it would be appropriate to subject the taking of the necessary measures to a requirement to take ‘account of any unnecessary burden on small or medium-sized businesses and on Parties’ administrations’. FCA considers that the requirements should be equally applicable to all covered persons. In making this recommendation, FCA notes that, if the recommendations above were accepted, persons covered by due diligence requirements would not be required to collect the same detailed information that authorities would collect through licence applications, and ‘blocking’ would be performed by government authorities rather than by covered persons.</p> | <p>5. Each Party shall take all necessary legislative, administrative and other measures to ensure that all natural and legal persons referred to in paragraph 1 of this Article comply with the above provisions while taking account of any unnecessary burden on small or medium-sized businesses and on Parties’ administrations.</p> |
| <p>6. Each Party shall require that all natural and legal persons referred to in paragraph 1 of this Article terminate business relations, including the supply of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, with any customer if a competent authority provides such persons with sufficient evidence that the customer has knowingly engaged in the sale, distribution, storage or shipment of tobacco, tobacco products or equipment used in the manufacture of tobacco products in contravention of provisions of this Protocol or</p> | <p>FCA supports the prevention of further participation in the tobacco product supply chain by persons who have engaged in illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, including contravention of laws or regulations adopted by a Party in pursuance of its obligations under the Protocol, at a level serious enough to warrant exclusion from relevant commercial activities. However, FCA does not consider the proposed application of a ‘blocking’ system operated by</p> | <p>6- 5. Each Party shall, <i>when satisfied that any person engaged in activities included in Article 5.1 is unfit to conduct such activities, including on the basis of evidence that the person has engaged in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products:</i></p> <p><i>(a) if the Party has granted a licence to the person to conduct activities included in Article 5.1, cancel the licence; and</i></p> |

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| <p>any other activity contrary to the provisions of this Protocol. Thereafter, such a customer shall be a “blocked customer”.</p> <p>7. Each Party shall communicate to the Convention Secretariat the identity of the authority that it has designated to maintain the list of blocked customers. The Convention Secretariat shall compile a list of the designated authorities of the Parties and make the list available on a web site.</p> <p>8. With regard to blocked customers, each Party shall require that:</p> <p>(a) suppliers immediately communicate the names of blocked customers to the designated authority, which will maintain a list of blocked customers;</p> <p>(b) this list is made available on demand to all natural and legal persons referred to in paragraph 1 of this Article;</p> <p>(c) once so designated, a customer will remain blocked for a period of five years following termination of a business relationship in accordance with paragraph 6 of this Article;</p> <p>(d) all blocked customers shall be barred from conducting business, directly or indirectly, with the natural and legal persons referred to in paragraph 1 of this Article relating to the manufacture, sale, distribution or storage of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;</p> | <p>commercial actors to be an appropriate method of achieving this.</p> <p>FCA notes that draft Articles 6.6-6.9 appear to be modeled on provisions of agreements between the European Community and Philip Morris and Japan Tobacco International. FCA considers that, while a ‘blocked customer’ system may be practicable and effective in this context, with a single, large, well-resourced commercial entity agreeing to apply ‘blocking’ measures to its customers in communication with a competent authority, the proposed application of such a system to a wide range of persons throughout the supply chain raises a number of complexities. The draft provisions contemplate a competent authority providing a person with ‘sufficient evidence’ of wrongdoing by another person, but then leaving it to the first-mentioned person to ‘block’ the other person and then inform the competent authority of the ‘blocking’. FCA considers that a system which ‘blocks’ persons from conducting business should be operated by Parties, rather than by private commercial actors.</p> <p>FCA considers that the most reasonable and practicable method of achieving the aims of the proposed ‘blocked customer’ provisions is:</p> <ul style="list-style-type: none"> • the application of an effective licensing system, in combination with the proposed requirement in Article 6.2 that licensees be required, as part of their due diligence obligations, to establish that relevant persons with whom they transact also hold valid licences. If a competent authority becomes aware that a person has engaged in illicit trade or any other | <p>(b) take effective measures to require that all natural and legal persons referred to in paragraph 1 of this Article terminate business relations cease commercial transactions in pursuance of activities included in Article 5.1, including transactions relating to the supply of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, with the person any customer if a competent authority provides such persons with sufficient evidence that the customer has knowingly engaged in the sale, distribution, storage or shipment of tobacco, tobacco products or equipment used in the manufacture of tobacco products in contravention of provisions of this Protocol or any other activity contrary to the provisions of this Protocol. Thereafter, such a customer shall be a “blocked customer”.</p> <p>7. Each Party shall communicate to the Convention Secretariat the identity of the authority that it has designated to maintain the list of blocked customers. The Convention Secretariat shall compile a list of the designated authorities of the Parties and make the list available on a web site.</p> <p>8. With regard to blocked customers, each Party shall require that:</p> <p>(a) suppliers immediately communicate the names of blocked customers to the designated authority, which will maintain a list of blocked customers;</p> <p>(b) this list is made available on demand to all natural and</p> |
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| <p>(e) if a blocked customer does not engage in illicit sale, distribution, storage or shipment of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products or any other activity contrary to the provisions of this Protocol during the five-year period, the “blocked” designation shall be lifted and the customer shall again be subject to the provisions for customer identification and verification; and</p> <p>(f) if a currently or previously blocked customer engages in illicit sale, distribution, storage or shipment of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products or any other activity contrary to the provisions of this Protocol X number of times, the “blocked” designation shall be made permanent.</p> <p>9. Parties shall recognize “blocked” designations assigned to customers by other Parties to the Protocol.</p> | <p>contravention of laws or regulations adopted by a Party in pursuance of its obligations under the Protocol – whether through information provided on application for a licence, notification of a change to this information, notification of a reasonable suspicion by a person who engages in a transaction with the licensee, or any other means – and this evidence indicates that the person is unfit to conduct activities included in Article 5.1, the competent authority should refuse to grant a licence to the person, or cancel the person’s licence. If a person does not hold a valid licence to engage in relevant activities, other persons will have notice that the person does not have the approval of the competent authority or authorities to engage in those activities – and should be prohibited from engaging in relevant commercial transactions with the person, as proposed in draft Article 13 (Offences); and</p> <ul style="list-style-type: none"> the inclusion of a provision requiring Parties, where there is evidence that any person engaged in activities included in Article 5.1 is unfit to conduct such activities – including evidence that the person has engaged in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products – to take effective measures to require that all other persons engaged in activities included in Article 5.1 cease commercial transactions in pursuance of such activities with that person. Where the person is required to hold a licence in the Party’s jurisdiction, the application of effective sanctions for engaging in commercial transactions with an unlicensed person may be a sufficiently effective measure. However, additional | <p>legal persons referred to in paragraph 1 of this Article;</p> <p>(e) once so designated, a customer will remain blocked for a period of five years following termination of a business relationship in accordance with paragraph 6 of this Article;</p> <p>(d) all blocked customers shall be barred from conducting business, directly or indirectly, with the natural and legal persons referred to in paragraph 1 of this Article relating to the manufacture, sale, distribution or storage of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;</p> <p>(e) if a blocked customer does not engage in illicit sale, distribution, storage or shipment of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products or any other activity contrary to the provisions of this Protocol during the five-year period, the “blocked” designation shall be lifted and the customer shall again be subject to the provisions for customer identification and verification; and</p> <p>(f) if a currently or previously blocked customer engages in illicit sale, distribution, storage or shipment of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products or any other activity contrary to the provisions of this Protocol X number of times, the “blocked” designation shall be made permanent.</p> <p>9. Parties shall recognize “blocked” designations assigned to customers by other Parties to the Protocol.</p> |
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| | <p>measures, such as orders to cease trading with the person, may be required, particularly where the person is operating outside the Party’s jurisdiction and is therefore not required to be issued with a licence by the Party.</p> <p>FCA fully supports effective information sharing between Parties in respect of actions taken pursuant to Article 6, including the identity of persons ‘blocked’ under proposed Article 6.5 from engaging in relevant commercial transactions, and any notifications under proposed Article 6.2 indicating illicit trade occurring in another Party’s territory or by persons licenced to conduct relevant activities in another Party’s territory. FCA recommends that provisions providing for such information sharing be considered together with other draft provisions dealing with information sharing, as detailed below in relation to draft Articles 20, 21 and 22.</p> | |
| <p>10. Each Party shall require all natural and legal persons referred to in paragraph 1 of this Article to monitor their customers’ purchases to ensure that the quantities of such purchases are commensurate with the demand for such products within the intended market of sale or use.</p> | <p>FCA recommends the deletion of draft Article 6.10. As noted above, FCA supports the inclusion in Article 6.2 of an obligation to obtain information about the purpose of a transaction, with attention to ensuring that production or supply is commensurate with reasonably anticipated demand, and recommends the inclusion of an obligation to ‘monitor’ transactions in Article 6.3. FCA also supports the inclusion in Article 9 (Security and preventive measures) of an obligation not to supply tobacco, tobacco products, or manufacturing equipment used in the manufacture of tobacco products in amounts that exceed reasonable estimates of consumption or use in the intended market of use or retail sale. FCA does not consider the inclusion of a further requirement on</p> | <p>10. Each Party shall require all natural and legal persons referred to in paragraph 1 of this Article to monitor their customers’ purchases to ensure that the quantities of such purchases are commensurate with the demand for such products within the intended market of sale or use.</p> |

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| | <p>persons subject to due diligence requirements to ‘monitor their customers’ purchases to ensure that the quantities of such purchases are commensurate with the demand for such products within the intended market of sale or use’ to be necessary.</p> | |
| | <p>FCA recommends the inclusion of an additional provision requiring Parties to endeavour, when feasible, to apply due diligence requirements to persons engaged in commercial growing of tobacco or retailing of tobacco or tobacco products, as appropriate. FCA recognizes that requiring growers and retailers to conduct due diligence on other participants in the tobacco product supply chain will not be practicable in all Parties, but considers that Parties should be encouraged to include these important links in the supply chain within their due diligence systems when feasible, as proposed in the equivalent draft provision in Article 8.4 (Record-keeping).</p> | <p><i>6. Each Party shall endeavour, when feasible, to apply the requirements in this Article, as appropriate, to all natural and legal persons engaged in activities included in Article 5.2.</i></p> |

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Article 7
Tracking and tracing

1. For the purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products, the Parties to this Protocol agree to establish a global tracking and tracing system. The system will comprise a clearing-house database containing the information collected by Parties pursuant to this Article, maintained by the Convention Secretariat and accessible to all Parties.

2. Each Party shall establish or, where a relevant system exists, develop a tracking and tracing system for all tobacco products and manufacturing equipment used in the manufacture of tobacco products that are manufactured in or imported onto its territory, taking into account available best practices.

3. With a view to enabling effective tracking and tracing, each Party shall, within three years of accession, acceptance, approval, formal confirmation or ratification of this Protocol for that Party, require that unique, secure and non-removable markings are affixed to:

(a) all master cases, cartons and, when technology is sufficiently developed in accordance with paragraph 12(c) of this Article or otherwise, packs of cigarettes and other tobacco products containing more than one unit manufactured in or imported onto its territory; and

(b) all manufacturing equipment used in the manufacture of tobacco products that is manufactured in or imported

FCA supports the establishment of an effective global tracking and tracing system for tobacco products. In order to effectively combat illicit trade, authorities must monitor the movement of lawfully manufactured tobacco products, and, upon seizure of such products, be able to access information to assist in recreating their movement through the supply chain.

FCA broadly supports the overall approach taken in draft Article 7, particularly the application of obligations to both products manufactured in a Party’s territory for the domestic market and imported products. However:

- FCA does not agree that obligations should not apply with respect to individual packs of tobacco products. Technology exists to uniquely mark individual packs so as to allow linking from the individual pack to information held with respect to the carton or other packaging unit in which individual packs are packaged; and
- FCA notes that a fully functioning tracking and tracing system would include the recording of information through the supply chain and not only at the time of first shipment or import, as currently proposed. Draft Article 7.10, which would require Parties to ‘require the further development and expansion’ of the tracking and tracing system to require recording of information relating to ‘sales by first purchasers, second purchasers and, wherever feasible, subsequent purchasers’ and to enable access to this information, is too vague to ensure that appropriate action is taken by Parties to ensure the recording of information through the supply chain.

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| <p>onto its territory.</p> <p>4. Each Party shall, as part of its tracking and tracing system, require that the unique markings affixed, pursuant to paragraph 3 of this Article, permit, when scanned pursuant to this Protocol, determination of the following information:</p> <ul style="list-style-type: none"> (a) date and location of manufacture; (b) manufacturing facility; (c) machine used to manufacture tobacco products; (d) production shift of manufacture; (e) the name, invoice, order number and payment record of the first customer who is not affiliated with the manufacturer; (f) the intended market of retail sale or the intended country of installation or use; (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. <p>5. Each Party shall require, within [three] years of</p> | <p>Clearer obligations, and a process for ‘developing and expanding’ the tracking and tracing system, are required.</p> <p>FCA notes that some of the details of the system proposed in draft Article 7 require further clarification, including:</p> <ul style="list-style-type: none"> • the extent to which standardization of technologies between Parties will be necessary, and the mechanisms or processes for agreeing on standardized technologies and facilitating updating of such technologies. FCA understands the implication of draft Article 7.9 to be that the markings required by any Party to the protocol will need to be understandable or readable in all other Parties – in order for competent authorities to be able to make a request for information ‘based on’ a marking, they will need to be able to read or understand the marking; • what is meant by ‘appropriate format’ for the ‘inclusion’ and ‘transfer’ of information proposed in draft Articles 7.7 and 7.8, and the process for developing the appropriate format or formats; • how information is to be transferred from the ‘central point’ in each territory to the international ‘clearing-house database’, as proposed in draft Article 7.8, and particularly what level of interoperability of systems this will require between individual Parties’ central points and the international clearing-house database; • how requests are to be ‘passed on’ to the international ‘clearing-house database’ and how | |
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accession, acceptance, approval, formal confirmation or ratification of this Protocol for that Party, that the information set out in paragraph 4 of this Article is recorded, by using an appropriate technology, at the time of first shipment by any manufacturer established on that Party’s territory or at the time of import onto its territory of products covered by paragraph 3 of this Article which have not been subject to the provisions of this Protocol.

6. Each Party shall ensure that the information recorded under paragraph 5 of this Article is accessible by means of a link with the unique markings required under paragraph 3 of this Article to be affixed to the manufacturing equipment used in the manufacture of tobacco products, master cases, cartons and, when technology allows, packs of cigarettes and other tobacco products.

7. Each Party shall ensure that the information recorded in accordance with paragraph 5 of this Article, as well as the unique codes rendering such information accessible in accordance with paragraph 6 of this Article shall be included [daily and] in an appropriate format at a central point on its territory.

