



FCTC

WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL

FCTC/COP/INB-IT/5/REC/1

**CONFERENCE OF THE PARTIES
TO THE WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL**

**INTERGOVERNMENTAL NEGOTIATING
BODY ON A PROTOCOL ON ILLICIT
TRADE IN TOBACCO PRODUCTS**

**FIFTH SESSION
GENEVA, 29 MARCH – 4 APRIL 2012**

SUMMARY RECORDS

**GENEVA
2012**



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PREFACE

The fifth session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products was held in Geneva, from 29 March to 4 April 2012. The proceedings are issued in one volume, containing, in addition to other relevant material, the summary records of plenary meetings and the list of participants.

The documentation of the session is accessible on the following web site:
<http://www.who.int/fctc/>

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AGENDA¹

1. Opening of the session

1.1 Officers of the Intergovernmental Negotiating Body

1.2 Adoption of the agenda and organization of work

Documents FCTC/COP/INB-IT/5/1 and FCTC/COP/INB-IT/5/1 (annotated)

1.3 Report on credentials

Document FCTC/COP/INB-IT/5/2

2. Outcome of the work of the informal working group on the draft protocol established by the fourth session of the Conference of the Parties

Document FCTC/COP/INB-IT/5/3

3. Drafting and negotiation of a Protocol to eliminate illicit trade in tobacco products

Documents FCTC/COP/INB-IT/5/4, FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2 and FCTC/COP/INB-IT/5/INF.DOC./3

4. Text of the draft protocol and report of the Intergovernmental Negotiating Body to the fifth session of the Conference of the Parties

5. Closure of the session

¹ As adopted by the Intergovernmental Negotiating Body at its first plenary meeting.

LIST OF DOCUMENTS

FCTC/COP/INB-IT/5/1 Rev.1	Provisional agenda
FCTC/COP/INB-IT/5/1 (annotated) Rev.1	Provisional agenda (annotated)
FCTC/COP/INB-IT/5/2	Report on credentials
FCTC/COP/INB-IT/5/3	Informal working group on the draft protocol to eliminate illicit trade in tobacco products
FCTC/COP/INB-IT/5/4	Draft protocol to eliminate illicit trade in tobacco products
FCTC/COP/4/4	Report of the Chairperson of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products to the fourth session of the Conference of the Parties
FCTC/COP/INB-IT/5/5	Draft protocol to eliminate illicit trade in tobacco products
Information documents	
FCTC/COP/INB-IT/5/INF.DOC./1	Estimated costs for assistance to Parties in the period prior to entry into force of the protocol to eliminate illicit trade in tobacco products
FCTC/COP/INB-IT/5/INF.DOC./2	Possible cooperation of the Convention Secretariat with other international organizations in relation to the future protocol
FCTC/COP/INB-IT/5/INF.DOC./3	Manufacturing equipment for the manufacture of cigarettes and other tobacco products
FCTC/COP/INB-IT/5/INF.DOC./4	Accuracy and consistency of the language used in all language versions of the draft protocol
Diverse documents	
FCTC/COP/INB-IT/5/DIV/1 Rev.1	List of participants
FCTC/COP/INB-IT/5/DIV/2	Guide for participants in the Intergovernmental Negotiating Body

SUMMARY RECORDS OF PLENARY MEETINGS

FIRST PLENARY MEETING

Thursday, 29 March 2012, at 11:15

Acting Chairperson: Dr H. NIKOGOSIAN (Head, Convention Secretariat)

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. OPENING OF THE SESSION: Item 1 of the Provisional agenda

The ACTING CHAIRPERSON declared open the fifth session of the Intergovernmental Negotiating Body and welcomed representatives. A total of 127 Parties had registered to attend the session, along with seven non-Parties and eight intergovernmental and nongovernmental organizations.

Officers of the Intergovernmental Negotiating Body: Item 1.1 of the Provisional agenda (Document FCTC/COP/INB-IT/5/1 Rev.1)

The ACTING CHAIRPERSON, recalling the relevant decision of the Conference of the Parties at its fourth session,¹ said that, if he saw no objection, he would take it that the Intergovernmental Negotiating Body wished the Chairperson of its fourth session, Mr I. Walton-George (European Union), to continue as Chairperson at the current session.

It was so agreed.

Mr Walton-George (European Union) took the Chair.

The CHAIRPERSON thanked representatives for their continued confidence in him. He welcomed six new Parties to the WHO Framework Convention on Tobacco Control that had ratified the Convention after the previous session: Afghanistan, Côte d'Ivoire, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Tunisia, and Turkmenistan.

He informed the meeting that Dr M. Kabir of Nigeria and Mr A.T. Faireka of Cook Islands had replaced Dr M.E. Anibueze of Nigeria and Dr T. Vinit of Papua New Guinea, respectively, as Vice-Chairpersons for the current session.

The task of the Intergovernmental Negotiating Body at the current session was to finalize the draft protocol on illicit trade in tobacco products. After four previous sessions, plus two meetings of an informal working group in 2011, it was in a good position to do so. The text would then be submitted to the fifth session of the Conference of the Parties, to be held in November 2012, for adoption.

Adoption of the agenda and organization of work: Item 1.2 of the Provisional agenda (Document FCTC/COP/INB-IT/5/1 Rev.1)

¹ Decision FCTC/COP4(11).

The agenda was adopted.

The CHAIRPERSON said that, if he saw no objection, he would take it that the Intergovernmental Negotiating Body wished to meet throughout the week in plenary session, rather than in two committees, as it had done at some of its previous sessions. That method of work would allow smaller delegations to participate fully in the discussion of all articles in the draft protocol. Provision had been made for evening meetings, if necessary. Drafting groups could be set up as required to discuss problematic issues and bring proposed solutions back to the plenary for final decision.

It was so agreed.

The CHAIRPERSON said that the negotiations were being conducted on the principle that “nothing was agreed until everything was agreed”, which meant that representatives were at liberty to discuss any part of the draft protocol. Nevertheless, he appealed to them to refrain, if at all possible, from discussing wording that had already been agreed at previous sessions.

From the next meeting onwards, delegations would be seated in regional groups instead of alphabetical order of country names, in order to facilitate informal discussions.

Dr NIKOGOSIAN (Head, Convention Secretariat) drew attention to a suggestion by the Convention Secretariat that an advisory committee on language¹ be established to address the inconsistencies in the text that had arisen during the lengthy drafting process, both within and between the various language versions. It was proposed that the language advisory committee, which would be representative of all WHO regions and the six official languages, should meet daily during the session to finalize all six language versions of agreed text.

On the instructions of the Conference of the Parties, the Convention Secretariat had reviewed the English text of the draft protocol and associated documents for editorial and terminological (i.e. non-substantive) inconsistencies and had proposed a list of recommended terms for the English version of the text, available in document FCTC/COP/INB-IT/5/INF.DOC./4 as Annex 2. In addition, the five language versions of the document other than English had an Annex 3 that showed proposed amendments, in the language concerned only, intended to bring that language version into line with the English version.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that the advisory committee was a good idea, but it must not make substantive decisions about the English version of the text that had been negotiated in plenary.

Dr LABIB (Egypt), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, supported the creation of the advisory committee and nominated the representatives of Iraq and United Arab Emirates as members.

Ms SY (Senegal), speaking on behalf of the Parties in the WHO African Region, supported the creation of the advisory committee and nominated the representatives of Togo (French-speaking) and Swaziland (English-speaking) as members.

Mr LINDGREN (Norway), speaking on behalf of the Parties in the WHO European Region, supported the creation of the advisory committee and said that the Parties intended to

¹ See document FCTC/COP/INB-IT/5/INF.DOC./4, Annex 1.

nominate three members – one French-speaking, one Russian-speaking and one Spanish-speaking.

Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region, said that the Parties were eager to participate in the work of the advisory committee and would nominate members for the committee in due course.

Mr COTTERELL (Australia), speaking on behalf of the Parties in the WHO Western Pacific Region, said that the Parties supported the creation of the advisory committee and had submitted nominations for one Chinese-speaking and one English-speaking member to the Secretariat. Some issues relating to the consistency of language in the draft protocol would, nevertheless, need to be discussed in plenary.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that the advisory committee's task should be to produce parallel language versions of the English text agreed in plenary. It must not change the substance of the text in any way.

The CHAIRPERSON said that the advisory committee would confine itself to issues of consistency. It would report back regularly to the plenary, referring to it any cases that might change the substance of the negotiated text.

Mr LEGUERRIER (Canada) said that in some States, including his own, there was a legal difference between apparently similar terms, such as “domestic law” and “national law”, which might alter the substance of the text. The overall consistency of the language of the draft protocol would, therefore, ultimately need to be reviewed by the plenary.

The CHAIRPERSON suggested that the advisory committee should correct non-substantive errors in consistency, ensuring, for instance, that the phrase “natural and legal persons” always appeared in that form and not as “legal and natural persons”, and recommend those changes to the plenary. It should take note of any changes that might be substantive and refer them back to the plenary for further discussion.

It was so agreed.

The CHAIRPERSON recalled that, at its third and fourth sessions, the Intergovernmental Negotiating Body had decided to exclude the general public from both plenary and committee meetings, while still allowing observers to attend. He understood that a large majority of Parties wished to do the same at the current session, although some had strong reservations.

Ms BERNER (Denmark), speaking on behalf of the European Union and supported by Mr LEGUERRIER (Canada) and Dr LABIB (Egypt), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, said that the Parties would prefer meetings to be entirely open. However, in order to avoid a lengthy debate or even a vote on the issue, they would accept the preference of the majority.

The CHAIRPERSON said that, accordingly, members of the public would be excluded from meetings, with effect from the next meeting, scheduled for that afternoon.

It was so agreed.

Report on credentials: Item 1.3 of the Agenda (Document FCTC/COP/INB-IT/5/2)

The CHAIRPERSON said that a report would be submitted later in the week, when all delegations' credentials had been examined by the Bureau.

2. OUTCOME OF THE WORK OF THE INFORMAL WORKING GROUP ON THE DRAFT PROTOCOL ESTABLISHED BY THE FOURTH SESSION OF THE CONFERENCE OF THE PARTIES: Item 2 of the Agenda (Document FCTC/COP/INB-IT/5/3)

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chairperson of the informal working group on the draft protocol and illustrating her remarks with slides, said that the group had been made up of 30 Parties. A number of non-Parties, observers with specific expertise, intergovernmental organizations including the United Nations Office on Drugs and Crime (UNODC), the World Customs Organization (WCO) and the World Trade Organization (WTO), and nongovernmental organizations had also attended. The group had held two meetings, in July and September 2011.

The informal working group had succeeded in drawing up new proposed wording for Part III of the draft protocol on supply chain control, namely Articles 5, 6, 8, 9, 10, 11 and 11*bis*. It had not reviewed Article 7 since consensus on that article had been reached at the fourth session of the Intergovernmental Negotiating Body. It had also drafted a new article on protection of personal data.

She highlighted the key points arising in connection with Articles 5, 6, 8, 9, 10, 11 and 11*bis*, on the basis of which the working group had developed the new proposed wording for Part III, as set forth in the Annex to document FCTC/COP/INB-IT/5/3.

The informal working group had discussed the issue of financing of the future protocol, and considered that the Conference of the Parties should review all decisions connected with that issue before the first Meeting of the Parties and should finance that Meeting, as well as activities connected with the protocol prior to its entry into force. The working group had requested the Convention Secretariat to update the anticipated costs for the period prior to the entry into force of the protocol and to submit the updated budget to the current session of the Intergovernmental Negotiating Body.

With regard to the general financing of protocol activities, the working group suggested the following options for consideration by the Intergovernmental Negotiating Body: (1) that all Parties to the WHO FCTC should finance the protocol; (2) that only Parties to the protocol should finance it; or (3) that all Parties to the WHO FCTC should finance the protocol for a period of five years after entry into force of the protocol and that the Conference of the Parties should decide on a financing mechanism thereafter.

The working group recommended that the provisions on mutual legal assistance and extradition (Articles 30 to 32) should be retained, with efforts being made to ensure that they conformed as closely as possible to the relevant provisions of the United Nations Convention on Transnational Organized Crime. The Intergovernmental Negotiating Body should consider the following points: whether the criteria for an "organized criminal group", as defined in Article 2(a) of the United Nations Convention on Transnational Organized Crime, should be included; whether Parties should be able to declare that they would not use the protocol as a legal basis for extradition; and the threshold penalties to be used for extradition.

The working group had drawn up a new article on protection of personal data, provisionally numbered Article 4*bis*, which read: "Parties shall protect personal data of individuals regardless of nationality or residence in line with existing international standards,

such as the United Nations guidelines for the regulation of computerized personal data files, and subject to national and/or domestic law regarding the protection of personal data when implementing this protocol.”

The working group had called upon the Convention Secretariat to avoid duplication of work by making the best possible use of existing resources and arrangements, and to collaborate closely with intergovernmental organizations and other expert bodies. Information on that issue was available in document FCTC/COP/INB-IT/5/INF.DOC./2.

The CHAIRPERSON thanked the Chairperson and members of the informal working group for their efforts.

Mr COTTERELL (Australia) speaking on behalf of the Parties in the WHO Western Pacific Region, said that the Parties had agreed to use the working group’s text as a basis for the current negotiations, with the aim of achieving an agreed text for submission to the Conference of the Parties at its fifth session.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, thanked the members of the informal working group for their work.

Mr LINDGREN (Norway), speaking on behalf of the Parties in the WHO European Region, said that the Parties were committed to finalizing the text of the draft protocol during the current session. To do so, it would be necessary to confirm the agreement that had already been reached on certain provisions and adopt a practical approach to resolving the outstanding issues. Thanks to the informal working group’s efforts, an agreed text on Articles 5, 6, 8, 9, 10, 11 and 11*bis* of the draft protocol had been drawn up, which the Parties were prepared to accept, in a spirit of compromise and provided that the text was not further amended.

Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region, commended the informal working group for its achievements and supported its proposed text as a basis for further negotiations. He urged other Parties not to reopen the debate on articles on which consensus had been reached at earlier sessions.

Ms SY (Senegal), speaking on behalf of the Parties in the WHO African Region, expressed her thanks to the informal working group and her satisfaction with the group’s proposed text, which would form a good basis for negotiation by the plenary.

Mr NGEYWO MASUDI (Kenya) welcomed the results achieved by the working group, of which his country had been a member. Most of the contentious issues in the draft protocol had now been resolved and he therefore encouraged Parties to approve the proposed text so that the draft protocol could be finalized at the current session.

Dr LABIB (Egypt), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, thanked the working group for its work.

3. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: ITEM 3 OF THE AGENDA
(Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4)

The CHAIRPERSON listed the documents to be considered under the current agenda item. A useful overview of the status of negotiations on each article of the draft protocol, as at the beginning of the current session, was annexed to the annotated agenda contained in document FCTC/COP/INB-IT/5/1 (annotated) Rev.1.

Three information documents had been prepared at the request of the informal working group. Document FCTC/COP/INB-IT/5/INF.DOC./1 set out the estimated costs for assistance to Parties in the period prior to entry into force of the future protocol. Document FCTC/COP/INB-IT/5/INF.DOC./2 described the possibilities for cooperation between the Convention Secretariat and other international organizations; and document FCTC/COP/INB-IT/5/INF.DOC./3 provided information about manufacturing equipment for the manufacture of cigarettes and other tobacco products. Another information document, FCTC/COP/INB-IT/5/INF.DOC./4, had been discussed earlier that morning. It listed proposals drawn up by the Convention Secretariat, with the assistance of WHO Language Services, that were intended to ensure consistency of language throughout the English version of the draft protocol and the accuracy of the translations.

He suggested that the Convention Secretariat should prepare a consolidated text as the basis for the negotiations, based on the version of the draft protocol submitted by the Intergovernmental Negotiating Body to the fourth session of the Conference of the Parties (Annex of document FCTC/COP/5/4), which contained an agreed wording for many articles. The definitions in Article 1 would be replaced by those proposed by the working group on definitions during the fourth session of the Intergovernmental Negotiating Body and contained in Annex 2 to document FCTC/COP/4/4. For Articles 5, 6, 8, 9, 10, 11 and 11bis, the text proposed by the informal working group, contained in the Annex to document FCTC/COP/INB-IT/5/3, would be used, along with the proposed new article on protection of personal data, contained in the same document. The text would also show the proposed changes contained in Annexes 2 and 3 to document FCTC/COP/INB-IT/5/INF.DOC./4, intended to ensure consistency within and between the various language versions. Those changes would be inserted in track change mode so that Parties could verify that no substantive changes had been introduced.

Mr LINDGREN (Norway), speaking on behalf of the Parties in the WHO European Region, said that the Parties had agreed that the text proposed by the working group should be used for further negotiations on Articles 5, 6, 8, 9, 10, 11 and 11bis. However, no regional position had been agreed on the other changes proposed by the Chairperson.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, noted that the definitions proposed at the fourth session by the working group on definitions for inclusion in Article 1 had never been discussed in plenary.

The CHAIRPERSON said that there was no question of approving those definitions without discussion in plenary. The proposal was that they should be included in the consolidated text as a basis for further negotiation.

Mr COTTERELL (Australia) suggested that the proposed definitions for Article 1 and the proposals for consistency and accuracy of language versions should be added to the consolidated document, rather than replacing the original text. In that way, it would be clear which changes had been made.

Mr DESIRAJU (India), speaking on behalf of the Parties in the WHO Western Pacific Region and supported by Mr COTTERELL (Australia), asked for the definitions in Article 1 of the draft protocol to be discussed early on in the session, as a number of important issues remained outstanding in that regard.

Dr AL MANSOORI (United Arab Emirates) said that, while he agreed with the Chairperson's proposed method of work, the Parties in the WHO Eastern Mediterranean Region had not formally approved it.

Mr BAGHERPOUR (Islamic Republic of Iran) said that misunderstandings might arise if the working group's proposals were integrated into the consolidated text with no explanation of the rationale behind them. Representatives, especially those who had not taken part in the working group meetings, must be free to go back to the original text submitted to the fourth session of the Conference of the Parties or to make new suggestions.

The CHAIRPERSON suggested that discussion of Part III of the draft protocol should be postponed until later in the week. That would give Parties time to consult the Chairperson of the informal working group, and their regional representatives, in order to ensure that they fully understood the rationale behind the compromises reached by the working group.

Ms SY (Senegal), speaking on behalf of the Parties in the WHO African Region, said that the Parties had not discussed the proposal to use the definitions proposed by the working group on definitions as the basis for further negotiation on Article 1, and therefore did not yet have a regional position on that issue.

The CHAIRPERSON said that, if he saw no objection, he would take it that representatives wished the Convention Secretariat to prepare a consolidated version of the draft protocol by the next morning. The definitions for Article 1 proposed by the working group on definitions would appear alongside the original text for purposes of comparison. The new wording for Articles 5, 6, 8, 9, 10, 11 and 11bis and the new article on protection of personal data, proposed by the informal working group, would replace the original text. The proposals for ensuring consistency and accuracy of the various language versions would be included in track change mode.

It was so agreed.

The meeting rose at 13:00.

SECOND PLENARY MEETING

Thursday, 29 March 2012, at 15:10

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. ORGANIZATION OF WORK

The CHAIRPERSON suggested that the outstanding issues relating to the draft protocol should be divided into seven groups. He proposed to begin by discussing Part V (International cooperation), with the exception of Article 26 on jurisdiction. Article 26 would be discussed together with the articles still outstanding in Part IV (Offences), in the following order: Article 12, Articles 15 to 18, Article 26 and Article 14.3. It would be necessary to finalize that set of articles before going on to Articles 30 to 32 on mutual legal assistance and extradition.

The informal working group had drawn up an agreed version of Part III on supply chain control. The new text was a delicate compromise, which he was anxious not to disturb by reopening the debate. He therefore requested the Intergovernmental Negotiating Body to approve the working group's text without further negotiation. He appealed to representatives to raise any outstanding concerns with the Chair of the working group, with himself or with the Secretariat, with the aim of resolving them informally.

A further group of articles concerned institutional issues, Article 2 on the relationship between the protocol and other agreements and legal instruments, Article 36 on the Secretariat of the protocol (along with the new Article 4bis on protection of personal data, drawn up and agreed by the informal working group); and issues relating to financing. The preamble to the protocol could not be finalized until the major outstanding issues had been resolved.

In Part X (Final provisions), the main issue concerned Article 42 on reservations to the protocol, which he proposed should be addressed when the rest of the text had been finalized.

The final question to be considered was that of definitions, which were provided in Article 1 of the protocol. However, a number of crucial terms appeared in articles that had not yet been finalized. He suggested that, in those cases, the definition should be finalized in conjunction with the article concerned. The Secretariat could provide a list of the articles in which a particular term appeared, so that all its occurrences could be considered simultaneously.

Mr ALBUQUERQUE E SILVA (Brazil) said that, according to the relevant decision of the Conference of the Parties at its fourth session,¹ as his country interpreted it, the informal working group's task had been to facilitate the negotiations at the current session of the Intergovernmental Negotiating Body, not to carry out the negotiations itself. The text for Part III drawn up by the working group was therefore not an agreed text, merely a basis for negotiation. He proposed that the working group's text for Part III should be discussed and finalized in plenary at the beginning of the meeting, before any discussion of Parts IV and V.

Mr DESIRAJU (India) agreed with the representative of Brazil that the working group's draft of Part III was not an agreed text that could be approved without further discussion. The text should be discussed and approved in plenary before the

¹ Decision FCTC/COP4(11), paragraph 4.

Intergovernmental Negotiating Body looked at later parts of the draft protocol, since many of the concepts in Part III that related to offences, documentation and information-sharing needed to be clarified before they were brought up in relation to later articles.

Mr LEGUERRIER (Canada) likewise agreed that it was essential to know what was in Part III before going on to the other parts of the draft protocol. The definitions of terms used in Part III could be finalized during the discussion as the Chairperson had suggested, which would facilitate negotiations on subsequent articles.

Mr LINDGREN (Norway), speaking on behalf of the Parties in the WHO European Region, reiterated the Parties' position that they were prepared to accept the working group's draft of Part III as a complete package, without reopening negotiations on individual articles. The Parties had not discussed the order in which the different parts of the draft protocol should be discussed, and accordingly had no regional position on that issue.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, agreed with the representatives of Brazil and Canada that the Intergovernmental Negotiating Body should consider Part III of the draft first and decide on definitions of terms as they came up in the text.

Mr COTTERELL (Australia) endorsed the proposal to clarify definitions during the discussion on individual articles. Speaking on behalf of the Parties in the WHO Western Pacific Region, he said that the Parties had not discussed the order in which the parts of the draft protocol should be discussed, and accordingly had no regional position on that issue.

Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region, said that the Parties had not discussed their position on the order in which the parts of the draft protocol should be taken up. Speaking on behalf of his own delegation, he supported the position taken by the representative of Norway.

Mr BOUZO (Syrian Arab Republic) said that his delegation would support the majority view with respect to the order in which the different parts of the draft protocol should be discussed.

Mr NDAO (Senegal), speaking on behalf of the Parties in the WHO African Region, agreed with the Parties in the WHO European Region that the debate on the articles agreed by the working group should not be reopened. If the Intergovernmental Negotiating Body were to start discussing those articles again, the efforts of the working group, which had, after all, consisted of representatives of all regions, would have been in vain.

The CHAIRPERSON said that representatives clearly wanted to finalize Part III of the draft protocol before going on to later articles. It was indeed important to avoid jeopardizing the delicate compromise achieved by the working group. He suggested that the working group's draft for Part III, as contained in document FCTC/COP/INB-IT/5/3, should be displayed on screen, article by article. He appealed to representatives to raise only those points with which they disagreed so strongly that their countries would be unwilling to sign or ratify the protocol if they were retained, and to identify terms that required definition before the article could be approved.

2. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: ITEM 3 OF THE AGENDA (Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part III: Supply chain control

- **Article 5: Licence, equivalent approval or control system**

Mr COTTERELL (Australia) asked for a definition of the term “manufacturing equipment”.

The CHAIRPERSON drew attention to information document FCTC/COP/INB-IT/5/INF.DOC./3, which gave details of the classification of manufacturing equipment contained in the Harmonized Commodity Description and Coding System (Harmonized System) of the World Customs Organization. The definition of the term “manufacturing equipment” could be added as an annex to the draft protocol, so that it could easily be amended to reflect future changes in technology.

Ms MATSAU (South Africa) asked for a definition of the term “key inputs” in paragraph 5.

Ms BWALYA (Zambia) asked for a definition of the term “natural or legal person” in paragraph 1.

Dr ROSELL-UBIAL (Philippines) asked for definitions of the terms “small-scale growers, farmers and producers” and “commercial quantities of tobacco products” in paragraph 2.

Mr SONG (Singapore) said that his country would be in favour of deleting all references to “manufacturing equipment”, since it was a vague concept and the equipment concerned could also be used for other, legitimate purposes. Keeping track of such equipment would be an extremely complex administrative task. The same problem had arisen in connection with the definition of “dual-use” equipment in legislation to prohibit weapons of mass destruction. He was nevertheless aware that some Parties wished to include manufacturing equipment in the protocol. As a compromise, therefore, he proposed that, in paragraph 1, the words “in accordance with national law” should be replaced by “subject to national law”.

The CHAIRPERSON asked whether Singapore would be unable to sign the protocol if the wording “in accordance with national law” were retained.

Mr SONG (Singapore) said that his country would be willing to sign the protocol if the wording “subject to national law” were used, but could not guarantee that it would do so if the wording “in accordance with national law” were retained.

The CHAIRPERSON said that the Intergovernmental Negotiating Body would endeavour to arrive at a generally accepted definition of the term “manufacturing equipment”. The question whether the phrase “subject to national law” was preferable to “in accordance with

national law” could be turned over to the advisory committee on language. He was anxious to avoid any changes in the wording approved by the informal working group, if at all possible.

Dr ROA (Panama) pointed out that the phrase “in accordance with national law” was used in many articles of the parent instrument, the WHO FCTC.

Mr BAGHERPOUR (Islamic Republic of Iran) said that he preferred the wording “in accordance with national law”. He agreed with the representative of South Africa that the term “key inputs” should be defined. Finally, he asked why, in paragraph 5, a five-year period of operation had been chosen before the impact of the protocol could be evaluated through evidence-based research, rather than the period of three years also considered by the working group.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group on the draft protocol, said that the longer period of five years had been chosen because it was hoped that by that time it would be possible to identify key inputs essential to the manufacture of tobacco products, many of which were also used for other purposes, and subject them to track-and-trace procedures.

The CHAIRPERSON said that it was his understanding that such research was essential in order to identify the key inputs properly.

Mr FISCH BERREDO MENEZES (Brazil), supported by Mr RAMIREZ CAMPOS (Colombia), noted that paragraph 1 listed those activities that a Party should definitely license, namely the manufacture, import and export of tobacco products and manufacturing equipment, while paragraph 2 listed further activities that Parties should merely “endeavour” to license. The phrase “subject to national law” weakened the wording, and might be used in paragraph 2 but not in paragraph 1.

The CHAIRPERSON said that it was important to maintain the reference to “manufacturing equipment” in paragraph 1, provided that the term was adequately defined.

Mr BAGHERPOUR (Islamic Republic of Iran) said that five years was a long time to wait before beginning research that could have implications for the implementation of the protocol. In fact, it would be much longer than five years before the research results were available, since it was not yet known how long it would be before the protocol entered into force, how long the research would take, or when the results would be submitted to the Conference of the Parties.

Mr ROWAN (European Union) said that some Parties in the working group had wished to include a reference to key inputs, while others had opposed the idea. The final compromise, which both sides had accepted, was to conduct research after the protocol had been in force for five years in order to identify any key inputs, which were commodities seized by the Parties’ law enforcement agencies in the context of illicit trade, with a view to subjecting them to a track-and-trace regime.

The CHAIRPERSON noted that the same compromise had been reached in respect of duty free sales (Article 11bis).

Mr BAYNA (Iraq) asked for a definition of the term “tobacco products”.

The CHAIRPERSON said that the definition of the term “tobacco products” in the protocol would be the same as that used in the WHO FCTC. Turning to the definition of the term “manufacturing equipment”, he noted that document FCTC/COP/INB-IT/5/INF.DOC./3 listed a number of tariff headings in the World Customs Organization Harmonized System that might be useful for arriving at a definition that was clear, precise and, as far as possible, exclusive to the manufacture of tobacco products. They included tariff heading 84.15, which covered air conditioning machines, and tariff heading 84.41, which covered machinery for making up paper pulp, paper or paperboard; however, machinery in both those categories could be used for many other purposes besides the manufacture of tobacco products. A third category – perhaps the most useful one – was tariff heading 84.78, which covered machinery for preparing or making up tobacco, including “cigar- or cigarette-making machines, whether or not equipped with an auxiliary packaging device”. The Intergovernmental Negotiating Body might wish to consider that wording as a definition, possibly for inclusion in an annex to the protocol rather than the main text.

Ms ALI-HIGO (Djibouti) said that the Harmonized System provided an excellent basis for arriving at a definition of manufacturing equipment for tobacco products. The definition should not be confined to the phrase “cigar- or cigarette-making machines, whether or not equipped with an auxiliary packaging device”, but should refer to the Harmonized System as a whole.

Mr ROWAN (European Union) said that the definition should not be too broad. It should be confined to machinery that was used only for the manufacture of tobacco products and, importantly, the parts that made up that machinery. Earlier in the negotiation process, the European Union had suggested the following definition: “machinery which is designed, or adapted, to be used solely for the manufacture of tobacco products and is integral to the manufacturing process”. In any case, producers of illicit tobacco products did not generally declare their machinery under the Harmonized System – instead, they brought the parts into the country concerned by a variety of routes, and assembled them there.

The CHAIRPERSON suggested that an open-ended working group should be convened, consisting of the representatives of Australia, Djibouti, the European Union, and any other interested parties. The working group would endeavour to draw up a definition of the term “manufacturing equipment” and other terms that had been brought up during the debate, notably “commercial quantities” and “small-scale growers, farmers and producers”. Otherwise, he took it that there was broad agreement on the wording of Article 5.

Replying to a question from Mr BAGHERPOUR (Islamic Republic of Iran), he said that, in view of the differences of opinion that had become clear during the meetings of the informal working group, the protocol should not include a definition of the term “key inputs”. The issue could be taken up again once the results of the research mandated in paragraph 5 were available, which would, admittedly, be some years in the future.

Mr BAGHERPOUR (Islamic Republic of Iran) reiterated his view that it was important to define the term “key inputs” to ensure that there was clarity on the matter.

The CHAIRPERSON said that any attempt to define the term at the current stage, without a general agreement, might restrict the research carried out later. If the term “key inputs” were left undefined in the protocol, Parties would be at liberty to suggest any elements they wished to be included.

Mr ROWAN (European Union) noted that the informal working group had identified several important elements of the key inputs referred to in paragraph 5, namely that key inputs should be essential to the manufacture of tobacco products, identifiable and potentially subject to an effective control mechanism.

The CHAIRPERSON said that, if he saw no objection, he would take it that provisional consensus had been reached on Article 5, subject to acceptable definitions being agreed for a number of terms.

It was so agreed.

- **Article 6: Due diligence**

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group on the draft protocol, said that the working group had thought it necessary to define the concept of “supply chain” because of differences of opinion among members about where the supply chain started and ended.

The CHAIRPERSON said that the term appeared in a number of articles, as well as in the title of Part III, but a definition of “supply chain” or the phrase “engaged in the supply chain” was required mainly in respect of Articles 6.1 and 8.1; in other articles, it could be deleted or replaced by a phrase such as “tobacco products”.

Mr ROWAN (European Union) agreed that the term “supply chain” required definition. For instance, some Parties were of the opinion that duty-paid products or those sold by retailers no longer formed part of the supply chain.

The CHAIRPERSON said that it would be impossible for a retailer to conduct due diligence in respect of an ordinary customer. He suggested that the task of defining the term “supply chain” in Articles 6.1 and 8.1 should be entrusted to the working group on definitions, which should also consider alternative wording that would enable the term to be deleted from all the other articles where it appeared.

Mr ALBUQUERQUE E SILVA (Brazil) said that the working group on definitions should bear in mind the fact that the supply chain as it related to tobacco products would be very different from that relating to manufacturing equipment.

Mr DESIRAJU (India) asked why paragraphs 1 and 2 referred to “national law or legally binding and enforceable agreements”. If a national law was in place, there was surely no need for any other legally binding agreement.

The CHAIRPERSON said that the wording was a delicate compromise reached by the working group after a great deal of negotiation.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group on the draft protocol, sought clarification from the Office of the Legal Counsel.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) said that the issue was substantive rather than legal. Moreover, reopening the debate on the issue of due diligence was likely to lead to the reopening of the debate on other articles.

Ms MATSAU (South Africa) said that a “legally binding and enforceable agreement” might be concluded between a country and a tobacco manufacturer, or between a country and an outside agency connected with the tobacco industry, and might then be used to prevent due diligence from being conducted properly. The provision was open to misinterpretation at best, and exploitation at worst.

Mr ROWAN (European Union) said that the provisions on due diligence were part of the overall compromise reached by the informal working group. The European Union had wished to ensure that provisions on due diligence were included in the draft protocol, and had therefore agreed to the inclusion of other provisions, such as those on key inputs and manufacturing equipment, which were important to other Parties. He did not see how the presence of a legally binding agreement could weaken due diligence obligations: such an agreement imposed legal obligations in just the same way as a national law.

The CHAIRPERSON said that Article 6 established a binding obligation on Parties to conduct due diligence. The wording was perhaps not very elegant, but it should be acceptable to most Parties.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) asked whether it was really necessary to talk about “due diligence” or whether “verification” would suffice. After all, the main requirement was to check the customer’s identity.

The CHAIRPERSON said that “due diligence” was the correct term in English, but the advisory committee on language could look at the French version and decide on the best translation.

Ms MATSAU (South Africa) said that she was concerned that a “legally binding and enforceable agreement”, outside the scope of the WHO FCTC, might be invoked by a Party as justification for failing to fulfil its obligations under the Convention.

The CHAIRPERSON said that, as he understood the Article, there could be no derogation from a Party’s obligation to ensure that due diligence was conducted, whether it was operating in accordance with national law or a legally binding and enforceable agreement. Any agreement considered permissible under Article 6 would have to provide for the conduct of due diligence.

Ms KIPTUI (Kenya) noted that the representative of South Africa was concerned about the risk of interference by the tobacco industry in the implementation of the protocol. She suggested that a reference to Article 5.3 of the WHO FCTC, which dealt with that subject, should be added to the preamble of the draft protocol, and she would be submitting wording to that effect to the Convention Secretariat. She further suggested that, in Article 6.1 and Article 9, the phrase “legally binding and enforceable agreements” should be replaced by “legal, legislative, executive, administrative or other measures”.

The CHAIRPERSON said that the proposed addition to the preamble would be useful. However, there was likely to be opposition to the suggestion by the representative of Kenya that the wording of Articles 6.1 and 9 should be changed. He asked whether he could take it that a consensus had been reached on Article 6.

Mr COTTERELL (Australia) said that it was difficult for his country to agree that a consensus had been reached before the terms used in the Article had been defined to all Parties' satisfaction.

The CHAIRPERSON said that, if he saw no objection, he would take it that provisional consensus had been reached on Article 6, subject to an acceptable definition being found for the terms "supply chain" and "manufacturing equipment".

It was so agreed.

(For continuation of the discussion on Article 6, see summary record of the eighth meeting.)

- **Article 8: Record-keeping**

The CHAIRPERSON noted that the wording of Article 8.1 echoed that of Article 6.1 and that the terms "supply chain" and "manufacturing equipment", which still required definition, occurred in both articles.

Mr IBRAHIM (Sudan) asked for clarification of the term "traditional growers" in paragraph 4. In his own country, some farmers grew tobacco on a very small scale, for instance to keep pests from attacking other crops. The Government wanted to adopt legislation regulating the adverse effects of tobacco growing on public health, but it was difficult to monitor tobacco growing and there were no economically viable alternative crops.

Dr KABIR (Nigeria) noted that the term "traditional growers" might provide a loophole in the implementation of the protocol. Were traditional growers really exempted from keeping records?

The CHAIRPERSON said that it might be necessary to define the terms "traditional growers" and "non-commercial basis". There had been some attempts in the past to define the term "commercial quantities". However, he was reluctant to change the current wording of Article 8.

If he saw no objection, he would take it that provisional consensus had been reached on Article 8, subject to an acceptable definition being found for a number of terms.

It was so agreed.

- **Article 9: Security and preventive measures**

The CHAIRPERSON pointed out that the term "manufacturing equipment" would require definition.

Mr FISCH BERREDO MENEZES (Brazil) said that, while it was feasible to require Parties to ensure that tobacco products were supplied only in amounts commensurate with the demand for such products in the intended market, as stated in subparagraph 1(b), it was not clear how they could enforce that provision in respect of manufacturing equipment. How could a Party determine whether a tobacco manufacturer's plans to replace an entire production line, or set up five new ones, were commensurate with demand in a particular market, for example?

The CHAIRPERSON said that it would be easy to recognize an extreme case, for instance where a maker of manufacturing equipment proposed to export large quantities of machinery to a country in which the domestic market could clearly not absorb the quantity of tobacco products which that machinery could produce. The provision was intended to allow Parties to keep track of such events.

Mr BAGHERPOUR (Islamic Republic of Iran) noted that the introduction to paragraph 1 referred to “tobacco products” but made no mention of tobacco or manufacturing equipment. If that was not a deliberate omission, he suggested that it should be rectified for the sake of consistency with other articles.

Dr KABIR (Nigeria) said that, as he remembered the working group’s discussions, the omission of the term “manufacturing equipment” had been an oversight.

The CHAIRPERSON pointed out that the term appeared in subparagraph 1(b).

Mr COTTERELL (Australia) asked for a definition of the term “financial institutions”. The definition drawn up by the Financial Action Task Force might be useful in that regard.

Ms MADRAZO REYNOSO (Mexico), supported by Dr ABASCAL (Uruguay), said that the term “tobacco products” had been used on its own in paragraph 1 for the sake of consistency with Article 15 of the WHO FCTC. The informal working group had thought that the issue of manufacturing equipment had been adequately dealt with in the subsequent subparagraphs. The term “suspicious transactions” in subparagraph 1(a)(ii) had been left in inverted commas as it had been anticipated that it would require definition.

The CHAIRPERSON agreed that the term “suspicious transactions” would require definition.

Mr DLAMINI (Swaziland) appealed to representatives not to reopen the debate on the text agreed by the informal working group unless there were real problems of interpretation of the wording. Representatives should confine themselves to identifying key terms that required definition.

Mr BAGHERPOUR (Islamic Republic of Iran) said that the current wording was illogical: paragraph 1 referred to “diversion of tobacco products into illicit trade channels, including ... supplying tobacco products or manufacturing equipment”, as if manufacturing equipment were a type of tobacco product. All three categories – tobacco, tobacco products and manufacturing equipment – should appear in the introductory part of paragraph 1. That would be a simple editorial amendment, intended to ensure consistency in the wording, rather than a substantive change.

The CHAIRPERSON said that, although he could appreciate the reasons behind that suggestion, he was afraid that such an amendment would destroy the fragile compromise that had been achieved.

Mr FISCH BERREDO MENEZES (Brazil) said that, as he remembered the working group’s discussions, Article 9 was intended to apply to all natural and legal persons that had been licensed to manufacture tobacco products or manufacturing equipment in accordance with Article 5. Thus, the Article would apply to producers of manufacturing equipment if the

Party had granted them a licence; and, after all, it would be difficult to deny producers a licence on the grounds that they might subsequently engage in illicit trade.

Dr ROA (Panama) noted that Article 15 of the WHO FCTC began by referring only to tobacco products, but included a reference to manufacturing equipment later on, in subparagraph 4(c).

Dr ABASCAL (Uruguay) said that subparagraph 1(b) of paragraph 9 of the protocol was surely intended to cover situations in which a manufacturer wished to create manufacturing capacity that was clearly inconsistent with the size of the market in the country concerned. For instance, a manufacturer would not be allowed to import enough equipment to produce products for 5 million consumers in a country that had only 100 000 consumers of its own.

The CHAIRPERSON said that the provision was designed to give enforcement authorities the power to intervene in cases in which a licensed natural or legal person had acted without due caution.

Mr FISCH BERREDO MENEZES (Brazil) pointed out that some manufacturers had a large export market. Honduras, for instance, produced far more tobacco products than it could sell on the domestic market because it was a major exporter to other Central American countries.

The CHAIRPERSON said that Article 9 applied to the natural and legal persons licensed pursuant to Article 5 and was intended to prevent the diversion of tobacco products into illicit trade channels, as stated in paragraph 1. It followed that the persons concerned should refrain from supplying either tobacco products themselves or the equipment required to make them in quantities that were inconsistent with the demand in the customer's market, as stated in subparagraph 1(b). The logic of the paragraph was sound, in his opinion.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that, in his country, import checks on tobacco products consisted mainly of ensuring that the product originated from a registered supplier. Checks on that supplier and, in particular, on the manufacturing equipment used were conducted entirely separately. His country would therefore have difficulty in complying with the requirements for monitoring of manufacturing equipment called for in Article 9. The staff concerned simply did not possess the required technical expertise.

The CHAIRPERSON said that, as each Party prepared to ratify the protocol, it could discuss with the Convention Secretariat the assistance it might need with implementation, including training needs, for example.

Mr DESIRAJU (India) noted that, while it referred to "tobacco products", Article 15 of the WHO FCTC came under Part IV of the Convention, which dealt with tobacco in general. He was concerned that, in its present form, Article 9 of the protocol did not adequately protect against illicit trade in the raw tobacco from which tobacco products could be made.

The CHAIRPERSON said that tobacco itself, as opposed to tobacco products, was covered in the draft protocol, notably in the provisions covering licensing, due diligence and record keeping. He said that, overall, the draft protocol established a control mechanism that would monitor raw tobacco adequately.

Ms ALI-HIGO (Djibouti) echoed the concerns of the representative of the Democratic Republic of the Congo about lack of capacity in developing countries. The same concern applied to a number of articles, including Article 5 on licensing. She called for particular attention to be paid to technical cooperation in training, the sharing of experience and the transfer of technology.

The CHAIRPERSON agreed that technical cooperation would be essential for implementing the protocol effectively. Many Parties would need assistance in using the global information sharing focal point provided for in Article 7 on tracking and tracing, for example.

Dr SA'A (Cameroon) noted that the protocol would be implemented as a whole. If issues such as manufacturing equipment were dealt with adequately elsewhere, there was no need to repeat the relevant provisions in Article 9. The issue of manufacturing equipment was not particularly relevant for his own country, which did not have a domestic tobacco industry, although it was, unfortunately, flooded with illicit products from neighbouring countries. The feasibility of the measures advocated must be a major consideration: some countries would hesitate to accede to the protocol if they felt that they would not be able to make the required changes in their own legislation. He called for any issues that could not be resolved swiftly in the plenary to be referred to a working group, in order to expedite the work of the current session.

The CHAIRPERSON said that, if he saw no objection, he would take it that provisional consensus had been reached on Article 9, subject to acceptable definitions being found for a number of terms, including “manufacturing equipment”. The phrase “traditional small-scale growers, farmers and producers” in Article 5.2(b) would clearly also require definition.

It was so agreed.

(For continuation of the discussion on Article 9, see summary record of the fifteenth meeting.)

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

The CHAIRPERSON said that there appeared to be no terms in the Article that required definition. If he saw no objection, he would take it that consensus had been reached on Article 10.

It was so agreed.

The meeting rose at 17:55.

THIRD PLENARY MEETING

Thursday, 29 March 2012, at 19:15

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part III: Supply chain control (continued)

- **Article 11: Free zones and international transit**

The CHAIRPERSON noted that the term “manufacturing equipment” would require definition. The term “free zone” was already defined in the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention). A definition of the term “intermingling” had been proposed, namely “the mixing together of tobacco and non-tobacco products”.

Mr SONG (Singapore) asked whether, in order to comply with the prohibition on intermingling in paragraph 2, a single carton of tobacco products would have to be transported in an otherwise empty container, even if other legitimate, non-tobacco goods were awaiting shipment at the same time. Also, if intermingling was such a serious problem, why was it prohibited in the protocol only in respect of tobacco products passing through free zones?

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group on the draft protocol, said that the provision was intended to prevent the transport of tobacco products in the same container as non-tobacco products, a practice that had been associated with illicit trade.

The CHAIRPERSON said that the most serious problems that had arisen involved the intermingling of tobacco and non-tobacco products for shipment from free zones, which was why the issue had been addressed in the protocol. At a later date, further provisions might be introduced to prohibit intermingling in shipments of duty-paid products.

Dr AL WAHAIBI (Oman) said that, in view of the potential for smuggling of tobacco products through free zones, it might be useful to add a paragraph to Article 11 under which Parties would be entitled to control or ban any form of manufacturing or storage of such products within free zones.

Ms OBILLOS-MAPA (Philippines) said that combining products of different types in a single shipment was a common business practice. The prohibition should perhaps be confined to the intermingling of tobacco and non-tobacco products with the intention of concealing illicit trade.

Mr ROWAN (European Union) said that the informal working group had considered a provision of that kind, but had concluded that it would be almost impossible to prove that an exporter had used intermingling with the intention of defrauding another party further down the supply chain. Indeed, at the time of the intermingling, no offence would yet have taken place. Global losses due to the export from free zones of dutiable products that had been misdescribed as other products amounted to 4–5 billion euros per year. The scale of the offences was enormous: in one case, 800 master cases of tobacco products had been seized, intermingled with 200 cases of tee-shirts and toys.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that he supported the proposal to prohibit intermingling altogether. Diplomatic personnel, including staff of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), often imported whole container-loads of goods, purportedly for personal use, which increased the potential for diversion into illicit trade channels. Indeed, a certain brand of cigarettes, which were officially available only to international personnel, had already been seized on the illicit market. The customs and other authorities in his country had asked the Ministry of Foreign Affairs to appoint an ad hoc committee to define reasonable quantities for personal use, since at present they were not in a position to object to any imports by diplomatic personnel.

Ms NIKITINA (Russian Federation) said that intermingling was not illegal in her country. Instead of intermingling, paragraph 2 should refer to the shipment of one type of goods under the guise of another.

The CHAIRPERSON said that the Article stipulated a blanket ban on all types of intermingling because it was an objective measure that did not rely on proving an intent to defraud. Implementing it, however, might require changes to legislation in a particular country.

Ms ALI-HIGO (Djibouti) queried the use of the phrase “manufacturing of ... tobacco” in paragraph 1. Did it mean “tobacco growing”? There was a growing trend for manufacturers of tobacco products to set up their factories inside a free zone. Would paragraphs 1 and 3 apply to such factories as well? She could support the informal working group’s wording for paragraph 2 without amendment. Often, in developing countries, the quantities smuggled at one time were very small, as little as 10 cartons, for instance. Even such small quantities should be covered by the protocol.

The CHAIRPERSON said that, as far as he was aware, tobacco was not currently grown in any free zone. However, the wording of the Article was broad enough to cover various possibilities.

Dr ROA (Panama) said that the informal working group’s wording should be preserved without amendment. The blanket ban on all types of intermingling was a preventive measure since, as other speakers had said, it would be difficult to prove after the event that intermingling had been carried out with fraudulent intent. She also felt that the phrase “manufacturing ... of tobacco or tobacco products” in paragraph 1 should be maintained, as the manufacturing process included packaging and other processes that might be misused in order to disguise tobacco products as other products.

Mr THOMPSON (Nicaragua) agreed that intermingling of tobacco and non-tobacco products should be prohibited altogether. It was common practice to put a number of different

cargoes together for greater efficiency, but if such consolidation was performed in a free zone, through which tobacco products were transported but not where they were actually manufactured, then intermingling should not be permissible.

Dr ZOTOUA (Côte d'Ivoire) argued that there was no justification for intermingling tobacco and non-tobacco products. He asked why a time-limit of three years had been specified in paragraph 1 for the introduction of the ban on intermingling, when five years had been allowed for measures called for in other articles.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group on the draft protocol, said that most measures laid down in the draft protocol had a time-limit of three years. In some cases, including provisions relating to duty free sales and the collection of data on key inputs, a longer time-limit had been thought necessary.

The CHAIRPERSON said that, in each case, the text specified the minimum time thought necessary for the achievement of the objectives of the article in question.

Mr SONG (Singapore) said that he opposed a blanket ban on intermingling, and welcomed the suggestion by the representative of the Philippines that intermingling should be defined as a practice undertaken for illicit purposes. The shipping of different types of products in a mixed consignment was a legitimate business operation, and its prohibition would entail additional costs for industry, as well as being impractical to enforce. He suggested that in paragraph 1 the words "endeavour to" should be inserted before "implement effective controls".

Mr ROWAN (European Union) said that illicit trade facilitated by the intermingling of tobacco and non-tobacco products shipped through free zones was one of the main types of illicit trade targeted by the protocol. To describe a typical scenario: a mixed consignment of tobacco and non-tobacco products, correctly listed as such in the bill of lading, was shipped from a free zone, but by the time the shipment arrived at its destination, the bill of lading had been altered to show only the non-tobacco products. No legitimate manufacturer of non-tobacco products would wish to transport its own products with tobacco products, as the smell of the tobacco would be transferred to the rest of the consignment. The informal working group had approved the wording of the article unanimously, and he considered it important to maintain the provision unchanged.

Mr NGEYWO MASUDI (Kenya) said that the wording agreed by the informal working group should be retained. Shipping companies operating from free zones worked on such a large scale that it was never essential for them to mix tobacco and non-tobacco products in the same consignment. In his country's experience, intermingling was used only as a way of concealing illicit trade, since it made it more difficult for the authorities to verify the content of the consignment.

Dr ROA (Panama) said that the protocol was not intended to regulate illicit trade in general, but only illicit trade in tobacco products, in line with the public health aims of the parent instrument, the WHO FCTC. Much of that illicit trade passed through free zones, particularly in countries such as her own, which was not a tobacco producer. It was essential to control such trade in order to reduce tobacco consumption and the illness and death caused thereby.

Ms ALI-HIGO (Djibouti) said that free zones had been a constant source of concern since the entry into force of the WHO FCTC. Countries with service-based economies would be tempted to allow tobacco manufacturers to operate from free zones, and it was essential to regulate their activities in order to mitigate the risk to public health. The wording for Article 11 proposed by the informal working group was a first step towards regulation, and should not be watered down. Indeed, its provisions and the measures taken to enforce them should be made even stricter in the future.

Mr DAS (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that the wording agreed by the informal working group should be maintained. As other speakers had said, there was no legitimate justification for intermingling. The working group's wording correctly conveyed the intention behind the Article.

Ms EKEMAN (Turkey) likewise supported the wording agreed by the informal working group. The protocol was intended to protect public health; its provisions might indeed increase the operating expenses of the tobacco industry, but that was no reason to alter them.

Dr CALLE PLATA (Plurinational State of Bolivia) said that there was no reason for a legitimate business to practise intermingling. Countries should ensure that their legislation prohibited the practice. The wording of the Article approved by the informal working group should be retained.

Dr ABASCAL (Uruguay) said that illicit trade in tobacco products, which was often associated with shipment through free zones, undermined the strategy of increasing duty on tobacco products in order to make them less affordable for young people and thus discourage them from initiating tobacco use. The prohibition on intermingling was therefore an important public health measure and should be maintained.

The CHAIRPERSON, replying to a query from Ms ONAMBELE (Cameroon), said that the "effective controls" referred to in paragraph 1 were those listed in the other articles of Part III on supply chain control, including licensing, due diligence, record-keeping and tracking and tracing. Most representatives appeared to be in favour of retaining the wording approved by the informal working group, subject to a satisfactory definition of the terms "manufacturing equipment" and "intermingling". He said that he appreciated that the representative of Singapore held a different view, but suggested that he should reflect on his position overnight and consider joining the majority.

(For continuation of the discussion on Article 11, see summary record of the fourth meeting.)

- **Article 11*bis*: Duty free sales**

The CHAIRPERSON, replying to a point raised by Mr FISCH BERREDO MENEZES (Brazil), said that the phrase "ascertain the extent of illicit trade" in paragraph 2 also covered the possibility that no such trade existed.

Mr ROWAN (European Union) recalled that there had been considerable discussion within the informal working group about whether there actually was any illicit trade in tobacco products in free zones. The current wording definitely allowed for the possibility that such trade did not, in fact, exist.

Mr NGEYWO MASUDI (Kenya) drew attention to an apparent contradiction between paragraphs 1 and 2. Paragraph 1 called on Parties to implement effective measures to subject duty free sales to the provisions of the protocol, while paragraph 2 stated that research should be carried out subsequently to determine whether action other than the measures referred to in paragraph 1 was necessary, making it seem as if the drafters of the protocol were not convinced of the usefulness of the original measures. He suggested that paragraph 2 should be deleted. He was concerned that duty free sales might be used as a loophole to facilitate illicit trade and thus make it more difficult to achieve the aim of reducing tobacco consumption overall. For instance, travellers flying within Europe had to pay duty on tobacco purchases, whereas those flying from a European Union member State to a country outside Europe were allowed to buy goods free of duty.

Mr NJOKU (Nigeria) said that he agreed with the previous speaker. Illicit trade in tobacco products associated with duty free sales definitely took place: for instance, travellers returning to Nigeria from Europe often brought back large quantities of duty free tobacco products. Some Parties had provided statistics to back up their observations, but they had not been accepted by others, hence the requirement in paragraph 2 for further research. If duty was payable in the European Union, then it should be payable everywhere: otherwise, a two-track system of prices would develop, with tobacco at a lower price in countries with an emerging economy than in developed countries.

The CHAIRPERSON said that duty was charged on tobacco products within the European Union because it was classified as a single market, in which products were taxed at the traveller's point of departure. It was not a question of duty-paid versus duty free products. He did not see a contradiction between paragraphs 1 and 2. Paragraph 1 stated that the relevant provisions of the protocol, such as licensing and record-keeping, should also apply to duty free sales. If, following the relevant research, duty free sales were found to be a significant source of illicit trade, then Parties would decide on the appropriate action to be taken.

Mr ROWAN (European Union) said that paragraph 2 had been included as a concession to those Parties – not including the European Union – that had originally called for a total ban on duty free sales. If the research mandated in that paragraph demonstrated the need for a total ban, then it might be imposed in the future. He felt that paragraph 2 strengthened rather than weakened paragraph 1.

Mr NJOKU (Nigeria) said that he had no objection to the European common market, but felt that duty should be imposed on all sales within that market, without exception. Failing to do so created an opportunity for illicit trade outside Europe.

Mr NGEYWO MASUDI (Kenya) reiterated his view that, if paragraph 2 were retained, the research mandated in that paragraph would determine whether action should be taken under paragraph 1, and what that action should be. It would, accordingly, be impossible to take any action under paragraph 1 until the research was complete. There was no longer any justification for duty free sales. Travellers might be allowed to buy 200 cigarettes free of duty at an airport, but they were not allowed to smoke them, either in the airport or on the aeroplane. It was assumed that they would take the cigarettes home.

The CHAIRPERSON said that the research conducted by Parties, as the representative of the European Union had said, might lead to the conclusion that duty free sales should be banned altogether.

Dr ABASCAL (Uruguay) said that, in his opinion, the two paragraphs did not contradict one another. It should not be assumed that action could not be taken under paragraph 1 until the research mandated under paragraph 2 had been completed. There was some evidence that duty free sales contributed to illicit trade in tobacco products. However, detailed data and incontrovertible evidence had not yet been collected to prove the need for a complete ban, with all the implications that would have for international trade treaties and other agreements. Naturally, the tobacco industry was entirely in favour of duty free sales: such sales made tobacco products available at a lower price, which had been proved to increase consumption.

Ms MADRAZO REYNOSO (Mexico) recalled that participants' initial positions in the informal working group had been highly polarized, with some Parties calling for a complete ban on duty free sales and others strongly opposing such a ban. The wording eventually agreed upon had been a delicate compromise. It stopped short of a complete ban, which some Parties had said would prevent them from acceding to the protocol, but left the way open for research and the possibility that a ban might be proved to be justifiable at some point in the future. She agreed with the representative of Uruguay that very sound evidence would be required to persuade Parties to impose a complete ban.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group, proposed an amendment to paragraph 2, namely the insertion of the word "further" before "appropriate action". The action recommended in paragraph 1 would be taken straight away, and further action would be taken when the research referred to in paragraph 2 had been completed, if the Conference of the Parties deemed it appropriate.

The CHAIRPERSON said that the proposed amendment appeared to offer a solution to the concerns expressed. However, if any Parties objected, he would return to the original wording. Replying to a query from Ms MATSAU (South Africa), he said that, reading the text as a native English speaker, he was in no doubt that the word "further" applied to "appropriate action" and not to the verb "consider".

Mr ROWAN (European Union) asked for more time for the Parties in the European Union to consider the proposed change. If they decided they could accept it, it would be on the understanding that no further changes would be made to the section on supply chain control.

(For continuation of the discussion on Article 11*bis*, see summary record of the fourth meeting.)

Part II: General obligations

- **Article 4*bis*: Protection of personal data**

The CHAIRPERSON drew attention to the proposed new article on protection of personal data,¹ drawn up by the informal working group and reproduced in document FCTC/COP/INB-IT/5/3, Proposal 4.

¹ Subsequently included in the draft protocol as Article 5.

Mr SONG (Singapore) asked about the reference to “existing international standards, such as the United Nations guidelines for the regulation of computerized personal data files”. Were the standards in question ones to which Parties were likely already to be adhering, or would they need to ratify new international instruments in order to implement the article?

The CHAIRPERSON suggested that the Parties that had participated in the informal working group should reflect on that question overnight and express their views the following day.

Mr COTTERELL (Australia) asked about the interpretation of the word “existing”. Did it apply only to those instruments that were in existence when the protocol came into force or when a Party acceded to it? Would any subsequent amendments to those instruments have to be taken into account in the implementation of the protocol?

Ms GRANZIERA (WHO Secretariat, Office of the Legal Counsel) said that she would check which standards were being referred to and report back to the plenary the next day. In her view, the word “existing” meant only those standards that were in existence at the time of negotiation of the protocol, which would ensure that Parties knew exactly what they were committing themselves to do. However, the wording was clearly open to a number of interpretations.

Mr SONG (Singapore) suggested the wording “in line with the existing international standards binding upon them”.

Mr REGALADO PINEDA (Mexico) said that the Spanish version of the Article implied, on the contrary, that Parties should take account of any developments in existing international standards in their implementation of the protocol. That was a more flexible approach than merely adhering rigidly to the instruments in force at the time a Party ratified the protocol.

Mr BAGHERPOUR (Islamic Republic of Iran) noted that, while the protocol itself would be binding on the Parties that chose to accede to it, the standards referred to in the article under discussion, including the Guidelines for the Regulation of Computerized Personal Data Files, adopted by the United Nations General Assembly in its resolution 45/95 of 14 December 1990, and related General Assembly resolutions, were not necessarily legally binding.

Mr NEVES SILVA (Brazil) agreed that the current wording was ambiguous. As he remembered the informal working group’s discussions, the Article was not intended to impose binding obligations arising from other international standards on those Parties that acceded to the protocol. There had been some discussion of the standards that should be cited, with only the United Nations Guidelines for the Regulation of Computerized Personal Data Files meeting with general approval. In fact, his understanding of the text was that, where relevant provisions existed in domestic law, those would take precedence over international standards.

The CHAIRPERSON suggested that an informal drafting group should be convened to discuss the wording of the Article. One possible formulation might be: “in line with international standards and subject to national and/or domestic law”.

It was so agreed.

(For continuation of the discussion on Article 4*bis*, see summary record of the fourth meeting.)

2. ORGANIZATION OF WORK

Advisory committee on language

The CHAIRPERSON drew attention to the draft decision contained in Annex 1 of document FCTC/COP/INB-IT/5/INF.DOC./4, which proposed the establishment of an advisory committee on language that would ensure consistency within and between the various language versions of the draft protocol. The advisory committee would have to complete its work during the current session in order to meet the deadline for submission of the draft to the Parties, namely six months before the fifth session of the Conference of the Parties, due to be held in November 2012. The draft decision stated that the Chair of the advisory committee should be an expert who had participated in previous negotiations on the draft protocol.

Dr NIKOGOSIAN (Head, Convention Secretariat), replying to a question from Mr COTTERELL (Australia), said that paragraph (7) of the draft decision, which provided for the advisory committee to be consulted after the session if necessary, had been added purely as a precautionary measure.

Ms EMOND (Canada) asked whether the advisory committee would make a final decision on changes to the English language version proposed in plenary meetings, or confine itself to verifying the accuracy of the translation into the other official languages. The advisory committee would not need to make any decisions after the session, as the finalized draft would be sent to all Parties in May for their comments. Parties would also be able to raise any outstanding issues at the fifth session of the Conference of the Parties.