8. Each Party shall establish a link or interface with the central point referred to in paragraph 7 of this Article and ensure that data are transferred [daily and] in an appropriate format to the clearinghouse database.

9. Each Party shall establish the means by which a competent authority on its territory, upon any seizure being made within its territory of cigarettes, other tobacco products or manufacturing equipment used in the

information is to be obtained from the database under draft Article 7.9, and particularly whether Parties’ competent authorities will be able to directly input a request into the database to obtain information; and

- the likely costs of establishing and maintaining the clearing-house database, and the feasibility and likely cost to Parties of meeting the proposed obligations.

FCA recommends that a working group be established at INB-3 to examine and clarify these and any other related issues – including the requirements proposed in draft Article 8.3 for provision to competent authorities of particular information about the movement of tobacco products being exported and/or in transit – and report back to the INB. This working group should be mandated to propose any changes to the text that might be considered necessary after the clarification of relevant issues.

FCA notes that, given the complex nature of some of the practical and technological issues involved, some form of inter-sessional work is likely to be required between INB-3 and INB-4. There may also be a need for continuing work after the protocol has been adopted, involving both Parties and relevant experts, to ensure that best practices are developed and shared, new technologies adopted and the scope of the tracking and tracing system expanded as appropriate.

Having reviewed the text of draft Article 7, FCA makes the following additional comments for consideration by the working group:

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manufacture of tobacco products, can make a request based on the unique marking on such seized products to the central point on its territory and shall ensure that such a request is passed on to the clearing-house database to obtain the information listed in paragraph 4 of this Article in relation to that seizure.

10. Each Party shall require the further development and expansion of the scope of the applicable tracking and tracing system to require the marking and recording of information relating to sales by first purchasers, second purchasers and, wherever feasible, subsequent purchasers, and to enable recording and access to such information in accordance with the provisions of this Article.

11. Parties shall cooperate with each other to ensure that, as far as possible, the tracking and tracing systems established on their territories avoid unnecessary costs or duplication of requirements imposed on manufacturers of cigarettes, other tobacco products and manufacturing equipment used in the manufacture of tobacco products. Where a tracking and tracing system already exists in another Party, it shall be taken into account when establishing any system in a Party that does not currently have such a system.

12. The Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing or requiring licensees to develop improved technologies for tracking and tracing. Such cooperation shall include:

(a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology,

- It is not clear to FCA that the forms of packaging to which the draft provisions are proposed to apply are appropriately defined in draft Article 1. Under the definition of 'carton' ('packaging for five or more unit packs of tobacco products'), any 'master case' ('packaging for about 10,000 cigarettes') would also be a 'carton'. As the same obligations are proposed to apply with respect to master cases and cartons, it is not clear what value there is in including 'master case', as defined, in the provisions, and why it is necessary to include a definition of 'cigarettes' separate to other 'tobacco products'. FCA considers that the broad definition of the term 'carton', which commonly applies to packaging of a relatively small size, may cause confusion. FCA recommends that the separate concepts of 'carton' and 'master case' be removed from the text and replaced with the word 'bulk package', which should be defined, as recommended above in relation to draft Article 1, as 'a receptacle of any kind containing five or more packs of tobacco products, whether packaged or packed for retail, wholesale or transport'. Provisions applicable to 'bulk packages' would then include what might ordinarily be understood as 'cartons' and 'master cases'.
- FCA considers that the words 'within three / [three] years of accession, acceptance, approval, formal confirmation or ratification of this Protocol for that Party' in draft Articles 7.3 and 7.5 should be amended to 'within three / [three] years of *entry into force* of this Protocol for that Party', as the proposed obligations would come into effect only upon entry into force of the Protocol for a Party, as set out in

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| <p>including knowledge, skills, capacity and expertise;</p> <p>(b) support for training and capacity-building programmes for Parties that express such a need; and</p> <p>(c) further development of the technology to mark and scan cigarette packs and unit packs of other tobacco products to make accessible the information listed in paragraph 4 of this Article.</p> | <p>draft Article 47, rather than upon deposit of its instrument of accession, acceptance, approval, formal confirmation or ratification.</p> <ul style="list-style-type: none"> ● FCA broadly supports the items of information listed in draft Article 7.4, but notes that further attention is required to ensure that both manufacture and import, and both tobacco products and manufacturing equipment, are adequately addressed in accordance with the system proposed in the Article. In particular, FCA notes that: <ul style="list-style-type: none"> - in respect of imported products or equipment, draft subprovision (e) should be amended to require ‘the name, invoice, order number and payment record of the first customer who is not affiliated with the manufacturer <i>or importer</i>’, and an additional subprovision should be included requiring ‘the date and place of entry into the importing Party’s territory’. - each draft subprovision be examined for its application to manufacturing equipment and any necessary amendments be made. For example, draft subprovision (c), ‘machine used to manufacture tobacco products’, would not apply to manufacturing equipment; <p>In addition, FCA recommends that:</p> <ul style="list-style-type: none"> - an additional subprovision be included requiring ‘the name, address and licence number of the manufacturer or importer’; - draft subprovision (g), ‘product description’, be extended to include product quantity and/or amount; - the meaning of draft subprovision (h), ‘any | |
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| | <p>warehousing and shipping’, and particularly its relationship with the shipping details in draft subprovision (j), be clarified.</p> <ul style="list-style-type: none">• FCA recommends that the words ‘at the time of’ in draft Article 7.5 be amended to ‘<i>by</i> the time of’. While it is important that information has been recorded when a product is shipped or imported, that this need not happen ‘at the time of’ shipping or importation. | |
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| <p><i>Article 8</i> <i>Record-keeping</i></p> | | <p><i>Article 8</i> <i>Record-keeping</i></p> |
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| <p>1. Each Party shall require that all natural and legal persons engaged in the commercial sale of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products maintain complete and accurate records of all transactions relevant to the objectives and purposes of this Protocol.</p> <p>2. Each Party shall require persons licensed in accordance with Article 5 to provide the following information to the competent authorities, on request:</p> <p>(a) general information on market volumes, trends, forecasts and other relevant information; and</p> <p>(b) the quantities of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products in the licensee’s possession, custody or control kept in stock in tax and customs warehouses under the regime of transit or duty suspension as of the date of the request.</p> | <p>FCA supports the proposed requirement that key participants in the tobacco product supply chain be required to keep records, including records of all relevant commercial transactions in which they engage, and to make these records easily accessible to relevant authorities. These requirements will assist authorities in monitoring the trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, and in detecting, investigating and prosecuting illicit trade. FCA recommends the following amendments to strengthen the proposed record-keeping requirements.</p> <p>In draft Article 8.1, FCA recommends that:</p> <ul style="list-style-type: none"> the categories of persons to which record-keeping requirements are proposed to apply should be clarified. FCA supports the application of record-keeping requirements to all key participants in the tobacco product supply chain, but is concerned that inconsistencies in language between the activities covered by draft Article 8 and the activities covered by draft Articles 5 and 6 will lead to confusion and difficulties in application. As recommended in relation to licensing requirements in Article 5.1, FCA recommends that Article 6 cover persons engaged in: <ul style="list-style-type: none"> manufacturing, commercial import, commercial export, warehousing, brokering or wholesaling of tobacco products; manufacturing, commercial import, commercial export, brokering, wholesaling or retailing of manufacturing equipment used in the manufacture of tobacco products; and commercial import, commercial export, | <p>1. Each Party shall require that all natural and legal persons engaged in <i>activities included in Article 5.1</i> the commercial sale of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products maintain complete and accurate records of:</p> <p>(a) all transactions <i>in which they engage in pursuance of the activities relevant to the objectives and purposes of this Protocol</i>; relevant to the objectives and purposes of this Protocol;</p> <p>2. Each Party shall require persons licensed in accordance with Article 5 to provide the following information to the competent authorities, on request:</p> <p>(a) (b) general information on market as applicable, volumes of production, imports, exports, and/or sales, trends, forecasts and other relevant information; and</p> <p>(b) (c) the quantities of any tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products in their licensee’s possession, custody or control, including warehoused tobacco or tobacco products kept in stock in tax and customs warehouses under the regime of transit or duty suspension as of the date of the request.</p> |

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| | <p>warehousing, primary processing, wholesaling or brokering of tobacco, excluding primary processing or wholesaling by the legal or natural person responsible for growing the tobacco;</p> <ul style="list-style-type: none">• record-keeping requirements should apply to transactions in which the persons engage in pursuance of the activities, rather than ‘transactions relevant to the objectives and purposes of this Protocol’. FCA considers that the concept of ‘relevance’ to the ‘objectives and purposes’ of the protocol is not sufficiently defined, and recommends that all transactions engaged in in pursuance of the relevant activities be covered. <p>FCA recommends the deletion of the proposed requirement under draft Article 8.2 that Parties require ‘persons licensed in accordance with Article 5’ to provide certain information to competent authorities ‘on request’. FCA considers that the information included under draft Article 8.2 should be included, as appropriate, in the requirement to ‘maintain complete and accurate records’ under Article 8.1, and ‘made available to the competent authority or authorities’, along with other records, under draft Article 8.5. FCA notes that draft Article 8.2 may require covered persons to be prepared at all times to provide authorities with a wide range of information, including information that they may not possess, such as ‘general’ market ‘trends’ and ‘forecasts’. FCA recommends that the proposed information be included as subprovisions of Article 8.1 and refined to cover only information specific to the relevant commercial activities of the covered person. FCA considers that this information should include</p> | |
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| <p>3. With respect to tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products sold or manufactured on the territory of the Party for export outside the territory of the Party or subject to duty-suspended movement in transit on the territory of the Party, each Party shall require that persons licensed or equivalently approved in accordance with this Protocol provide the competent authorities in the country of departure (electronically where the appropriate infrastructure exists) at the time of departure from their control with the following information:</p> <ul style="list-style-type: none"> (a) date of shipment from the last point of physical control of the products by the person licensed in accordance with this Protocol; (b) details concerning the products shipped (including brand, amount, warehouse); (c) intended shipping destination; (d) identity of the person to whom the products are being shipped; (e) mode of transport, including the identity of the transporter; (f) expected date of arrival of the shipment at the intended | <p>quantities of <i>any</i> tobacco, tobacco products or manufacturing equipment in the person’s possession, custody or control, including, but not limited to, warehoused tobacco or tobacco products.</p> <p>FCA recommends the deletion of draft Article 8.3. While FCA fully supports the inclusion in the protocol of requirements to ensure that competent authorities can access detailed information about the movement of tobacco products being exported and/or in transit, FCA considers that, as noted above in relation to draft Article 7 (Tracking and tracing), the detail of such requirements should be considered together with the details of the proposed tracking and tracing system, and the relevant provisions concluded together with the provisions establishing that system.</p> | <p>3. With respect to tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products sold or manufactured on the territory of the Party for export outside the territory of the Party or subject to duty suspended movement in transit on the territory of the Party, each Party shall require that persons licensed or equivalently approved in accordance with this Protocol provide the competent authorities in the country of departure (electronically where the appropriate infrastructure exists) at the time of departure from their control with the following information:</p> <ul style="list-style-type: none"> (a) date of shipment from the last point of physical control of the products by the person licensed in accordance with this Protocol; (b) details concerning the products shipped (including brand, amount, warehouse); (c) intended shipping destination; (d) identity of the person to whom the products are being shipped; (e) mode of transport, including the identity of the transporter; (f) expected date of arrival of the shipment at the intended |
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| <p>shipping destination; and</p> <p>(g) intended market of retail sale or use.</p> <p>4. When feasible, each Party shall require that tobacco growers and retailers maintain complete and accurate records of all relevant transactions in which they engage.</p> <p>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:</p> <p>(a) maintained for a period of no fewer than five years;</p> <p>(b) made available to the competent authority or authorities; and</p> <p>(c) as far as feasible, kept in a common format or as prescribed by the competent authorities.</p> | <p>FCA recommends that draft Article 8.4 be amended for consistency with the proposed wording of Articles 5.2 and 6.5 – to require Parties to ‘endeavour’ to apply record-keeping requirements to persons engaged in commercial growing of tobacco and retailing of tobacco or tobacco products when feasible. FCA considers that this provision should follow draft Article 8.5 (which, if the above recommendations were accepted, would be renumbered Article 8.2) rather than precede it.</p> | <p>shipping destination; and</p> <p>(g) intended market of retail sale or use.</p> <p>4. When feasible, each Party shall require that tobacco growers and retailers maintain complete and accurate records of all relevant transactions in which they engage.</p> <p>5. 2. 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:</p> <p>(a) maintained for a period of no fewer than five years;</p> <p>(b) made available to the competent authority or authorities; and</p> <p>(c) as far as feasible, kept in a common format or as prescribed by the competent authorities.</p> <p><i>3. Each Party shall endeavour, when feasible, to apply the requirements in this Article to all natural and legal persons engaged in activities included in Article 5.2.</i></p> |
| <p>6. Each Party shall, as appropriate and subject to national laws, establish a system for sharing all records kept in accordance with this Article with other Parties.</p> | <p>FCA recommends the deletion of draft Article 8.6. While FCA fully supports the inclusion in the protocol of requirements for the sharing of records between Parties, FCA considers that a system for the sharing of records should be considered together with other proposed requirements for information sharing under Part V of the protocol, rather than established separately by each Party.</p> | <p>6. Each Party shall, as appropriate and subject to national laws, establish a system for sharing all records kept in accordance with this Article with other Parties.</p> |

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| <p>7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved technologies for record-keeping.</p> | <p>FCA supports the proposed requirement that Parties endeavour to cooperate in respect of technologies for record-keeping.</p> | <p>7. 4. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved technologies for record-keeping.</p> |
| <p style="text-align: center;">Article 9 <i>Security and preventive measures</i></p> <p>1. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to require that all natural and legal persons engaged in commercial sales of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products take all reasonably practicable measures to prevent the diversion of tobacco products into illicit trade channels.</p> | <p>FCA supports the proposed requirement that participants in the tobacco product supply chain be subject to a general requirement to take all reasonably practicable measures to prevent diversion into illicit trade channels. To clarify and strengthen draft Article 9.1, FCA recommends that:</p> <ul style="list-style-type: none"> • the categories of persons to which the requirement is proposed to apply should be clarified, to avoid confusion and difficulties in application across the various provisions of Part III of the protocol. FCA supports the application of the requirement to all categories of persons recommended to be included in Articles 5.1 and 5.2. While what is ‘reasonably practicable’ for persons engaged in tobacco growing or retailing of tobacco products will differ from what is reasonably practicable for, for example, a manufacturer of tobacco products, FCA considers that all key participants in the tobacco product supply chain, including growers and retailers, should be required to meet this standard; and • the diversion of tobacco or manufacturing equipment used in the manufacture of tobacco products into illicit trade channels, and not only the diversion of tobacco products, should be covered by the requirement. | <p style="text-align: center;">Article 9 <i>Security and preventive measures</i></p> <p>1. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to require that all natural and legal persons engaged in <i>activities included in Articles 5.1 and 5.2</i> commercial sales of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products take all reasonably practicable measures to prevent the diversion of <i>tobacco</i>, tobacco products, and <i>manufacturing equipment used in the manufacture of tobacco products</i> into illicit trade channels.</p> |