Dr NIKOGOSIAN (Head, Convention Secretariat) said that the advisory committee would verify both the consistency of the terminology used in the English language version and the accuracy of the translation from English into the other official languages. The advisory committee would meet at lunchtime on most days of the session. The committee Chair would report briefly to the afternoon meeting of the plenary, and the committee's conclusions would be submitted to the plenary for approval at regular intervals, in the form of a conference paper.

The CHAIRPERSON suggested that paragraph (7) of the draft decision should be deleted. Subject to that amendment, if he saw no objection, he would take it that the Intergovernmental Negotiating Body wished to adopt the draft decision contained in Annex 1 of document FCTC/COP/INB-IT/5/INF.DOC./4.

The draft decision, as amended, was adopted.

The meeting rose at 21:00.

FOURTH PLENARY MEETING

Friday, 30 March 2012, at 10:15

Chairperson: Mr I. WALTON-GEORGE (European Union)

DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

The CHAIRPERSON drew attention to a consolidated draft of the protocol, prepared by the Convention Secretariat. It consisted of the version of the draft protocol contained in document FCTC/COP/INB-IT/5/4, with a number of amendments as well as proposals relating to Article 1 by the working group on definitions. The proposals by the informal working group established by the Conference of the Parties with regard to Articles 5, 6 to 8 and 11*bis* had replaced the earlier version of those Articles contained in document FCTC/COP/INB-IT/5/4. A new provision on protection of personal data, as proposed by the informal working group in document FCTC/COP/INB-IT/5/3, was included as Article 4*bis*.

Part III: Supply chain control (continued from the third meeting)

- Article 11: Free zones and international transit (continued from the third meeting)

Mr SONG (Singapore) read out a statement of his delegation's position. He wished to make it clear that tobacco and tobacco products were not manufactured in the free zones of his country and such conduct was punishable by law. However, the current wording of paragraph 1 was not limited to the manufacturing process, but also dealt with transactions relating to tobacco and tobacco products in free zones. That wording was too broad, and he proposed that the words "shall ... implement" should be replaced by "shall endeavour ... to implement". He was aware that smuggling occurred in free zones on the territory of some Parties, and fully supported all efforts to regulate the movement of goods into and out of free zones.

Turning to paragraph 2, he said that it was illegal in his country to hide smuggled goods in a consignment of legal goods in order to circumvent the law. However, the mere intermingling of tobacco and non-tobacco products in a single consignment was not illegal. He would prefer more precise wording for that paragraph but would not block any consensus.

The CHAIRPERSON, commending the flexibility shown by the representative of Singapore, said that, if he saw no objection, he would take it that provisional consensus had been reached on Article 11, subject to an acceptable definition being found for the term "intermingling".

It was so agreed.

(For continuation of the discussion on Article 11, see summary record of the thirteenth meeting.)

- **Article 11bis: Duty free sales** (continued from the third meeting)

Mr SONG (Singapore) read out a statement of his delegation's position. He shared the concerns expressed by other Parties about the addition of the phrase "further appropriate action". However, in the interests of consensus, he would not object to that amendment if other Parties were willing to accept it.

Mr ROWAN (European Union) said that, following regional consultations and in the light of the spirit of compromise shown by the delegation of Singapore, the Parties in the European Union were prepared to accept the wording "appropriate further action".

Mr TAGOE (Ghana) expressed concern that the current wording provided that the evidence-based research referred to in paragraph 2 would not begin until five years after the entry into force of the protocol. With the other delays inherent in the process, it could be 15 years before the results were available.

Dr NDYANABANGI (Uganda) said that she, too, did not understand the rationale for waiting five years before beginning the research. Instead, the Convention Secretariat should begin the research as soon as the protocol entered into force, so that the Meeting of the Parties could evaluate the results and decide rapidly on the action to be taken.

Mr PUSP (India) agreed that 10 or 15 years was too long to wait for the research results.

Mr ROWAN (European Union) said that, at present, illicit trade in duty free products, such as those sold at airports, was not a major problem. The research referred to in paragraph 2 had been suggested as a compromise between those Parties represented in the working group that wanted a complete ban on duty free sales and those that were strongly opposed to such a ban, considering that the small amount of illicit trade that had been detected, such as individual airline passengers buying two or three cartons of cigarettes in excess of their duty free allowance, could safely be left for national customs authorities to deal with. The period of five years before the initiation of evidence-based research to determine the extent of the problem of illicit trade related to duty free sales – or indeed whether it existed at all – had been accepted by members of the working group from all WHO regions after lengthy discussion.

Replying to a point raised by the CHAIRPERSON, he said that the Parties in the European Union might agree to the research starting earlier, so that the results could be made available more quickly, but they would need time to consult before stating a definite position. In any case, as stipulated in paragraph 1, all measures provided for in the protocol would also apply to illicit trade related to duty free sales, so it was not the case that no action at all would be taken until the research results were available.

Mr COULOMBE (Canada) proposed that, in paragraph 2, the words "Five years" should be replaced by "No later than five years". That would give the Meeting of the Parties the freedom to decide on the most suitable time to begin the research.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group on the draft protocol, said that it would take about five years to collect the necessary data. The first Meeting of the Parties would have the authority to request the Convention Secretariat to begin the research immediately, so that the results would be available at a subsequent Meeting.

The CHAIRPERSON suggested that the wording of paragraph 2 should be left as it was, on the understanding that the first Meeting of the Parties could request the Convention Secretariat to begin the research immediately after the Meeting. That understanding could be stated explicitly in the Intergovernmental Negotiating Body's report to the Conference of the Parties. The research results would then be available approximately five years later.

Mr TAGOE (Ghana) said that he supported the suggestion that, to prevent differing interpretations of the five-year deadline, the research should begin as soon as the protocol entered into force.

Mr ROMERO PUENTES (Observer, Cuba)¹ said that the word "further" implied that action would definitely be taken on illicit trade related to duty free sales. Such matters should be dealt with under national customs regulations rather than an international instrument like the protocol. The deletion of paragraph 2, or wording such as "action should be taken, if necessary" would be preferable.

The CHAIRPERSON, replying to a question from Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo), said that the precise scope of the research would be decided by the first Meeting of the Parties. The Parties would have ample time before then to decide which areas most urgently required research.

Mr NGEYWO MASUDI (Kenya) said that the Intergovernmental Negotiating Body should decide on the scope of the research, rather than leaving the task to the Meeting of the Parties, and should request the Convention Secretariat to begin the research immediately, so that the results would be available to the Meeting of the Parties at its first session.

Dr NDYANABANGI (Uganda) agreed that the research should begin immediately. She took exception to the suggestion made by some representatives that the Parties should be shackled by the outcome of the informal working group's deliberations. The Intergovernmental Negotiating Body was at liberty to amend the working group's proposals if it saw fit.

Mr DESIRAJU (India) said that the proposal by the representative of Canada made allowance for the fact that it might not be possible to start the research immediately, but made it clear that it could not be postponed indefinitely.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) suggested that a working group should meet to decide on the general areas to be covered by the research. The proposals would be compiled into a report by the Convention Secretariat and submitted to the Meeting of the Parties, which could then mandate a group of experts to carry out the research.

Ms EKEMAN (Turkey) said that the issue was clearly a sensitive one and it might be necessary to amend the wording proposed by the informal working group, despite some Parties' reluctance to do so.

¹ Participating by virtue of Rule 29 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that the Parties supported the amendment proposed by the representative of Canada as their regional position.

Mr ROWAN (European Union) said that since illicit trade related to duty free sales was not a serious problem, any research undertaken straight away to determine the scope of such illicit trade would merely be a waste of money.

The CHAIRPERSON said that it was understandable that some Parties might wish to prove through research whether the problem did, or did not, really exist.

Mr NJOKU (Nigeria) said that for every 10 aircraft landing in Nigeria from Europe, an average of three containers' worth of duty free tobacco was imported into the country, which was likely to be diverted into illicit trade. Perhaps the problem did not exist in Europe, but it certainly did in Africa. The research in question was a priority for the Parties in the WHO African Region.

Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region, said that the Parties supported the amendment proposed by the representative of Canada. There was no reason to delay the research. The Parties hoped that duty free sales would be abolished in the near future, which would make that form of illicit trade impossible.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand), speaking in her capacity as Chair of the informal working group, noted that the concept of evidence-based research, to begin five years following the entry into force of the protocol, also appeared in Article 5.5. The wording proposed for Article 11bis represented a delicate compromise between those Parties that wished duty free sales to continue, whose concerns were principally addressed in paragraph 1, and those that wanted a complete ban, whose concerns were principally addressed in paragraph 2. The proposal by the representative of Canada provided an acceptable solution.

The CHAIRPERSON suggested that a small working group should meet that afternoon to discuss the proposal by the representative of Canada and other possible solutions to the issues raised.

Mr ALBUQUERQUE E SILVA (Brazil), supported by Ms EKEMAN (Turkey), expressed concern about the proposal to convene yet another working group. Two members of his delegation were already occupied by working group meetings, and it would be difficult for his delegation to cover another working group as well as the plenary.

Ms MADRAZO REYNOSO (Mexico), speaking also on behalf of Panama, likewise deplored the tendency to create informal working groups to deal with every sensitive issue. With a little more discussion, she felt that the wording of Article 11bis could be agreed in plenary to all Parties' satisfaction.

The CHAIRPERSON suggested that consideration of the article should be suspended until the next meeting to give delegations time to consider their positions.

Dr SA'A (Cameroon) recalled the proposal made by the Parties in the African Region, namely that the Convention Secretariat should immediately conduct a preliminary study to

identify the areas where research was most urgently needed. Was the Convention Secretariat in a position to undertake that task?

Ms KANGANGWANI (Botswana) said that, if a working group were to be convened, it should discuss both the amendment proposed by Canada and the proposal by Kenya that the Convention Secretariat should begin the research immediately.

Mr BAGHERPOUR (Islamic Republic of Iran) said that the amendment proposed by the representative of Canada was acceptable. However, for the sake of consistency, any changes to Article 11bis should also be made to Article 5.5.

The CHAIRPERSON said that, if he saw no objection, he would take it that consensus had been reached on paragraph 1. He called upon delegations to discuss in their regional groups whether they could accept the amendment proposed by the representative of Canada and, if so, whether Article 5.5 should be amended in the same way.

(For continuation of the discussion on Article 11bis, see summary record of the fifth meeting.)

It was so agreed.

Part II: General obligations (continued from the third meeting)

- **Article 4bis: Protection of personal data** (continued from the third meeting)

The CHAIRPERSON recalled the changes proposed at the previous meeting, namely the deletion of the word “existing” and the phrase “such as the United Nations guidelines for the regulation of computerized personal data files”. The deletion of the phrase “and/or domestic law” had also been proposed but, as the representative of Canada had explained, the distinction between national and domestic law was important in some countries’ legal systems.

Mr SONG (Singapore) suggested the addition of “binding upon them” after “international standards”.

The CHAIRPERSON said that, if he saw no objection, he would take it that provisional consensus had been reached on Article 4bis with the inclusion of the word suggested by the representative of Singapore.

It was so agreed.

(For continuation of the discussion on Article 4bis, see summary record of the seventh meeting.)

Part V: International cooperation

The CHAIRPERSON, responding to a point raised by Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that he was aware of the potential problems associated with discussing the section on international cooperation before other articles, notably Article 12 (*Unlawful conduct including criminal offences*), had been finalized. Nevertheless, he felt that useful progress could be made.

- **Article 20: General information sharing**

Mr ALBUQUERQUE E SILVA (Brazil) noted that a number of issues on which consensus had been reached at previous sessions were, in fact, still not agreed. One such issue concerned the word “counterfeit”. He read out a statement of his delegation’s position.

The protocol aimed to provide an effective response to illicit trade in tobacco products, considering the contribution of illicit trade to the spread of the tobacco epidemic, which was a global problem with serious consequences for public health.

The Parties’ purpose was to address illicit trade in tobacco products rather than counterfeit products, which came within the area of intellectual property rights. It was, therefore, inappropriate to address the issue of counterfeit products in the protocol. Such an approach might lead to public health resources being used to protect the intellectual property rights of tobacco manufacturers, which were dealt with by other international instruments and by organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). He therefore proposed that the term “counterfeit” should be deleted from Articles 12, 18 and 20 of the draft protocol. Specifically, in Article 20.1(a), the phrase “counterfeit and genuine brands” should be deleted.

Mr MA Xinmin (China) said that subparagraph 1(c) should be deleted as it was not particularly relevant to illicit trade.

Mr BAGHERPOUR (Islamic Republic of Iran) said that he had strong reservations about the term “offences”. He would be unable to agree to any article in Part V of the draft protocol containing that term until Article 12 had been finalized.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, appealed to other Parties not to reopen the debate on articles and paragraphs on which consensus had been reached in earlier sessions. Subparagraph 1(c) did not come into that category, and he agreed that it should be deleted.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that the Parties supported as their regional position the statement made by the representative of Brazil calling for the deletion of the reference to “counterfeit” brands.

Ms MOODLEY (alternate to Ms Matsau, South Africa) likewise supported the deletion of “counterfeit”.

Mr NDAO (Senegal), speaking on behalf of the Parties in the WHO African Region, agreed that subparagraph 1(c) should be deleted, as the data called for in subparagraph 1(b), namely the quantity or value of production of tobacco or tobacco products, would provide the same information.

Ms KIPTUI (Kenya) agreed that subparagraph 1(c) should be deleted. A provision should also be added to Article 20, stating that the collection of information pursuant to the Article should be as transparent as possible and that the information should be protected from interference by the tobacco industry, in accordance with Article 5.3 of the WHO FCTC.

Mr AZAM-E-SADAT (Bangladesh) said that both the term “counterfeit” and the call for collection of data on agricultural production should be retained. Smuggling of counterfeit tobacco products was certainly a problem in his country, and he felt that it could only be

beneficial to collect as much information as possible about such products and about agricultural production of tobacco, and share it among all Parties.

Ms PATTERSON (alternate to Mr Cotterell, Australia) supported the deletion of the word “counterfeit”. The protocol was intended to protect public health; intellectual property issues were dealt with in other international instruments.

Mr ALADLY (Iraq), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region that had met in the morning, said that the Parties supported the wording of the Article, particularly with regard to international exchange of information.

Mr DESIRAJU (India) agreed that the reference to “counterfeit” should be deleted. In respect of subparagraph 1(c), he felt that the provision was hedged with so many caveats, including the reference in the introductory part of paragraph 1 to “relevant” information reported “subject to domestic law” and “where appropriate”, that any country that did not wish to provide information on its agricultural production would be able to avoid doing so. There was, therefore, no need to delete the subparagraph.

Mr DLAMINI (Swaziland) agreed with the representative of Brazil that the reference to “counterfeit” brands in subparagraph 1(a) and the whole of subparagraph 1(c) should be deleted.

Dr ROSELL-UBIAL (Philippines) said that the reference to “counterfeit” brands should be retained but that subparagraph 1(c) should be deleted.

Dr ABASCAL (Uruguay) said that the protocol was intended to prevent tax evasion. It should not address issues related to trademarks and brands. However, counterfeit tobacco products were just as damaging to people’s health as any others, and sometimes even more so.

The CHAIRPERSON noted that a large majority of speakers appeared to be in favour of deleting subparagraph 1(c), particularly since much of the information referred to would in any case be supplied under subparagraph (b). If he saw no objection, he would take it that subparagraph 1(c) should be deleted.

It was so agreed.

The CHAIRPERSON said that the issue of counterfeit brands was a much more complex one that affected many areas of the protocol. In the specific case in question, it was not clear whether the mere transmission of information about seizures of illicitly traded genuine or counterfeit tobacco products was an issue of intellectual property rights.

Mr ALBUQUERQUE E SILVA (Brazil) said that WHO would be setting a dangerous precedent if it started to monitor an issue that was properly the preserve of WIPO or WTO. Paragraph 1 stated that “relevant” information should be supplied, and he did not consider information on counterfeit products to be relevant.

For some years, a WHO working group had discussed the issue of substandard, spurious, falsely-labelled, falsified and counterfeit medical products, without even reaching consensus on a definition of such products. Brazil strongly opposed counterfeiting at the WTO and in other relevant forums, but it was both unnecessary and unwise to venture into such controversial territory in the present protocol.

The CHAIRPERSON asked whether it would be acceptable to delete the phrase “counterfeit and genuine” and leave “brands”. Information showing a high volume of seizures of a particular brand of tobacco product might indicate that the manufacturer of that product was not adequately licensed or monitored, for example.

Mr FISCH BERREDO MENEZES (Brazil) said that, in his understanding, the brand formed part of the product description, which was covered by subparagraph 1(a).

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that the Parties in the Union would need time to discuss the implications of deleting the phrase “counterfeit and genuine brands”, since it appeared in a subparagraph on which, they had thought, consensus had been reached at an earlier session.

Mr AZAM-E-SADAT (Bangladesh) said that information on “counterfeit” brands could be useful, as it would enable the companies that manufactured such products to be identified and penalized and helped to distinguish them from legal manufacturers.

The CHAIRPERSON noted that some Parties had proposed replacing “domestic law” with “national law”, both in Article 20 and in other articles of the protocol. However, some representatives, including the representatives of Canada and the European Union, had indicated that the two terms were distinct under their law. He therefore suggested that, throughout the protocol, the term “domestic” should be retained since it had been approved by consensus at a previous session.

The outstanding issues to be decided in relation to Article 20 were the definition of “manufacturing equipment”, the issue of counterfeit brands and that of national versus domestic law. He would allow representatives time to reflect and consult further. Otherwise, he took it that provisional consensus had been achieved on the wording of Article 20.

It was so agreed.

(For continuation of the discussion on Article 20, see summary record of the eleventh meeting.)

- **Article 21: Enforcement information sharing**

The CHAIRPERSON recalled that questions had been raised about the inclusion of the term “manufacturing equipment”. If the term was to be retained, it would need to be adequately defined. The use of the terms “domestic law” and “national law” would also need to be agreed.

Ms BASTOS DE ANDRADE (Brazil) suggested using the words “domestic and/or national law”.

The CHAIRPERSON said that, if he saw no objection, he would take it that provisional consensus had been reached on Article 21, subject to a satisfactory definition of the term “manufacturing equipment” and to the final decision relating to the use of the terms “domestic law” and “national law”.

It was so agreed.

(For continuation of the discussion on Article 21, see summary record of the eleventh meeting.)

- **Article 22: Information sharing, confidentiality and protection of information**

The CHAIRPERSON suggested that the original wording, “domestic law”, should be retained in preference to “national law”. Otherwise, if he saw no objection, he would take it that consensus had been achieved on Article 22.

It was so agreed.

- **Article 23: Assistance and cooperation: training, technical assistance and cooperation in scientific, technical and technological matters**

The CHAIRPERSON suggested that the phrase “The Parties” in paragraph 1 should be replaced by “Parties”. Otherwise, if he saw no objection, he would take it that consensus had been achieved on Article 23.

It was so agreed.

- **Article 24: Assistance and cooperation: investigation and prosecution of offences**

The CHAIRPERSON said that questions had been raised about the inclusion of the term “manufacturing equipment”. If the term was to be retained, it would need to be adequately defined. The use of the terms “domestic law” and “national law” would also need to be agreed. Otherwise, if he saw no objection, he would take it that provisional consensus had been achieved on Article 24.

It was so agreed.

(For continuation of the discussion on Article 24, see summary record of the eleventh meeting.)

- **Article 25: Protection of/[Respect for]/[Protection of and respect for] sovereignty**

The CHAIRPERSON, noting that the title of the Article had no legal significance, suggested that it would be simpler to entitle it merely “Sovereignty”.

Mr ALBUQUERQUE E SILVA (Brazil) said that the wording of the Article was taken almost verbatim from Article 4 of the United Nations Convention against Transnational Organized Crime. He suggested that the title should be changed to “Protection of sovereignty” to match that instrument.

It was so agreed.

The CHAIRPERSON said that there were two possible options in paragraph 2: “domestic law” and “domestic or international law”.

Dr SA'A (Cameroon) said that he preferred the wording "domestic and/or international law".

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that the whole of paragraph 2 should be deleted, since it added little to the Article. If it were retained, however, the wording "domestic law or international law" would be preferable.

Ms MANSUR (Israel) said that, in some countries including her own, certain functions were traditionally performed by, and assumed under international law to be exclusively performed by, the State, even though there was no national law that specifically assigned those functions to the State. It was therefore essential that paragraph 2 should use the wording "national or international law". If "national law" were used alone, the safeguard described in the paragraph could not be provided, as the relevant national laws simply did not exist.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) asked whether it was legitimate to refer to "domestic or international law". Surely, in cases where domestic and international law covered the same issue, international law always took precedence?

Ms PATTERSON (alternate to Mr Cotterell, Australia) said that the term "domestic law" should be used, since Article 4 of the United Nations Convention against Transnational Organized Crime did not refer to international law.

Mr RAMÍREZ CAMPOS (Colombia) said that he supported the views expressed by the representatives of Israel and the Denmark. Paragraph 2 reinforced paragraph 1 by establishing that certain functions were exclusively reserved for the authorities of a particular State.

Mr BAGHERPOUR (Islamic Republic of Iran) said that paragraph 2 expressed a well-known principle of international relations, also enshrined in Article 2, paragraph 7 of the Charter of the United Nations. It was preferable to use the term "domestic law", since "international law" might be open to varying interpretations.

Mr AZAM-E-SADAT (Bangladesh) said that if paragraph 2 made reference to international law only, that might imply that domestic law in some countries did not respect the sovereignty of other countries. Nevertheless, it did no harm to include both terms.

Mr SONG (Singapore), supported by Mr ALBUQUERQUE E SILVA (Brazil), suggested using the term "domestic law" since it corresponded to the wording of Article 4 of the United Nations Convention against Transnational Organized Crime, to which most Parties to the WHO FCTC were also party.

Ms GRANZIERA (WHO Secretariat, Office of the Legal Counsel), replying to the question raised by the representative of the Democratic Republic of the Congo, said that the language of paragraph 2 was taken from Article 4.2 of the United Nations Convention against Transnational Organized Crime. Such language was commonly used in legal instruments with a view to avoiding conflict between national and international law.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that he would need to consult his Government before stating his definitive position.

The CHAIRPERSON suggested that the phrase “domestic law” should be used alone, as that was the wording used in the United Nations Convention against Transnational Organized Crime.

Ms MANSUR (Israel) said that she favoured the use of the term “domestic or international law”. Otherwise, paragraph 2 could simply be deleted, since paragraph 1 would be stronger without it. However, she would accept the decision of the majority.

The CHAIRPERSON said that, if he saw no objection, he would take it that the meeting agreed to use the phrase “by its domestic law” in paragraph 2 and that consensus had thus been achieved on Article 25.

It was so agreed.

- **Article 27: Joint investigations**

The CHAIRPERSON suggested that Article 27 should be deleted, as had been proposed by a number of Parties at previous sessions. If he saw no objection, he would take it that the meeting endorsed his suggestion.

It was so agreed.

- **Article 28: Law enforcement cooperation**

The CHAIRPERSON said that the terms “offences” and “natural and legal persons” would require adequate definition.

Mr MAYEYA (Zambia) said that the Parties in the WHO African Region supported the text of the Article. At both national and international level, criminals involved in illicit trade must face strict penalties. Cooperation between law enforcement systems in different countries was essential to achieve that aim.

Mr HAMANEH (Islamic Republic of Iran) requested that consideration of the Article be suspended until the wording of Article 12, on unlawful conduct including criminal offences, was finalized.

It was so agreed.

(For continuation of the discussion on Article 28, see summary record of the eighth meeting.)

- **Article 29: Mutual administrative assistance**

The CHAIRPERSON noted that the issue of offences, dealt with in Article 12, and the concepts of “natural and legal persons” and “suspected” persons were of crucial relevance to Article 29. An adequate definition of the term “manufacturing equipment” would be required.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that, in the introduction to the Article, the phrase “Consistent with their respective domestic legal and administrative systems” should be retained and the phrase “either on request or on their own

initiative” deleted. The last sentence should read: “Such information may, inter alia, include”. Subparagraph (d) should be deleted.

Dr KONUMA (Japan) agreed that the phrase “Consistent with their respective domestic legal and administrative systems” should be retained. He would prefer the use of “should” rather than “shall” throughout the Article, but would not insist on the change.

Mr HAMANEH (Islamic Republic of Iran) said that the phrases “Consistent with their respective domestic legal and administrative systems” and “either on request or on their own initiative” should both be retained.

The CHAIRPERSON said that, if he saw no objection, he would take it that the phrase “Consistent with their respective domestic legal and administrative systems” should be included in the text.

It was so agreed.

(For continuation of the discussion on Article 29, see summary record of the eighth meeting.)

The meeting rose at 12:45.

FIFTH PLENARY MEETING

Friday, 30 March 2012, at 15:10

Chairperson: Mr I. WALTON-GEORGE (European Union)

DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part III: Supply chain control (continued from the fourth meeting)

- **Article 11bis: Duty free sales** (continued from the fourth meeting)

Paragraph 2 (continued from the fourth meeting)

The CHAIRPERSON invited Parties to resume their consideration of paragraph 2. Once agreement had been reached on that paragraph, the discussion on Part III (Supply chain control) could be closed, with the exception of the definitions that needed to be finalized. He asked whether the Intergovernmental Negotiating Body was prepared to endorse the proposal made by the representative of Canada at the morning meeting to amend the beginning of the paragraph to read “No later than five years following the entry into force of this Protocol”.

Mr LINDGREN (Norway), speaking on behalf of the Parties in the WHO European Region, said that the text as originally proposed would have been preferable, since that was the wording on which the informal working group had agreed. However, following consultations, the Parties in the Region were prepared to accept the wording suggested by Canada with the understanding that debate on Articles 5 to 11bis would then be closed, since consensus had been reached on all the other provisions.

Ms MOODLEY (alternate to Ms Matsau, South Africa) asked whether it would still be possible for the Convention Secretariat to examine research conducted immediately following the entry into force of the protocol and report thereon to the Meeting of the Parties to facilitate its decision-making.

The CHAIRPERSON said that, as he understood it, the proposal by Canada defined the limits of the compromise that could be reached at the present juncture.

Mr CISSE (Senegal) said that he failed to see a fundamental difference between the existing wording and the proposed new wording.

The CHAIRPERSON said that, at least in the English version, the proposed new wording “no later than five years” meant that action could begin at any time during the five year period following the entry into force of the protocol.

Mr HAMANEH (Islamic Republic of Iran), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, said that the proposed new wording was acceptable, provided that the same amendment was made to Article 5.5.

The CHAIRPERSON said that the suggestion made by the representative of the Islamic Republic of Iran probably went a step too far and would make it impossible to reach consensus on Part III as a whole.

Dr NDYANABANGI (Uganda) said that the Parties in the WHO African Region were willing to accept the proposal put forward by Canada provided that the same wording was used in Article 5.5.

Mr DLAMINI (Swaziland), supporting the views of the previous speaker, said that his delegation would have preferred the research referred to in paragraph 2 to be conducted immediately following the entry into force of the protocol so that it would be available to the Meeting of the Parties at its first meeting.

Mr TAGOE (Ghana) suggested that the beginning of paragraph 2 should be amended to read “Immediately following the entry into force of this Protocol”.

The CHAIRPERSON said that the Conference of the Parties could, at its meeting in November 2012, provide guidance on the wording of paragraph 2.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that the vast majority of Parties in the Region would find it difficult to take action immediately following the entry into force of the Protocol.

Mr ROWAN (European Union) said that it was regrettable that attempts were now being made to introduce new elements into the text after consultations had been held in which a number of delegations had given ground in order to reach a compromise solution. The only similarity between paragraph 2 and Article 5.5 was the period of five years mentioned in both. The European Union was prepared to accept the phrase “no later than five years” in paragraph 2 but was strongly against reopening discussion on Article 5.5, to which the Parties had already agreed.

Ms MADRAZO REYNOSO (Mexico) said that the wording suggested by the representative of Canada was the best means of reconciling the divergent positions of those who wanted to ban duty free sales immediately and those who were not in a position to do so.

Ms EKEMAN (Turkey) said that the content of Article 5.5, which dealt with key inputs, was clearly certainly different from that of paragraph 2, which dealt with duty free sales. If it turned out that immediate action was needed to combat illicit traffic in relation to duty free sales of tobacco products, the wording “no later than five years” would make that possible. Otherwise, Parties should refrain from reopening discussion of text that had already been agreed.

Dr ROA (Panama) said that a great deal of work had gone into drafting the text of paragraph 2, a provision that had given rise to controversy. The wording proposed by the informal working group would give the Meeting of the Parties a certain flexibility in terms of when action might be taken. The wording proposed by Canada offered a good compromise solution.

Mr HAMANEH (Islamic Republic of Iran) said that the Parties in the WHO Eastern Mediterranean Region understood the difference between paragraph 2 and Article 5.5 and did not wish to reopen discussion on the latter. All delegations and regional groups should nevertheless have the right to comment on matters of importance to them.

The CHAIRPERSON urged all delegations to accept the proposed new text and to refrain from reopening discussion of text already agreed. He proposed that discussion of the item should be suspended in order to give Parties further time for consultation.

It was so agreed.

(For continuation of the discussion on Article 11*bis*, see summary record of the seventh meeting.)

Part IV: Offences

- **Article 12: Unlawful conduct including criminal offences**

Ms SCHWERDTFEGER (Convention Secretariat) said that a drafting group comprising 30 Parties and invited experts had met after the third session of the Intergovernmental Negotiating Body and drafted Article 12, drawing in part on the text of the United Nations Convention against Transnational Organized Crime. The Intergovernmental Negotiating Body had not had sufficient time at its fourth session to examine the text. To facilitate the present discussion, a criminal law expert and a member of the Secretariat of the United Nations Office on Drugs and Crime were available to answer questions.

Mr HAMANEH (Islamic Republic of Iran), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, pointed out that paragraphs 3 and 4 were largely based on the United Nations Convention against Transnational Organized Crime. What, then, were the implications of Article 12 for States not party to that Convention? How would it be possible to ensure that those States met their obligations under the protocol? Was it the intention of the drafting group to link the protocol, which was meant to supplement the WHO FCTC, to the Convention against Transnational Organized Crime, as well as the United Nations Convention against Corruption and other relevant instruments dealing mainly with criminal law issues?

Mr AAGAARD (Denmark), speaking on behalf of the European Union, expressed general support for Article 12 in its current form, welcoming in particular the distinction between unlawful conduct and criminal offences. Any mention of criminal offences in other articles in the protocol should refer to such offences as being established not in accordance with paragraph 1 but with Article 12 as a whole.