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| <p>2. Each Party shall ensure that any contravention of the measures adopted pursuant to paragraph 1 of this Article is subject to appropriate criminal, civil and/or administrative procedures and effective, proportionate and dissuasive sanctions, including, as appropriate, suspension or cancellation of a licence and prohibition of the licensee from re-applying for a licence during a five-year period.</p> | <p>FCA recommends the deletion of draft Article 9.2. FCA fully supports the application of appropriate criminal, civil and/or administrative procedures and effective, proportionate and dissuasive sanctions, including licence suspension or cancellation, but considers that this should be dealt with in a separate provision applicable not just to contravention of the measures adopted pursuant to Article 9.1, but to contravention of any laws or regulations adopted by a Party in pursuance of its obligations under the protocol, as recommended below in relation to draft Article 14.</p> | <p>2. Each Party shall ensure that any contravention of the measures adopted pursuant to paragraph 1 of this Article is subject to appropriate criminal, civil and/or administrative procedures and effective, proportionate and dissuasive sanctions, including, as appropriate, suspension or cancellation of a licence and prohibition of the licensee from re-applying for a licence during a five-year period.</p> |
| <p>3. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to require that tobacco products are not intermingled with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transport, import and export.</p> | <p>FCA supports the inclusion in the protocol of a requirement to take measures to prevent intentional intermingling of tobacco products with non-tobacco products when such intermingling is undertaken for the purpose of, or creates a risk of, diversion of the products into illicit trade channels. FCA is concerned that draft Article 9.3 may be unintentionally over-broad. It may be read as requiring that tobacco products be kept completely separate from all other products at all stages of the tobacco product supply chain – meaning, for example, separate means of transport and separate areas for loading and unloading – which is unlikely to be practicable. FCA recommends that draft Article 9.3 be amended to restrict its application to packaging or handling of tobacco products in such a way as to conceal them from authorities or disguise them as non-tobacco products.</p> | <p>3. 2. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to require that tobacco products are not, intermingled with non-tobacco products during their progression through the supply chain, <i>packaged or handled in such a way as to conceal them from authorities or disguise them as non-tobacco products</i> of tobacco products, including during storage, warehousing, transit, transport, import and export.</p> |
| <p>4. Parties should require that natural or legal persons engaged in trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of</p> | <p>FCA recommends the deletion of draft Article 9.4. FCA notes that draft Article 9.5 would eliminate cash payments for transactions in pursuance of the covered</p> | <p>4. Parties should require that natural or legal persons engaged in trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of</p> |

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| <p>tobacco products report the cross-border transfer of substantial quantities of cash in the amount of at least USD 10 000 or any amount as agreed to in mutual legal assistance treaties or appropriate negotiable instruments.</p> | <p>activities. Considering the two draft Articles together, it is difficult to understand what relevant ‘cross-border transfer[s] of substantial quantities of cash’ the proposed reporting requirement would apply to.</p> | <p>tobacco products report the cross border transfer of substantial quantities of cash in the amount of at least USD 10 000 or any amount as agreed to in mutual legal assistance treaties or appropriate negotiable instruments.</p> |
| <p>5. Parties should require that payments for transactions relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and manufacturing equipment used in the manufacture of tobacco products be allowed only in the currency and in the same amount as the invoice for those products, and only by wire or cheque from financial institutions located on the territory of the intended market of retail sale of the tobacco products and shall not be operated through any other alternative remittance system.</p> | <p>FCA supports the inclusion in the protocol of a requirement to place restrictions on methods of payment for key transactions in the tobacco product supply chain. Such restrictions will assist in preventing money laundering through these transactions. To strengthen draft Article 9.5, FCA recommends that:</p> <ul style="list-style-type: none"> • the categories of transactions to which the restrictions are proposed to apply be clarified, to avoid confusion and difficulties in application across the various provisions of Part III of the protocol. FCA supports the application of the requirement to transactions engaged in in pursuance of any of the activities recommended to be included in Article 5.1; • the invoice referred to be the invoice for ‘the transaction’, rather than for ‘the products’, as not all covered transactions will involve products; • bank drafts be included as an acceptable means of payment, in addition to wire and cheque; and • payments be allowed from financial institutions located in the territory of the business location of either party to the transaction, rather than restricted to financial institutions located in the ‘territory of the intended market of retail sale of the tobacco products’. FCA notes that not all covered transactions will involve tobacco products, and not all transactions that involve tobacco products will | <p>5. 3. Parties should <i>Each Party shall</i> require that payments for transactions <i>in pursuance of activities included in Article 5.1</i> relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and manufacturing equipment used in the manufacture of tobacco products be allowed only in the <i>same</i> currency and in the same amount as the invoice for <i>the transaction</i> these products, and only by wire, or cheque, <i>or bank draft</i> from a financial institutions located in the territory of the <i>business location of one of the parties to the transaction,</i> intended market of retail sale of the tobacco products and shall not be operated through any other alternative remittance system.</p> |

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| | <p>take place exclusively in the intended market of retail sale of those products. The draft provision would require, for example, a manufacturer and exporter both located in a Party, engaging in a transaction relating to products intended for retail sale in another Party, to use the services of a financial institution located in that other Party, rather than those of a financial institution located in the Party in which they were both located.</p> | |
| <p>6. Each Party shall require that all natural and legal persons engaged in commercial sale of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products shall supply such products only in amounts commensurate with legitimate consumption or use in the intended market of use or retail sale and refuse to supply such items in amounts that exceed such consumption or use.</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to prohibit the supply of tobacco, tobacco products or manufacturing equipment in amounts that exceed reasonably anticipated consumption or use in the intended market of use or retail sale. This will support the proposed requirement under draft Article 6.2 that all persons engaged in the relevant activities be required, as part of due diligence before engaging in any commercial transaction in pursuance of the activities, to obtain information about the purposes of the transaction, with attention to ensuring that production or supply is commensurate with reasonably anticipated demand. To strengthen and clarify draft Article 9.6, FCA recommends that:</p> <ul style="list-style-type: none"> • the persons to which the prohibition will apply should be clarified, to avoid confusion and difficulties in application across the various provisions of Part III of the protocol. FCA supports the application of the requirement to persons engaged in any of the activities recommended to be included in Article 5.1; and • consistent with the term used in the due diligence | <p>6. 4. Each Party shall require that all natural and legal persons engaged in <i>activities included in Article 5.1</i> commercial sales of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products shall supply such tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products only in amounts commensurate with legitimate <i>reasonably anticipated</i> consumption or use in the intended market of use or retail sale and refuse to supply such items in amounts that exceed such consumption or use.</p> |

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| | <p>requirement in draft Article 6.2, the prohibition should apply to supply in excess of ‘reasonably anticipated’ consumption or use, rather than supply that exceeds consumption or use by any amount.</p> | |
| <p>7. Each Party shall require that all natural and legal persons engaged in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products report all suspicious transactions to the competent authorities.</p> | <p>As noted above in relation to draft Article 6.3, FCA supports the inclusion in the protocol of a requirement that key participants in the tobacco product supply chain notify competent authorities of any activities or omissions which could reasonably indicate engagement in or intention to engage in illicit trade, including contravention of or intention to contravene any laws or regulations adopted by a Party in pursuance of its obligations under the protocol, by any person. FCA recommends that draft Article 9.7 be deleted and replaced with this proposed broader notification requirement in Article 6.</p> | <p>7. Each Party shall require that all natural and legal persons engaged in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products report all suspicious transactions to the competent authorities.</p> |
| <p style="text-align: center;">Article 10 <i>Sale by Internet, telecommunication or any other evolving technology</i></p> <p>[Each Party shall require that all legal and natural persons engaged in commercial sales of tobacco or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products conducting business through Internet-, telecommunication-or any other evolving technology-based modes of sale comply with all relevant obligations covered by this Protocol.]</p> <p style="text-align: center;">Or</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to ban telecommunication-based retail sales of tobacco and tobacco products, including internet sales, and sales by any other means through which the purchaser and the retailer transact without being in the same physical location. These remote means of sale are easily used to evade taxes and duties, as well as other regulations including prohibitions on sales to minors and packaging and labelling requirements.</p> <p>FCA does not consider that the first option proposed in draft Article 10 – which would permit sales through the internet and other means of telecommunication provided ‘all relevant obligations covered by th[e] Protocol’ had been complied with – would effectively address the</p> | <p style="text-align: center;">Article 10 <i>Sale by Internet, telecommunication or any other remote means evolving technology</i></p> <p>[Each Party shall require that all legal and natural persons engaged in commercial sales of tobacco or the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment used in the manufacture of tobacco products conducting business through Internet-, telecommunication-or any other evolving technology-based modes of sale comply with all relevant obligations covered by this Protocol.]</p> <p style="text-align: center;">Or</p> |

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

realities of remote means of sale. Remote means of sale allow persons located within one jurisdiction to interact directly with persons located within another jurisdiction and effect exchange of tobacco or tobacco products without the involvement of any other person other than those facilitating payment for the transaction and providing delivery services (who will often be unaware of the nature of the items they are delivering). The payment of applicable taxes and duties in these circumstances is very difficult to monitor. Different delivery services can deliver multiple consignments of products to either the same individual at the same address or multiple individuals at different addresses, without authorities observing any unusual or suspicious activity. The measures proposed under other ‘relevant obligations covered by th[e] Protocol’, most of which do not require obligations to be imposed on those centrally involved in remote sales – including retailers, purchasers, delivery service providers and credit card service providers – cannot effectively address the evasion through such sales of taxation laws and other tobacco control laws and regulations.

FCA recommends that the second option proposed in draft Article 10 – the imposition of a ban on telecommunications-based sales – be included in the protocol and strengthened as follows:

- as proposed in draft Article 11 in respect of a prohibition on the application of tax, regulatory and other advantages in free-trade zones, and duty-free sales, Article 10 should require each Party to implement effective measures to impose a prohibition within three years of entry into force of

{Each Party shall, *within three years of the entry into force of this Protocol for that Party, ban implement effective measures to prohibit:*

(a) retail sales of tobacco, or tobacco products or manufacturing equipment used in the manufacture of tobacco products through any remote means, including the Internet-, or any other telecommunications- medium or any other evolving technology-based modes of sale,;

(b) provision of any service that facilitates payment for any retail sale of tobacco or tobacco products through any remote means, by any natural or legal person who knows or ought reasonably to know that they are facilitating payment for such a sale; and

(c) transport or delivery of tobacco or tobacco products the subject of retail sale through any remote means, by any natural or legal person who knows or ought reasonably to know that they are transporting or delivering tobacco or tobacco products the subject of such a sale.}

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| | <p>the protocol for that Party;</p> <ul style="list-style-type: none">• the prohibition should apply to sales by <i>any</i> remote means – which, as recommended above in relation to draft Article 1, should be defined as any means of transacting by which the parties to the transaction are not in the same physical location – including mail order sales, sales through the internet or any other telecommunications medium, and sales through any other technology that may be developed and used for remote transactions. All remote means of sale pose serious risks for the evasion of taxation laws and other tobacco control laws and regulations, and only a prohibition on all remote means of sale will allow states to effectively target all those involved, including, in particular, persons transporting or delivering tobacco or tobacco products sold through remote means;• the prohibition should apply to retail sales – which, as recommended above in relation to draft Article 1, should be defined as sales directly to consumers – rather than all sales. While FCA supports regulation of remote wholesale transactions through the measures proposed in other provisions of Part III of the protocol, FCA does not consider that a complete ban on business-to-business transactions – which would prohibit, for example, persons doing business by phone or email – would be practicable;• the prohibition should not apply to sales of manufacturing equipment used in the manufacture of tobacco products. While FCA supports regulation of transactions relating to manufacturing equipment through the measures proposed in other provisions of | |
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| | <p>Part III of the protocol, remote transactions in respect of manufacturing equipment do not present the same risk of evasion, as equipment is not subject to taxation laws and other tobacco control regulations in the same way as tobacco and tobacco products; and</p> <ul style="list-style-type: none"> • the prohibition should apply not only to sales of tobacco or tobacco products by remote means, but also to knowingly providing services that facilitate payment for such a sale and knowingly transporting or delivering tobacco or tobacco products the subject of such a sale. An effective ban on remote means of sale of tobacco and tobacco products will need to cover providers of these facilitative services, particularly where retailers engaging in prohibited sales are located outside a Party’s territory, as is often the case in internet transactions. | |
| <p align="center">Article 11 <i>Free-trade areas and duty-free sales</i></p> <p>Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective measures to prohibit any tax, regulatory or other advantages that apply in free-trade areas from applying to tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, including tax-reduced and duty-free sales to individual customers.</p> | <p>FCA supports the inclusion in the protocol of provisions to ensure that free-trade zones are not used to facilitate illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, and to prohibit tax-free, tax-reduced, duty-free and duty-reduced sales of tobacco and tobacco products. FCA notes that, as recognized in the draft preamble: free-trade zones – which are characterized by a lack of monitoring and law enforcement activities – ‘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’; and tax- and duty-free products ‘are often diverted into illicit trade’. To strengthen and clarify the draft provisions, FCA recommends that:</p> | <p align="center">Article 11 <i>Free-trade areas zones and duty-free sales</i></p> <p>Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective measures to prohibit any tax, regulatory or other advantages that apply in free-trade areas from applying to the introduction of any tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products <i>into any free-trade zone, except:</i></p> <p><i>(a) tobacco or tobacco products introduced into the free-trade zone by a natural person for personal use; or</i></p> <p><i>(b) tobacco or tobacco products introduced into the free-trade zone for the purpose of sale to persons ordinarily</i></p> |