The CHAIRPERSON, replying to a request for clarification from Mr BOUZO (Syrian Arab Republic), suggested that subparagraphs 1(a) and (b) should be reviewed by the advisory committee on language to ensure that they were clear in all language versions.

Mr ALBUQUERQUE E SILVA (Brazil) said that the protocol must be as realistic as possible. How feasible was it for countries to establish as unlawful conduct or criminal offences many of the activities to which Article 12 referred? For example, Brazil was not in a position to adopt legislation establishing the manufacturing of tobacco and manufacturing

equipment as unlawful conduct or criminal offences. Nor would it be prepared to make intermingling unlawful.

The CHAIRPERSON said that Article 12 referred to a number of other activities, such as acts of smuggling, and manufacturing without the payment of applicable duties, that would certainly be unlawful.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that some of the conduct set out in subparagraphs 1(a) to (h) might be considered a criminal offence in certain countries. Such conduct would also constitute a serious crime under the United Nations Convention against Transnational Organized Crime under two conditions: if the crime were punishable by a maximum deprivation of liberty of at least four years, or a more serious penalty, and if it were transnational in nature and committed by an organized criminal group, as defined in Article 2(a) of the United Nations Convention against Transnational Organized Crime. Conduct that might fall within the scope of that Convention would presumably be discussed by the Intergovernmental Negotiating Body in relation to Article 2 of the protocol. With regard to paragraph 3, he said that parties to the United Nations Convention against Transnational Organized Crime were expected to set up a mechanism to deal with money laundering and were urged to apply the provisions relating to money laundering to the widest possible range of predicate offences.

The CHAIRPERSON said that in drafting the protocol, an effort had been made to ensure consistency with the United Nations Convention against Transnational Organized Crime since States that were party to both the Convention and the protocol would not wish to have their obligations weakened by the latter. The protocol also sought to guarantee the same level of protection offered by that Convention to States not party to it.

Mr HAMANEH (Islamic Republic of Iran) said that the protocol was intended to serve as a supplement to the WHO FCTC, rather than to other international instruments. Consistency between the protocol and the WHO FCTC was paramount, and the concerns of Parties that, like his own, were not party to the United Nations Convention against Transnational Organized Crime should be taken into account.

The CHAIRPERSON said that every effort had been made to include in the draft of the protocol the strongest possible set of provisions to prevent, investigate and eliminate all forms of illicit trade in tobacco products, in line with Article 15.1 of the WHO FCTC.

Paragraph 1

Mr SONG (Singapore) asked whether there was any difference between the phrase “subject to its domestic law” and the phrase “subject to the basic principles of its domestic law”.

Ms GRANZIERA (WHO Secretariat, Office of the Legal Counsel) said that, while there might be a difference between them in criminal law, there was no significant difference between the two phrases in the context of paragraph 1.

Professor BÖSE (Invited expert), speaking at the invitation of the CHAIRPERSON, said that in treaties on criminal law, reference was often made to constitutional limits of criminal law, which might vary among the parties. The phrase “the basic principles of” in

paragraph 1 would take account of differing constitutional principles among the Parties to the protocol.

Mr HAMANEH (Islamic Republic of Iran) asked whether there was any difference between the terms “domestic law” and “national law” in the context of Article 12. Both terms were found in the WHO FCTC. However, in the United Nations Convention against Transnational Organized Crime, on which Article 12 was largely based, only the wording “principles of domestic law” was used. That language gave parties greater flexibility in deciding whether to criminalize certain acts or establish them as unlawful conduct.

The CHAIRPERSON said that the term “domestic law” should be used in paragraph 1 in order to ensure consistency throughout the text.

Subparagraph (a)

Mr ALBUQUERQUE E SILVA (Brazil) said that the words “tobacco” and “manufacturing equipment” should be placed in square brackets until the latter term had been defined and agreement reached on paragraph 1.

Subparagraph (b)(i)

The CHAIRPERSON, in response to a question from Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo), said that the criteria for establishing conduct relating to transport as unlawful were to be determined by each Party under its domestic law but might include, for example, failure by a transporter to pay excise duties or to meet the requirements for fiscal stamps.

Mr IBRAHIM (Sudan) asked whether the provisions of Article 12 covered the cultivation of tobacco, noting that tobacco underwent chemical changes during storage that made it harmful to health.

The CHAIRPERSON said that he did not think that Article 12 covered the planting of seeds and actual cultivation of tobacco. The activities covered by the term “manufacturing of tobacco” would depend on the definition of the term “tobacco” itself.

Mr ALBUQUERQUE E SILVA (Brazil) said that he wished to withdraw his request to place square brackets around the words “tobacco” and “manufacturing equipment” in subparagraph 1(a) since the words “applicable duties, taxes and other levies” and “applicable fiscal stamps” in subparagraph (b)(i) made the square brackets unnecessary.

Mr AL-SARRAY (Iraq) pointed out that manufacturing tobacco was very different from growing tobacco.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) suggested that in subparagraph (b)(i) mention should be made of the mandatory licence needed to operate within the supply chain, which gave rise to the obligation to pay duties and affix fiscal stamps on products.

The CHAIRPERSON said that the protocol did not deal with specific national requirements, such as licensing systems. There was, moreover, a limit to the types of conduct that could be established as unlawful in all Parties. He invited the representative of the

Democratic Republic of the Congo to put his suggestion in writing and submit it to the Convention Secretariat for consideration.

Subparagraph (b)(ii)

Ms MANSUR (Israel), in response to a request for clarification from Mr HAMANEH (Islamic Republic of Iran), said that the phrase “any other acts of smuggling” had been included to reflect the fact that some countries had internal borders across which items could be smuggled.

The CHAIRPERSON said that the phrase “any other acts of smuggling” should remain as it stood pending confirmation that it referred to the crossing of a border that was not a customs border, since the definition of smuggling was generally linked to customs control.

Subparagraph (c)(i)

Mr FISCH BERREDO MENEZES (Brazil), supported by Ms PATTERSON (alternate to Mr Cotterell, Australia), Mr DLAMINI (Swaziland) and Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya), proposed that subparagraph (c)(i) should be deleted for reasons that had been set out in the previous meeting.

Dr SA’A (Cameroon) said that he could not agree with those who wished to delete subparagraph (c)(i). Counterfeiting was a matter of great interest to WHO. Counterfeit tobacco products were of poor quality and therefore detrimental to health; moreover, their low cost made them easily accessible. If subparagraph (c)(i) were to be deleted, would that mean that counterfeiting was lawful?

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that it would be strange to exclude from the protocol one of the forms of illicit trade in tobacco products explicitly mentioned in Article 15 of the WHO FCTC.

Mr SONG (Singapore) suggested that subparagraph (c)(i) should be retained, as the phrase “subject to the basic principles of its domestic law” in paragraph 1 provided for flexibility.

The CHAIRPERSON pointed out that subparagraph (c)(i) might be superfluous, since subparagraph (b)(i) referred to “manufacturing”, which would also cover the manufacturing of counterfeit cigarettes.

Ms MANSUR (Israel) said that the vast majority of smuggled cigarettes were counterfeit; subparagraphs (b)(i) and (ii) adequately covered counterfeiting, without explicitly mentioning the term.

Mr ALBUQUERQUE E SILVA (Brazil) said that the word “counterfeit” appeared in Article 15.1 of the WHO FCTC. However, some time after the Convention had been adopted, it had become clear that employing the term “counterfeit” in respect of medical issues had become problematic. As defined in the Agreement on Trade-Related Aspects of Intellectual Property Rights, “counterfeit” referred to a specific type of trademark violation. Most delegations now took the view that WHO had no role to play in intellectual property rights enforcement. It would therefore be better to include the concept of counterfeiting in the protocol without specifically mentioning the term.

The CHAIRPERSON asked whether there was general agreement that under subparagraph (b)(i), the production of counterfeit tobacco products without the payment of applicable duties would be unlawful.

Ms MANSUR (Israel) said that, even if counterfeit cigarettes were produced and all applicable taxes and levies were paid, the provisions of subparagraph (b)(i) would still be violated if the cigarettes did not bear genuine stamps, markings or labels.

Mr COULOMBE (Canada), pointing out that applicable duties and taxes were rarely paid on counterfeit goods, said that he was in favour of deleting subparagraph (c)(i). The issue of fiscal stamps was covered under subparagraph (c)(iii).

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that producers of counterfeit tobacco products were extremely clever; not only did they destroy all traces of their activity but they bribed customs officers in order to get the product approved.

The CHAIRPERSON said that, under subparagraph (b)(i), manufacturers endeavouring to legalize counterfeit cigarettes before they entered the market would be identified by their failure to pay the applicable taxes and duties.

Mr AL-SARRAY (Iraq) said that counterfeiting was also unlawful under other legislation.

The CHAIRPERSON, supported by Mr COULOMBE (Canada), said that the phrase “counterfeiting manufacturing equipment” was covered under subparagraph (b)(i). He proposed that the words “counterfeiting packaging” should be deleted from subparagraph (c)(i).

Ms MANSUR (Israel) said that the drafting group had included the phrase “counterfeiting of manufacturing equipment” because it was impossible to make counterfeit cigarettes without counterfeiting the equipment a legitimate company would use. She suggested that the words “or attempted smuggling” should be added after “acts of smuggling” in subparagraph (b)(ii) to cover counterfeit cigarettes seized prior to leaving the point of manufacture.

The CHAIRPERSON said that counterfeit goods could easily be produced on genuine equipment. The references in subparagraph (c)(i) to “applicable fiscal stamps” and “markings or labels” were adequately covered under subparagraph (c)(iii). He asked whether subparagraph (c)(i) could be deleted since the concepts to which it referred were covered by other subparagraphs in Article 12.

Subparagraph (c)(ii)

Mr ALBUQUERQUE E SILVA (Brazil) proposed that subparagraph (c)(ii) should read “wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco products with fraudulent or counterfeit fiscal stamps or unique identification markings, or any other required markings or labels which are fraudulent”.

Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya), supporting the proposal of Brazil for subparagraph (c)(ii), said that the term “fraudulent” was broader in

scope than “counterfeit” and could be considered to subsume the latter. Subparagraph (b)(ii) should also be deleted, as it was adequately covered under subparagraph (b)(i).

The CHAIRPERSON said that subparagraph (b)(ii) concerned smuggling across internal borders where no actual customs offence had been committed, and should be retained.

Ms MADRAZO REYNOSO (Mexico), supporting the view expressed by the representative of Kenya, said that the word “fraudulent” was broader than the word “counterfeit” and was therefore a good choice.

The CHAIRPERSON, following a comment from Mr HAMANEH (Islamic Republic of Iran), said that he would ask the working group on definitions to decide whether the term “fraudulent” was in need of definition.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that the European Union wished to issue a general reservation on subparagraph (c)(ii) because it considered the term “fraudulent” to be too broad in scope. He would report on the European Union’s final position following further consultations.

Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya) said that the production of tobacco products with fraudulent fiscal stamps should also be made unlawful and therefore suggested that the word “manufacturing” should be included at the beginning of subparagraph (c)(ii).

The CHAIRPERSON said that the suggestion made by the representative of Kenya appeared to be acceptable to the Parties.

Subparagraph (d)

Mr AAGAARD (Denmark), speaking on behalf of the European Union, suggested that, in the light of Article 11, subparagraph (d) might be amended to specify that intermingling of tobacco products was relevant only in free zones.

Ms OBILLOS-MAPA (Philippines) said that it should be made clear throughout the protocol that intermingling was unlawful only if used for the purpose of concealing or disguising tobacco products. Intermingling was indeed one of various strategies used to smuggle tobacco in free zones but it was also a normal business practice. A complete ban on intermingling, as was the case under Article 11.2, was unnecessary and would hurt non-tobacco traders. Article 11.2 should therefore be amended to correspond to subparagraph (d). Prohibition of intermingling would not solve the problem of illicit trade in free zones; the key was to strengthen the capacity of the competent authorities to enforce provisions prohibiting illicit trade.

Mr SONG (Singapore) said that he could accept subparagraph (d) as it stood, subject to definition of the term “supply chain”. In Singapore, tobacco products could be intermingled with non-tobacco products once duty had been paid and the products had entered the country. He failed to see why the protocol made a distinction between intermingling within free zones, which would be banned across the board, and intermingling under other circumstances, which would be prohibited only if done for the purpose of concealing or disguising tobacco products. Clarification of the European Union’s position on that question would be welcome.

Ms MANSUR (Israel) said that a distinction had been made between operators within free zones and other operators. In the first case, described in Article 11.2, a total ban on intermingling had been imposed because major corporations were involved. In the second case, described in subparagraph (d), a total ban on intermingling had not been deemed feasible because small distributors in the supply chain often received their deliveries from a single truck carrying a variety of goods. The phrase “for the purpose of concealing or disguising tobacco products” had therefore been added at the end of the subparagraph.

The CHAIRPERSON invited the delegation of the European Union and the delegation of Singapore to consult on possible new wording for the paragraphs in question.

Subparagraph (e)

Mr FISCH BERREDO MENEZES (Brazil) said that, in order to be consistent with the wording of Article 10, the words “tobacco” and “manufacturing equipment” should be deleted from subparagraph (e).

The CHAIRPERSON said that the words “the provisions of” should also be deleted from the same paragraph. If he heard no objections, he would take it that provisional consensus had been reached on subparagraph (e), as amended.

It was so agreed.

Subparagraph (f)

Ms MANSUR (Israel), in response to a question from Mr DESIRAJU (India), said that subparagraph (f) was not applicable at the individual retail level, but rather to distributors involved in the major supply chain.

The CHAIRPERSON, in response to a request for clarification from Mr HAMANEH (Islamic Republic of Iran), said that persons licensed in accordance with Article 5 were required, under Article 6, to conduct due diligence before entering business relationships. Failure to do so would constitute an unlawful act.

The CHAIRPERSON said that if he heard no objections, he would take it that provisional consensus had been reached on subparagraph (f), subject to the definition of “manufacturing equipment”.

It was so agreed.

Subparagraph (g)

The CHAIRPERSON said that if he heard no objections, he would take it that provisional consensus had been reached on subparagraph (g).

It was so agreed.

Subparagraph (h)(i)

The CHAIRPERSON said that if he heard no objections, he would take it that provisional consensus had been reached on subparagraph (h)(i).

It was so agreed.

Subparagraphs (h)(ii) and (h)(ii)(a)

The CHAIRPERSON said that if he heard no objections, he would take it that provisional consensus had been reached on subparagraphs (h)(ii) and (h)(ii)(a).

It was so agreed.

Subparagraph (h)(ii)(b)

The CHAIRPERSON said that if he heard no objections, he would take it that provisional consensus had been reached on subparagraph (h)(ii)(b).

It was so agreed.

Subparagraph (h)(iii)

The CHAIRPERSON, in response to a question from Mr HAMANEH (Islamic Republic of Iran), said that record creation and maintenance was currently a requirement under the draft of the protocol. Failure to comply would constitute an unlawful act. If he heard no objections, he would take it that full consensus had been reached on subparagraph (h)(iii).

It was so agreed.

(For continuation of the discussion on Article 12, see summary record of the sixth meeting.)

The meeting rose at 18:00.

SIXTH PLENARY MEETING

Friday, 30 March 2012, at 19:05

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. REPORT OF THE ADVISORY COMMITTEE ON LANGUAGE

Dr VECINO QUINTANA (Spain), speaking as Chair of the advisory committee on language, reported that the group had held its first meeting earlier in the day and had determined its working methods. Its aim was not to redraft the text, but to ensure that the agreed changes to the English text had been accurately rendered in the other language versions. The Committee had already dealt with Article 3, and would be considering Article 4 at its next meeting.

2. REPORT OF THE OPEN-ENDED WORKING GROUP ON DEFINITIONS

Mr GORUN (Turkey), speaking as Chair of the open-ended working group on definitions, said that the group had agreed on definitions of “personal data” and “manufacturing equipment”, although some minor square brackets remained with regard to the latter. It had also been agreed by consensus that a number of suggested terms did not need to be defined in the text. The group would be working on a definition of “supply chain” at its next meeting, and he would be able to report in full on the outcome of the group’s work the following day.

3. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part IV: Offences (continued from the fifth meeting)

- **Article 12: Unlawful conduct including criminal offences** (continued from the fifth meeting)

Paragraph 1 (continued)

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he wished to maintain the reservation he had expressed with respect to subparagraph 1(c) at the previous meeting, pending further discussion of the provision and the production of a clean text. He suggested that subparagraph 1(d) should be amended to read “intermingling tobacco products with non-tobacco products in contravention of this Protocol”. Subparagraph 1(f) should be amended to read “failure to conduct due diligence in contravention of this

Protocol”, in order to make it clear that the unlawful conduct to which the provision referred related to the obligation to perform due diligence under Article 6 of the protocol.

Mr ROWAN (European Union), referring to the suggested new wording of subparagraph 1(d), said that only actions not permitted under the protocol could constitute unlawful conduct, and recalled that, under Article 11, the intermingling of tobacco products with non-tobacco products in free zones was prohibited.

The CHAIRPERSON asked whether other Parties agreed with the approach put forward by the European Union, namely considering that failure to comply with the provisions of the protocol would constitute an unlawful act.

Mr SONG (Singapore) said that he was intrigued by the proposal made by the European Union but would require more time to consider the suggested new wording of subparagraph 1(d). He welcomed the acknowledgement that if intermingling was to be in contravention of the Protocol, it had to be for the purpose of concealing or disguising tobacco products.

Mr THOMPSON (Nicaragua) pointed out that the consolidation of cargo – a form of intermingling – at all stages of the supply chain was an accepted practice all over the world. The text should indicate clearly that intermingling would be considered unlawful if it was done to disguise or conceal tobacco or tobacco products. Accordingly, he proposed that subparagraph 1(d) should read: “intermingling of tobacco products with non-tobacco products during storage, transit, transportation, import or export for the purpose of concealing or disguising tobacco products”.

Ms LECLAIRE (Canada) said that she would need more time to consider the proposed new wording of subparagraph 1(f), in particular the reference to due diligence, which was not currently defined in the draft protocol. It might therefore be difficult to determine what constituted failure to conduct due diligence.

The CHAIRPERSON said that the text of the various amendments would be provided to all Parties the following day.

Paragraph 2

Mr DESIRAJU (India) said that he recognized the importance of the principle set out in paragraph 2 and the primacy given to domestic law in determining conduct that constituted a criminal offence. However, it was also important to arrive at a common understanding as to the criminal nature of illicit trade in tobacco. The protocol should specify a minimum list of activities to be declared as criminal offences by all Parties. The criminal conduct specified in paragraph 3 was not specifically related to tobacco but rather to money laundering in general, the text having been taken from the United Nations Convention against Transnational Organized Crime.

Ms MANSUR (Israel) recalled that the drafting group that had worked prior to the fourth session of the Intergovernmental Negotiating Body had not been able to reach consensus on a list of basic crimes to be considered criminal offences under the protocol. Such a list would be useful, particularly in the event of a request for extradition or mutual legal assistance, and she suggested that, in addition to money laundering, fraud, forgery, the use of a forged document and smuggling might be established as recognized criminal

behaviour under the protocol. Article 12 could also provide Parties with the option of identifying additional unlawful acts as criminal offences, although such a provision might not be necessary, since obviously Governments were entitled to determine that any unlawful act constituted a crime under their domestic law.

Mr CISSE (Senegal) suggested that the words “and adopt legislative and other measures as may be necessary to give effect to such determination” were superfluous and should be deleted.

Dr ABASCAL (Uruguay) said that it would be very difficult for Parties to agree on an exhaustive list of criminal conduct under the protocol, and observed that a number of the unlawful activities set out in paragraph 1 were already considered criminal offences in most countries.

Mr DLAMINI (Swaziland) said that a list of activities considered to be criminal offences for the purposes of the protocol could help to foster international cooperation, particularly in the event of a request for mutual legal assistance or extradition.

Mr SONG (Singapore) said that, as some of the unlawful conduct set out in paragraph 1 was already considered to be a criminal offence by some Parties, paragraph 2 could be made clearer with the addition of the words “for the purposes of this Protocol” after “criminal offences”.

Mr CISSE (Senegal) said that paragraph 2 was entirely consistent with paragraph 1 and should be retained if not all the unlawful conduct set out in paragraph 1 was to be considered a criminal offence.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he supported the original wording of paragraph 2, and would be opposed to any attempt to limit the autonomy of each State to determine which of the unlawful conduct in paragraph 1 should be considered a criminal offence.

Ms MANSUR (Israel) said that, if paragraph 2 did not include a list of basic criminal offences to which all Parties could agree, the provisions concerning mutual legal assistance and extradition would have to be adjusted, as Parties were unlikely to agree to a request for extradition in connection with conduct they did not consider to be a criminal offence.

The CHAIRPERSON said that there were several options to be considered. The list of criminal offences in paragraph 3 might be expanded, and the provisions on mutual legal assistance could then be adjusted to ensure that they applied only to the common criminal offences listed in Article 12.3. Another option would be simply to delete the provisions on mutual legal assistance and extradition.

Dr MANJUBA (Guinea Bissau) asked how it would be possible to implement the protocol in countries that were in conflict.

Dr ABASCAL (Uruguay) said that the inclusion of a list of criminal offences could lead to some countries having to change their criminal code, which could cause delays in implementing the protocol. The Article, in its current formulation, was balanced and flexible, and could be effective if properly implemented.

Dr BEKBASAROVA (Kyrgyzstan) said that the references to “domestic law” throughout the protocol could give rise to delays in implementation of the protocol as some countries did not have the appropriate legislation in place, and ensuring the adoption of such legislation could take considerable time. She therefore suggested that the references to “domestic law” in paragraphs 1, 2, and 3 of Article 12 should be deleted and that the Article should contain a list of specific criminal offences.

Dr KONUMA (Japan) said that he supported the views expressed by the representative of Denmark; the original wording of paragraph 2 should be retained if the text was to be acceptable to as many countries as possible.

Mr HAMANEH (Islamic Republic of Iran) said that leaving it to Parties to determine the forms of unlawful conduct that would constitute criminal offences could lead to difficulties with regard to mutual legal assistance or extradition. In his country, many of the unlawful acts set forth under Article 12.1 had already been criminalized under national legislation concerning the smuggling of goods and products, but that might not be the case in all countries. However, the establishment of a list of common criminal offences was a complex task that must be approached with caution. Under the United Nations Convention against Transnational Organized Crime, Parties had agreed to only a very limited list of criminal offences, which was indicative of how difficult it would be to draw up a common list.

The CHAIRPERSON said that the issue was challenging and acknowledged that the linkage between Article 12 and Articles 30 to 32, which dealt with mutual legal assistance, extradition and measures to ensure extradition, was making a difficult task even harder. The establishment of certain conduct as criminal offences in some countries and not in others could create complications with regard to mutual legal assistance and extradition, but it was clearly very difficult to compile a list of common criminal offences. He suggested that paragraph 1, as amended in the discussions at the previous meeting, and the original version of paragraph 2 be retained for the moment, and that the Intergovernmental Negotiating Body move on and examine paragraph 3 with an eye to whether any specific tobacco-related offences might be added. If not, then it would be necessary to determine whether Articles 30 to 32 should remain in the draft protocol.

Paragraph 3

Mr SINGH (India) observed that the provisions of paragraph 3 would apply only in respect of conduct determined by each Party, under paragraph 2, to be a criminal offence. The provisions relating to proceeds of crime, for example, could only apply to the unlawful conduct set out in paragraph 1 if that conduct had been established as a crime under paragraph 2. As a number of representatives had indicated that some of the unlawful conduct set out in paragraph 1 was already considered a criminal offence under their domestic law, it should not be too difficult to agree on a common minimum list of criminal offences, thus providing a sound basis for judicial cooperation in the area of mutual legal assistance and extradition.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that, since the protocol concerned illicit trade in tobacco, rather than crime in general, the beginning of subparagraph 3(a) should be amended to read “converting or transferring tobacco products”, and “origin of the property” should read “origin of the products”.

The CHAIRPERSON asked whether the drafting group that had worked prior to the fourth session of the Intergovernmental Negotiating Body had come close to reaching agreement on any other forms of conduct that could be listed under paragraph 3 as criminal offences.

Ms MANSUR (Israel) said that, in formulating the Article, the drafting group had drawn up a list of unlawful conduct in paragraph 1. Having been unable to reach agreement on which of those should be criminal activities, it had decided to leave the matter for the Intergovernmental Negotiating Body. Acts such as fraud, forgery, use of forged documents, money-laundering and smuggling were considered criminal offences in all countries, and if, as suggested by the previous speaker, language were added specifically linking those crimes to the subject of the protocol, that would provide a starting point and provide for international cooperation, mutual legal assistance and extradition in respect of those crimes.

Dr ABASCAL (Uruguay) agreed that smuggling, for example, was a criminal offence in most countries, but the scale and seriousness of the crime could vary enormously. Hence, if a common list of crimes were to be established, aspects such as size, scale and degree of organization would also have to be addressed, since States were unlikely to agree to an extradition request in respect of a minor criminal offence. The text, as it stood, was balanced, and the introduction of new elements could cause difficulties and prolong the negotiations.

Mr THOMPSON (Nicaragua), speaking also on behalf of Mexico and Panama, said that the identification of common elements, such as fraud, forgery and smuggling, linked to the protocol and to the WHO FCTC would help to strengthen implementation.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo), reiterating his earlier point, said that it was important to link the text of subparagraph 3(a) to tobacco and tobacco products.

Mr SONG (Singapore) expressed concern regarding the link between paragraph 3 and the provisions on mutual legal assistance and extradition. Countries would probably be reluctant to provide mutual legal assistance and extradition, which were both resource-intensive activities, for a minor offence that did not carry a heavy jail term. He wondered what benefit would be derived, in terms of cooperation, mutual legal assistance and extradition, from including subparagraphs 3(a), (b) and (c) in the protocol, since assistance would be provided under the United Nations Convention against Transnational Organized Crime if the criminal offence in question was transnational in nature, classified as serious and involved an organized criminal group. For the purposes of rendering assistance under the protocol, consideration might be given to including a threshold of severity.

The CHAIRPERSON recalled that, originally, it had been decided to include paragraph 3 in the Article as some Parties to the WHO FCTC were not party to the United Nations Convention against Transnational Organized Crime.

Mr DLAMINI (Swaziland) said that it appeared highly unlikely that agreement would be reached on which unlawful acts were to be considered criminal offences. Accordingly, in order to foster cooperation, it might be prudent to keep the approach set out in paragraph 2, but require all Parties to notify the Secretariat which of the unlawful acts listed in paragraph 1 they had determined to be criminal offences, so that other Parties would know whether they might expect cooperation in respect of particular offences.

Ms MANSUR (Israel) welcomed the approach suggested by the previous speaker. With regard to the comments of the representative of Singapore, she said that the drafting group had chosen not to rely solely on the United Nations Convention against Transnational Organized Crime not only because some Parties to the WHO FCTC were not party to the United Nations Convention, but also because certain conditions had to be met in order for the Convention to apply. For example, the criminal offence in question had to have been conducted by an organized criminal group, and while that was often true in cases of cigarette smuggling, it was difficult to prove in court. In addition, Parties to the United Nations Convention against Transnational Organized Crime could opt out of using that instrument as an extradition treaty. The domestic law of many countries required them to have a treaty basis for mutual legal assistance and extradition, and those that were not parties to bilateral or multilateral agreements that would cover the type of cooperation envisaged under the protocol would be relying on the protocol for that purpose.

Dr ABASCAL (Uruguay), referring to the link between paragraph 3 and Articles 30 to 32, said that the three subparagraphs of paragraph 3 gave some indication of the seriousness of the criminal offence, since the proceeds of crime to which they referred would not be generated from a minor criminal offence.

Mr MA Xinmin (China) said that he supported the views expressed by the representative of Israel regarding the determination of some actions as criminal offences.

The CHAIRPERSON suggested that a possible means of resolving the difficulties surrounding Article 12 might be to retain the text proposed by the drafting group, with the agreed amendments to paragraph 1, but to add a requirement, as proposed by the representative of Swaziland, that Parties must inform the Convention Secretariat of which unlawful acts they had made criminal offences.

Mr SINGH (India) suggested that the phrase “and proceeds of acts prohibited pursuant to paragraph 1 of this Article” should be added after “proceeds of crime” in subparagraphs 3(a), (b) and (c).

Mr LEGUERRIER (Canada), supporting the views expressed by the representative of Singapore, suggested that further consideration of Article 12 be deferred pending regional consultations.

Mr HAMANEH (Islamic Republic of Iran), welcoming the suggestion made by the previous speaker, and added that the subparagraphs in paragraph 3 should refer to both predicate offences and to the subject matter of the protocol.

Ms EVISON (New Zealand) said that she supported the suggestion by the representative of Canada to defer further discussion of the text.

The CHAIRPERSON agreed that it would be wise to defer further discussion of Article 12 pending regional consultations. During those consultations, Parties might wish to consider the following options: retain the text submitted by the working group with the agreed amendments to paragraph 1, link the offences to tobacco-related activities, and identify a list of criminal offences common to all countries.

It was so agreed.

(For continuation of the discussion on Article 12, see summary record of the eighth meeting.)

- **Article 15: Search of premises and seizure of evidence**

The CHAIRPERSON recalled that two versions of Article 15 had been put forward at the fourth session of the Intergovernmental Negotiating Body and were contained in document FCTC/COP/INB-IT/4/5. The deletion of the Article had also been proposed, as most of the Parties were already implementing the measures to which the provision referred.

In the absence of any objection, he would take it that Article 15 should be deleted.

It was so agreed.

- **Article 16: [Confiscation and seizure of assets] / [Seizure and confiscation]**

The CHAIRPERSON invited consideration of the text of Article 16 and suggested that the title should read "Seizure and confiscation".

It was so agreed.

Mr LEGUERRIER (Canada) suggested that, since Article 16 referred to criminal offences and unlawful conduct, the provision should be considered after the discussion of Article 12 had been concluded.

It was so agreed.

(For continuation of the discussion on Article 16, see summary record of the sixteenth meeting.)

- **Article 17: Seizure payments**

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that the word "distributor" should be added after "manufacturer".

The CHAIRPERSON, in reply to a question from Mr CISSE (Senegal) as to whether a provision concerning seizure payments should apply to producers and manufacturers, noted that it was left to the discretion of Parties to consider the action to be taken with respect to the actors listed.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) added that the producer or manufacturer would be implicated if a network was found to extend from the point of origin to the point of seizure.

The CHAIRPERSON, in the absence of any objection, took it that Parties could agree to the deletion of the square brackets around "producer", "distributor", "tobacco" and "or equipment".