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| | <ul style="list-style-type: none"> • draft Article 11 should be divided into two separate Articles – one addressing free-trade zones, and one addressing duty-free sales. FCA considers that all duty-free, duty-reduced, tax-free and tax-reduced sales should be addressed, not only sales occurring in free trade zones. All tax-and duty-free and tax- and duty-reduced products are at risk of diversion into illicit trade channels, not only those sold within free-trade zones; • the provision dealing with free-trade zones should be clarified to explicitly prohibit the introduction of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products into these areas. As it would not be possible for tobacco, tobacco products or manufacturing equipment to be introduced into a free-trade zone without enjoying at least some ‘tax, regulatory or other advantages’ that apply in the free-trade zone, FCA understands this to be the intention of the draft Article. For clarity, this should be explicitly stated. FCA recommends the inclusion of exceptions to this prohibition for tobacco or tobacco products introduced into a free-trade zone for personal consumption or for sale to persons ordinarily present in the free-trade zone (provided that any ordinarily applicable taxes, duties or other charges are applied); and • the provision dealing with duty-free sales should apply to ‘tax-free’ sales, as well as ‘tax-reduced’ sales, and to ‘duty-reduced’ sales, as well as ‘duty-free’ sales. FCA recommends that the prohibition apply to sales to ‘international travellers’ rather than | <p><i>present in the free-trade zone, provided that any duties, taxes or other charges ordinarily applicable in that Party's territory are applied to such sales.</i></p> <p style="text-align: center;">Article 12 <i>Tax- and duty-free sales</i></p> <p><i>Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective measures to prohibit including tax-reduced, tax-free, duty-reduced and duty-free sales of tobacco or tobacco products to international travellers individual customers.</i></p> |
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| | <p>‘individual customers’, as prohibition of all tax- and duty-free and tax- and duty-reduced sales within a Party’s territory, including, for example, sales in native reservations and on military bases, may not be practicable in all Parties.</p> | |
| <p>PART IV: OFFENCES AND SANCTIONS</p> <p><i>Article 12</i> <i>Offences</i></p> <p>1. Each Party shall adopt appropriate legislative and other measures, as may be necessary, to establish the following conduct as criminal under its domestic law when committed intentionally:</p> <p>(a) manufacturing, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products without the appropriate licence, payment of applicable duties, taxes levies, bearing applicable fiscal stamps, markings or labels;</p> <p>(b) counterfeiting tobacco products or manufacturing equipment used in the manufacture of tobacco products or counterfeiting packaging, fiscal stamps, markings or labels;</p> <p>(c) manufacturing, 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;</p> | <p>FCA supports the proposed requirement that Parties to the protocol establish offences to deter illicit trade and to hold those who participate in or facilitate illicit trade accountable for their conduct.</p> <p>FCA considers that draft Article 12 requires amendment to provide for clear, strong offences to support the measures to be implemented under Part III of the protocol (Supply chain control).</p> <p>FCA recommends that draft Articles 12.1 and 12.2 be combined into a single Article listing conduct which each Party shall establish as ‘an offence’ – which may be criminal, civil or administrative, and which may or may not include ‘intention to commit’ as a required element. While FCA strongly supports criminalization of serious forms of illicit trade, FCA recognizes that civil or administrative offences with strong sanctions may be effective in deterring many forms of prohibited conduct, and that the use of criminal, civil and administrative offences and sanctions differs between Parties. FCA notes that, as recognized in draft Article 2 and in the draft Preamble, there are important existing international agreements providing for criminalization of conduct of serious concern to the international community, including some forms of illicit trade in tobacco, tobacco products and manufacturing equipment used in the</p> | <p>PART IV: OFFENCES AND SANCTIONS</p> <p><i>Article 13 12</i> <i>Offences</i></p> <p>1. Each Party shall adopt appropriate legislative and other measures, as may be necessary, to establish the following conduct as criminal <i>an offence</i> under its domestic law when committed intentionally:</p> <p>(a) engaging in any activity included in Article 5.1 manufacturing, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products without the appropriate licence, payment of applicable duties, taxes levies, bearing applicable fiscal stamps, markings or labels;</p> <p>(b) counterfeiting tobacco products or manufacturing equipment used in the manufacture of tobacco products or counterfeiting packaging, fiscal stamps, markings or labels;</p> <p>(c) manufacturing, selling, transporting, distributing, storing, shipping, importing or exporting counterfeit tobacco products or counterfeit manufacturing equipment used in the manufacture of tobacco products or</p> |

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| <p>(d) mis-declaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;</p> <p>(e) defacing, falsifying, removing, altering or otherwise interfering with labelling, stamping or marking of or for tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;</p> <p>(f) acquiring, possessing, using, converting or transferring property or engaging in any activity that conceals or attempts to conceal the origin of the said property, knowing that such property is the proceeds of an offence or offences covered by this Protocol;</p> <p>(g) 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 derived from an offence or offences covered by this Protocol;</p> <p>(h) conspiring or attempting to commit an offence established in accordance with this paragraph; and</p> <p>(i) organizing, managing, financing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with this paragraph.</p> <p>2. Each Party shall adopt appropriate legislative and other measures, as may be necessary, to establish the following conduct as unlawful under its domestic law when</p> | <p>manufacture of tobacco products. Key agreements, including UNTOC and the United Nations Convention against Corruption (‘UNCAC’), cover the overwhelming majority of Parties to the FCTC and are administered by the United Nations Office on Drugs and Crime (‘UNODC’), a body with significant expertise and experience in facilitating implementation of states’ international criminal justice commitments. Recognizing the need to apply available resources to combat illicit trade as effectively as possible, FCA recommends that the protocol require criminalization of serious forms of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products in a manner that links to existing commitments, as detailed below in relation to draft Article 14 (Sanctions).</p> <p>In draft Article 12, FCA recommends the following amendments to the proposed list of offences:</p> <ul style="list-style-type: none"> • draft Article 12.1(a) should be limited to engaging in an activity included in Article 5.1 without the appropriate licence. FCA recommends the inclusion of separate offences for failing to affix markings required to be affixed pursuant to Article 7 (Tracking and tracing) and knowingly engaging in a commercial transaction in respect of tobacco products or manufacturing equipment to which a required marking has not been affixed. FCA does not consider the inclusion in the protocol of a requirement to create offences in relation to other ‘fiscal stamps, markings or labels’ – which may cover a wide range of stamps, markings or labels not dealt with in the protocol which might required by | <p>counterfeit fiscal stamps;</p> <p>(d) (b) providing to mis-declaring on an authority or official false or misleading information or documentation forms relating to any activity included in Article 5.1 or otherwise relevant 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 the description, quantity or value of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products;</p> <p>(c) failing to provide to an authority information required to be provided pursuant to Article 5.3(h) or Article 6.3;</p> <p>(d) engaging in a commercial transaction in pursuance of any activity included in Article 5.1 without conducting required due diligence;</p> <p>(e) failing to affix to tobacco products or manufacturing equipment used in the manufacture of tobacco products any marking required to be affixed to the tobacco products or manufacturing equipment pursuant to Article 7;</p> <p>(e) (f) defacing, falsifying, removing, altering or otherwise interfering with any labelling, stamping or marking of or for required to be affixed to tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products pursuant to Article 7;</p> <p>(g) engaging in any commercial transaction in respect of</p> |
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| <p>committed intentionally:</p> <p>(a) 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;</p> <p>(b) failing to maintain records covered by this Protocol or maintaining false records;</p> <p>(c) 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;</p> <p>(d) obtaining, by a person licensed or equivalently approved 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 or equivalently approved in accordance with Article 5;</p> <p>(e) 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; and</p> <p>(f) using Internet-, telecommunication-or any other</p> | <p>individual Parties – to be necessary. FCA recognizes that non-payment of applicable duties, taxes or levies is at the core of illicit trade in tobacco products, but that offences for non-payment of applicable duties, taxes or levies and dealing in products on which applicable duties, taxes or levies have not been paid are an inherent element of Parties’ taxation and related laws and do not need to be separately required in the protocol;</p> <ul style="list-style-type: none"> • draft Articles 12.1(b) and 12.1(c) should be deleted. FCA notes that counterfeit as an intellectual property matter is already dealt with through other international agreements and arrangements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’) and the Paris Convention for the Protection of Industrial Property (‘Paris Convention’). FCA considers that the protocol should be concerned with counterfeit products only to the extent that dealings in relation to such products undermine public health through evasion of taxation laws and other tobacco control laws and regulations – not with the protection of tobacco manufacturers’ intellectual property rights. FCA considers that, to avoid confusion, the falsifying of required markings should be dealt with as a separate offence – as proposed in draft Article 12.1(e) – and not treated as ‘counterfeiting’, which, in its technical sense, refers to infringement of a trademark; • draft Article 12.1(d) should be broadened to include any provision of false or misleading information or documentation relating to any activity included in | <p><i>tobacco products or manufacturing equipment used in the manufacture of tobacco products to which a marking required pursuant to Article 7 has not been affixed, or on which such a marking has been defaced, falsified, removed, altered or otherwise interfered with, by a person who knows or ought to know that a required marking has not been affixed to the tobacco products or manufacturing equipment or that such a marking has been defaced, falsified, removed, altered or otherwise interfered with;</i></p> <p>(f) acquiring, possessing, using, converting or transferring property or engaging in any activity that conceals or attempts to conceal the origin of the said property, knowing that such property is the proceeds of an offence or offences covered by this Protocol;</p> <p>(g) 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 derived from an offence or offences covered by this Protocol;</p> <p>(h) conspiring or attempting to commit an offence established in accordance with this paragraph; and</p> <p>(i) organizing, managing, financing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with this paragraph.</p> <p>2. Each Party shall adopt appropriate legislative and other measures, as may be necessary, to establish the following conduct as unlawful under its domestic law when</p> |
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| <p>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.</p> | <p>Article 5.1 to an authority or official. The content of draft Article 12.2(c), relating to ‘incomplete or false statements’ to an official performing 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, should be included in this broader offence;</p> <ul style="list-style-type: none"> • an additional offence should be included for failing to provide information required to be provided pursuant to proposed Article 5.3(h) (under the requirement to inform the competent authority or authorities of any material change in information provided in a licence application) or proposed Article 6.3 (under the requirement to notify the competent authority or authorities of activities or omissions which could reasonably indicate engagement in or intention to engage in illicit trade); • an additional offence should be included for engaging in a commercial transaction in pursuance of any activity included in Article 5.1 without conducting required due diligence; • draft Article 12.1(e) should be limited to defacing, falsifying, removing, altering or otherwise interfering with the markings required to be affixed pursuant to Article 7. As noted above, FCA does not consider the inclusion in the protocol of a requirement to create offences in relation to other ‘labelling, stamping or marking’ not dealt with in the protocol to be necessary; • as noted above in relation to draft Article 12.1(a), | <p>committed intentionally:</p> <p>(a) (h) obstructing any 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;</p> <p>(b) (i) failing to create or maintain records covered by this Protocol or maintaining false or misleading records;</p> <p>(j) failing to make records covered by this Protocol available to an authority when required to do so;</p> <p>(e) 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;</p> <p>(d) (k) obtaining engaging, by a person licensed or equivalently approved in accordance with Article 5, in any commercial transaction in pursuance of the licensed activities tobacco, tobacco products, or manufacturing equipment used in the manufacture of tobacco products from with a person who should be, but is not, licensed or equivalently approved in accordance with Article 5;</p> <p>(l) failing, by a person engaged in any activity included in Article 5.1 or Article 5.2, to take all reasonably practicable measures to prevent the diversion of tobacco,</p> |
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| | <p>separate offences should be included for failing to affix markings required to be affixed pursuant to Article 7 and knowingly engaging in a commercial transaction in respect of tobacco products or manufacturing equipment to which a required marking has not been affixed, or on which such a marking has been defaced, falsified, removed, altered or otherwise interfered with;</p> <ul style="list-style-type: none"> • draft Articles 12.1(f) and 12.1(g) should be deleted. FCA fully supports the application of money laundering offences to the widest possible range of offences relating to illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products. However, FCA recognizes that money laundering offences are usually criminal offences applicable only to dealings with the proceeds of certain other criminal offences, and that it will not be possible for all Parties to the protocol to apply money laundering offences to all ‘offences covered by this Protocol’. As detailed below in relation to draft Article 14 (Sanctions), FCA recommends that Parties to the protocol be required to establish the most serious forms of illicit trade as ‘serious crime’. Parties to the protocol that are Parties to UNTOC will be required under Article 6 of that Convention to apply their money laundering offences to the widest range of predicate offences, including all serious crime; • draft Articles 12.1(h) and 12.1(i), which provide for conspiracy offences and accessory liability – usually criminal law concepts that differ in their application according to the legal systems of different states – | <p><i>tobacco products or manufacturing equipment used in the manufacture of tobacco products into illicit trade channels;</i></p> <p>(e) (m) intermingling packaging or handling tobacco products in such a way as to conceal them from an authority or disguise them as with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transportation, import and export;</p> <p><i>(n) making or receiving, in any transaction engaged in in pursuance of an activity included in Article 5.1, a payment in a prohibited form;</i></p> <p><i>(o) supplying, by a person engaged in any activity included in Article 5.1, tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products in amounts that exceed reasonably anticipated consumption or use in the intended market of use or retail sale;</i></p> <p>(f) (p) selling using Internet, telecommunication or any other evolving technology based modes of sale of tobacco, or tobacco products to a consumer through any remote means or manufacturing equipment used in the manufacture of tobacco products, in contravention of the provisions of this Protocol.;</p> <p><i>(q) providing any service that facilitates payment for a retail sale of tobacco or tobacco products through any remote means, by any natural or legal person who knows or ought reasonably to know that they are facilitating</i></p> |
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| | <p>should be replaced with a broader offence of engaging in a practice or conduct intended to facilitate the commission of any of the other offences. FCA notes that ‘illicit trade’ according to Article 1 of the Convention and draft Article 1 of the protocol includes ‘any practice or conduct intended to facilitate’ a relevant practice or conduct;</p> <ul style="list-style-type: none"> • draft Article 12.2(b) should apply to failing to create or maintain records covered by the protocol – including records required under Article 7 (Tracking and tracing) and records required under Article 8 (Record-keeping) – and to maintaining false or misleading records; • an additional offence should be included for failing to make records covered by the protocol available to an authority when required to do so; • draft Article 12.2(d) should be broadened to apply to any commercial transaction in pursuance of the covered activities with an unlicensed person, not only to obtaining tobacco, tobacco products or manufacturing equipment from an unlicensed person; • an additional offence should be included for failing to take all reasonably practicable measures to prevent diversion of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products into illicit trade channels, as required pursuant to Article 9 (Security and preventive measures); • draft Article 12.2(e) should be limited to packaging or handling tobacco products in such a way as to conceal them from an authority or disguise them as | <p><i>payment for such a sale;</i></p> <p><i>(r) transporting or delivering tobacco or tobacco products the subject of retail sale through any remote means, by any natural or legal person who knows or ought reasonably to know that they are transporting or delivering tobacco or tobacco products the subject of such a sale;</i></p> <p><i>(s) introducing tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products into a free-trade zone, except by a natural person for personal use, or for the purpose of sale to persons ordinarily present in the zone, provided that any ordinarily applicable duties, taxes or other charges are applied to such sales;</i></p> <p><i>(t) selling tax-reduced, tax-free, duty-reduced or duty-free tobacco products to an international traveller; and</i></p> <p><i>(u) engaging in any practice or conduct intended to facilitate the commission of any of the above offences.</i></p> |
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| | <p>non-tobacco products. As noted above in relation to draft Article 9, FCA supports measures to prevent intentional intermingling of tobacco products with non-tobacco products when such intermingling is undertaken for the purpose of, or creates a risk of, diversion into illicit trade channels. However, FCA is concerned that the draft offence of ‘intermingling’ may be unintentionally over-broad. It may be read as requiring that tobacco products be kept completely separate from all other products at all stages of the tobacco product supply chain – meaning, for example, separate means of transport and separate areas for loading and unloading – which is unlikely to be practicable;</p> <ul style="list-style-type: none">• an additional offence should be included, to support the restrictions on methods of payment proposed to be included in Article 9, for making or receiving a payment in a prohibited form;• an additional offence should be included, to support the requirement proposed to be included in Article 9, for supplying tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products in amounts that exceed reasonably anticipated consumption or use in the intended market of use or retail sale;• draft Article 12.2(f) should be amended to cover: any retail sale of tobacco or tobacco products through remote means; provision of any service that facilitates payment for such a sale by any natural or legal person who knows or ought reasonably to know that they are facilitating payment for such a sale; and transport or delivery of tobacco or tobacco products | |
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| | <p>the subject of such a sale by any natural or legal person who knows or ought reasonably to know that they are transporting or delivering tobacco or tobacco products the subject of such a sale;</p> <ul style="list-style-type: none">• additional offences should be included to support the prohibitions under proposed Articles 11 and 12: for introducing tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products into a free-trade zone, except by a natural person for personal use, or for the purpose of sale to persons ordinarily present in the zone, provided that any ordinarily applicable duties, taxes or other charges are applied to such sales; and for selling any tax-reduced, tax-free, duty-reduced or duty-free tobacco products to an international traveller. | |
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| <p>Article 13 <i>Liability of legal persons</i></p> <p>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 offences established in accordance with Article 12.</p> <p>2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative.</p> <p>3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.</p> | <p>FCA supports draft Article 13, which will ensure that each Party, consistent with its legal principles, may hold legal persons liable for offences established in accordance with draft Article 12. FCA recommends that draft Article 13.1 be broadened to cover all illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products – ie all practices or forms of conduct prohibited by law and relating to production, shipment, receipt, possession, distribution, sale or purchase of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products – including, but not limited to, offences established pursuant to the protocol. FCA also recommends that the word ‘criminal’ be deleted from draft Article 13.3, as the principle that liability of legal persons should be without prejudice to the liability of natural persons should not be limited to criminal liability.</p> | <p>Article 14 13 <i>Liability of legal persons</i></p> <p>1. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for <i>illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products</i>, including the offences established in accordance with Article 13 12.</p> <p>2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative.</p> <p>3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.</p> |
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| <p>Article 14 <i>Sanctions</i></p> <p>1. Parties shall ensure that offences punishable by a maximum deprivation of liberty of at least four years or a more serious penalty are considered as serious crime.</p> <p>2. Each Party shall make the commission of an offence established in accordance with this Protocol liable to criminal or non-criminal sanctions that take into account the gravity of that offence. Each Party shall, in particular, ensure that legal and natural persons held liable for offences established in accordance with Article 12 are subject to effective, proportionate and dissuasive sanctions,</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to make the commission of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products liable to effective sanctions. To clarify and strengthen draft Article 14, FCA recommends the following:</p> <ul style="list-style-type: none"> draft Article 14.1 should be redrafted as a requirement to ensure that the most serious forms of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products are established as criminal offences punishable by maximum deprivation of liberty of at least four years or a more serious penalty. As currently drafted, this provision has no significance – | <p>Article 15 14 <i>Sanctions</i></p> <p>1. Each Partyies shall, <i>within three years of the entry into force of this Protocol for that Party</i>, ensure that the most serious forms of <i>illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products</i> offences punishable by a maximum deprivation of liberty of at least four years or a more serious penalty are established considered as serious crime.</p> <p>2. Each Party shall provide copies of its laws that give effect to paragraph 1 of this Article to the Convention Secretariat, and shall promptly notify the Convention</p> |

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| <p>including monetary sanctions.</p> <p>3. Each Party shall ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences relevant to this Protocol 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.</p> <p>4. Each Party shall, where appropriate and in accordance with domestic law, establish under its domestic law a lengthy statute of limitations period in which to commence proceedings for any offence covered by this Protocol and a lengthier period when the alleged offender has evaded the administration of justice.</p> <p>5. Nothing contained in this Protocol shall affect the principle that the description of the 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 in accordance with that law.</p> | <p>it requires Parties to ‘ensure that offences punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’ are ‘considered as’ conduct constituting an offence punishable by maximum deprivation of liberty of at least four years or a more serious penalty – ie serious crime shall be considered as serious crime. FCA considers that it is critical that all Parties criminalize the most serious forms of illicit trade and subject them to penalties that will bring into operation the criminal justice provisions of UNTOC (including provisions relating to laundering of the proceeds of crime, confiscation and seizure, international cooperation for purposes of confiscation, jurisdiction, extradition, mutual legal assistance, joint investigations, special investigative techniques, transfer of proceedings, and obstruction of justice) pursuant to Article 3 of that Convention;</p> <ul style="list-style-type: none"> • an additional subprovision should be included requiring Parties to provide copies of their laws establishing serious forms of illicit trade as serious crime, and information regarding any subsequent changes to such laws, to the Convention Secretariat. This information should be provided to the Meeting of the Parties and made publicly available. FCA notes that there may be differences in the most serious forms of illicit trade between Parties – including, for example, varying thresholds of applicable taxes or duties evaded or sought to be evaded through the offence or volumes of tobacco, tobacco products, or manufacturing equipment involved in the offence, or the presence of different aggravating factors such as violence or threats of violence or repetition of the conduct or practice. FCA | <p><i>Secretariat of any subsequent changes to such laws. The Convention Secretariat shall provide a report on information received in accordance with this paragraph to each regular session of the Meeting of the Parties, and shall make this information accessible to the public.</i></p> <p>2- 3. Each Party shall make the commission of <i>illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products</i>, including any offence established in accordance with this Protocol, liable to criminal or non-criminal sanctions that take into account the gravity of that offence. Each Party shall, in particular, ensure that legal and natural persons held liable for offences established in accordance with Article 13 42 are subject to effective, proportionate and dissuasive sanctions, including, <i>licence suspension or cancellation</i>, monetary sanctions <i>and imprisonment</i>.</p> <p>3- 4. Each Party shall ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences relevant to this Protocol 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.</p> <p>4- 5. Each Party shall, where appropriate and in accordance with domestic law, establish under its domestic law a lengthy statute of limitations period in which to commence proceedings for any offence covered by this Protocol and a lengthier period when the alleged offender has evaded the administration of justice.</p> <p>5- 6. Nothing contained in this Protocol shall affect the</p> |
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| | <p>considers that it is critical that detailed information about relevant serious crimes be made available in a timely matter to facilitate international cooperation in respect of these offences; and</p> <ul style="list-style-type: none"> • draft Article 14.2 should be broadened to cover all illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, including, but not limited to, offences established pursuant to the protocol, and should specifically include licence suspension or cancellation and imprisonment as applicable sanctions. | <p>principle that the description of the 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 in accordance with that law.</p> |
| <p style="text-align: center;">Article 15 <i>Search of premises and seizure of evidence</i></p> <p>Each Party shall adopt such legislative, executive, administrative and other measures as may be necessary to authorize competent authorities to search a building, receptacle, means of transport or place for evidence, including tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, with respect to a commission of an offence under Article 12.1 of this Protocol, and to seize such evidence when found, in accordance with its national law.</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to adopt measures to authorize search and seizure of evidence relating to illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products. FCA considers that search and seizure should be broadly available to competent authorities, but recognizes that not all Parties authorize search and seizure in respect of non-criminal offences. FCA therefore recommends that draft Article 15 be amended to provide for the adoption of the necessary measures, as appropriate, in respect of all illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, including offences under draft Article 12 of the protocol.</p> | <p style="text-align: center;">Article 16 15 <i>Search of premises and seizure of evidence</i></p> <p>Each Party shall, <i>as appropriate</i>, adopt such legislative, executive, administrative and other measures as may be necessary to authorize competent authorities to search a building, receptacle, means of transport or place for evidence, including tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, with respect to a commission of <i>illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products</i>, including an offence under Article 12.1 <i>13</i> of this Protocol, and to seize such evidence when found, in accordance with its national law.</p> |

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| <p style="text-align: center;"><i>Article 16</i> <i>Confiscation and seizure of assets</i></p> <p>1. Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:</p> <p>(a) proceeds of crime derived from offences covered by Article 12.1 of this Protocol or property the value of which corresponds to that of such proceeds;</p> <p>(b) property, equipment or other instrumentalities used in or destined for use in offences covered by Article 12.1 of this Protocol.</p> <p>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.</p> <p>3. If proceeds of crime 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.</p> <p>4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.</p> | <p>FCA supports the adoption of measures to enable confiscation of proceeds of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, and of property, equipment or other instrumentalities used in or destined for use in illicit trade. However, FCA recognizes that powers of confiscation are generally applicable only in relation to criminal offences. In accordance with the recommendation above to provide for a single list of offences in draft Article 12, which may be criminal, civil or administrative, FCA therefore recommends the deletion of draft Article 16. FCA notes that, in respect of serious forms of illicit trade established as criminal offences within the scope of UNTOC, Parties to that Convention will be subject to the requirements set out in draft Article 16 – with the exception of draft Article 16.10, the content of which is also included in draft Article 18 (Destruction) – under Article 12 of that Convention.</p> | <p style="text-align: center;"><i>Article 16</i> <i>Confiscation and seizure of assets</i></p> <p>1. Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:</p> <p>(a) proceeds of crime derived from offences covered by Article 12.1 of this Protocol or property the value of which corresponds to that of such proceeds;</p> <p>(b) property, equipment or other instrumentalities used in or destined for use in offences covered by Article 12.1 of this Protocol.</p> <p>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.</p> <p>3. If proceeds of crime 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.</p> <p>4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.</p> |
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5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this Article, in the same manner and to the same extent as proceeds of crime.

6. For the purposes of this Article, 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 a person under investigation 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

~~5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this Article, in the same manner and to the same extent as proceeds of crime.~~

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~~10. Without prejudice to the provisions of this Article and the provisions of Article 18, Parties may allow retention of~~

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| <p>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.</p> | | <p>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.</p> |
| <p style="text-align: center;"><i>Article 17</i> <i>Seizure payments</i></p> <p>For the purpose of eliminating illicit trade in tobacco products, the Parties may 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.</p> | <p>FCA supports the inclusion in the protocol of a provision encouraging Parties to allow for recovery, when tobacco or tobacco products are seized by authorities, of taxes and duties evaded or sought to be evaded on the tobacco or tobacco products from their producer, manufacturer, importer or exporter. This measure recognizes that producers, manufacturers, importers and exporters have significant capacity to control the supply chain, and should be held accountable for failing to exercise this control responsibly. To strengthen and clarify draft Article 17, FCA recommends that:</p> <ul style="list-style-type: none"> • in accordance with the definitions proposed in draft Article 1, the provision should apply in respect of seizure or confiscation of tobacco or tobacco products; • the provision should apply in respect of all tobacco products, not only ‘genuine’ tobacco products. FCA understands the word ‘genuine’ to be intended to distinguish between products manufactured by the manufacturer identified on the product and counterfeit product not in fact manufactured by the manufacturer identified on the product. FCA considers that it is unnecessary to make this distinction here, as the draft provision only refers to the levying of payments on the ‘manufacturer’ – if | <p style="text-align: center;"><i>Article 17</i> <i>Seizure payments</i></p> <p>For the purpose of eliminating illicit trade in tobacco products, the Parties may consider adopting such legislative and other measures as may be necessary to authorize competent authorities, <i>upon seizure or confiscation of tobacco or tobacco products</i>, to levy an amount equivalent to lost taxes and duties from <i>on the producer, manufacturer, importer or exporter of seized the tobacco, or genuine tobacco products an amount equivalent to the taxes and duties evaded or sought to be evaded</i> or equipment used in the production of tobacco products.</p> |

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| | <p>seized products were counterfeit and not manufactured by the manufacturer identified on the product, the provision would not apply with respect to that manufacturer;</p> <ul style="list-style-type: none"> • the provision should not apply in respect of manufacturing equipment used in the manufacture of tobacco products, which is not subject to taxes and duties in the same way as tobacco or tobacco products; and • the amount to be levied should be described as an amount equivalent to ‘the taxes or duties evaded or sought to be evaded’, not limited to an amount equivalent to ‘lost’ taxes and duties. | |
| <p style="text-align: center;"><i>Article 18 Destruction</i></p> <p>1. All confiscated manufacturing equipment, tobacco, counterfeit and contraband cigarettes and other tobacco products shall be destroyed. Such destruction shall be by using environmentally friendly methods upon completion of any legal process in relation to the tobacco products in question.</p> <p>2. Confiscated material other than tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products may be retained for the purposes of training and other law enforcement purposes.</p> <p>3. Parties shall take necessary measures for the early destruction of seized tobacco and tobacco products and for the admissibility as evidence of duly certified samples of</p> | <p>FCA supports the inclusion in the protocol of a provision requiring destruction of confiscated tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, while allowing for the retention of small quantities of tobacco or tobacco products for use as evidence. FCA recommends the following amendments to clarify draft Article 18:</p> <ul style="list-style-type: none"> • in draft Article 18.1, the words ‘confiscated manufacturing equipment, tobacco, counterfeit and contraband cigarettes and other tobacco products’ – which mirror the wording of Article 15.4(c) of the Convention – should, for consistency with the wording used throughout the draft protocol, be replaced with the words ‘confiscated tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products’. ‘Tobacco’ and ‘equipment’ should also be included within the reference to ‘completion of any legal process’; and | <p style="text-align: center;"><i>Article 18 Destruction</i></p> <p>1. All confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products, <i>and manufacturing equipment used in the manufacture of tobacco products</i> shall be destroyed. Such destruction shall be by using environmentally friendly methods upon completion of any legal process in relation to the <i>tobacco, tobacco products or equipment</i> in question.</p> <p>2. Confiscated material other than tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products may be retained for the purposes of training and other law enforcement purposes.</p> <p>3. Parties shall take necessary measures for the early destruction of seized <i>confiscated</i> tobacco and tobacco</p> |