It was so agreed.

Mr ALBUQUERQUE E SILVA (Brazil) said that, for consistency with other provisions of the protocol, the word “manufacturing” should be inserted before “equipment”.

Ms EVISON (New Zealand) pointed out that “used in the production of tobacco products” after “equipment” should be deleted in order to be consistent with other articles.

Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya) said that the provision should contain a punitive element since the aim was not simply to recover taxes and duties lost through illicit trade, but to punish and deter such trade. Accordingly, the words “a penalty of” should be inserted before “an amount”.

Mr DAS (India), speaking on behalf of the Parties in the WHO South-East Asia Region, suggested that the words “a fine and penalty” should be added after “lost taxes and duties”. Any penalty imposed should be in addition to the lost taxes and duties recovered.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, pointed out that the nature of the proceedings could vary in different countries, and might be civil or administrative in nature rather than criminal. He would therefore oppose the inclusion of words such as “fine” or “penalty”, which were associated with criminal proceedings.

Mr GORUN (Turkey) said that he would support the inclusion of the term “penalty” and suggested that the words “at least” be added after “equivalent” to enable States to levy a higher amount.

Mr HAMANEH (Islamic Republic of Iran) said that he would caution against adding too much detail to a provision that was not binding, but suggested that the provision could be made stronger by replacing “should” with “shall”.

The CHAIRPERSON pointed out that in discussions of the provision at earlier sessions of the Intergovernmental Negotiating Body, a majority had favoured the term “should”.

Dr SA’A (Cameroon) concurred with the views expressed by the representative of Turkey; irrespective of whether or not it was a penalty, the amount levied should exceed the lost taxes and duties.

Dr KONUMA (Japan) expressed concern at the proposal to levy a penalty on manufacturers and others that had inadvertently become involved in illicit trade.

Mr CISSE (Senegal) said that he supported the comments made by the representative of the Islamic Republic of Iran. Unless the provision was made stronger, it might not be possible to recover any amount.

Mr ALBUQUERQUE E SILVA (Brazil) asked where the language of Article 17 had come from and specifically whether it had come from agreements between the industry and some countries. The language was weak and contained so many conditionalities that Parties would be able to avoid implementing it. The Article was not an essential element of the protocol and should be deleted.

The CHAIRPERSON said that the provision had originally been included in the Chair’s text with a view to deterring illicit trade.

Mr REGALADO PINEDA (Mexico), Mr LEGUERRIER (Canada), Ms EVISON (New Zealand), Dr KONUMA (Japan), Mr SONG (Singapore), and Dr ROA (Panama) supported the deletion of the Article.

Mr BOUZO (Syrian Arab Republic) said that the Article should be retained and that he supported the comments of the representative of the Islamic Republic of Iran.

Mr CISSE (Senegal) said that, although the provision in its current form, was weak, that did not necessarily mean it should be deleted. It could be made stronger by replacing “should” with “shall”.

Mr NJOKU (Nigeria) said that the Article would help a number of African countries to combat illicit trade. It was not mandatory and should be retained for those Parties that wished to make use of its provisions.

Dr CALLE PLATA (Plurinational State of Bolivia) said that in his country, contraband cigarettes were incinerated upon seizure to prevent them from re-entering the market, but the smugglers were not necessarily arrested because it was not always known who they were. That being the case, he wondered how feasible it would be to impose a penalty on cigarette smugglers. Moreover, if a penalty was paid, would the seized goods have to be returned?

The CHAIRPERSON replied that the procedure to be followed would be determined by the country concerned; Article 17 merely asked Parties to consider adopting necessary legislative and other measures. Summarizing the discussion, he said that there were differences of opinion on whether or not to delete the Article, and whether or not to include terms such as “fine” or “penalty”. He therefore suggested the following compromise text: “For the purpose of eliminating illicit trade in tobacco products, Parties should, in accordance with their domestic law, consider adopting such legislative and other measures as may be necessary to authorize competent authorities to levy an amount equivalent at least to lost taxes and duties from the producer, manufacturer, distributor, importer or exporter of seized tobacco, tobacco products or manufacturing equipment”, which would allow Parties wide latitude to apply the provision as they saw fit.

Dr SA’A (Cameroon) agreed that the Article should be retained. Since it was not binding, Parties would be free to apply it or not.

Mr GORUN (Turkey) said that without some penalty mechanism, the Article would be virtually useless. In order to eliminate the economic benefits of illicit trade, there should be a mechanism that provided for the recovery of an amount at least equivalent to the lost taxes and duties.

The CHAIRPERSON pointed out that the wording he had proposed called for recovery of at least the amount of taxes and duties lost.

Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya) said that the wording read out by the Chairperson was not punitive enough. The provision should be further amended to read “authorize competent authorities to levy a penalty or recover lost taxes and duties from”.

The CHAIRPERSON observed that many Parties would be unable to accept the provision if it referred specifically to the term “penalty”. The compromise wording he had

suggested would enable Parties to charge more than the lost taxes and duties, and the amount could be levied from someone other than the person or entity originally liable to taxation.

Dr BEKBASAROVA (Kyrgyzstan) said that the provision should be retained and noted that each Party could, in accordance with its domestic law, decide on the amount to be recovered.

Mr HAMANEH (Islamic Republic of Iran), noting that his country already had legislation in place that went far beyond the provisions of Article 17, agreed that each Party could implement the Article as it saw fit. He suggested that the words “inter alia” should be added after “consider adopting”, since the adoption of the measures to which the provision referred was only one tool that could help to eliminate illicit trade.

The CHAIRPERSON suggested that the provision should begin “Parties should consider”, and asked whether delegations could accept the compromise text.

Mr ALBUQUERQUE E SILVA (Brazil) said that the provision was very weak and used language more common to recommendations than to conventions. He asked why the provision was confined to producers, manufacturers, distributors, importers and exporters and did not extend to all the actors referred to in Article 12. The term “equivalent” should be replaced by “proportionate” to give States greater flexibility.

Mr BOUZO (Syrian Arab Republic) said that the Article should be retained. The original version would allow countries to envisage any measures they deemed necessary.

Mr IBRAHIM (Sudan) agreed that the Article should not be deleted.

The CHAIRPERSON asked whether Parties would agree to compromise wording that read: “Parties should, in accordance with their domestic law, consider adopting such legislative and other measures as may be necessary to authorize competent authorities to levy an amount proportionate to lost taxes and duties from the producer, manufacturer, distributor, importer or exporter of seized tobacco, tobacco products or manufacturing equipment”.

Dr BEKBASAROVA (Kyrgyzstan), supported by Mr GORUN (Turkey), said that she would prefer the term “shall” to “should” but would, in a spirit of compromise, be prepared to accept the text read out by the Chairperson.

Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya) said that “or manufacturing equipment” should read “and/or manufacturing equipment”.

The CHAIRPERSON said that he would take it that the Intergovernmental Negotiating Body could agree to the text he had read out, with the amendment proposed by the representative of Kenya.

It was so agreed.

- **Article 18:** [Destruction] / [**Disposal**]

Paragraph 1

The CHAIRPERSON invited comments on paragraph 1, recalling that the idea behind Article 18 was that confiscated material would be destroyed, subject to certain exceptions. In

his view, the words “counterfeit and contraband” were unnecessary and should be placed in square brackets for possible deletion.

Mr ALBUQUERQUE E SILVA (Brazil) said that cigarettes were covered under the concept of tobacco products. The beginning of the paragraph should therefore be amended to read “All confiscated tobacco, tobacco products and manufacturing equipment”

The CHAIRPERSON said that if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to accept that suggestion.

It was so agreed.

Mr MAKHOSHI (alternate to Ms Matsau, South Africa) asked whether the cost of destruction would be borne by the competent authority or by the perpetrators of the unlawful conduct or offence.

Ms ALI-HIGO (Djibouti) said that the first sentence of the provision should read “All confiscated tobacco, tobacco products and manufacturing equipment shall be destroyed in accordance with national or domestic law”. She agreed that cost was an issue that must be addressed.

Mr CALLE PLATA (Plurinational State of Bolivia) said that it would be beneficial to learn of the experience and practices of other countries with regard to destruction and disposal of confiscated goods. In his country, confiscated tobacco products were incinerated in smelting furnaces.

Mr CISSE (Senegal) said that the products should be destroyed publicly and the cost borne by the manufacturer, producer or importer.

The CHAIRPERSON said that consideration might have to be given to the inclusion in the protocol of an additional paragraph concerning the costs arising out of the protocol and payment thereof.

Mr COTTERELL (Australia) said that he had a strong preference for the term “disposal”, which was used in his country’s customs legislation, rather than “destruction”. He expressed concern at the use of the term “immediately”, given that Australian law also provided for appeal processes, which could take time. Concerning environmentally friendly methods, the phrase “to the greatest extent possible” should be retained.

Ms MADRAZO REYNOSO (Mexico) said that she, too, would prefer to avoid using the term “immediately”, since immediate destruction was not always feasible. As to the issue of who would pay the costs arising from the implementation of the protocol, it was important not to make the protocol too prescriptive and to refrain to the extent possible from drafting additional text. The issue of payment could be decided by each Party in accordance with its domestic law.

Mr AZOFF (Israel) said that he shared the concerns expressed regarding the term “immediately”, and found the wording suggested by Djibouti acceptable, as it would enable countries to postpone the disposal of confiscated goods if their laws so provided. He agreed that cost was a matter to be determined under national law.

Mr RAMÍREZ CAMPOS (Colombia) suggested that in the Spanish version of paragraph 2 the word “*judicial*” should be replaced by the word “*legal*”, which was a broader term encompassing both judicial and administrative proceedings.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, expressed a preference for the term “shall” in paragraph 1. He agreed that the word “immediately” should be deleted and the phrase “to the greatest extent possible” retained.

Mr ALBUQUERQUE E SILVA (Brazil) said that he would prefer use of the term “shall” and deletion of the term “immediately” and favoured the phrase “destroyed or disposed of in accordance with national or domestic law”. He also favoured retention of the phrase “to the greatest extent possible”.

Ms ALI-HIGO (Djibouti) said that immediate destruction was not always feasible and agreed that the phrase “to the extent possible” should be retained. Regarding cost, seized products were sometimes left in storage as the State could not afford to pay for their destruction, and there was a risk that they could be stolen and re-enter the market. In order to avoid such a situation, it must be possible to ensure that the offenders were made to bear the costs of destruction.

The CHAIRPERSON said that a number of comments had been gathered in respect of paragraph 1 and that the discussion so far seemed likely to enable the Intergovernmental Negotiating Body to produce a reasonable text for that paragraph that linked effectively with paragraphs 2 and 3.

(For continuation of the discussion on Article 18, see summary record of the seventh meeting.)

The meeting rose at 22:00.

SEVENTH PLENARY MEETING

Saturday, 31 March 2012, at 10:20

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. REPORT ON CREDENTIALS: Item 1.3 of the Agenda (Document FCTC/COP/INB-IT/5/2) (continued from the first meeting)

The CHAIRPERSON said that the Bureau had examined the report on credentials contained in document FCTC/COP/INB-IT/5/2 the previous day. He called on the 15 Parties listed in paragraph 3 of that document to submit their original credentials. In response to a question from Ms MATSAU (South Africa), he confirmed that the Parties listed in the Annex to that document had submitted their original credentials. He took it that the Intergovernmental Negotiating Body wished to adopt the report.

It was so agreed.

2. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/INB-IT/5/4, FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part II: General obligations (continued from the fourth meeting)

• **Article 4bis: Protection of personal data** (continued from the fourth meeting)

The CHAIRPERSON invited the Intergovernmental Negotiating Body to resume its consideration of Article 4bis on protection of personal data, noting that an alternative text produced as a result of consultations between interested parties read: “Parties shall protect personal data of individuals regardless of nationality or residence, subject to national law, taking into consideration international standards regarding the protection of personal data, when implementing this Protocol”. He asked whether there was any objection to that wording.

Mr HAMANEH (Islamic Republic of Iran) requested clarification of the existing “international standards” envisaged, as the term was very general and could be open to interpretation. Were the standards in question the applicable United Nations standards?

The CHAIRPERSON said that the term “international standards” would encompass United Nations and Organisation for Economic Co-operation and Development standards. The intent was not to limit Parties to a specific set of international standards but to provide a starting point for protection of personal data, subject to national law.

Mr HAMANEH (Islamic Republic of Iran) reiterated that “international standards” was open to interpretation, which could create difficulties with respect to the application of such

standards. He would prefer that reference be made to “recognized United Nations standards”, but would not insist if the more general wording was acceptable to the majority of Parties.

The CHAIRPERSON, thanking the representative of the Islamic Republic of Iran for his flexibility, took it that the Intergovernmental Negotiating Body agreed to the alternative version of Article 4*bis* that he had just read out.

It was so agreed.

Part III: Supply Chain Control (continued from the fifth meeting)

• Article 11bis: Duty free sales (continued from the fifth meeting)

Paragraph 2

The CHAIRPERSON invited representatives to continue their consideration of paragraph 2 of Article 11bis. He recalled that there was general agreement, subject to agreement on the whole paragraph, to insert the word “further” after “appropriate” at the end of the paragraph. Some Parties had requested more time to consider the compromise put forward by the representative of Canada to amend the beginning of the paragraph to read “No later than five years following the entry into force of this Protocol”.

Ms MATSAU (South Africa) said that the Parties in the WHO African Region would have preferred the wording “Immediately following the entry into force”, but could accept the proposal of the representative of Canada. However, the same formulation should be used in Article 5.5 (Licence, equivalent approval or control system), which concerned a related concept.

Mr HAMANEH (Islamic Republic of Iran) said that the Parties in the WHO Eastern Mediterranean Region could accept the amendment and agreed that the same wording should be included in Article 5.5, since both provisions concerned research.

The CHAIRPERSON took it that the Intergovernmental Negotiating Body could agree to the compromise wording for paragraph 2 of Article 11bis proposed by the representative of Canada and to the addition of the term “further”.

It was so agreed.

The CHAIRPERSON said that it was his understanding that the phrase “Five years following the entry into force of this Protocol” had been included in Article 5.5 because an expert employed by the Secretariat had already undertaken some research on key inputs and had concluded that no key inputs were used solely in the production and manufacture of tobacco products. The situation with respect to duty free sales of tobacco products was different.

Mr HAMANEH (Islamic Republic of Iran) said that, as such research had already taken place, it should be possible to agree to the addition of “No later than five years” in Article 5.5.

Mr LINDGREN (Norway), speaking on behalf of the Parties in the WHO European Region, said that the proposal to amend Article 5.5 would be difficult for the Parties to accept; they had already indicated their willingness to accept the new wording of paragraph 2 of Article 11bis suggested by the representative of Canada on the understanding that no other

provisions in the supply chain section would be reopened. He could not agree to the amendment to Article 5.5 without consulting the Parties in the Region, and sought confirmation that Article 5.5 would be the last issue to be discussed within the supply chain section, since all the other provisions enjoyed consensus.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that he could agree in principle that Article 5.5 should be the last issue concerning the supply chain to be discussed, but pointed out that the results produced by the working group on definitions were still awaited.

Mr HAMANEH (Islamic Republic of Iran), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, reiterated his request for the proposed amendment to be included in Article 5.5. There should be no further amendment to any provisions concerning the supply chain, with the exception of the definitions.

Ms PATTERSON (alternate to Mr Cotterell, Australia), speaking on behalf of the Parties in the WHO Western Pacific Region, agreed that there was provisional consensus on the other Articles concerning the supply chain, subject to the report of the working group on definitions.

Mr DESIRAJU (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that although he had no specific issues to raise at the present juncture in respect of the supply chain articles, the recommendations of the working group on definitions would need to be examined.

Dr NDYANABANGI (Uganda), speaking on behalf of the Parties in the WHO African Region, thanked the European Union for accepting the compromise wording to paragraph 2 of Article 11bis suggested by the representative of Canada and for agreeing that the same wording should apply to Article 5.5. As the Parties in the African Region still had some concerns about the words “legally binding and enforceable agreements” in Articles 6 and 9, they were unable to guarantee that they would not reopen discussion of those Articles.

The CHAIRPERSON suggested that, in order to avoid reopening the discussion on Articles 6 and 9, the Parties in the WHO African Region should consult Parties from other regions informally with a view to addressing their concerns.

Dr BEKBASAROVA (Kyrgyzstan) said that she shared the concerns of the Parties in the WHO African Region regarding Articles 6 and 9. The phrase “in accordance with its national law or legally binding and enforceable agreements” should be deleted from the provisions as the protocol should form the basis for action by each Party.

Mr ROWAN (European Union) said that participants in the informal working group set up by the Conference of the Parties at its fourth session had worked hard and made concessions in order to make progress. The European Union, for example, had not wanted any reference in the protocol to key inputs and manufacturing machinery, which it considered were not related directly to illicit trade in tobacco products. Unfortunately, instead of choosing to move forward, Parties were now seeking to reopen issues, and the progress made was beginning to unravel. He wished to place on record that the European Union had not accepted revision of Article 5.5, and, having conceded much, in particular to the Parties in the WHO African Region, wished to place Article 7 (Tracking and tracing) in square brackets.

The CHAIRPERSON agreed that there was a danger that much of the progress made could unravel, and invited Parties to consult informally with a view to clearing up any misunderstandings and reaching agreement. Meanwhile square brackets would be placed around “in accordance with its national law or legally binding and enforceable agreements” in Articles 6.1, 6.2, 9.1 and 9.2, and around the whole of Article 7.

Mr ALBUQUERQUE E SILVA (Brazil) said that, although Brazil was opposed to legally binding agreements between the tobacco industry and some countries, which could provide loopholes that would prevent full implementation of the WHO FCTC, such agreements did exist. Brazil recognized the sovereign right of Parties to conclude legally binding and enforceable agreements, but considered that an explicit reference in the protocol to such agreements might encourage their conclusion by other Parties, and would therefore prefer such references to be deleted. His Government could not accept the protocol without Article 7, and he therefore hoped that a compromise would be reached so that the square brackets could be removed.

Dr ROA (Panama) said that she would prefer the phrase “in accordance with its national laws or legally binding and enforceable agreements” to be deleted. However, she could accept its inclusion provided that the scope and objectives of the protocol were not affected. She sought clarification in that regard from the Legal Counsel.

Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya) said that Parties had come to the negotiating table in good faith and should have the right to raise any issue for consideration in order to ensure that the protocol could be implemented and that it would be of value to Parties in dealing with the tobacco industry. He did not understand the reaction of the European Union, and pointed out that the Parties in the WHO African Region had not yet been given the opportunity to explain their technical and legal concerns in relation to the bracketed text in Articles 6 and 9.

Mr DLAMINI (Swaziland) added that it was not the intention, nor was it in the best interests, of the Parties in the WHO African Region to derail or stall the negotiations. The objective was to develop a strong and effective protocol that could be implemented by all.

Ms SY (Senegal), speaking on behalf of the Parties in the WHO African Region, said that although the Parties in the Region understood the concerns of countries that already had agreements in place, their aim was to protect the protocol. She suggested that further discussion of the issue be deferred to enable interested Parties to formulate wording acceptable to all.

Ms MATSAU (South Africa) pointed out that, in order to develop a protocol that was reasonable and could be implemented, all Parties had had to compromise. Parties in the WHO African Region were concerned that the wording “legally binding and enforceable agreements” might imply that a private agreement could supersede the protocol. In a spirit of compromise, she suggested that it should be replaced with the phrase “legislative and other measures”, which was used in Article 17.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, and Ms ALI-HIGO (Djibouti) sought clarification from the Legal Counsel of the implications of the phrase “legally binding and enforceable agreements” for the rest of the protocol.

The CHAIRPERSON, replying to questions from Ms MATSAU (South Africa) and Mr ROWAN (European Union), confirmed that square brackets remained around “in accordance with its national law or legally binding and enforceable agreements” in Articles 6.1, 6.2, 9.1 and 9.2. The whole of Article 7 was also in square brackets, as was the phrase “no later than five years” in Article 5.5.

Dr BEKBASAROVA (Kyrgyzstan) reiterated her view that reference in the protocol to national law could cause difficulties in implementation and should be avoided unless absolutely necessary, such as in reference to offences in Article 12. Reference to legally binding and enforceable agreements could weaken the protocol as precedence might be given to international agreements other than the protocol and the WHO FCTC.

The CHAIRPERSON suggested that further discussion of the issue be deferred to give interested parties, in particular the African Region, the European Union and Kyrgyzstan, an opportunity to consult informally with a view to achieving a political compromise and resolving any misunderstandings.

It was so agreed.

Dr SA’A (Cameroon) said that it had been his understanding from the beginning of the process that Parties would not return to Articles on which a consensus had been achieved, and the square brackets around Article 7, which had been agreed after much negotiation and many concessions, should therefore be removed. No consensus had yet been reached on Articles 6 and 9, however, and they therefore remained open for discussion.

The CHAIRPERSON said that it was the prerogative of any Party to put in square brackets any provisions with which it had difficulty. He hoped that the consultations to be held between interested parties would result in the deletion of the square brackets.

Part IV: Offences (continued from the sixth meeting)

- **Article 18:** [Destruction]/[**Disposal**] (continued from the sixth meeting)

Paragraph 1 (continued)

The CHAIRPERSON invited representatives to continue their consideration of Article 18, which sought to ensure that confiscated tobacco, tobacco products and manufacturing equipment could not be used for the purposes of illicit trade. He recalled that the term “immediately” had presented some difficulty for a number of Parties; a phrase such as “as soon as practicable” might be more appropriate.

Mr COULOMBE (Canada) said that the confiscation and seizure of contraband tobacco products was an important element of an effective protocol aimed at combating illicit trade in tobacco products. However, the technical aspects of the disposal of confiscated goods, including their destruction, should be left to individual Member States, which might have legitimate reasons for not immediately destroying seized tobacco products. For example, in Canada seized raw leaf tobacco and tobacco products were sometimes sold by the State to a legitimate tobacco licensee, and products seized in error were not usually destroyed but returned to a legitimate tobacco licensee or importer. In order to facilitate ratification by all Parties, the words “where appropriate” should be added before “in accordance with” in Article 18.1.

In response to a question from the CHAIRPERSON, he said that the sale of seized tobacco products to a legitimate tobacco licensee was possible, particularly if the costs of destruction were high and the leaves could be used by the legitimate tobacco licensee to manufacture legitimate products. Rather than bearing the costs of destruction, the State would then earn revenue to be used for enforcement.

Mr HASEGAWA (Japan) said that he supported the view expressed by the representative of Canada.

Mr BAYNA (Iraq) said that in his country confiscated tobacco products could be sold under certain conditions.

Ms ALI-HIGO (Djibouti), referring to the amendment proposed by the representative of Canada, suggested that the matter might be addressed under national legislation, and wording to that effect might be included in order to maintain consistency with wording elsewhere in the protocol.

Dr CALLE PLATA (Plurinational State of Bolivia) pointed out that under Article 18.1 each country would act in accordance with its national law. Legislation in his country provided for the immediate incineration of confiscated tobacco products; there were no legal processes to be completed in relation to such products. Where such processes were required, they could lead to significant in delays in destruction.

The CHAIRPERSON said that the phrase “upon completion of any legal process in relation to the tobacco products in question” was covered under “in accordance with national law” and should be deleted. The main issue still to be resolved appeared to be whether the Article would call for disposal or destruction of the product, and slightly different rules might be needed, depending on the type of good confiscated. The provision might be amended to read along the following lines: “All confiscated tobacco, tobacco products and manufacturing equipment shall be disposed of as soon as possible in accordance with national law. Such products shall not be sold other than to persons licensed under Article 5. Such disposal, other than sales, shall be by using environmentally friendly methods to the greatest possible extent”.

Dr BEKBASAROVA (Kyrgyzstan) said that she had some difficulty with the terms “as soon as possible” and “in accordance with national law”.

Ms ALI-HIGO (Djibouti) said that she did not support the wording suggested by the Chairperson. The protocol should not refer to the sale of confiscated material. In order to give States the flexibility to decide which confiscated products would be destroyed and which sold, the word “all” before “confiscated products” might be deleted.

Dr ROA (Panama), speaking also on behalf of Mexico, said that she could not accept any explicit reference to the sale of confiscated products in the protocol. The aim of the protocol was the same as the aim of the WHO FCTC: to reduce tobacco use. That aim could not be achieved if contraband products were put back on the market.

Dr GAMKRELIDZE (Georgia) said that he concurred with the views of the previous speaker. An explicit reference in the protocol to the sale of confiscated goods was not appropriate, particularly when no indication of the quality of the products was given.

Mr DESIRAJU (India) said that he was concerned about the loss of a reference to the concept of destruction in the proposed wording and suggested that a formulation such as “destroyed or disposed of” might be considered. He agreed that reference in the protocol to the sale of confiscated items was entirely inappropriate.

Mr HAMANEH (Islamic Republic of Iran) said that he supported the views expressed by the representative of India and suggested that the phrase “including through destruction” should be inserted after “disposed of”.

Mr IBRAHIM (Sudan) said that reference should be made in the provision to the fact that the tobacco products to be destroyed in an environmentally friendly manner were dangerous.

Dr AL TARKAIT (Kuwait) concurred with the view that no reference to the sale of confiscated products should be included in the protocol.

Mr AHMED (United Arab Emirates) said that it would be inappropriate to include in the protocol any reference to sales, and agreed that the concept of destruction should be incorporated in the paragraph.

Dr LABIB (Egypt) said that any reference to the sale of counterfeit or contraband products would be unacceptable. Each Party should destroy the products in the environmentally friendly manner it deemed most appropriate.

The CHAIRPERSON said that, in the light of the views expressed, the reference to the sale of confiscated goods should be deleted.

Ms PATTERSON (alternate to Mr Cotterell, Australia) suggested that paragraph 1 might be amended by drawing on wording used in Article 15.4(c) of the WHO FCTC and rephrasing the paragraph to read: “All confiscated tobacco, tobacco products and manufacturing equipment shall be destroyed using environmentally friendly methods to the greatest extent possible, or disposed of in accordance with national law”.

Dr BARILLAS (Guatemala) said that she supported the wording suggested by the representative of Australia. Confiscated tobacco and tobacco products were detrimental to health and their sale should not be an option. The sale of confiscated manufacturing equipment might be an option if some parts could be reused, but if not, the equipment should not be sold.

Mr TAGOE (Ghana) pointed out that shredding was a more environmentally friendly method of destruction than incineration.

Mr COULOMBE (Canada) expressed support for the wording proposed by the representative of Australia, which addressed all his country’s concerns with respect to the provision.

Mr IBRAHIM (Sudan) said that confiscated tobacco and tobacco products must be destroyed as they contained dangerous chemical components, and that they should be destroyed in accordance with internationally accepted procedures. In any case, the language used must be binding.

The CHAIRPERSON said that the mandatory nature of the provision was conveyed by the use of the verb “shall”, and noted that the chemical content in the cigarettes would effectively be eliminated during destruction. The phrase “in accordance with national law” gave Parties the flexibility to take into account the measures they considered necessary, including the application of international law. In the absence of any objection, he would take it that the wording proposed by the representative of Australia was acceptable to all.

It was so agreed.

The CHAIRPERSON, in response to a comment from Dr BEKBASAROVA (Kyrgyzstan), said that as the amended wording of the paragraph referred to both disposal and destruction, the title might read “Destruction or disposal”.

Mr NJOKU (Nigeria), supported by Mr IBRAHIM (Sudan), said that that title should read “Disposal”, which was a broad term encompassing destruction.

Dr AL TARKAIT (Kuwait) said that he would prefer the title to read “Destruction”.

Mr DONBE (Chad) said that as countries could decide to destroy or dispose of confiscated material, both words should be included in the title.

Dr TERFANI (Algeria) suggested that the title might read “Destruction and/or disposal”.

The CHAIRPERSON said that, in the absence of objection, he would take it that the title “Disposal or destruction” was acceptable.

It was so agreed.

Paragraphs 2 and 3

Dr CALLE PLATA (Plurinational State of Bolivia) said that paragraphs 2 and 3 were contradictory and suggested that paragraph 2 should be deleted.

Dr NEBLI (Tunisia) concurred with the view of the previous speaker and asked what confiscated material other than tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products was envisaged under paragraph 2.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that paragraph 2 should be retained. The confiscated material envisaged might be items used in the process of smuggling. For the purposes of clarity, the paragraph might be amended to read: “Confiscated material other than that referred to in paragraph 1 may be retained, or could be transferred to other Parties, for the purposes of training and other law enforcement purposes upon completion of any legal process in relation to the material in question”. It was not necessary to provide an explicit reference to the retention of small quantities as evidence, and paragraph 3 could thus be deleted. However, if such a reference was considered necessary, the following words might be added at the beginning of paragraph 1 “ Without prejudice to the possibility of retaining small quantities of tobacco and tobacco products as duly certified samples for evidence”.

Mr NJOKU (Nigeria) said that he supported the comments of the previous speaker.

Mr DESIRAJU (India) said that all confiscated material should either be disposed of or destroyed in accordance with national law. However, paragraph 2, as currently worded, appeared to refer to another category of material available for transfer to other Parties. For the purposes of clarity, the beginning of paragraph 2 might be amended to read: “Confiscated material, other than material that has been destroyed, could be transferred”.

Ms ALI-HIGO (Djibouti) requested clarification of the material envisaged under paragraph 2. If the provision was to be retained, its scope might be restricted through the addition of introductory wording such as “Subject to the provisions of national or international law, certain confiscated material”. She would support the deletion of paragraph 3.

The CHAIRPERSON said that the materials envisaged under paragraph 2 would be determined under national law but might include confiscated packaging material or means of transport, which could be used to train customs officials, for example, to recognize packaging or to search vehicles.

Mr AHMED (United Arab Emirates), referring to paragraph 2, agreed that samples of certain confiscated material, not all, should be retained. As the issue of evidence was already covered in paragraph 2, paragraph 3 could be deleted.

Ms MANSUR (Israel) recalled that paragraph 2 had been included, in particular but not exclusively, in order to allow for the possibility that expensive items seized from smugglers, such as aircraft, could be used for law enforcement purposes, including training. In the interests of clarity, it might be advisable to give examples of the specific types of material envisaged.

THE CHAIRPERSON invited comments on the wording of paragraph 2 suggested by the representative of Denmark, but noted that the phrase “upon completion of any legal process in relation to the material in question” was redundant since any decision to retain or transfer confiscated material would be taken in accordance with national law.

Dr NEBLI (Tunisia) said that she did not support combining paragraphs 3 and 1 as proposed by the representative of Denmark and suggested that paragraph 2 should refer to specimens of confiscated material. She recalled that the question of who should bear the cost of destruction or disposal had yet to be discussed.

Mr PÉREZ AVID (Paraguay) said that paragraph 2 should be deleted. It was not appropriate to include reference to products other than those defined in Article 1(f) of the WHO FCTC. Paragraph 3 should also be deleted, since Parties would be able to retain small quantities of evidence as part of the legal processes provided for in paragraph 1.

Mr SONG (Singapore), supporting the comments of the previous speaker, said that the phrase “in accordance with national law” in paragraph 1 gave Parties sufficient flexibility to undertake the actions provided for in paragraphs 2 and 3. The protocol should not cover confiscated material other than tobacco, tobacco products and manufacturing equipment.

Mr FISCH BERREDO MENEZES (Brazil) said that, in order to avoid repetition, the additional wording suggested by the representative of Denmark should be added at the end of paragraph 1. The provision would thus read: “or disposed of in accordance with national law, without prejudice to the possibility of retaining small quantities as duly certified samples for

evidence”. He would support the deletion of paragraph 2, as confiscated material outside the scope of the protocol should be dealt with under domestic law.

Dr BARILLAS (Guatemala) said that each Party would decide, in accordance with its national law, the purposes for which the confiscated material referred to in paragraph 2 was to be retained or transferred. Accordingly, should the provision be kept, the wording “for the purposes of training and other law enforcement purposes [upon completion of any legal process in relation to the material in question]” should be deleted.

Ms PATTERSON (alternate to Mr Cotterell, Australia) said that she would support the deletion of paragraphs 2 and 3.

Ms ALI-HIGO (Djibouti) expressed support for the deletion of paragraphs 2 and 3. The text of paragraph 1 as agreed earlier in the meeting covered the procedure to be followed, and the additional wording suggested by the representative of Denmark was therefore not needed.

The CHAIRPERSON, summing up the discussion, said that there appeared to be support for the deletion of paragraph 2, which referred to material outside the scope of the WHO FCTC, and paragraph 3, since the action referred to was covered by the phrase “in accordance with national law” in paragraph 1. He took it that the Intergovernmental Negotiating Body agreed to the deletion of paragraphs 2 and 3.

It was so agreed.

He further took it that, since national law was likely to provide for the possibility of retaining small quantities of confiscated products for evidence, the additional wording for paragraph 1 suggested by the representative of Denmark need not be included. Paragraph 1 would thus read: “All confiscated tobacco, tobacco products and manufacturing equipment shall be destroyed using environmentally friendly methods to the greatest extent possible or disposed of in accordance with national law.”

It was so agreed.

Ms ALI-HIGO (Djibouti) said that the cost of destruction, especially using environmentally friendly methods, was high, particularly for developing countries. The perpetrators of illicit trade should be made liable for the costs of such destruction. Confiscated products often remained in storage for long periods pending completion of formalities, which also entailed a cost. Moreover, there was a risk that stored products could be stolen and re-enter the market.

The CHAIRPERSON sought views on whether the protocol should include a provision allowing Parties to make certain persons liable for the costs of destroying confiscated products.

Mr DONBE (Chad) said that under national legislation in Chad, the perpetrators of illicit trade were liable for the cost of destruction.

Mr NJOKU (Nigeria) pointed out if a provision making perpetrators of illicit trade liable for destruction costs were included, a problem could arise if the perpetrator could not be apprehended. In his view, each Party should determine, under its national law, who was

liable for the cost of destruction or disposal. Above all, it must be ensured that the seized products did not re-enter the supply chain,

The CHAIRPERSON observed that the words “in accordance with national law” in paragraph 1 would give States the option of imposing the costs of destruction and disposal on perpetrators.

Ms ALI-HIGO (Djibouti) said that she had yet to hear of the experience of any Parties whose national law contained provisions requiring perpetrators to pay for the destruction of seized products, although they might have such provisions in their regulations. Including in the protocol a provision relating to payment of costs could help Parties to impose some of the costs on the tobacco industry, which was sometimes involved in illicit trade. It could also free up resources for the implementation of the protocol. At all events, governments and taxpayers must not be required to pay for the destruction of the confiscated products.

Mr HAMANEH (Islamic Republic of Iran) said that the matter raised by the representative of Djibouti was covered by the phrase “in accordance with national law”. However, in order to make the provision more comprehensive, the words “and regulations” might be added after “law”. Additionally, commas should be inserted after “destroyed” and after “possible”.

The CHAIRPERSON noted that the insertion of those commas would make the punctuation of Article 18 consistent with that of Article 15.4(c) of the WHO FCTC.

Mr RAMÍREZ CAMPOS (Colombia) said that, without prejudice to the consensus already reached on Article 38 (Financial resources) at the fourth session of the Intergovernmental Negotiating Body, that Article should be examined to determine whether it addressed the concerns of the representative of Djibouti in relation to the costs associated with implementing the protocol. If not, additional provisions might be added.

Mr TAGOE (Ghana) said that she supported the views expressed by the representative of Nigeria. Each Party should determine, under its national law, who was liable for the costs of destruction.

Ms MANSUR (Israel), referring to the suggestion by the Islamic Republic of Iran to add “and regulations” at the end of Article 18.1, said that Israel, whose legal system was based on common law, understood the term “national law” or “domestic law” used throughout the protocol to mean statutes, regulations and, in some cases, judicial opinions. Other Parties might have a different interpretation, and the Legal Counsel might need to give an opinion to ensure that all Parties shared the same understanding.

Mr HAMANEH (Islamic Republic of Iran) pointed out that the phrase “laws and regulations” was used in certain instances in the WHO FCTC. In some countries, the term “laws” did not cover regulations concerning executive and administrative orders.

The CHAIRPERSON said that the Legal Counsel would be consulted on the matter. Meanwhile, he suggested that the wording of paragraph 1, with the amended punctuation proposed by the representative of the Islamic Republic of Iran, be retained. If he heard no objection, he would take it that there was now consensus on Article 18, subject to the definition of manufacturing equipment and any comment from the Legal Counsel.

It was so agreed.

(For continuation of the discussion on Article 18, see summary record of the eleventh meeting.)

- **Article 19: Special investigative techniques**

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that the term “offences” used in Article 19.2 should read “criminal offences” in line with the wording used in Article 12.

The CHAIRMAN said that the wording of Article 19 would be discussed at a subsequent meeting.

(For continuation of the discussion on Article 19, see summary record of the thirteenth meeting.)

The meeting rose at 13:00.

EIGHTH PLENARY MEETING

Saturday, 31 March 2012, at 15:10

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. REPORT OF THE ADVISORY COMMITTEE ON LANGUAGE

Dr VECINO QUINTANA (Spain), speaking as Chair of the advisory committee on language, reported that the committee had examined the first five articles on which consensus had been reached. He was confident that it would continue to make good progress towards consensus on the remaining articles. Possible changes concerning the consistency of the English text would be submitted to the plenary for its consideration in due course.

The CHAIRPERSON thanked the committee for its work and invited the Chair of the committee to report to the plenary on completion of its work or as the committee saw fit.

2. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part IV: Offences (continued from the seventh meeting)

• **Article 12: Unlawful conduct including criminal offences** (continued from the sixth meeting)

The CHAIRPERSON recalled that, although good progress had been made with regard to the question of unlawful conduct under Article 12.1, there had been difficulty agreeing on which unlawful acts should be established as criminal offences under Articles 12.2 and 12.3 and which of those offences should be common to all Parties. He invited comments on progress that had been made in that regard during discussions in regional groups.

Mr LEGUERRIER (Canada), speaking on behalf of the Parties in the WHO Region of the Americas, said that following extensive discussions a consensus had emerged: it should be left to Parties to determine, on the basis of their particular national context, what unlawful conduct constituted a criminal offence, and Article 12.3 should be revised accordingly. It had been agreed that the provisions relating to money laundering should be removed from the Article and that its focus should be offences closely related to illicit trade in tobacco products, the elimination of which was the aim of the protocol. That aim would be largely achieved through the application of the provisions on supply chain control in Part III.

Participants in the regional discussions had also considered the complex question of the links between the protocol and other international instruments. It had been argued previously that the protocol should make specific reference to provisions in the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, because otherwise Parties that were not signatories to those instruments would lack a treaty basis for their interventions. That argument was not

compelling, however, since some 160 countries had ratified both instruments. The proposal was that the existing paragraphs 2 to 6 of Article 12 should be replaced with text reading:

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

3. Each party shall adopt, subject to the basic principles of its domestic law, legislative and other measures as may be necessary to establish any other conduct related to illicit trade in tobacco products as criminal offences.

4. In order to enhance international cooperation in combating the criminal offences related to illicit trade in tobacco products, Parties are encouraged to review their national laws regarding money laundering, mutual legal assistance and extradition, having regard to the United Nations Convention against Transnational Organized Crime, to ensure that they are effective in the enforcement of the provisions of this Protocol.”

In addition, he proposed that articles 30 to 32, which also made specific reference to provisions of the United Nations Convention against Transnational Organized Crime, should be deleted in their entirety.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of Congo) expressed concern about the impact of Parties each making different determinations as to what conduct would be criminal. He asked whether a Party that determined that a particular conduct was not criminal under its domestic law would be exempt from applying the provisions of the protocol in that regard.

The CHAIRPERSON suggested that, in keeping with a suggestion made by the representative of Swaziland during the previous meeting, consideration might be given to including a provision requiring Parties to notify the Convention Secretariat of which acts were regarded as criminal offences under their domestic legislation.

Mr DESIRAJU (India) noted that the proposal put forward by the representative of Canada stated that Parties would rely on their domestic law to do what they thought best, which would not be helpful, given that the point of an internationally agreed protocol was to govern how Parties would cooperate with each other. While the primacy of national law was recognized, situations were bound to arise that involved two or more countries, and such situations would be difficult to resolve if it could not be assured that the alleged offence was a crime in all countries involved. The proposed wording would dilute the provisions of Article 12.2 and 12.3 as originally drafted. Furthermore, he did not understand the rationale for the suggestion that adopting the proposed solution on Article 12 would render Article 30 on mutual legal assistance unnecessary. The aim of the negotiations currently under way was precisely to determine how Parties would assist each other in controlling the illicit trade of tobacco products.

Ms HEYWARD (alternate to Mr Cotterell, Australia), speaking on behalf of the Parties in the WHO Western Pacific Region, said that it was worth considering the proposal made by Swaziland for the inclusion of a mechanism by which Parties would notify the Secretariat as

to which unlawful conduct was criminal under their domestic law. She also noted that the discussions on Article 12 were linked to discussions still to come on Articles 30 to 32.

Mr PÉREZ AVID (Paraguay) pointed out that Article 5 of the WHO FCTC required each Party to develop, implement, periodically update and review its national tobacco control strategies, plans and programmes in accordance with the Convention and any protocols to which it was a Party. Hence, it would not matter if a particular Party had not established a particular conduct as a criminal offence under its national legal system, as the Party would be expected to adapt its legislation in accordance with the protocol.

Ms MANSUR (Israel) said that a protocol that did not cover extradition might be acceptable, though it would be less effective. However, the provisions on mutual legal assistance must not be removed. Without those provisions, Parties would have no treaty basis for cooperation. The United Nations Convention against Transnational Organized Crime would not provide an adequate basis for many mutual legal assistance requests relating to cigarette smuggling and other forms of illicit trade in tobacco products.

Mr DLAMINI (Swaziland) said that he had no objection to the proposal on Article 12.2, which retained the formulation he had proposed earlier. However, he agreed that the protocol would be weakened by the removal of the provisions on mutual legal assistance and extradition. The text of Article 12 should perhaps be retained as it was with a slight modification of paragraph 3 regarding the proceeds of crime and perhaps also with a new paragraph dealing with issues of notification.

The CHAIRPERSON invited the representative of Canada to elucidate the reasoning behind the proposal that Articles 30 to 32 should be deleted.

Mr YOST (Canada) observed that a decision to establish a certain act as a criminal offence would lead to a series of legal consequences, which would vary depending on how the crime was classified within the national legal system, what penalty it would entail and other considerations. Those decisions would have to be made within the national context. Once it was decided which tobacco-related offences were to be considered criminal offences, each Party would need to review how the provisions of its domestic law – including provisions relating to extradition and mutual legal assistance – would apply to those offences. It should be borne in mind that the provisions of the United Nations Convention against Transnational Organized Crime would not apply unless the offence in question was punishable by a prison sentence of at least four years.

In response to a query from the CHAIRPERSON, he added that adopting the proposed new wording of Article 12 would not mean that the draft protocol would not include any provision for mutual legal assistance and extradition. The provisions of the United Nations Convention against Transnational Organized Crime would apply to tobacco-related offences that were punishable by at least four years in prison and were transnational in nature.

The CHAIRPERSON said that he understood that Parties might have the option of recourse to the United Nations Convention against Transnational Organized Crime; however, he wished to clarify whether the Parties from the WHO Region of the Americas opposed the inclusion of provisions for mutual legal assistance in the draft protocol even if it was agreed also to include a provision that required Parties to notify the Secretariat of which unlawful acts would be regarded as criminal offences and of the punishment incurred for those offences.

Mr YOST (Canada) said that the inclusion of such provisions would be acceptable provided that they were drafted in a way that would not require Parties to set up arrangements for mutual legal assistance or extradition in respect of minor crimes.

Ms MANSUR (Israel) said that she, too, wished to avoid a situation in which national authorities would be unduly burdened by trivial cases. She therefore advocated the inclusion of threshold requirements. It would not be acceptable to rely on the provisions of the United Nations Convention against Transnational Organized Crime to provide a treaty basis for extradition or mutual legal assistance in relation to tobacco-related offences, as those provisions were subject not only to the four-year minimum imprisonment threshold, but also to proof that they had been committed by an organized criminal group, meaning that three or more people were working together in a concerted action, and that the offence had been taking place over a significant period of time – all of which might be difficult to prove in cases of cigarette smuggling. The draft protocol must therefore include at least some explicit provision for mutual legal assistance; provisions on extradition might not be necessary, but would be desirable. At the same time, a *de minimis* threshold for the application of such provisions must be agreed.

The CHAIRPERSON noted that under Article 30 all requests for mutual legal assistance were required to detail the relevant provisions of national law and the penalty for the offence in question, thus giving Parties the information they needed to be able to decide whether or not they could meet the request. A decision to adopt the proposed new wording of Article 12 would not necessarily be a decision to delete the articles on extradition and mutual legal assistance.

Mr ALBUQUERQUE E SILVA (Brazil) said that Part III was the most important part of the protocol, as establishing clear and rigid control of the supply chain would ensure the achievement of the objectives of those Parties that were genuinely interested in having an effective protocol. It was unrealistic to expect that consensus could be reached during the current meeting on all aspects of Articles 30 to 32. As to the proposal on Article 12, he encouraged Parties to examine it carefully and suggest any amendments they deemed necessary, but not to dismiss it out of hand as unacceptable. Such an attitude was not conducive to successful negotiations.

Dr ABASCAL (Uruguay) said that he agreed that the provisions relating to supply chain control were largely sufficient to eliminate illicit trade in tobacco products. It was important to be realistic about the inclusion of specific provisions relating to criminal offences and to recognize that countries were unlikely to be willing to amend their criminal codes in order to accommodate such provisions. Parties should be allowed to determine for themselves which unlawful acts would constitute criminal offences. It should also be recognized that the majority of Parties to the WHO FCTC had ratified the United Nations Convention against Transnational Organized Crime, which provided measures for combating illicit trade.

Ms EVISON (New Zealand) welcomed the proposal by the Parties from the WHO Region of the Americas, which had helped to address her concerns regarding the “pick and mix” approach of incorporating into the protocol certain aspects of the United Nations Convention against Transnational Organized Crime. The proposed formulation would make it easier for her Government to support the draft protocol.

The CHAIRPERSON asked whether the Intergovernmental Negotiating Body wished to go forward on the basis of the text proposed by the WHO Region of the Americas, on the understanding that the proposal would not prejudice future discussions on Articles 30 to 32.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he could support the proposed text of paragraphs 2, 3 and 4 of Article 12. He said that the Parties in the European Union would, however, need time to consult on paragraph 3, which obliged Parties to adopt further measures regarding criminal offences not mentioned in paragraph 1 of the Article. He noted also that the wording of paragraph 4 seemed more appropriate to a recommendation than to a legally binding instrument.

The CHAIRPERSON suggested that the content of paragraph 4 would be more appropriately placed in the preamble, and invited the representative of Canada to respond to the query raised about paragraph 3.

Mr YOST (Canada) said that the version of Article 12.3 appearing in document FCTC/COP/INB-IT/5/4 essentially asked Parties to reproduce the provisions on money laundering that existed under the United Nations Convention against Transnational Organized Crime and other conventions. The proposed new wording for paragraph 12.3 would ask Parties to consider whether there was any other conduct related to illicit trade in tobacco products which under their domestic law should be considered a criminal offence.

The CHAIRPERSON suggested that the proposed new wording might be more in the nature of a recommendation than hard law.

Mr FISCH BERREDO MENEZES (Brazil) added that the idea behind Article 12.3 was to allow for the possibility that illicit trade practices other than those mentioned in Article 12.1 could be dealt with as criminal offences.

Ms MADRAZO REYNOSO (Mexico) said that she supported the comments made by the representative of Brazil. The protocol should not be prescriptive. It would be weaker if it did not leave open the possibility for new practices also to be considered criminal offences. It should be made clear that the list of offences in Article 12.1 was not intended to be exhaustive.

The CHAIRPERSON said that all Parties would doubtless want to retain the possibility of criminalizing any offence under their domestic law. Whether or not it was necessary to state that explicitly in Article 12.3 was open to debate.

Ms MANSUR (Israel) pointed out that the intent of the proposed Article 12.3 was covered in the proposed Article 12.2, which stated that Parties could determine that “any other conduct contrary to the provisions of this Protocol” would be criminal offences. If Parties believed that that wording was not sufficient, it might be replaced with: “any other conduct related to illicit trade in tobacco or tobacco products”. In any case, Article 12.3 was redundant.

Mr SONG (Singapore) said that Parties’ positions did not appear to be very far apart. He understood that the idea behind Article 12.3 was not to limit Parties’ ability to criminalize additional offences. He shared the view of the representative of Israel that Articles 12.2 and 12.3 were closely related and might be merged. Referring to the proposal that Parties should be asked to notify the Secretariat of which unlawful acts they had established as criminal

offences, he suggested that Parties might be given the option to include in that list offences not mentioned in Article 12.1 that they had criminalized.

The CHAIRPERSON said that there seemed to be general agreement that Article 12 should give Parties the option of establishing tobacco-related acts not listed in Article 12.1 as criminal offences. The suggestion by the representative of Singapore might be a means of accomplishing that. If it was agreed that under Article 12 it was to be left to Parties to determine what unlawful conduct constituted a criminal offence, there could be consequences for subsequent articles that also related to offences. Before taking a decision on Article 12, the Intergovernmental Negotiating Body might therefore wish to review other articles to assess what those consequences might be.

It was so agreed.

(For continuation of the discussion on Article 12, see summary record of the tenth meeting.)

Part V: International cooperation (continued from the fourth meeting)

• **Article 26: Jurisdiction**

Paragraph 1

The CHAIRPERSON invited the Intergovernmental Negotiating Body to consider whether Article 26 could remain unchanged, if the approach under consideration for Article 12 was adopted.

Mr YOST (Canada) said that it was assumed that governments would have jurisdiction over offences committed in their territory, and subparagraph 1(a) could therefore be taken as self-evident. As to subparagraph 1(b), Parties might need to review their legislation to determine whether they would automatically have jurisdiction if the offence were committed outside their territory on board an aircraft or a vessel flying their flag.

Ms MANSUR (Israel) said that Article 26.1 was not needed. Articles 26.2, 26.3 and 26.4 would need to be examined closely.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that Article 26.1, which affirmed the principle of territoriality, was acceptable. While the word “shall” could be used in that paragraph in relation to the establishment of jurisdiction, it was important to retain the word “may” in Articles 26.2 and 26.4, as those types of jurisdiction would not be established in all States.

Mr HAMENEH (Islamic Republic of Iran) said that the presumption in Article 26 as drafted was that certain crimes were being established in Article 12. Although the jurisdiction clause could theoretically be maintained, it would be of little merit in practical terms if Article 12 did not establish any specific criminal offences. As such, it made little sense to retain Article 26.

The CHAIRPERSON invited expert legal opinion as to whether Article 26 could be deleted and as to the consequences of its deletion for the operation of international criminal law.

Professor BÖSE (Invited expert), speaking at the invitation of the CHAIRPERSON, said that the obligation in paragraph 1 of Article 26 only made sense if there was mandatory criminalization of certain conduct in the protocol.

Mr SONG (Singapore) said that he concurred with the view expressed by the invited expert.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, pointed out that even if the protocol did not establish any common offences, Parties would be required to hold persons liable for unlawful acts listed in Article 12 under Article 14 as currently drafted. The possibility of deleting Article 26 should be examined in the light of that requirement, which might necessitate some jurisdiction rules.

Ms MANSUR (Israel) said that the content of Article 26.3 was adequately covered by Article 31.8 on extradition.

The CHAIRPERSON suggested that the Intergovernmental Negotiating Body should move on to examine Article 14.3 in the light of its earlier discussion of Article 12.

It was so agreed.

Part IV: Offences (resumed)

- **Article 14: Prosecutions and sanctions**

Paragraph 3

The CHAIRPERSON noted that the paragraph as drafted referred to “unlawful conduct including criminal offences” established in accordance with the protocol, yet no criminal offences would be established under the protocol if the approach under consideration for Article 12 was adopted.

Mr YOST (Canada) pointed out that criminal offences would be established under the protocol, in that the unlawful conduct listed in Article 12.1 would become criminal offences as determined by each Party.

Professor BÖSE (Invited expert), speaking at the invitation of the CHAIRPERSON and in response to a request for clarification by Mr DLAMINI (Swaziland), said that criminal offences would be established under Article 12.2 and 12.3. He added that the main purpose of the provision in Article 14.3 was to establish that the main basis for prosecution was the domestic law of the Parties and not the protocol itself.

Mr DLAMINI (Swaziland), seeking further clarification, asked what legal principles would determine the lawfulness of conduct and whether the approach being considered in respect of Article 12 would detract from the right of a Party to conduct prosecution in accordance with its national law.

Professor BÖSE (Invited expert), speaking at the invitation of the CHAIRPERSON, said that paragraph 3 referred to the general criminal law of each Party, under which various legal defences would remain applicable even if the Party had implemented the protocol by establishing certain offences under a special part of its criminal law.

The CHAIRPERSON said that it was clear from the invited expert's explanation that Parties would not lose any powers as a result of Article 14.3. Given the explanations provided, he enquired whether any Party objected to the wording of Article 14.3.

Mr HAMENEH (Islamic Republic of Iran) noted that the wording of the paragraph closely corresponded to that of Article 11.6 of the United Nations Convention against Transnational Organized Crime, and was thus based on the assumption that certain crimes were established in the protocol. An argument might be made for retaining the paragraph, even if no specific criminal offences were established in the protocol, given that it also referred to unlawful conduct.

The CHAIRPERSON said that he took it that the Intergovernmental Negotiating Body had no objection to the current wording of Article 14.3 and that there was therefore now consensus on the whole of Article 14. He added that the expression "national law" would be replaced by "domestic law" wherever applicable and that, for the sake of consistency, the word order "natural and legal persons", rather than "legal and natural persons" would be used.

It was so agreed.

Part V: International cooperation (resumed)

• Article 28: Law enforcement (continued from the fourth meeting)

The CHAIRPERSON, noting that Article 28 was already marked as consensus text, asked whether the wording of the Article would still be appropriate in the light of the approach being considered in respect of criminal offences.

Mr HAMANEH (Islamic Republic of Iran) expressed concern that a patchwork approach was being used, which borrowed provisions from the United Nations Convention against Transnational Organized Crime without having reasonable grounds for doing so. The protocol was intended to be a criminal law instrument, at least with regard to some aspects of illicit trade in tobacco products, and yet it was not clear which offences would be considered criminal offences under the protocol. That made it difficult to discuss law enforcement cooperation in relation to those offences. If Parties were to be asked to submit information about which unlawful acts they considered criminal offences, would there then be a delay of several years before cooperation under the protocol could begin?

The CHAIRPERSON said that he was not sure that the protocol was intended to be a criminal law instrument. He suggested that a provision might be included to require Parties to notify the Secretariat within a certain time – perhaps a year from the date of protocol's entry into force – as to which unlawful conduct they would establish as criminal offences. It would thus be clear which offences were considered criminal offences under the protocol. If he heard no objection, he would take it that there remained consensus on Article 28.

It was so agreed.

• Article 29: Mutual administrative assistance (continued from the fourth meeting)

Subparagraphs (b) and (c)

The CHAIRPERSON recalled that discussion on Article 29 had been deferred pending the discussions on Article 12, as Article 29 contained several references to offences listed under Article 12. If the approach under consideration in respect of Article 12 was adopted, no specific criminal offences would be listed and therefore in subparagraph (b) of Article 29 the phrase “new trends, means or methods of committing offences listed in article 12” would need to be redrafted.

Ms EVISON (New Zealand) proposed the wording “new trends, means or methods of committing offences communicated to the Secretariat under the terms of” the relevant article, assuming an article on notification was to be included.

Mr CISSE (Senegal) agreed that reference could not be made to offences “listed”, but that it would be acceptable to refer to new trends, means or methods “indicated” or “notified” under Article 12.

Dr NDYANABANGI (Uganda) proposed the wording “referred to in Article 12”.

Mr SONG (Singapore) said that he supported the concept underlying the wording proposed by the representative of New Zealand. For standardization purposes, if it was agreed to adopt an article on notification of criminal offences, similar wording should be used throughout the protocol wherever reference was made to offences. He would need to see the text of any such article before agreeing to it.

The CHAIRPERSON said that the same wording might be used in subparagraph (c).

Mr HAMANEH (Islamic Republic of Iran), expressing confidence that all those present wished to develop an international instrument that would be effective, operational and workable, said that he foresaw difficulties with implementation of the obligations placed on Parties if those obligations were not known quantities. Under Article 29, for example, Parties would commit to provide information about new trends, means or methods of committing offences without knowing what those offences were. They would have to wait until a certain number of Parties had provided information to the Secretariat, and even then it was not clear whether a Party’s obligations under the protocol would apply to all offences communicated to the Secretariat or only to those which that Party had identified as criminal offences.

Mr YOST (Canada) suggested that the matter might be resolved by referring to goods and to persons known to engage in the illicit trade of those goods, rather than to offences.

The CHAIRPERSON, welcoming the suggestion of the representative of Canada, asked whether any reference should be made to the unlawful conduct mentioned in Article 12 or simply to the illicit trade in tobacco products.

Mr YOST (Canada) said that his preference was for a general reference to illicit trade. Subparagraph (b) might thus read “new trends, means or methods of engaging in illicit trade in tobacco products” or words to that effect.

The CHAIRPERSON said that the same approach might be followed in subparagraph (c), using wording such as “goods related to illicit trade in tobacco products” or “goods known to be subject to illicit trade in tobacco products”. That approach would ensure that information would be exchanged without the need to refer to offences. If he heard no objection he would take it that the Intergovernmental Negotiating Body wished to amend the

wording of paragraphs (b) and (c) to refer generally to illicit trade rather than to specific offences.

It was so agreed.

Subparagraph (d)

The CHAIRPERSON, noting that subparagraph (d) had been left in square brackets at the previous session of the Intergovernmental Negotiating Body, sought clarification of why some Parties had objected to the bracketed text.

Mr YOST (Canada) said that he believed that his Government had had concerns about restrictions imposed by its domestic privacy laws on the sharing of some kinds of information.

The CHAIRPERSON asked whether the data protection provisions that had been included in Article 4 bis might assuage those concerns.

Mr YOST (Canada) said that he thought that those provisions in combination with the addition of the phrase “consistent with their national legal and administrative systems” would indeed address concerns that a Party might be asked to share information in violation of its privacy laws.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he would like subparagraph (d) to be removed. As Article 29 was indicative in nature, information on natural or legal persons engaged in illicit trade in tobacco products could still be shared, but there was no need to highlight that aspect of information exchange.

The CHAIRPERSON asked whether any Party objected to the deletion of subparagraph (d).

Ms MATSAU (South Africa) asked for clarification of the rationale for removing subparagraph (d).

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that one reason for its proposed deletion was that in the European Union information of the type referred to in subparagraph (d) would normally fall within the domain of mutual legal assistance, not mutual administrative assistance.

Ms MATSAU (South Africa) said that the subparagraph should be retained, but that it should be made clear that Parties’ actions in respect of it would be governed by their domestic law.

The CHAIRPERSON said that, if retained, the wording of subparagraph (d) would need to be amended if no specific offences were to be listed in Article 12.

Dr ROSELL-UBIAL (Philippines) proposed the wording “natural or legal persons known to have engaged in illicit trade in tobacco products” in subparagraph (d) in order to ensure consistency with the amended wording of subparagraphs (b) and (c).

The CHAIRPERSON welcomed the suggested wording for subparagraph (d) and proposed that the bracketed text at the end of the subparagraph, if retained, should accordingly be amended to read “or suspected of being engaged in illicit trade in tobacco

products”. He suggested deferring a decision on the matter to give Parties time to consider their positions on whether to delete or retain the subparagraph.

It was so agreed.

Subparagraph (e)

The CHAIRPERSON suggested deleting the words “supply chain” from subparagraph (e). In the absence of any objection, he would take it that the Intergovernmental Negotiating Body agreed with that suggestion and wished to amend subparagraph (e) to read: “any other data that would assist designated agencies in risk assessment for control and other enforcement purposes”.

It was so agreed.

Summing up, the CHAIRPERSON said that, subject to reaching agreement on the inclusion or removal of subparagraph (d), there seemed to be good prospects for reaching consensus on Article 29. He noted, however, that some text in the *chapeau* (introductory paragraph) remained bracketed.

Mr CISSE (Senegal) said that he was not comfortable with the reference in subparagraph (d) to persons “suspected” of being engaged in illicit trade in tobacco products. It might be preferable to refer to “attempted illicit trade”, as Parties could not be expected to take action against persons merely suspected of engaging in an act.

The CHAIRPERSON pointed out that the subparagraph concerned the exchange of information; it did not imply that suspected persons were guilty of committing an offence. However, the concerns expressed by the representative of Senegal had been noted and that part of the text would remain bracketed.