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| <p>small quantities of such substances.</p> | <ul style="list-style-type: none"> in accordance with the definitions proposed in draft Article 1, the requirement under draft Article 18.3 to take necessary measures for ‘early destruction’ should apply to ‘confiscated’ tobacco or tobacco products (those taken by a competent authority permanently), rather than ‘seized’ tobacco or tobacco products (those taken only temporarily). The requirement to take necessary measures for admissibility as evidence should apply to both seized tobacco or tobacco products and confiscated tobacco or tobacco products. | <p>products and for the admissibility as evidence of duly certified samples of small quantities of such substances <i>seized or confiscated tobacco or tobacco products.</i></p> |
| <p style="text-align: center;">Article 19 <i>Special investigative techniques</i></p> <p>1. Each Party shall, subject to the fundamental principles of its legal system, take the necessary measures to allow for the appropriate use of controlled delivery at national and international levels and for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities on its territory for the purpose of effectively combating illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products.</p> <p>2. For the purpose of investigating the offences covered by this Protocol, Parties are encouraged to conclude 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.</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties, subject to the fundamental principles of their legal systems, to allow for the appropriate use of controlled delivery and other special investigative techniques for the purpose of effectively combating illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products. FCA considers that the proposed encouragement to conclude appropriate bilateral or multilateral agreements or arrangements for using these techniques should apply broadly in respect of all illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products.</p> | <p style="text-align: center;">Article 19 <i>Special investigative techniques</i></p> <p>1. Each Party shall, subject to the fundamental principles of its legal system, take the necessary measures to allow for the appropriate use of controlled delivery at national and international levels and for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities on its territory for the purpose of effectively combating illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products.</p> <p>2. For the purpose of investigating <i>illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products</i> the offences covered by this Protocol, Parties are encouraged to conclude 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</p> |

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| <p>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.</p> <p>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.</p> | | <p>the international level.</p> <p>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.</p> <p>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.</p> |
| <p>PART V: INTERNATIONAL COOPERATION</p> <p><i>Article 20</i> <i>Information sharing: statistical data</i></p> <p>1. The Parties shall, for the purpose of achieving the objectives of this Protocol, exchange relevant information on matters such as:</p> <p>(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, entities involved, date and place of manufacture; modi operandi including means of transport, concealment, routing and detection; counterfeit and genuine brands; and taxes evaded;</p> | <p>FCA supports the inclusion in the protocol of comprehensive provisions on information sharing. FCA considers that the Revised Chairperson’s text contains a number of proposals for information sharing that will greatly assist Parties in combating illicit trade. However, the provisions will need to be streamlined and clarified in order to ensure that they operate effectively. As currently drafted, the provisions propose a number of different processes for information sharing, with, in some cases, the same or similar kinds of information dealt with through different processes or through more than one process.</p> <p>There are six draft Articles in Part V of the Revised Chairperson’s text that contain provisions dealing with information sharing:</p> <ul style="list-style-type: none"> • Article 20 (Information sharing: statistical data); | |

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| <p>(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;</p> <p>(c) data on the agricultural production of tobacco;</p> <p>(d) trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and</p> <p>(e) any other relevant information, as agreed by the Parties.</p> <p>2. The information referred to in paragraph 1(b–e) of this Article shall be placed in a secure, central, automated database, managed by X and exploiting existing systems. The information referred to in paragraph 1(a) of this Article shall be included in the database if it is non-identifiable personal information.</p> <p>3. The communication of information by a Party to the central automated database shall be subject to that Party’s legal and administrative provisions.</p> <p>4. Parties shall cooperate with each other and with competent international organizations to build the capacity of Parties to collect and exchange information.</p> <p>5. The Parties shall deem the said information to be confidential and for restricted use, unless otherwise stated</p> | <ul style="list-style-type: none"> • Article 21 (Information sharing: operational data); • Article 22 (Information sharing: confidentiality and protection of information); • Article 24 (Assistance and cooperation: investigation and prosecution of offences); • Article 28 (Law enforcement cooperation); and • Article 29 (Mutual administrative assistance) <p>These provisions are in addition to exchange of information covered by draft Article 6 (Customer identification and verification), draft Article 7 (Tracking and tracing) and draft Article 8 (Record-keeping).</p> <p>In addition to information exchange through the proposed tracking and tracing ‘clearing-house database’, information is proposed to be shared by two principal means: communication to a ‘secure, central, automated database’ (Art 20); and exchange directly between Parties, either on their own initiative or on request (Arts 8, 21, 28, and 29). For each of the Articles proposing direct exchange between Parties, either processes for exchange are not specified, or different processes are proposed, with different requirements, qualifications and protections:</p> <ul style="list-style-type: none"> • under Article 8.6, no specific procedure is proposed, rather: ‘Each Party shall, as appropriate and subject to national laws, establish a system for sharing all records kept in accordance with this Article with other Parties’; • under Article 21, it is proposed that Parties shall exchange certain information ‘on their own | |
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by the transmitting Party.

Article 21

Information sharing: operational data

The Parties shall 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, subject to national law:

- (a) records of licensing for the legal and natural persons concerned;
- (b) information for identification, monitoring and prosecution of legal or natural persons involved in illicit trade in tobacco, tobacco products or equipment used in the manufacture of tobacco products;
- (c) records of investigations and prosecutions; and
- (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.

Article 22

Information sharing: confidentiality and protection of information

initiative or on the request of a Party that provides due justification that such information is necessary for the purposes of detection or investigation of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products ... subject to national law’;

- under Article 28.1(g), it is proposed that: ‘Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to exchange relevant information with other Parties’;
- under Article 28.1(h), it is proposed that: ‘Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to exchange relevant information’; and
- under Article 29, it is proposed that: ‘Parties shall provide each other, either on request or on their own initiative’, with certain 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’.

The information proposed to be shared under Part V is listed below. It has been ordered so as to group similar types of information, which are dealt with in different Articles, together:

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1. Each Party shall designate the domestic authority to which operational and statistical data 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 national law regarding confidentiality and privacy. The Parties shall protect, as mutually agreed, any confidential information that is exchanged.

- ‘details of seizures of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, including case reference information where appropriate, quantity, value of seizure, product description, entities involved, date and place of manufacture; modi operandi including means of transport, concealment, routing and detection; counterfeit and genuine brands; and taxes evaded’ (Art 20.1(a)) (provided this information is ‘non-identifiable personal information’ (Art 20.2));
- ‘trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products’ (Art 20.1(d));
- relevant information on ‘specific means and methods used by natural or legal persons in committing criminal offences covered by the protocol, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities’ (Art 28.1(f));
- ‘new trends, means or methods of committing offences, listed in Article 12’ (Art 29(b));
- ‘information for identification, monitoring and prosecution of legal or natural persons involved in illicit trade in tobacco, tobacco products or equipment used in the manufacture of tobacco products’ (Art 21(b));
- relevant information ‘for the purpose of early identification of the offences’ covered by the Protocol (Art 28.1(g));

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| | <ul style="list-style-type: none">• ‘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’ (Art 29(d));• ‘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’ (Art 29(c));• ‘records of licensing for the legal and natural persons concerned’ (Art 21(a));• ‘records of investigations and prosecutions’ (Art 21(c));• ‘records of payment for import, export or duty-free sales of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products’ (Art 21(d));• ‘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’ (Art 20.1(b));• ‘data on the agricultural production of tobacco’ (Art 20.1(c));• ‘new customs and other enforcement techniques of demonstrated effectiveness’ (Art 29(a));• ‘any other relevant information, as agreed by the Parties’ (Art 20.1(e));• ‘any other data that would assist designated agencies in risk assessment for supply chain control and other enforcement purposes’ (Art 29(e)). | |
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| | <p>This information is in addition to that proposed to be shared under Part III, including under draft Article 6 (which proposes information sharing with respect to persons ‘blocked’ from engaging in relevant commercial transactions), draft Article 7 (which proposes sharing of ‘tracking and tracing’ information through a ‘clearinghouse database’), and draft Article 8 (under which ‘all records kept in accordance with this Article’ are proposed to be shared between Parties).</p> <p>There are two draft provisions dealing with the designation of a central authority for information sharing: Article 22.1, which proposes that each Party ‘shall designate the domestic authority to which operational and statistical data are supplied’; and Article 24.2, which proposes that each Party ‘shall consider the establishment of a designated authority to serve as a national centre for the collection, analysis, and dissemination of information’.</p> <p>There are two draft provisions dealing with communication between relevant agencies and authorities: Article 24.2, which provides that Parties shall ensure that relevant ‘administrative, regulatory, law enforcement and other authorities ... can cooperate and exchange relevant information at national and international levels’; and Article 28.1(a), which provides that Parties shall adopt effective measures to ‘enhance and, where necessary, establish channels of communication between the competent authorities and agencies in order to facilitate the secure and rapid exchange of information’.</p> | |
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| | <p>There are three draft provisions providing for confidentiality and protection of information exchanged under the protocol (Arts 20.5, 22.2, and 29). One of these, Article 22.2, is expressed to apply to all forms of information exchange under the protocol, in relation to which ‘Parties shall protect, as mutually agreed, any confidential information that is exchanged’.</p> <p>There are five draft provisions that propose that obligations be consistent with Parties’ domestic laws or arrangements: Article 20.3 (‘subject to that Party’s legal and administrative provisions’); Article 21 (‘subject to national law’); Article 22.2 (which proposes that all forms of information exchange under the protocol ‘shall be subject to national law regarding confidentiality and privacy’); and Articles 28.1(f) and (g) (‘consistent with their respective domestic legal and administrative systems’).</p> <p>FCA considers that streamlining of the various draft provisions on information sharing is required to ensure the inclusion in the protocol of clear, effective provisions. FCA recommends the establishment of a working group to undertake this work at INB-3. The working group should consider and present recommendations on:</p> <ul style="list-style-type: none">• the ‘secure, central, automated database’ proposed in Article 20, including:<ul style="list-style-type: none">- which ‘existing systems’ it will ‘exploit’;- who will manage the proposed database;- how and by whom information will be placed on the proposed database; | |
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| | <ul style="list-style-type: none"> - how and to whom information on the proposed database will be accessible; • what information should be placed on the proposed database; • what information should be exchanged between Parties directly; and • what arrangements will be required to facilitate information sharing between Parties directly, including designation of particular authorities or agencies and establishment or enhancement of channels of communication. <p>Once the operation of the proposed database has been clarified, it will be possible to clearly identify which information should be shared through the database and which information should be shared between Parties directly. The proposed working group should be mandated to ensure that all information dealt with under the draft protocol, including under Parts III and IV, is covered by the information sharing provisions in Part V.</p> | |
| <p style="text-align: center;">Article 23 <i>Assistance and cooperation: training, technical assistance and cooperation in scientific, technical and technological matters</i></p> <p>1. The Parties shall cooperate, with each other and/or through competent international organizations in providing training, technical assistance and cooperation in scientific, technical and technological matters, in order to achieve the objectives of this Protocol. Such assistance may include the transfer of expertise or appropriate technology in the areas</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to cooperate in providing training, technical assistance and cooperation in scientific, technical and technological matters in order to achieve the objectives of the protocol. FCA recommends minor amendments to strengthen and clarify draft Article 23.3, including broadening its application to cover all information about the origin of tobacco and tobacco products – not just the ‘exact geographical origin’ – and to include manufacturing equipment used in the manufacture of tobacco products.</p> | <p style="text-align: center;">Article 23 <i>Assistance and cooperation: training, technical assistance and cooperation in scientific, technical and technological matters</i></p> <p>1. The Parties shall cooperate, with each other and/or through competent international organizations in providing training, technical assistance and cooperation in scientific, technical and technological matters, in order to achieve the objectives of this Protocol. Such assistance may include the transfer of expertise or appropriate technology in the areas</p> |

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of intelligence collection, law enforcement, tracking and tracing, information management, protection of personal data, interdiction, electronic surveillance, forensic analysis, mutual legal assistance and extradition.

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

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

of intelligence collection, law enforcement, tracking and tracing, information management, protection of personal data, interdiction, electronic surveillance, forensic analysis, mutual legal assistance and extradition.

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

3. Parties shall cooperate to ~~develop and~~ research *and develop the possibilities methods* of identifying the ~~exact geographical~~ origin of seized *or confiscated* tobacco, ~~and~~ tobacco products *and manufacturing equipment used in the manufacture of tobacco products.*

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| <p style="text-align: center;">Article 24 <i>Assistance and cooperation: investigation and prosecution of offences</i></p> <p>1. The Parties agree to 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.</p> <p>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) can cooperate and exchange relevant information at national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a designated authority to serve as a national centre for the collection, analysis and dissemination of information among the other authorities and with other Parties.</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to strengthen cooperation by multilateral, regional or bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of persons engaged in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products. FCA considers that ‘prevention’ and ‘detection’ should be included in the title of draft Article 24, in addition to ‘investigation and prosecution’, and that the provision should not be limited to offences under the protocol. FCA recommends that the word ‘can’ be deleted from draft Article 24.2, which should require Parties to ensure that authorities dedicated to combating illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products <i>do</i> cooperate at national and international levels, within the conditions prescribed by its domestic law, not merely to ensure that they ‘can’ cooperate</p> <p>As noted above in relation to draft Articles 20, 21 and 22, FCA supports the inclusion in the protocol of comprehensive provisions on information sharing, and considers that a working group should be established at INB-3 to consider and present recommendations on proposed information sharing provisions, including parts of draft Article 24.2. FCA recommends that these parts of the draft Article be deleted and included within amended information sharing provisions.</p> | <p style="text-align: center;">Article 24 <i>Assistance and cooperation: prevention, detection, investigation and prosecution of offences</i></p> <p>1. The Parties agree to 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.</p> <p>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) can cooperate and exchange relevant information at national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a designated authority to serve as a national centre for the collection, analysis and dissemination of information among the other authorities and with other Parties.</p> |
| <p style="text-align: center;">Article 25 <i>Protection of sovereignty</i></p> | <p>FCA does not consider the inclusion in the protocol of a provision on protection of sovereignty – which would ordinarily be included in a treaty with provisions</p> | <p style="text-align: center;">Article 25 <i>Protection of sovereignty</i></p> |

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| <p>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.</p> <p>2. Nothing in this Protocol entitles a Party to undertake on 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.</p> | <p>requiring criminalization – to be necessary if the recommendation above to provide for a single list of offences in draft Article 12, which may be criminal, civil or administrative, is accepted. FCA therefore recommends the deletion of draft Article 25. FCA notes that, in respect of serious forms of illicit trade established as criminal offences within the scope of UNTOC, Parties to that Convention will be subject to an equivalent provision under Article 4 of that Convention.</p> | <p>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.</p> <p>2. Nothing in this Protocol entitles a Party to undertake on 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.</p> |
| <p style="text-align: center;"><i>Article 26</i> <i>Jurisdiction</i></p> <p>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:</p> <p style="padding-left: 20px;">(a) the offence is committed on the territory of that Party or</p> <p style="padding-left: 20px;">(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.</p> <p>2. Subject to Article 25, a Party may also establish its jurisdiction over any such criminal offence when:</p> <p style="padding-left: 20px;">(a) the offence is committed against that Party;</p> <p style="padding-left: 20px;">(b) the offence is committed by a national of that Party or a stateless person who has his or her habitual residence on its territory; or</p> | <p>In accordance with the recommendation above to provide for a single list of offences in draft Article 12, which may be criminal, civil or administrative, FCA does not consider the inclusion of a provision addressing the scope of Parties’ criminal jurisdiction to be necessary. FCA therefore recommends the deletion of draft Article 26. FCA notes that, in respect of serious forms of illicit trade established as criminal offences within the scope of UNTOC, Parties to that Convention will be subject to the equivalent provision under Article 15 of that Convention.</p> | <p style="text-align: center;"><i>Article 26</i> <i>Jurisdiction</i></p> <p>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:</p> <p style="padding-left: 20px;">(a) the offence is committed on the territory of that Party or</p> <p style="padding-left: 20px;">(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.</p> <p>2. Subject to Article 25, a Party may also establish its jurisdiction over any such criminal offence when:</p> <p style="padding-left: 20px;">(a) the offence is committed against that Party;</p> <p style="padding-left: 20px;">(b) the offence is committed by a national of that Party or a stateless person who has his or her habitual residence on its territory; or</p> |

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| <p>(c) the offence is:</p> <p>(i) one of those established in accordance with Article 12.1 and is committed outside its territory with a view to the commission of a crime within its territory;</p> <p>(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.</p> <p>3. For the purposes of Articles 31 and 33, each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences covered by this Protocol when the alleged offender is present on its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.</p> <p>4. Each Party may also adopt such measures as may be necessary to establish its jurisdiction over the criminal offences covered by this Protocol when the alleged offender is present on its territory and it does not extradite him or her.</p> <p>5. If a Party exercising its jurisdiction under paragraph 1 or 2 of this Article has been notified, or has otherwise learnt, that one or more other Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions.</p> | | <p>(c) the offence is:</p> <p>(i) one of those established in accordance with Article 12.1 and is committed outside its territory with a view to the commission of a crime within its territory;</p> <p>(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.</p> <p>3. For the purposes of Articles 31 and 33, each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences covered by this Protocol when the alleged offender is present on its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.</p> <p>4. Each Party may also adopt such measures as may be necessary to establish its jurisdiction over the criminal offences covered by this Protocol when the alleged offender is present on its territory and it does not extradite him or her.</p> <p>5. If a Party exercising its jurisdiction under paragraph 1 or 2 of this Article has been notified, or has otherwise learnt, that one or more other Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions.</p> |
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| <p>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.</p> | | <p>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.</p> |
| <p style="text-align: center;">Article 27 <i>Joint investigations</i></p> <p>Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The Parties involved shall ensure that the sovereignty of the Party on the territory of which such investigation is to take place is fully respected.</p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to consider concluding bilateral or multilateral agreements or arrangements for the establishment of joint investigative bodies in relation to matters subject to investigations, prosecutions or judicial proceedings. FCA considers that draft Article 27 should apply to all matters relating to illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products.</p> | <p style="text-align: center;">Article 25 27 <i>Joint investigations</i></p> <p>Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters <i>relating to illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products</i> that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The Parties involved shall ensure that the sovereignty of the Party on the territory of which such investigation is to take place is fully respected.</p> |
| <p style="text-align: center;">Article 28 <i>Law enforcement cooperation</i></p> <p>1. Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to:</p> <p>(a) enhance and, where necessary, establish channels of communication between the competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of</p> | <p>FCA supports the inclusion in the protocol of provisions requiring Parties to ensure effective law enforcement cooperation. FCA considers that effective law enforcement cooperation should apply to all forms of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, not only to the offences included in draft Article 12 of the protocol, and not only to criminal offences.</p> <p>As noted above in relation to draft Articles 20, 21 and</p> | <p style="text-align: center;">Article 26 28 <i>Law enforcement cooperation</i></p> <p>1. Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to:</p> <p>(a) enhance and, where necessary, establish channels of communication between the competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of</p> |

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| <p>the criminal offences covered by this Protocol;</p> <p>(b) ensure effective cooperation among the competent authorities, agencies, customs, police and other law enforcement agencies;</p> <p>(c) cooperate with other Parties in conducting enquiries in specific cases with respect to criminal offences covered by this Protocol concerning:</p> <p>(i) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;</p> <p>(ii) the movement of proceeds of crime or property derived from the commission of such offences; and</p> <p>(iii) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;</p> <p>(d) provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;</p> <p>(e) facilitate effective coordination among its competent authorities, agencies and services and promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the Parties concerned, the posting of liaison officers;</p> <p>(f) exchange relevant information with other Parties on specific means and methods used by natural or legal</p> | <p>22, FCA supports the inclusion in the protocol of comprehensive provisions on information sharing, and considers that a working group should be established at INB-3 to consider and present recommendations on proposed information sharing provisions, including draft Articles 28.1(a), 28.1(f), and parts of draft Article 28.1(g). FCA recommends that these parts of draft Article 28 be deleted and included within amended information sharing provisions.</p> | <p>the criminal offences covered by this Protocol;</p> <p>(b) (a) ensure effective cooperation among the competent authorities, agencies, customs, police and other law enforcement agencies;</p> <p>(c) (b) cooperate with other Parties in conducting enquiries in specific cases <i>of illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products</i> with respect to criminal offences covered by this Protocol concerning:</p> <p>(i) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;</p> <p>(ii) the movement of proceeds of crime or property derived from the commission of such offences; and</p> <p>(iii) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;</p> <p>(d) (c) provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;</p> <p>(e) (d) facilitate effective coordination among its competent authorities, agencies and services and promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the Parties concerned, the posting of liaison officers;</p> |
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| <p>persons in committing such offences, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities; and</p> <p>(g) exchange relevant information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Protocol.</p> <p>2. With a view to giving effect to this Protocol, Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them accordingly. In the absence of such agreements or arrangements between the Parties concerned, the Parties may consider this Protocol as the basis for mutual law enforcement cooperation in respect of the offences covered by this Protocol. Whenever appropriate, Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.</p> <p>3. Parties shall endeavour to cooperate within their means to respond to transnational illicit trade of tobacco products committed through the use of modern technology.</p> | | <p>(f) exchange relevant information with other Parties on specific means and methods used by natural or legal persons in committing such offences, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities; and</p> <p>(g) (e) exchange relevant information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of <i>illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products</i> the offences covered by this Protocol.</p> <p>2. With a view to giving effect to this Protocol, Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them accordingly. In the absence of such agreements or arrangements between the Parties concerned, the Parties may consider this Protocol as the basis for mutual law enforcement cooperation in respect of <i>illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products</i> 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.</p> <p>3. Parties shall endeavour to cooperate within their means to respond to transnational illicit trade of in tobacco, tobacco products <i>or manufacturing equipment used in the</i></p> |
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| | | <p><i>manufacture of tobacco products</i> committed through the use of modern technology.</p> |
| <p style="text-align: center;">Article 29 <i>Mutual administrative assistance</i></p> <p>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:</p> <ul style="list-style-type: none"> (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) 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 | <p>As noted above in relation to draft Articles 20, 21 and 22, FCA supports the inclusion in the protocol of comprehensive provisions on information sharing, and considers that a working group should be established at INB-3 to consider and present recommendations on the draft information sharing provisions, including draft Article 29.</p> | |

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| <p>(e) any other data that would assist designated agencies in risk assessment for supply chain control and other enforcement purposes.</p> | | |
| <p style="text-align: center;">Article 30 <i>Mutual legal assistance</i></p> <p>1. Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the criminal offences covered by this Protocol in Article 12.1.</p> <p>2. Under the conditions provided for in its national law, the Party on the territory of which a crime set out in Article 12.1 has been committed shall, if it has reason to believe that an alleged offender has fled from its territory, communicate to the State or States concerned all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.</p> <p>3. Whenever a crime set out in Article 12.1 has been committed, any Party that has information concerning the victim and circumstances of the crime shall transmit such information, under the conditions provided for in its national law, fully and promptly to the State or States concerned.</p> | <p>FCA supports the provision by all Parties to the protocol of the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings relating to illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products. However, FCA recognizes that formal mutual legal assistance is generally reserved to serious criminal offences – and that, in respect of serious forms of illicit trade established as criminal offences within the scope of UNTOC, Parties to that Convention will be subject to the detailed provisions providing for mutual legal assistance under Article 18 of that Convention. If the recommendation above to provide for a single list of offences in draft Article 12 is accepted, FCA therefore recommends the deletion of draft Article 30.</p> | <p style="text-align: center;">Article 30 <i>Mutual legal assistance</i></p> <p>1. Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the criminal offences covered by this Protocol in Article 12.1.</p> <p>2. Under the conditions provided for in its national law, the Party on the territory of which a crime set out in Article 12.1 has been committed shall, if it has reason to believe that an alleged offender has fled from its territory, communicate to the State or States concerned all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.</p> <p>3. Whenever a crime set out in Article 12.1 has been committed, any Party that has information concerning the victim and circumstances of the crime shall transmit such information, under the conditions provided for in its national law, fully and promptly to the State or States concerned.</p> |
| <p style="text-align: center;">Article 31 <i>Measures to ensure prosecution or extradition</i></p> | <p>FCA supports the treatment of serious forms of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products</p> | <p style="text-align: center;">Article 31 <i>Measures to ensure prosecution or extradition</i></p> |

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1. When the circumstances so warrant, the Party on the territory of which the alleged offender is present shall take the appropriate measures under its national law to ensure that person’s presence for the purpose of prosecution or extradition.

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.

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.

Article 33

Extradition of alleged offenders

as extraditable offences, and the taking by all Parties to the protocol of all measures necessary to ensure that alleged offenders within their territory are either prosecuted or extradited for the purpose of prosecution. However, FCA recognizes that extradition is generally reserved to serious criminal offences – and that, in respect of serious forms of illicit trade established as criminal offences within the scope of UNTOC, Parties to that Convention will be subject to the detailed provisions providing for extradition under Article 16 of that Convention. If the recommendation above to provide for a single list of offences in draft Article 12 is accepted, FCA therefore recommends the deletion of draft Articles 31, 32 and 33.

~~1. When the circumstances so warrant, the Party on the territory of which the alleged offender is present shall take the appropriate measures under its national law to ensure that person’s presence for the purpose of prosecution or extradition.~~

~~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.~~

~~**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.~~

~~**Article 33**~~

~~*Extradition of alleged offenders*~~

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FCA Comments

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| <p>1. 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.</p> <p>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 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.</p> <p>3. 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.</p> <p>4. 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.</p> | | <p>1. 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.</p> <p>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 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.</p> <p>3. 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.</p> <p>4. 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.</p> |
| <p>PART VI: REPORTING</p> <p><i>Article 34</i> <i>Reporting and exchange of information</i></p> | <p>FCA supports the inclusion in the protocol of a provision requiring Parties to submit periodic reports on implementation. Reporting and exchange of information will be critical in monitoring the implementation of the protocol and maximizing its effectiveness.</p> | <p>PART VI: REPORTING</p> <p><i>Article 27 34</i> <i>Reporting and exchange of information</i></p> |

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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 frequency and format of such reports shall be determined by the Meeting of the Parties.

3. The Meeting of the Parties shall determine the content of the periodic reports referred to in paragraph 1 of this Article, which should include 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 or received for activities related to the elimination of illicit trade in tobacco products; and
- (d) the information specified in Articles XX, XX, XX, XX and XX.

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

4. The Meeting of the Parties, pursuant to Articles XX and XX, shall consider arrangements to assist developing-

FCA recommends that draft Article 34.2 specify that each Party shall make its initial report within two years of the entry into force of the protocol for that Party, as required in relation to reports on implementation of the Convention under Article 21. For clarity, FCA recommends that the word 'those Articles' in draft Article 34.5 be replaced with the words 'this Article'.

FCA reserves its position as to whether other Articles of the protocol should specify particular information that should be included in periodic reports, as envisaged under draft Article 34.3(d), and as to whether the protocol should include Articles other than draft Article 38 (Financial resources) relevant to assisting developing-country Parties and Parties with economies in transition in meeting their reporting obligations, as envisaged under draft Article 34.4.

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 frequency and format of such reports shall be determined by the Meeting of the Parties. *Each Party shall make its initial report within two years of the entry into force of this Protocol for that Party.*

3. The Meeting of the Parties shall determine the content of the periodic reports referred to in paragraph 1 of this Article, which should include 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 or received for activities related to the elimination of illicit trade in tobacco products; and
- (d) the information specified in Articles XX, XX, XX, XX and XX.