Mr HAMANEH (Islamic Republic of Iran) asked for clarification of the rationale for deleting the words “supply chain” from subparagraph (e) and expressed concern that without them it was not sufficiently clear what was to be controlled. With regard to the bracketed text in the *chapeau*, he wished to clarify his remarks of the previous day. His delegation was willing to be flexible with respect to that text, but would prefer “shall” to be replaced with “should”.

The CHAIRPERSON noted that a large majority of Parties had appeared to favour “shall” and enquired whether the representative of the Islamic Republic of Iran would be willing to accept its use.

Mr HAMANEH (Islamic Republic of Iran) said that for the time being his instructions were to request “should”.

The CHAIRPERSON encouraged the representative of the Islamic Republic of Iran to consult with his national authorities and see whether they might be willing to join the apparent consensus in favour of “shall”. He noted that the words “on request” and “on their own initiative” were bracketed because they had been considered redundant.

Ms MATSAU (South Africa), referring to subparagraph (e), said that it was clear that all the preceding provisions in Article 29 were part of a risk assessment strategy. That being

the case, she did not see how subparagraph (d) could be removed, as it was part of risk assessment.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that, in his view, if subparagraph (d) was covered by subparagraph (e), that would be an argument for deleting it.

Ms MATSAU said that information about persons engaged in illicit trade, like the information called for in the other subparagraphs, was an integral part of risk assessment, and therefore paragraph (d) could not be deleted.

The CHAIRPERSON suggested that the representative of South Africa and the representative of Denmark, on behalf of the European Union, should meet informally in order to reach agreement on subparagraph (d). Responding to the question from the representative of the Islamic Republic of Iran, he said that the reason for removing the term “supply chain” from subparagraph (e) had been to facilitate the work of the working group on definitions, as the term “supply chain” appeared in several places in the draft protocol and could have different meanings in different contexts. The term was not necessary in subparagraph (e), although “control of tobacco, tobacco products and manufacturing equipment” might be an acceptable wording. In any case, the idea was simply to ensure that the exchange of data would assist Parties with control and enforcement in respect of illicit trade.

Mr HAMANEH (Islamic Republic of Iran) said that if the consensus was to delete the term “supply chain” he would not object, as long as it was made clear what was being controlled and enforced. If the wording suggested by the Chairperson was acceptable to other delegations, he could accept it as well. He repeated his request to replace “shall” with “should”.

Mr LEGUERRIER (Canada) asked what purpose was served by subparagraph (d) of Article 29, when the same ground was covered by Article 28.1(c)(i).

The CHAIRPERSON said that subparagraph (d) of Article 29 as amended would be wider in scope than Article 28.1(c) because it referred generally to illicit trade; it did not use the word “offences”. He encouraged the representative of Canada to join informal discussions on subparagraph (d). He asked whether in subparagraph (e), the representative of the Islamic Republic of Iran wished to add the words “of tobacco, tobacco products, and manufacturing equipment” after the word “control”, or could accept the more general wording.

Mr HAMANEH (Islamic Republic of Iran) reiterated that if the Chairperson’s suggestion was acceptable to other delegations then it was acceptable to his delegation, too.

The CHAIRPERSON said that if there were no objections from other delegations, the subparagraph would refer simply to “control and other enforcement purposes”.

It was so agreed.

Mr NGEYWO MASUDI (alternate to Mr Mboya Okeyo, Kenya) said that the wording of subparagraphs (b), (c) and (d) should be made consistent with the chapeau, which referred to “illicit trade in tobacco, tobacco products or manufacturing equipment”, rather than just to “tobacco products”.

Dr COULIBALY (Mali) asked whether negotiations were to be resumed on Article 12. In his view, subparagraph (f) of that Article was problematic and should be amended to read “failure by an operator to obtain a licence in accordance with Article 5 or obtaining tobacco, tobacco products or manufacturing equipment from a person not licensed in accordance with Article 5” in order to make it clear that failure to obtain a licence in accordance with Article 5 was an unlawful act.

The CHAIRPERSON confirmed that discussions on Article 12 would resume at a later date and invited the representative of Mali to submit his proposed wording to the Secretariat.

Mr HASEGAWA (Japan) said that in the chapeau paragraph of Article 29 he would prefer to keep the formulation “either on request or on their own initiative”, which he did not view as redundant.

Mr SONG (Singapore) concurred with the representative of Japan that there was merit to keeping the phrase. Although mutual administrative assistance was more informal in nature than mutual legal assistance, the information exchanged was nonetheless sometimes confidential or for restricted use, and States would have to consider, when a request was made, whether their domestic law permitted them to share it.

The CHAIRPERSON asked whether any Party objected to leaving the phrase in.

Mr AAGAARD (Denmark), speaking on behalf of the Member States of the European Union, said that he had no objection.

The CHAIRPERSON said that, unless anyone else objected, the square brackets around that phrase would be removed. In the interests of consistency with the chapeau, subparagraphs (b), (c) and (d) would be amended to read “illicit trade in tobacco, tobacco products and manufacturing equipment”. He suggested that the discussion of Article 29 should be continued at a subsequent meeting, following informal consultations among Parties.

It was so agreed.

(For continuation of the discussion on Article 29, see summary record of the thirteenth meeting.)

Part III: Supply Chain Control (continued from the seventh meeting)

• Article 6: Due diligence (continued from the second meeting)

Paragraph 1

The CHAIRPERSON invited the Office of the Legal Counsel to advise on the impact of the wording in Article 6.1 regarding legally binding and enforceable agreements, noting that the same wording occurred in Article 9.1.

Mr FEINÄUGLE (WHO Secretariat, Office of the Legal Counsel) said that he could confirm that the provision in Article 6.1 relating to legally binding and enforceable agreements would not mean that such agreements could supersede the obligations laid down in Article 6. The words “in accordance with its national laws or legally binding and enforceable agreements” in Article 6.1 made it clear that the obligations established under

Article 6 were not subordinate to such agreements and they could therefore not be limited by such agreements.

The CHAIRPERSON asked whether any Party required further clarification on the matter.

Ms MATSAU (South Africa) said that she wished to know what purpose the wording served.

Mr FEINÄUGLE (WHO Secretariat, Office of the Legal Counsel) said that the phrase “in accordance with its national law” was common language in international agreements. The question raised by the representative of South Africa regarding legally binding and enforceable agreements would best be referred to the Parties that had proposed the language.

Mr SONG (Singapore) said that the Office of the Legal Counsel had made it clear that no obligations under the protocol would be limited by any legally binding and enforceable agreements. As the opinion of the Office of the Legal Counsel would be recorded in the official record of the meeting, he believed that further discussion on the matter could be avoided.

Mr TAGOE (Ghana) sought clarification as to whether the protocol and other legally binding and enforceable agreements could run concurrently without any conflict.

Dr NDYANABANGI (Uganda) sought assurance from the Office of the Legal Counsel that, if the wording remained in the text of the protocol, the scope of Parties’ obligations under it would in no way be affected by the content of such agreements. She drew attention to the danger of leaving any loophole that might be exploited by the tobacco industry, which could be relied upon to attempt to conclude legally binding agreements detrimental to the implementation of the protocol.

Mr DLAMINI (Swaziland) enquired whether the wording as it stood might not be interpreted to mean that the extent of a Party’s obligations under the protocol would be dependent on the content of any legally binding and enforceable agreements to which it was also a party.

Mr DESIRAJU (India) asked whether, in the opinion of the Office of the Legal Counsel, the suggestion made in an earlier meeting to replace the phrase “legally binding and enforceable” with “legislative and other measures” could serve the same purpose.

Mr COULOMBE (Canada), responding to the question by the representative of South Africa, explained that Canada had entered into agreements with major tobacco manufacturers after they had pleaded guilty to taxation and excise offences in 2008 and 2010, the aim of those agreements being to ensure that there were sufficient and effective controls in place. Canada’s obligations in relation to due diligence and security and preventive measures would be fulfilled through those legally binding and enforceable agreements and he therefore asked that the reference to such agreements be retained. He would be pleased to provide details of the agreements in question so that Parties could see that they did not represent an attempt to circumvent Canada’s obligations under the protocol.

Mr ROWAN (European Union) said that the purpose of such agreements was solely to fight illicit trade in tobacco products and that they were covered under Article 5.3 of the WHO FCTC and the guidelines on implementation of Article 5.3.

Mr FEINÄUGLE (WHO Secretariat, Office of the Legal Counsel) said that from a legal point of view one reason for including a reference to legally binding and enforceable agreements was that such agreements were not always strictly national in nature, as was the case with some agreements among Member States of the European Union. Other agreements, however, were between States and private companies, as in the case of Canada. He encouraged Parties to ensure that there was a shared understanding of the intended meaning of the phrase “legally binding and enforceable agreements”.

The CHAIRPERSON suggested that Parties should hold discussions within regional groups and between regional groups in order to ensure that they fully understood one another’s positions and that all Parties felt comfortable with the outcome, whatever it might be.

Ms MATSAU (South Africa) welcomed the prospect of informal discussions with other interested Parties, which she hoped would clarify the matter. Her fear was that an agreement negotiated by one Party with the tobacco industry, which might have been greatly influenced by the industry, might subsequently affect all Parties to the protocol. She did not see how such private agreements involving only one Party could have a place in a protocol involving numerous Parties. That was the issue that she had hoped that the Office of the Legal Counsel would address.

The CHAIRPERSON said that the issues under discussion might not necessarily be legal in nature. It was important to arrive at a solid common understanding, and he therefore again encouraged Parties to take part in informal discussions scheduled for later in the evening. If legal questions arose during those discussions then certainly they could be referred to the Office of the Legal Counsel.

(For continuation of the discussion on Article 6, see summary record of the fifteenth meeting.)

3. REPORT OF THE OPEN-ENDED WORKING GROUP ON DEFINITIONS

Mr GORUN (Turkey), speaking as Chair of the open-ended working group on definitions, said that the working group had held four meetings on 30 and 31 March 2012, and that its discussions had been positive and fruitful. Representatives of Australia, Brazil, Canada, Colombia, Denmark, Djibouti, Democratic Republic of the Congo, European Union, France, Germany, India, Israel, Japan, Kenya, Kuwait, New Zealand, Nigeria, Serbia, Singapore, South Africa, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, and Zambia had participated. Representatives of the World Customs Organization and the Framework Convention Alliance on Tobacco Control had also participated.

The open-ended working group had considered possible definitions of the terms “manufacturing equipment”, “supply chain”, “personal data”, “traditional growers working on a non-commercial basis”, “commercial quantities”, “natural and legal persons”, “financial institutions” and “intermingling/intermingled”. The working group’s recommendation was that a definition was not necessary for the term “traditional growers working on a non-commercial basis”, as the text already noted that such workers were operating on a non-

commercial basis. The group had also decided that definitions of “commercial quantities” and “natural and legal persons” were not needed as there was a common understanding of those terms, and they were used in other international instruments without definition. As to “financial institutions”, the request for a definition had been withdrawn. A definition of “intermingling” or “intermingled” had been considered inappropriate owing to the term’s use in describing goods in one context and funds in another.

The open-ended working group proposed the following definitions of the remaining terms:

1. (a) “**Manufacturing equipment**” means machinery which is designed, or adapted, to be used solely for the manufacture of tobacco products and is integral to the manufacturing process.*

(b) “Any part thereof” in the context of manufacturing equipment means any identifiable part which is unique to manufacturing equipment used in the manufacture of tobacco products.

*[as a footnote] Parties may include reference to the Harmonized Commodity Description and Coding System of the World Customs Organization for this purpose, wherever applicable.

2. “**Personal data**” means any information relating to an identified or identifiable natural person.

3. The “**supply chain**” covers the manufacture of tobacco products and manufacturing equipment; and import or export of tobacco products and manufacturing equipment; and may be extended, where relevant, to one or more of the following activities when so decided by a Party:

(a) retailing of tobacco products;

(b) growing of tobacco, except for traditional small-scale growers, farmers and producers;

(c) transporting commercial quantities of tobacco products or manufacturing equipment; and

(d) wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment.

The open-ended working group had considered the applicability of the proposed definition of “supply chain” in the light of the current version of the articles in Part III and had confirmed that it was appropriate in respect of Articles 6.1, 7.1, and 8.1, but had noted in relation to Article 7.1 that there was no agreed definition for “tracking and tracing”. The working group recommended that, should the Intergovernmental Negotiating Body agree with the proposed definition of “supply chain”, that definition should be taken into account in finalizing Articles 12.1(d) and 29(e).

The CHAIRPERSON thanked the Chair of the working group on definitions for his report and asked whether the work of the working group on definitions could thus be considered completed.

Mr COTTERELL (Australia) drew attention to the need for an agreed definition of “tracking and tracing” and several other terms.

Mr HAMANEH (Islamic Republic of Iran) asked whether, as the term “supply chain” had now been defined, further discussion might be needed of whether to include it in subparagraph (e) of Article 29. He also wondered whether a definition was needed of the term “fraud” or “fraudulent practices”, which had been proposed as a substitute for “counterfeiting”.

The CHAIRPERSON recalled that removing the term “supply chain” from Article 29(e) had already been agreed, but that its use in subparagraph Article 12.1(d) would need to be considered. He asked the working group on definitions to continue its work. In response to a comment by Ms LECLAIRE (Canada), he affirmed that the working group would work only on definitions that it had deemed necessary.

Ms SY (Senegal), congratulating the working group on definitions on behalf of the Parties in the WHO African Region, asked when a French version of the group’s report would be available.

The CHAIRPERSON said the report would be available in all languages on the following Monday.

The meeting rose at 18.05.

NINTH PLENARY MEETING

Monday, 2 April 2012, at 10:20

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. ORGANIZATION OF WORK

The CHAIRPERSON, setting out a proposed schedule of work for the day, said that he intended to begin with discussion of Articles 30 to 32 on mutual legal assistance and extradition, followed by discussion of Article 36, Article 2 and, time permitting, Articles 40 to 49 and some of the definitions in the preamble. Once the working group on definitions had reached consensus, particularly on a definition of the term "manufacturing equipment", all the articles marked "provisional consensus" could be marked "full consensus". He hoped that the Intergovernmental Negotiating Body would have reached agreement on the entire protocol by the end of the following day, in order that the final meeting of the session might be devoted to its report to the Conference of the Parties. He took it that the proposed schedule was acceptable.

MR SONG (Singapore), noting the links between Articles 30–32 and Article 12, asked when discussions on the latter were to be completed.

The CHAIRPERSON said that negotiations on Article 12 would be resumed as part of the final discussions the following day. Meanwhile, negotiations on Articles 30–32 would be based on the assumption that each Party would notify the Convention Secretariat of which unlawful acts it would establish as criminal offences under its domestic law.

Mr SONG (Singapore) said that Article 12 was crucial, and noted that it also tied in closely with Article 11. He had shown considerable flexibility in order to allow negotiations to move forward, but he had done so on the understanding that other Parties would reciprocate on the issues that were of importance to his country, which included the provisions on intermingling. A full discussion would therefore be needed on subparagraph (d) of Article 12.1 and how it dovetailed with Article 11.2, which prohibited intermingling. When would he have an opportunity to express his views in that regard? He emphasized that the protocol should not be concluded in a way that left unclear what obligations it imposed on Parties, as ambiguity in that regard would be a significant barrier to ratification.

The CHAIRPERSON said that he would try to return to Article 12 later in the day.

Mr LEGUERRIER (Canada), speaking on behalf of the Parties in the WHO Region of the Americas, suggested that an open-ended working group should be set up to clarify the links between Article 12 and Articles 30 to 32.

The CHAIRPERSON, acknowledging the links between those articles, said that he would informally seek the views of other delegations regarding the proposal to establish a working group.

2. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/INB-IT/3/5 Rev.1, FCTC/COP/INB-IT/3(1), FCTC/COP/INB-IT/4/3, FCTC/COP/INB-IT/4/4, FCTC/COP/INB-IT/4/5 and FCTC/COP/INB-IT/4/INF.DOC./1) (continued)

Part V: International Cooperation (continued from the eighth meeting)

- **Article 30: Mutual legal assistance**

Mr LINDGREN (Norway), speaking on behalf of Parties in the WHO European Region, said that those Parties generally wished to see Articles 30 to 32 retained.

Ms MANSUR (Israel) noted that money laundering had been considered such an integral part of the protocol that it had been decided at previous sessions of the Intergovernmental Negotiating to mandate that every Party would criminalize it. A provision to that effect should therefore be included in Article 12. She suggested that it be added to paragraph 1.

Mr DLAMINI (Swaziland), speaking on behalf of the Parties in the WHO African Region, said that those Parties supported the retention of Articles 30 to 32 on mutual legal assistance and extradition, which they regarded as important for the purposes of implementation and enforcement of the protocol.

The CHAIRPERSON recalled that two options remained for Article 12, the first was that Parties would notify the Convention Secretariat of which of the unlawful conduct listed under Article 12.1 they would establish as criminal offences, and the second was that Article 12.2 would specify conduct that all parties agreed would be criminal offences. Articles 30 and 31 should be considered in that light, and in terms of what Parties would be obliged to do or able to avoid doing in accordance with their domestic law.

Paragraph 1

The CHAIRPERSON recalled that in earlier discussions it had been generally agreed that the phrase “established in accordance with Article 12” did not necessarily mean that a list of specific offences had to be included in the protocol. It had also been agreed that Parties could notify the Secretariat of which unlawful acts they had established as criminal offences and other Parties could then decide on the basis of their domestic law whether they could respond to a request for mutual legal assistance or extradition. He therefore suggested that the references to specific paragraphs of Article 12 should be removed from paragraph 1, which would then read simply “established in accordance with Article 12 of the Protocol”.

Mr SONG (Singapore) said that he had no objection to that proposal, which would allow Parties to determine criminality at their discretion. However, in order to avoid Parties being overburdened with requests for legal assistance in respect of minor offences, he wished to see the incorporation of a threshold such as existed under the United Nations Convention against Transnational Organized Crime, namely that requests must relate to offences that carried a maximum sentence of at least four years. Paragraph 1 might be the most appropriate place for mention of that threshold to appear.

The CHAIRPERSON said that, alternatively, a threshold provision might be included in paragraph 14, which set out the circumstances in which mutual legal assistance could be refused. In subparagraph 14(d), reference to a specific threshold would be clearer than the current wording: “matters of a de minimis nature”. He suggested that the matter of a threshold be considered when the Intergovernmental Negotiating Body discussed that paragraph.

Mr YOST (Canada) said that his preference was still to remove the articles on mutual legal assistance and extradition from the protocol entirely. If they were to be retained, his Government considered the inclusion of a four-year threshold essential but was flexible as to where in the protocol such a provision should appear. He noted that the definition of the term “serious crime” in Article 1 included the four-year threshold, but that the term did not appear to be used in the protocol.

The CHAIRPERSON recalled that the working group on definitions had recommended against using the term “serious crime”. He had noted the proposal by the representative of Canada to delete Articles 30 to 32, which had been linked to his proposal concerning Article 12, but had also noted that other Parties had wished to retain them. He enquired whether Canada would insist on the deletion of Articles 30 to 32.

Mr YOST (Canada) said that he could agree to the retention of Articles 30 to 32, but only provided that a four-year sentence threshold was included.

The CHAIRPERSON said that he took it that there was provisional consensus on his proposal to delete the bracketed text reading “paragraphs 2, 3 and 4 of” before “Article 12” from paragraph 1 of Article 30.

It was so agreed.

Paragraph 2

The CHAIRPERSON said that, as agreement had been reached on Article 13, he would take it that there was provisional consensus on paragraph 2.

It was so agreed.

Paragraph 3

Mr ABASCAL (Uruguay) said that the word “bank” in subparagraph (f) might pose difficulties as his country’s laws on banking secrecy might prevent the sharing of bank records.

The CHAIRPERSON asked whether that problem would be resolved by the provision contained in subparagraph 14(e) of Article 30, which provided that Parties could refuse a request for assistance if granting the request would be contrary to their legal system.

Mr ABASCAL (Uruguay) said that that provision appeared to address his concern, but that he would need to seek legal advice on the matter.

The CHAIRPERSON said that the word “bank” would be placed in square brackets, pending discussions on paragraph 14. He took it that there was otherwise provisional consensus on the wording of paragraph 3.

It was so agreed.

Paragraph 4

Mr ALMOSAYTEER (Saudi Arabia) asked whether the term “treaty” covered agreements between legal persons such as businesses.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that his understanding was that treaties governing mutual legal assistance were agreements between States.

Mr ALMOSAYTEER (Saudi Arabia), noting that Article 6.1 contained similar language but referred to “legally binding and enforceable agreements”, said that it should that it should perhaps be clarified that the treaties referred to in Article 4 were between Parties to the Protocol.

The CHAIRPERSON said that the response of the invited expert appeared to indicate that it was not necessary to clarify what was meant by “treaty”, as there was an accepted interpretation of the term.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, confirmed that the word “treaty” was a term used in public international law to signify agreements between States that were legally binding, once duly ratified. It was used specifically in reference to bilateral and multilateral agreements.

The CHAIRPERSON said that the use of different terminology might give rise to confusion and asked whether the representative of Saudi Arabia could accept the word “treaty” without further clarification.

Mr ALMOSAYTEER (Saudi Arabia) said that he was prepared to be flexible, but that clearer wording might be required in Article 6.1.

The CHAIRPERSON, noting that some of the language in Article 6 remained bracketed and would be subject to further discussion, said that he took it that there was provisional consensus on paragraph 4.

It was so agreed.

Paragraph 5

The CHAIRPERSON said that as paragraph 5 contained only non-substantive modification with respect to the corresponding provision in the United Nations Convention against Transnational Organized Crime, he presumed that the proposed wording was acceptable.

Mr SONG (Singapore) pointed out that the corresponding article of the United Nations Convention against Transnational Organized Crime made explicit reference to the concept of reciprocity. Paragraph 5 should also include a requirement for reciprocity. He therefore proposed inserting the words “on the basis of reciprocity” after the word “shall” in the first sentence.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, confirmed that the corresponding paragraph in the United Nations Convention against Transnational Organized Crime did provide that assistance should be extended reciprocally. The wording of Article 30.5 as currently drafted was slightly more flexible. Although the United Nations conventions against corruption and against illicit traffic in narcotic drugs and psychotropic substances contained similarly worded provisions, those instruments established a set of clearly defined offences. In the United Nations Convention against Transnational Organized Crime, however, some offences were established under the treaty and some were left for Parties to determine, due to the use of the concept of “serious crime”. The notion of reciprocity should not be confused with that of dual criminality, which was covered in paragraph 18. It should also be borne in mind that the provisions of Article 30 from paragraph 6 onwards were intended to complement any existing treaties, and that Parties were strongly encouraged to apply them if they would facilitate cooperation.

The CHAIRPERSON enquired whether other delegations would object to the proposal put forward by the representative of Singapore.

Mr SINGH (India) said that as the inclusion of the notion of reciprocity seemed to have been treated as optional in other treaties, he would prefer not to place any further conditionalities on the provision of mutual legal assistance.

Mr SONG (Singapore) said that the element of reciprocity should be included somewhere in the protocol, as it was in the United Nations Convention against Transnational Organized Crime. It might be included either in Article 30 or in Article 35. Mutual legal assistance was a powerful tool for cooperation among States. Article 18 of the United Nations Convention against Transnational Organized Crime and Article 30 of the draft protocol essentially established a multilateral mutual legal assistance treaty applicable to many countries, and he would be hesitant to support such a treaty without any assurance of reciprocity. A reciprocity requirement was important because it made it clear that States requesting assistance should, in return, be prepared to extend such assistance.

The CHAIRPERSON asked the representative of India whether he could accept the inclusion of the notion of reciprocity.

Mr SINGH (India) said that he would prefer not to include any reference to reciprocity in respect of mutual legal assistance. Dual criminality might be grounds for refusing extradition, but was never invoked in respect of mutual legal assistance.

Ms MANSUR (Israel) said that reciprocity was a standard commitment in legal assistance agreements. Some States would not grant mutual legal assistance requests unless the dual criminality requirement was met, but dual criminality had nothing to do with reciprocity, which simply meant that if one country repeatedly met requests from another for

legal assistance, that country could expect that a request of its own would be met favourably by the other country.

The CHAIRPERSON, noting that the representative of India had said that he would prefer not to include the notion of reciprocity, asked whether he insisted on not including the wording proposed by the representative of Singapore.

Mr SINGH (India) said that incorporating the notion of dual criminality would further weaken a protocol already weakened by its reliance on Parties discretion to determine for themselves which unlawful acts would be established as criminal offences. Parties risked ending up with a protocol with no practical application.

The CHAIRPERSON emphasized that the notion of reciprocity was distinct from the requirement for dual criminality. He added that the concept of reciprocity was included in the United Nations Convention against Transnational Organized Crime, which had been signed by 166 Parties.

Mr SINGH (India) said that the difference was that the United Nations Convention against Transnational Organized Crime established specific criminal offences, whereas in the draft protocol it was unclear which offences, if any, Parties would establish as criminal offences. Adding further conditions added to the risk that the provision would never be used.

Mr ALBUQUERQUE E SILVA (Brazil), expressing support for the position taken by India, said that wording taken from the United Nations Convention against Transnational Organized Crime should not be changed unless absolutely necessary.

Mr HAMANEH (Islamic Republic of Iran) said that he was flexible on the inclusion of reciprocity, but could see the virtue in adding a reciprocity requirement if that would facilitate consensus. The United Nations Convention against Transnational Organized Crime established a clearly defined list of criminal offences, whereas the protocol seemed likely to leave it to each Party to determine criminality. It might therefore be advisable to ensure that the protocol would apply reciprocally. He saw no harm in adding the wording proposed by the representative of Singapore.

The CHAIRPERSON said that another option would be to mention reciprocity in paragraph 1 of Article 30, as it was mentioned in paragraph 1 in the corresponding article in the United Nations Convention against Transnational Organized Crime. Paragraph 1 might be amended to read "Parties shall reciprocally afford each other".

Mr SONG (Singapore) said that he supported the Chairperson's proposal.

Mr ALBUQUERQUE E SILVA (Brazil) asked for clarification as to whether that proposal corresponded to the provision found in Article 18.1 of the United Nations Convention against Transnational Organized Crime. If so, it was in line with what his country had already agreed when it had ratified that Convention.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that the only difference between the proposed wording and the wording of Article 18 of the United Nations Convention against Transnational Organized Crime, which read "shall reciprocally extend to one another similar assistance", was that the latter also contained the word "similar". However, the concept of

“similar” was covered under the general principle of reciprocity. The scope of application of the two instruments was different, of course, but the language itself was essentially the same.

Mr DLAMINI (Swaziland) asked whether it might not be preferable to use the exact language used in Article 18.1 of the United Nations Convention against Transnational Organized Crime, notwithstanding the differences in scope of application. He requested clarification of the provisions of Article 18.1.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that the article provided that Parties would accept the application of the principle of reciprocity in affording mutual legal assistance. The concept of reciprocity had been explained in general terms by the representative of Israel. Some States made reciprocity a condition for the provision of mutual legal assistance, sometimes pursuant to national statutes. That was probably why the provision appeared in the United Nations Convention against Transnational Organized Crime. In some other treaties, in view of their different scope of application, States had probably agreed to a more flexible approach.

Mr REGALADO PINEDA (Mexico), speaking on behalf of Parties in the WHO Region of the Americas in which Spanish was the national language, said that the word “mutuo” in Spanish automatically implied reciprocity.

Ms KELEBOGILE MATSAU (South Africa), agreeing that the word “mutual” implied reciprocity, said that she would like to hear from the representative of Singapore specifically what harm he felt would be done if the phrase was not included.

Mr DLAMINI (Swaziland) said that, as an attorney, he agreed that the principle of reciprocity was inherent in the phrase “mutual legal assistance”, and that it was redundant to add the word “reciprocally” in Article 30.1 or “on the basis of reciprocity” in Article 30.5. He, too, was wary of placing too many conditions on the provision of mutual legal assistance, particularly as an opt-out clause was already provided in paragraph 14 of Article 30. He asked the representative of Singapore whether he could accept the paragraph as originally drafted.

Mr SONG (Singapore) said that he did not agree that the term “mutual” necessarily implied reciprocity; if that were the case, reference to reciprocity would not appear in Article 18 of the United Nations Convention against Transnational Organized Crime. Replying to the question of the representative of South Africa, he said that the only argument he had heard for not including the term in the protocol was redundancy. He agreed with the representative of Israel that the notion of reciprocity was a common and broadly accepted concept. Paragraph 5 placed an obligation on Parties to provide mutual legal assistance without exception, whereas the United Nations Convention against Transnational Organized Crime required reciprocity. If there had been a need for such a safeguard in the latter convention, he saw no reason not to include the same provision in the protocol.

The CHAIRPERSON said that the wording proposed by the representative of Singapore would be placed in square brackets and encouraged Parties to explore in informal discussions whether a common understanding could be reached on the question of reciprocity.

Paragraphs 6 and 7

The CHAIRPERSON said that he took it that there was provisional consensus on the wording of paragraphs 6 and 7, which corresponded to equivalent paragraphs in Article 18 of the United Nations Convention against Transnational Organized Crime.

It was so agreed.

Paragraph 8

The CHAIRPERSON, noting that the wording of the paragraph corresponded closely to Article 18.15 of the United Nations Convention against Transnational Organized Crime, said that he took it that Parties could accept the wording of subparagraphs (a) to (f). He invited comments on whether Parties still had difficulty in accepting subparagraph (g), which remained bracketed.

Mr ALBUQUERQUE E SILVA (Brazil) requested a legal opinion as to whether a requested State would have the option of refusing a request for mutual legal assistance made by a special or ad hoc tribunal.

The CHAIRPERSON said that he understood the question of the representative of Brazil to be whether a request made by a special or ad hoc tribunal rather than a competent national authority fell outside the scope of the Article.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that, in his interpretation, paragraph 8 referred to the kind of information that must be provided to the authorities of the requested State. The matter of which authority made the request was something that would be governed by the national law of the requesting State. The requested State could refuse the request on the grounds that it would be contrary to its domestic law.

The CHAIRPERSON said he took it that there was provisional consensus on the wording of paragraph 8.

It was so agreed.

Paragraphs 9 to 13

The CHAIRPERSON said that he took it that there was provisional consensus on the wording of paragraphs 9 to 13, which contained only non-substantive modifications to the language used in equivalent paragraphs in Article 18 of the United Nations Convention against Transnational Organized Crime.

It was so agreed.

Paragraph 14

The CHAIRPERSON noted that paragraph 14 set out the circumstances in which Parties had the right to refuse a request for mutual legal assistance. He took it that there was provisional consensus on subparagraphs (a), (b) and (c).