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

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| <p>country Parties and Parties with economies in transition, at their request, in meeting their obligations under this Article.</p> <p>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.</p> | | <p>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.</p> <p>5. The reporting of information under this these Articles shall be subject to national law regarding confidentiality and privacy. The Parties shall protect, as mutually agreed, any confidential information that is reported.</p> |
| <p>PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES</p> <p><i>Article 35</i> <i>Meeting of the Parties</i></p> <p>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 not later than one year after the entry into force of this Protocol.</p> <p>2. Thereafter, regular sessions of the Meeting of the Parties may be convened by the Convention Secretariat, in conjunction, whenever possible and desirable, with sessions of the Conference of the Parties.</p> <p>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.</p> <p>4. Funds required for the operation of this Protocol,</p> | <p>FCA broadly supports draft Article 35, which provides for the establishment of a Meeting of the Parties to the protocol, based on Article 23 of the Convention (Conference of the Parties).</p> <p>FCA considers that draft Article 35.2 should be amended to provide that the Meeting of the Parties will determine the venue and timing of its regular sessions – as provided for in relation to the Conference of the Parties under Article 23.1 of the Convention – rather than providing that such sessions ‘may be convened by the Convention Secretariat’.</p> <p>FCA considers that Article 23.5 of the Convention – which provides for certain functions that the Conference of the Parties shall undertake in order to ‘keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation’ – contains too much detail relating to substantive Articles of the Convention to be appropriately referenced ‘mutatis mutandis’ in draft Article 35.6. FCA recommends that, once the substantive content of the draft protocol has been agreed, draft Article 35.6 should be redrafted to provide for the key</p> | <p>PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES</p> <p><i>Article 28 35</i> <i>Meeting of the Parties</i></p> <p>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 not later than one year after the entry into force of this Protocol.</p> <p>2. Thereafter, <i>the Meeting will determine the venue and timing of its regular sessions.</i> of the Meeting of the Parties may be convened by the Convention Secretariat, <i>Such sessions shall be held</i> in conjunction, whenever possible and desirable, with sessions of the Conference of the Parties.</p> <p>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.</p> |

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| <p>including those required for secretariat services, shall be charged against contributions from the Parties. The scale and mechanism of such contributions as well as of other possible resources for implementation of the Protocol shall be decided by the Meeting of the Parties.</p> <p>5. The Rules of Procedure and the Financial Rules of the Conference of the Parties shall apply, mutatis mutandis, to the Meeting of the Parties.</p> <p>6. Article 23.5 of the WHO Framework Convention on Tobacco Control shall apply mutatis mutandis to this Protocol, subject to any modifications decided by the Meeting of the Parties.</p> | <p>functions of the Meeting of the Parties in accordance with the substantive content of the protocol.</p> | <p>4. Funds required for the operation of this Protocol, including those required for secretariat services, shall be charged against contributions from the Parties. The scale and mechanism of such contributions as well as of other possible resources for implementation of the Protocol shall be decided by the Meeting of the Parties.</p> <p>5. The Rules of Procedure and the Financial Rules of the Conference of the Parties shall apply, mutatis mutandis, to the Meeting of the Parties.</p> <p>[6. Article 23.5 of the WHO Framework Convention on Tobacco Control shall apply mutatis mutandis to this Protocol, subject to any modifications decided by the Meeting of the Parties.]</p> |
| <p style="text-align: center;"><i>Article 36 Secretariat</i></p> <p>1. The Convention Secretariat shall be the Secretariat of this Protocol.</p> <p>2. The functions of the Convention Secretariat with regard to its role as the secretariat of this Protocol shall be to:</p> <p style="padding-left: 20px;">(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;</p> <p style="padding-left: 20px;">(b) receive, analyse, transmit and provide feedback to</p> | <p>FCA broadly supports draft Article 36, which provides for the Convention Secretariat to function as the Secretariat of the protocol.</p> <p>In relation to draft Article 36.2, FCA:</p> <ul style="list-style-type: none"> • broadly supports the establishment and maintenance of a ‘clearing-house mechanism’ to facilitate the exchange of information among Parties, but awaits further clarification of this proposal at INB-3, including the relationship between the proposed clearing-house mechanism, the ‘clearing-house database’ proposed under draft Article 7 (Tracking and tracing), and the ‘secure, central, automated database’ proposed under draft Article 20 (Information sharing: statistical data); | <p style="text-align: center;"><i>Article 29 36 Secretariat</i></p> <p>1. The Convention Secretariat shall be the Secretariat of this Protocol.</p> <p>2. The functions of the Convention Secretariat with regard to its role as the secretariat of this Protocol shall be to:</p> <p style="padding-left: 20px;">(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;</p> <p style="padding-left: 20px;">(b) receive, analyse, transmit and provide feedback to</p> |

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| <p>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;</p> <p>(c) provide advice and support to the Parties, particularly developing-country Parties and Parties with economies in transition, on request, in the compilation, communication and exchange of information and in identifying and accessing available resources and mechanisms to facilitate the implementation of their obligations under this Protocol;</p> <p>(d) prepare reports on its activities under this Protocol under the guidance of and for submission to the Meeting of the Parties;</p> <p>(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;</p> <p>(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;</p> <p>(g) receive and review applications by intergovernmental and nongovernmental organizations wishing 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</p> | <ul style="list-style-type: none"> • recommends the inclusion of an additional subprovision, following draft Article 36.2(b), specifying as a function of the Secretariat – as recommended in proposed Article 14.2 – providing to the Meeting of the Parties a report on information received in accordance with proposed Article 14.1 (Sanctions), and making this information accessible to the public. FCA reserves its position as to whether other specific functions may need to be identified in draft Article 36 once the substantive content of the protocol has been agreed; and • recommends the deletion of draft Article 36.2(g), noting that the accreditation of intergovernmental and nongovernmental organizations as observers, and the role of the Secretariat in the process of accreditation, is provided for in Rules 29-31 of the Rules of Procedure of the Conference of the Parties to the Convention, which draft Article 35.5 (Meeting of the Parties) proposes ‘shall apply, mutatis mutandis, to the Meeting of the Parties’. FCA considers that the inclusion of draft Article 32.2(g), and particularly the use of the words ‘enter into official relations with’, which are different from the terms used in the Rules of Procedure, could lead to confusion about the process of accreditation. | <p>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;</p> <p><i>(c) provide to each regular session of the Meeting of the Parties a report on information received in accordance with Article 14.1, and make this information accessible to the public;</i></p> <p>(e) (d) provide advice and support to the Parties, particularly developing-country Parties and Parties with economies in transition, on request, in the compilation, communication and exchange of information and in identifying and accessing available resources and mechanisms to facilitate the implementation of their obligations under this Protocol;</p> <p>(d) (e) prepare reports on its activities under this Protocol under the guidance of and for submission to the Meeting of the Parties;</p> <p>(e) (f) ensure, under the guidance of the Meeting of the Parties, the necessary coordination with the competent international and regional intergovernmental organizations and other bodies;</p> <p>(f) (g) 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; <i>and</i></p> |
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| <p>(h) perform other secretariat functions specified by this Protocol and such other functions as may be determined by the Meeting of the Parties.</p> | | <p>(g) receive and review applications by intergovernmental and nongovernmental organizations wishing 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</p> <p>(h) perform other secretariat functions specified by this Protocol and such other functions as may be determined by the Meeting of the Parties.</p> |
| <p style="text-align: center;">Article 37 <i>Relations between the Meeting of the Parties and intergovernmental organizations</i></p> <p>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.</p> | <p>FCA supports draft Article 37, which provides for cooperation between the Meeting of the Parties and international and regional intergovernmental organizations, as provided for in relation to the Conference of the Parties under Article 25 of the Convention.</p> | <p style="text-align: center;">Article 30 37 <i>Relations between the Meeting of the Parties and intergovernmental organizations</i></p> <p>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.</p> |
| <p style="text-align: center;">Article 38 <i>Financial resources</i></p> <p>1. The Parties recognize the important role that financial resources play in achieving the objective of this Protocol.</p> <p>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.</p> | <p>FCA broadly supports draft Article 38, which covers financial resources for implementation of the protocol, as provided for under Article 26 of the Convention.</p> <p>FCA recommends:</p> <ul style="list-style-type: none"> • that an additional subprovision be included, following draft Article 38.3, encouraging Parties to implement measures – such as taxes, licence fees and monetary sanctions – to require persons engaged in manufacturing of tobacco products and other activities included in Article 5.1 to meet the costs of | <p style="text-align: center;">Article 31 38 <i>Financial resources</i></p> <p>1. The Parties recognize the important role that financial resources play in achieving the objective of this Protocol.</p> <p>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.</p> |

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| <p>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.</p> <p>4. Parties are encouraged to use any confiscated proceeds of crime as well as other proceeds of the implementation of this Protocol to achieve the objectives set out under this Protocol.</p> <p>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.</p> <p>6. The Parties agree that:</p> <p>(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</p> <p>(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.</p> | <p>implementation of the protocol; and</p> <ul style="list-style-type: none"> • that draft Article 38.4 be broadened to refer to any proceeds of illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, not only proceeds of crime. | <p>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.</p> <p><i>4. Parties are encouraged to implement measures, which may include taxes, licence fees and monetary sanctions, to require persons engaged in manufacturing of tobacco products and other activities included in Article 5.1 to meet the costs of implementation of this Protocol.</i></p> <p>4. 5. Parties are encouraged to use any confiscated proceeds of crime illicit trade in tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products, as well as other proceeds of the implementation of this Protocol, to achieve the objectives set out under this Protocol.</p> <p>5. 6. 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.</p> <p>6. 7. The Parties agree that:</p> <p>(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</p> |
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| | | <p>Protocol should be mobilized and utilized for the benefit of all Parties, especially developing-country Parties and Parties with economies in transition; and</p> <p>(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.</p> |
| <p>PART VIII: SETTLEMENT OF DISPUTES</p> <p><i>Article 39</i> <i>Settlement of disputes</i></p> <p>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.</p> | <p>FCA broadly supports draft Article 39, which will provide for settlement of disputes concerning the interpretation or application of the protocol as provided for in Article 27 of the Convention.</p> | <p>PART VIII: SETTLEMENT OF DISPUTES</p> <p><i>Article 32 39</i> <i>Settlement of disputes</i></p> <p>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.</p> |
| <p>PART IX: DEVELOPMENT OF THE PROTOCOL</p> <p><i>Article 40</i> <i>Amendments to this Protocol</i></p> <p>1. Any Party may propose amendments to this Protocol.</p> <p>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</p> | <p>FCA supports draft Articles 40 and 41, which provide for the adoption of amendments and annexes to the protocol through the same procedures provided for in Articles 28 and 29 of the Convention. FCA reserves its position as to the number of days which should be specified under draft Article 40.4 for the purposes of entry into force of an amendment to the protocol.</p> | <p>PART IX: DEVELOPMENT OF THE PROTOCOL</p> <p><i>Article 33 40</i> <i>Amendments to this Protocol</i></p> <p>1. Any Party may propose amendments to this Protocol.</p> <p>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</p> |

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of this Protocol and, for information, to the Depositary.

3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment to this Protocol. If all efforts at consensus have been exhausted and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For purposes of this Article, “Parties present and voting” means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the Convention Secretariat to the Depositary, who shall circulate it to all Parties for acceptance.

4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 of this Article shall enter into force for those Parties having accepted it on the [XX] day after the date of receipt by the Depositary of an instrument of acceptance by at least two thirds of the Parties to this Protocol.

5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

Article 41
Adoption and amendment of annexes to this Protocol

1. Any Party may make proposals for an annex to this Protocol and may propose amendments to annexes to this

of this Protocol and, for information, to the Depositary.

3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment to this Protocol. If all efforts at consensus have been exhausted and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For purposes of this Article, “Parties present and voting” means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the Convention Secretariat to the Depositary, who shall circulate it to all Parties for acceptance.

4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 of this Article shall enter into force for those Parties having accepted it on the [XX] day after the date of receipt by the Depositary of an instrument of acceptance by at least two thirds of the Parties to this Protocol.

5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

Article 34 ~~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

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| <p>Protocol.</p> <p>2. Annexes shall be restricted to lists, forms and any other descriptive material relating to procedural, scientific, technical or administrative matters.</p> <p>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.</p> | | <p>Protocol.</p> <p>2. Annexes shall be restricted to lists, forms and any other descriptive material relating to procedural, scientific, technical or administrative matters.</p> <p>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 33 40.</p> |
| <p style="text-align: center;">PART X: FINAL PROVISIONS</p> <p style="text-align: center;"><i>Article 42</i> <i>Reservations</i></p> <p>No reservations may be made to this Protocol.</p> <p style="text-align: center;"><i>Article 43</i> <i>Withdrawal</i></p> <p>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.</p> <p>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.</p> <p>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</p> | <p>FCA supports draft Articles 42-49, which will govern reservations, withdrawals, signature, ratification, acceptance, approval, formal confirmation or accession and entry into force of the protocol, voting rights under the protocol, and the Depositary and authentic texts of the protocol in the same manner as Articles 30-38 of the Convention. FCA reserves its position as to the number of days and the number of instrument of ratification, acceptance, approval, formal confirmation or accession which should be specified under draft Article 47.1 for the purposes of entry into force of the protocol.</p> | <p style="text-align: center;">PART X: FINAL PROVISIONS</p> <p style="text-align: center;"><i>Article 35 42</i> <i>Reservations</i></p> <p>No reservations may be made to this Protocol.</p> <p style="text-align: center;"><i>Article 36 43</i> <i>Withdrawal</i></p> <p>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.</p> <p>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.</p> <p>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</p> |

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date of its withdrawal from the WHO Framework Convention on Tobacco Control.

Article 44
Right to vote

1. Each Party to this Protocol shall have one vote, except as provided for in paragraph 2 of this Article.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States that are Parties to the Protocol. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice versa.

Article 45
Signature

The Protocol shall be open for signature by all Parties to the WHO Framework Convention on Tobacco Control at *place to be determined* from *date to be determined*.

Article 46
Ratification, acceptance, approval, formal confirmation or accession

1. This Protocol shall be subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations that are Party to the WHO Framework Convention on Tobacco Control. It shall be open for

date of its withdrawal from the WHO Framework Convention on Tobacco Control.

Article 37 44
Right to vote

1. Each Party to this Protocol shall have one vote, except as provided for in paragraph 2 of this Article.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States that are Parties to the Protocol. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice versa.

Article 38 45
Signature

The Protocol shall be open for signature by all Parties to the WHO Framework Convention on Tobacco Control at *place to be determined* from *date to be determined*.

Article 39 46
Ratification, acceptance, approval, formal confirmation or accession

1. This Protocol shall be subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations that are Party to the WHO Framework Convention on Tobacco Control. It shall be open for

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accession from the day after the date on which the Protocol is closed for signature. Instruments of ratification, acceptance, approval, formal confirmation or accession shall be deposited with the Depositary.

2. Any regional economic integration organization that becomes a Party to this Protocol without any of its Member States being a Party shall be bound by all the obligations under this Protocol. In the case of 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
Entry into force

1. This Protocol shall enter into force on the XX day following the date of deposit of the XX instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.

2. For each Party to the WHO Framework Convention on

accession from the day after the date on which the Protocol is closed for signature. Instruments of ratification, acceptance, approval, formal confirmation or accession shall be deposited with the Depositary.

2. Any regional economic integration organization that becomes a Party to this Protocol without any of its Member States being a Party shall be bound by all the obligations under this Protocol. In the case of 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 40 47
Entry into force

1. This Protocol shall enter into force on the XX day following the date of deposit of the XX instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.

2. For each Party to the WHO Framework Convention on

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Tobacco Control that ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the conditions set out in paragraph 1 of this Article for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval, accession or formal confirmation.

3. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States Members of that organization.

Article 48 *Depositary*

The Secretary-General of the United Nations shall be the Depositary of this Protocol and amendments thereto adopted in accordance with Article 40.

Article 49 *Authentic texts*

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Tobacco Control that ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the conditions set out in paragraph 1 of this Article for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval, accession or formal confirmation.

3. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States Members of that organization.

Article 41 48 *Depositary*

The Secretary-General of the United Nations shall be the Depositary of this Protocol and amendments thereto adopted in accordance with Article 40.

Article 42 49 *Authentic texts*

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.