It was so agreed.

The CHAIRPERSON noted that subparagraph (d) gave Parties the right to refuse requests for mutual legal assistance where the requests “involve matters of a de minimis nature” and that the same formulation was used in the United Nations Convention against Corruption.

Mr YOST (Canada) proposed that the subparagraph be amended to read “involves a crime where the maximum penalty is less than four years” in order to apply the same threshold as under the United Nations Convention against Transnational Organized Crime.

Mr SONG (Singapore) suggested that consideration should be given to where in the protocol the threshold requirement was best included. Including it in subparagraph 14(d) of Article 30 would not save Parties from the administrative burden of considering requests before turning them down. It would be more appropriate to introduce the threshold requirement earlier in the process by including it at the beginning of the article on mutual legal assistance.

Mr SINGH (India) observed that mutual legal assistance might be requested when investigations were at a preliminary stage, before it was known precisely what offence the suspect would be charged with. A four-year threshold might prevent mutual legal assistance from being granted for matters that turned out to involve serious offences.

The CHAIRPERSON noted that under paragraph 8 of Article 30, Parties would have to indicate the offence with which the person was charged and the maximum penalty for that offence.

Mr SINGH (India) asked how a request could be required to indicate the offence when it might not be clear at an early stage of the investigations.

The CHAIRPERSON pointed out that it would be known what the maximum penalty was for the most serious crime suspected at that stage.

Mr SINGH (India) said that a threshold requirement would serve as a restriction and thus reduce the usefulness of the protocol.

Mr HAMANEH (Islamic Republic of Iran) said that a threshold should be included somewhere in the protocol, but he did not think that paragraph 14 was the right place to do so. He noted that paragraph 18 authorized Parties to provide mutual legal assistance even if the offence was not an offence under their laws, which meant that it would be at the discretion of Parties to decide whether they wished to grant mutual legal assistance in such cases.

Dr SA’A (Cameroon) said that he supported the inclusion of a four-year threshold, which would serve as an indicator of the seriousness of the crime and would ensure that legal assistance was not requested in respect of minor crimes.

Mr MUBARAK MUNTAKA (Ghana), endorsing the view of the representative of India, said that he did not support the inclusion of a four-year threshold, as in cases where the list of possible charges was long, indicating an offence for which the maximum sentence was four years might amount to predetermination of the case and might prevent prosecution of other, lesser offences. The provision should not be restrictive; rather, it should be left open for Parties to decide whether or not to grant a request.

The CHAIRPERSON said that a balance must be struck: it must be ensured that mutual legal assistance was provided in serious cases, but also that Parties were not overburdened with requests involving minor offences. Subparagraph (d) would remain in square brackets until a solution was agreed.

Turning to subparagraph (e), which gave Parties the right to refuse mutual legal assistance if granting the request would be contrary to the legal system of the requested Party, he enquired whether any Party found that provision unacceptable.

Mr ALBUQUERQUE E SILVA (Brazil) asked again whether Parties would be able to refuse a request for mutual legal assistance on the grounds that it had been issued by a special or ad hoc tribunal. His concern was that the creation by a Party of a special or ad hoc tribunal might compromise the rule of law, affecting the full rights of the accused person or persons and thus violating human rights. He wondered whether a paragraph covering that possibility should be included in the protocol.

Professor JESSBERGER (Invited expert), speaking at the invitation of the CHAIRPERSON, said that it was his understanding that such a case would be covered by paragraph 14(b), which would allow a Party to refuse legal assistance if it considered that the request was not in line with its understanding of *ordre public*.

Mr ALBUQUERQUE E SILVA (Brazil) asked whether there was a universal understanding of the term *ordre public* or whether each Party would interpret its meaning in accordance with its legal system.

Professor JESSBERGER (Invited expert), speaking at the invitation of the CHAIRPERSON, said that the notion of *ordre public* was a universally accepted as a reason for refusing legal assistance. There might be some grey areas with respect to details, but there was a fundamental understanding of its core meaning. In his view, a case such as the one mentioned by the representative of Brazil would be covered.

Mr ALBUQUERQUE E SILVA (Brazil) said that consideration should be given to whether the term *ordre public* required definition in the protocol.

Mr SONG (Singapore) said that his understanding was that the provision applied to requests between States. Hence, if an ad hoc tribunal executed an order as a State-to-State request, it would be covered, although if the requested Party did not recognize that ad hoc tribunal, then it would not apply.

The CHAIRPERSON agreed that it was the requested Party that would ultimately decide whether to grant a request. If that Party felt, for example, that the request had come from an ad hoc tribunal that did not sufficiently respect human rights, it would be free to turn down the request. He asked the representative of Brazil to reflect on whether a definition of *ordre public* was needed. If so, the matter could be referred to the working group on definitions.

Paragraph 15

The CHAIRPERSON said that, in the absence of any objection, he would take it that there was consensus on paragraph 15.

It was so agreed.

Paragraph 16

The CHAIRPERSON asked the representative of Uruguay whether he could accept the provision contained in paragraph 16, namely that Parties would not decline to render mutual legal assistance on grounds of bank secrecy. He noted that the wording of the paragraph corresponded to Article 18.22 of the United Nations Convention against Transnational Organized Crime.

Mr ABASCAL (Uruguay) said that Uruguay had ratified the United Nations Convention against Transnational Organized Crime, and that he could therefore accept the paragraph.

The CHAIRPERSON asked whether the square brackets around the word “bank” in subparagraph 3(f) could therefore also be removed.

Mr ABASCAL (Uruguay) said that he could agree to the removal of the brackets, provided that, in line with the United Nations Convention against Transnational Organized Crime, a four-year sentence threshold was included in the draft protocol.

The CHAIRPERSON pointed out that the question of a four-year threshold had not yet been resolved. He took it that, subject to the inclusion of such a threshold, the representative of Uruguay would accept the word “bank” in paragraph 3(f) and that there was now provisional consensus on paragraph 16.

It was so agreed.

Paragraphs 17 to 24

The CHAIRPERSON, noting that paragraphs 17 to 24 contained mainly non-substantive modifications to the wording of the equivalent paragraphs in Article 18 of the United Nations Convention against Transnational Organized Crime, said that agreed editorial changes, such as replacement of “national” with “domestic”, would be made. In the absence of any objection, he would take it that there was provisional consensus on paragraphs 17 to 24.

It was so agreed.

The CHAIRPERSON noted that although provisional agreement had now been reached on most of Article 30, the question of its links with Article 12 and the approach adopted in that regard remained open.

Mr HAMANEH (Islamic Republic of Iran) noted that paragraph 6 of Article 30 used the words “appropriate international organizations” whereas the United Nations Convention against Transnational Organized Crime referred simply to the International Criminal Police Organization (INTERPOL). He asked whether there was another appropriate international organization. If not, the wording could be aligned with that used in the Convention.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that the United Nations Convention against Transnational Organized Crime referred only to INTERPOL, but that requests for legal assistance were to be transmitted through INTERPOL in urgent circumstances, where the States Parties agreed, in accordance with paragraph 13 of article 18 of the United Nations Convention against Transnational Organized Crime. States negotiating that Convention had agreed that direct communication between central authorities would be the usual means of communicating such requests, but they would keep the right to require that such requests be communicated through diplomatic channels, and in urgent circumstances through INTERPOL.

Ms MANSUR (Israel) said that paragraph 6 did not refer specifically to INTERPOL because, when the issue had been discussed at previous sessions of the Intergovernmental Negotiating Body and in working groups, it had been suggested that requests might at some point be transmitted through the World Customs Organization, which might be a channel better suited to the purposes of the protocol.

Mr HAMANEH (Islamic Republic of Iran) said that he was not convinced that the World Customs Organization would be the appropriate organization to help in respect of mutual legal assistance and that he would prefer to use clear language and refer to a specific authority, namely INTERPOL, using the same wording as that in the United Nations Convention against Transnational Organized Crime.

Mr TAGOE (Ghana) said that he preferred the term “appropriate international organizations”, as it allowed Parties some leeway.

Mr YOST (Canada) expressed support for the wording “appropriate international organizations”, which was flexible. Given the inclusion of the qualification “where Parties agree”, he did not see why Parties should not have the option of sharing information through an organization other than INTERPOL.

Mr DAS (India) expressed support for the more flexible language.

The CHAIRPERSON said that in his view it was important to retain flexibility for the future. He took it that the Intergovernmental Negotiating Body wished to retain the more flexible wording.

Mr HAMANEH (Islamic Republic of Iran) said that flexible language could sometimes create ambiguity. He proposed listing other named organizations, but said he did not think that the phrase “appropriate international organizations” was sufficiently specific for an international legal instrument. Most of the areas in which Parties would provide mutual legal assistance to one another would be judicial or criminal in nature, and the World Customs

Organization would not be involved in the exchange of such information. INTERPOL would be the best organization to handle mutual legal assistance.

The CHAIRPERSON encouraged the representative of the Islamic Republic of Iran to consult with his national authorities to see if there might be any flexibility in his position.

(For continuation of the discussion on Article 30, see summary record of the eleventh meeting.)

- **Article 2: Relationship between the Protocol and other agreements and legal instruments**

Paragraphs 1 and 2

The CHAIRPERSON said that in the absence of any objection he would take it that there was provisional consensus on paragraphs 1 and 2.

It was so agreed.

Paragraph 3

The CHAIRPERSON, noting the several possible alternative versions of paragraph 3 contained in document FCTC/COP/INB-IT/5/4, asked Parties which version they preferred.

Ms KELEBOGILE MATSAU (South Africa), speaking on behalf of Parties of the WHO African Region, said that she supported the formulation that read:

“Nothing in the Protocol shall affect the rights and obligations of Parties towards any provisions that are more conducive to the achievement of the elimination of illicit trade of tobacco products which may be contained in any other international convention, treaty or agreement in force for that Party, in particular the United Nations Convention against Transnational Organized Crime.”

That wording made clear the purpose of the paragraph and highlighted the importance of the United Nations Convention against Transnational Organized Crime. The following paragraph which began “Recalling and emphasizing the importance of other international agreements” should be included to the preamble.

Mr ABASCAL (Uruguay) said that he could agree with the formulation endorsed by the representative of South Africa, but suggested that it might be possible to combine that wording with the simpler wording of the first version of paragraph 3 appearing in document FCTC/COP/INB-IT/5/4, which encouraged countries that were not Parties to the United Nations Convention against Transnational Organized Crime to apply relevant provisions of that Convention, as appropriate.

Mr ALBURQUERQUE E SILVA (Brazil) expressed support for the wording read out by the representative of South Africa.

Ms ROA (Panama) also expressed support for the wording read out by the representative of South Africa. In her view, any provision encouraging non-parties to the United Nations Convention against Transnational Organized Crime to apply its provisions should be placed in the preamble.

The CHAIRPERSON sought Parties' views on whether the paragraph read out by the representative of South Africa should become paragraph 3 and whether the following two paragraphs should be moved to the preamble.

Mr YOST (Canada) noted that other international agreements might include a lower threshold requirement for the provision of mutual legal assistance. It was therefore important to be clear that the four-year threshold would not override other more favourable provisions, so that Parties could take advantage of better options that might be open to them.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that she would prefer the option that began "In the absence of any provision to the contrary", but amended so that the first part of the sentence would be deleted. The paragraph would then read: "The provisions of the United Nations Convention against Transnational Organized Crime shall be made complementary applicable when implementing this protocol by the Parties".

Ms PATTERSON (Australia) said that her Government favoured some variation of the option that began "Parties to this Protocol that are also Parties to the United Nations Convention against Transnational Organized Crime shall".

The CHAIRPERSON, noting the views expressed by the representatives of Australia and Denmark, said that the formulation read out by the representative of South Africa was clear and precise, and, with some rewording, might provide a basis for reaching consensus.

Mr SONG (Singapore), expressing support for the Chairperson's view, said that the importance to the protocol of the United Nations Convention against Transnational Organized Crime was apparent from the fact that several provisions in the protocol used wording drawn from that Convention. He wondered, however, whether it was necessary to refer explicitly to it in Article 2, since the phrase "any other international convention, treaty or agreement" would cover that Convention.

The CHAIRPERSON said that it was precisely because the protocol drew so much on the Convention that specific reference had been made to it in Article 2.

Mr HAMANEH (Islamic Republic of Iran) said that although his country was not a party to the United Nations Convention against Transnational Organized Crime, his Government had shown great flexibility in allowing provisions from that instrument to be imported into the protocol. However, it would have difficulty accepting an explicit reference to it. His Government took its legal obligations most seriously and could not explicitly endorse an instrument by which it was not legally bound. He would prefer the paragraph to end at the words "for that Party".

Ms MANSUR (Israel) said that, although her country was a party to the United Nations Convention against Transnational Organized Crime, she supported the view of the representative of the Islamic Republic of Iran. By making specific reference to the Convention, the paragraph would imply that that instrument was more conducive to the

elimination of the illicit trade in tobacco products than the protocol itself. She requested advice from the WHO Legal Counsel in that regard.

The CHAIRPERSON asked whether any Party would be unable to accept the deletion of the specific reference to the United Nations Convention against Transnational Organized Crime.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that she had no objection to the deletion of the specific reference in paragraph 3, but would wish to retain some reference in Article 2 to the relationship between the protocol and the United Nations Convention against Transnational Organized Crime. She noted the similarity of the proposed wording of paragraph 3 with that of paragraph 4.

The CHAIRPERSON asked whether anyone would object to the deletion of the reference to the United Nations Convention against Transnational Organized Crime from the version of paragraph 3 beginning “Nothing in this Protocol shall affect”.

Mr DLAMINI (Swaziland) said that he was in favour of deleting the reference. He pointed out that the proposed formulation went in tandem with what was required of Parties under Article 2 of the WHO FCTC.

The CHAIRPERSON said that, in the absence of any objection, he would take it that Parties could accept the version of paragraph 3 proposed by the representative of South Africa, minus the words “in particular the United Nations Convention against Transnational Organized Crime”.

Ms PATTERSON (Australia) said that she would need to seek further instructions from her Government before she could accept that proposal.

Ms BERNER (Denmark) enquired whether paragraph 4 would be deleted, as it was essentially the same as the paragraph under discussion. She reiterated her preference for the option she had proposed earlier on behalf of the European Union.

The CHAIRPERSON suggested that a solution might be to add the wording found at the end of paragraph 4 – “under, but not limited to, the United Nations Convention against Transnational Organized Crime” – to the end of the version of paragraph 3 favoured by South Africa and other Parties.

Ms MANSUR (Israel) reiterated her request for advice from the WHO Legal Counsel.

Ms GRANZIERA (WHO Secretariat, Office of the Legal Counsel) said that it could be supposed that as the protocol was being drafted to address a specific issue, it would be more focused on the subject matter. Provisions such as the one contained in paragraph 3 were normally used to avoid the possibility of conflict between different instruments. If it was the words “more conducive to the achievement of the elimination of the illicit trade in tobacco products” that was causing difficulty, Parties might wish to consider a more general formulation.

Mr YOST (Canada) said that the wording did not imply that any other instrument was more conducive to the elimination of illicit trade in its entirety; it merely pointed out that certain provisions in other instruments might be more conducive.

Mr SONG (Singapore) asked whether the wording proposed would mean that a Party could pick and choose certain provisions in another instrument and apply them under the protocol on a piecemeal basis.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that his interpretation of the provision was that Parties that were also party to other treaties could apply provisions contained in those treaties if they were more conducive to the achievement of the elimination of illicit trade in tobacco products, provided the specific case fell under the scope of the other treaty. In such a case, the provisions of the other treaty would apply. In cases that did not fall under the scope of the other treaty, he did not think that Parties would be able to pick and choose which provisions to apply.

The CHAIRPERSON asked whether, as the wording of the paragraph stated that nothing in the protocol would affect the rights and obligations of Parties towards provisions of other international instruments, it might be interpreted to mean that, if there was a more conducive provision in a particular article of another instrument to which a country was Party, that article could be applied in isolation, without having to apply the whole instrument.

Professor JESSBERGER (Invited expert), speaking at the invitation of the CHAIRPERSON, said that it would be possible to apply a single provision of another treaty, but only if that provision was applicable under that instrument to the matter in question.

The CHAIRPERSON said that the provision appeared to give Parties extra ammunition in the event that there was a more favourable provision that could be applied under another instrument. He proposed replacing the words “in particular under” before “the United Nations Convention against Transnational Organized Crime” with the words “including but not limited to”.

Mr YOST (Canada) said that the provisions of the United Nations Convention against Transnational Organized Crime would automatically apply to some cases of illicit trade in tobacco. The real question was how could certain provisions of that Convention be modified and incorporated into the protocol in order to make it more effective.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that the protocol would be strengthened by clearly establishing the relationship between the protocol and the United Nations Convention against Transnational Organized Crime such that non-parties to that Convention were committed to some of its provisions through the protocol. She therefore proposed to revise her earlier proposal, adding at the end “Non-parties to United Nations Convention against Transnational Organized Crime are encouraged to apply relevant provisions thereof as appropriate”.

The CHAIRPERSON asked whether the representative of Denmark would be satisfied with the addition to the preamble of a paragraph that encouraged Parties that had not yet become Parties to the United Nations Convention against Transnational Organized Crime and other relevant agreements to consider doing so.

Ms BERNER (Denmark) speaking on behalf of the European Union, said that that approach would meet some of her concerns.

The CHAIRPERSON asked whether it was legally possible to include a provision encouraging non-Parties to apply the relevant provisions of the United Nations Convention against Transnational Organized Crime.

Ms GRANZIERA (WHO Secretariat, Office of the Legal Counsel) said that non-Parties could certainly be encouraged to apply similar provisions, if not the provisions themselves.

Mr SONG (Singapore) expressed concern that unknown obligations might thus be imported into the protocol piecemeal from various other treaties and emphasized that treaties should apply in their entirety.

The CHAIRPERSON said that although the wording might need some amendment, the central purpose of the paragraph was to state that the provisions of the protocol did not affect other rights and obligations that Parties might have under other instruments and to give them the right, but not the obligation, to apply provisions other than those that existed under the protocol. If the word “provisions” was causing difficulty, the text might be amended to read: “other international agreement, treaty or convention in force for the Party”.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of Congo) suggested that the “relevant provisions” of the United Nations Convention against Transnational Organized Crime or other treaties might be identified and their content incorporated directly into the protocol.

The CHAIRPERSON said that the disadvantage of that approach would be that it would be limited to provisions of existing instruments, whereas more flexible wording would also permit the use of provisions in future treaties and protocols.

Mr HAMANEH (Islamic Republic of Iran) said that although he was willing to consider the wording supported by the representative of South Africa, he would have difficulty accepting the proposed amendments to that wording. It was unclear how a country could become a party to a protocol that encouraged it to apply the provisions of an instrument that it had not ratified. That prospect might hinder his country from becoming a party to the protocol.

Ms MANSUR (Israel) expressed support for the approach suggested by the representative of the Democratic Republic of Congo. In her view, it went without saying that Parties that were also Parties to other treaties could apply the provisions of those treaties in respect of matters involving the illicit trade in tobacco products, and the wording being discussed added very little but was causing considerable difficulties.

(For continuation of the discussion on Article 2, see summary record of the tenth meeting.)

The meeting rose at 13:00.

TENTH PLENARY MEETING

Monday, 2 April 2012, at 14:15

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. REPORT OF THE ADVISORY COMMITTEE ON LANGUAGE

Dr VECINO QUINTANA (Spain), speaking in his capacity as Chair of the advisory committee on language, said that the committee had completed its analysis of almost all the articles approved by the plenary to date. It would submit a summary showing the modifications proposed to the translations of the text. The purpose of those proposals was to ensure the accuracy of translations. The committee would also be referring three outstanding issues concerning consistency within the English text for further deliberation by the plenary.

2. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/INB-IT/5/4, FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4 (continued))

Part I: Introduction (continued from the ninth meeting)

- **Article 2** (continued from the ninth meeting)

Paragraph 3

The CHAIRPERSON invited Parties to review a revised version of paragraph 3, which read:

“Nothing in the protocol shall affect the rights and obligations of Parties pursuant to any other international convention, treaty or agreement in force for that Party that it deems to be more conducive to the achievement of the elimination of illicit trade in tobacco products including, but not limited to, the United Nations Convention against Transnational Organized Crime.”

The text reflected the wish of some delegations to refer to international conventions, treaties and agreements rather than to provisions. It was hoped that the more inclusive approach adopted would remove the impression that particular provisions had been cherry-picked from some treaties and conventions.

Mr YOST (Canada) pointed out that the word “Party” was shown in the plural the first time that it appeared and in the singular the second time and suggested that “the Parties” should perhaps be amended to read “a Party”.

Mr SONG (Singapore) said that he supported the proposed text since it addressed the issue of cherry-picking. He still felt that there was no need to include a specific reference to the United Nations Convention against Transnational Organized Crime, but he was prepared to accept the paragraph in its current formulation. The word “Parties”, in his view, referred to

Parties to the Protocol, while the word “Party” referred to specific agreements in force for a particular country.

Dr ABASCAL (Uruguay) said that he supported the proposed text, which addressed the various concerns raised during the previous meeting.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that she could agree to the text as presented, provided that a reference to “non-Parties” was still on the table for discussion.

The CHAIRPERSON confirmed that a reference to “non-Parties” could be discussed subsequently. He suggested that the paragraph should be rephrased so that the first part read: “Nothing in the Protocol shall affect the rights and obligations of any Party pursuant to any other international convention, treaty or agreement in force for that Party”.

Mr YOST (Canada) said that he could agree to the text with the change proposed by the Chairperson.

The CHAIRPERSON, noting that the paragraph was linked to the following two paragraphs, said that if he heard no objection he would take it that there was now provisional consensus on paragraph 3, as revised.

Mr SONG (Singapore) asked whether the words “that it deems to be more conducive to the achievement of the elimination of illicit trade” might be taken to mean that the intention was to leave out other treaties or that the protocol might affect the rights and obligations of a Party in respect of other treaties.

Ms LANNAN (Convention Secretariat) said that, pursuant to the rules of interpretation in the Vienna Convention on the Law of Treaties, any later treaty that concerned the same subject matter would have priority in terms of interpretation. The normal rules of interpretation would apply to the proposed text.

Mr HAMANEH (Islamic Republic of Iran) requested that the last part of the paragraph be placed in square brackets since he had not yet received instructions from his Government concerning the inclusion of the reference to the United Nations Convention against Transnational Organized Crime. The text as it stood could be open to subjective interpretation, since it would be left to Parties to decide whether another instrument was more conducive to the elimination of illicit trade. He wished to know whether the “agreements” in question meant the legally binding and enforceable agreements referred in Article 6.1 and whether such agreements were between States or whether they could also be between States and corporations.

Ms LANNAN (Convention Secretariat) said that, given that the paragraph referred simply to “agreements” rather than to “legally binding and enforceable agreements”, the two would be interpreted as not being the same sets of agreements, unless a specific definition of the term “agreement” were to be established.

The CHAIRPERSON said that the reference to the United Nations Convention against Transnational Organized Crime would be placed in square brackets until the representative of the Islamic Republic of Iran had consulted his Government. Responding to a question from Mr CISSE (Senegal) regarding the phrase “including, but not limited to”, he said that the aim

was to make it clear that although one convention was being referred to specifically, it was not to the exclusion of others.

Ms GRANZIERA (WHO Secretariat, Office of the Legal Counsel), responding to a question from Professor NUNTAVARN VICHIT-VADAKAN (Thailand), indicated that in her view that the word “international” applied equally to conventions, treaties and agreements.

The CHAIRPERSON, in reply to a question from Dr ABASCAL (Uruguay), said that the paragraph would apply to any Party that was a signatory to any international convention, treaty or agreement in force. Hence, it would apply to Parties that were not signatories to the United Nations Convention against Transnational Organized Crime but were Parties, for example, to the United Nations Convention against Corruption.

Mr DLAMINI (Swaziland) said that he saw no need for a specific mention of the United Nations Convention against Transnational Organized Crime, particularly as its inclusion appeared to be causing some confusion.

The CHAIRPERSON said that some Parties had expressly wished to have mention made of that convention. He inquired whether Parties could agree to remove the reference to it.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that, in a spirit of compromise, she could agree to the deletion of the reference to the United Nations Convention against Transnational Organized Crime from paragraph 3, although it would be necessary to have a discussion on the reference to “non-Parties” to that Convention in paragraph 4.

The CHAIRPERSON said that he would take it that the reference to the United Nations Convention against Transnational Organized Crime should be deleted, so that paragraph 3 ended at the words “illicit trade in tobacco products”.

It was so agreed.

Ms MANSUR (Israel) said that it would be preferable to repeat “international” before “agreement” or perhaps just to remove the word “agreement”.

The CHAIRPERSON said that the word “international” could be placed in front of “agreement”; there would be no need to qualify the word “treaty”, since treaties were obviously international agreements.

Ms KIPTUI (Kenya) said that she was not comfortable with the negative word “nothing” at the beginning of the paragraph and proposed that it be replaced with language similar to that of Article 2.2 of the WHO FCTC.

The CHAIRPERSON said that, with such an amendment, the paragraph would read: “The provisions of the Protocol shall in no way affect the rights and obligations of any Party pursuant to any other international convention, treaty or international agreement in force for the Party that it deems to be more conducive to the achievement of the elimination of illicit trade in tobacco products”.

Mr HAMANEH (Islamic Republic of Iran) noted that Article 2.2 of the WHO FCTC dealt with agreements or treaties that might come into force after the Convention, whereas the text under consideration referred to agreements or treaties that were already in force.

Ms KIPTUI (Kenya), in response to a question by the CHAIRPERSON, said that she could agree to the original wording, “Nothing in the Protocol shall affect the rights”, although she would prefer wording similar to that in the WHO FCTC.

The CHAIRPERSON said that he would take it that Parties agreed that the wording “Nothing in the Protocol shall affect the rights” would be retained and that the word “international” would be inserted before “agreement”, and that there was now provisional consensus on paragraph 3

It was so agreed.

The CHAIRPERSON recalled that there had been discussion at previous sessions of the Intergovernmental Negotiating Body of including in the preamble to the protocol a paragraph reading: “Recalling and emphasizing the importance of other international agreements such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption and the obligations that Parties to these Conventions have to apply the relevant provisions of these Conventions to illicit trade in tobacco”. He suggested that “products” should be added after “tobacco” and enquired whether anyone would object to the inclusion of the paragraph in the preamble.

Mr HAMANEH (Islamic Republic of Iran) requested that the reference to the United Nations Convention against Transnational Organized Crime should remain in square brackets until he had consulted his Government.

The CHAIRPERSON said that the text would be placed in square brackets and that approval of the final wording of the paragraph would be deferred to a subsequent meeting. He took it that there was agreement to the inclusion of the word “products” after “tobacco” in the paragraph.

It was so agreed.

The CHAIRPERSON noted that it had also been proposed to include in the preamble a paragraph reading: “Encourages those Parties to this Protocol that have not yet become Parties to these other international agreements to consider doing so” and suggested that the paragraph might be strengthened by adding: “and to endeavour to apply, as appropriate, the relevant provisions of these international agreements, in particular the United Nations Convention against Transnational Organized Crime, to cases of illicit trade in tobacco products”. He enquired whether anyone objected to the inclusion of such a paragraph in the preamble.

Mr HAMANEH (Islamic Republic of Iran) requested that the whole paragraph should remain in square brackets until he had consulted his Government. His delegation would find it easier to consider inclusion of the paragraph if it ended with the words “to consider doing so”, as it would not be possible for a country to apply provisions of an international agreement to which it was not a Party.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that she could accept the paragraph as proposed in its entirety.

The CHAIRPERSON said that the paragraph would remain in square brackets until the representative of the Islamic Republic of Iran had ascertained the position of his Government. He noted a request by Mr ALADLY (Iraq) to insert “tobacco and” before “tobacco products”.

Mr DLAMINI (Swaziland) suggested that the paragraph beginning “Recalling and emphasizing” should also end with a reference to “illicit trade in tobacco and tobacco products”. He would have preferred to replace the word “Recalling” with “Recognizing” although he would not insist on that point.

The CHAIRPERSON said that, in the absence of any objection, he would take it that the Intergovernmental Negotiating Body agreed to the addition of “tobacco and” before “tobacco products” in both paragraphs.

It was so agreed.

Paragraph 4

The CHAIRPERSON invited views on whether paragraph 4 was needed, given that it largely repeated the content of the revised version of paragraph 3 and the two proposed preambular paragraphs.

Mr SONG (Singapore), supported by Ms EVISON (New Zealand), Mr DLAMINI (Swaziland) and Dr ABASCAL (Uruguay), said that the paragraph used standard treaty language; it would be preferable to retain the text in its entirety, including the reference to the United Nations Convention against Transnational Organized Crime.

The CHAIRPERSON, responding to a question from Ms BERNER (Denmark), speaking on behalf of the European Union, concerning the difference between paragraphs 3 and 4, said that the latter was more specific and contained a clearer reference to the United Nations Convention against Transnational Organized Crime.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that she could accept the wording in paragraph 4.

Mr HAMANEH (Islamic Republic of Iran) said that paragraph 4 should cover all of the treaties and conventions to which the Parties to the Convention adhered. He saw no reason for a specific reference to the United Nations Convention against Transnational Organized Crime. The paragraph would be acceptable if it ended with the words “international law”.

The CHAIRPERSON noted that the reference to the United Nations Convention against Transnational Organized Crime would be placed in square brackets pending the outcome of the consultations by the representative of the Islamic Republic of Iran with his Government.

Ms MADRAZO REYNOSO (Mexico) sought clarification of the legal implications of maintaining the reference to the United Nations Convention against Transnational Organized Crime for those countries that were not party to it.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that, from a legal perspective, non-parties to the

United Nations Convention against Transnational Organized Crime did not have rights, responsibilities or obligations under that treaty.

The CHAIRPERSON noted that some Parties had expressed a strong preference for retaining paragraph 4. Both paragraphs 3 and 4 and the two preambular paragraphs would be re-examined once certain delegations had received instructions in respect of the references to the United Nations Convention against Transnational Organized Crime.

It was so agreed.

(For continuation of the discussion on Article 2, see summary record of the thirteenth meeting.)

Part IV: Offences (continued from the eighth meeting)

• **Article 12** (continued from the eighth meeting)

Paragraph 2

The CHAIRPERSON asked whether the Intergovernmental Negotiating Body wished to take the approach discussed during its eighth meeting, namely that it would be left to Parties to decide which of the unlawful acts set out in paragraph 1 of Article 12 were to be considered criminal offences and that, as proposed by the representative of Swaziland, Parties would be required to notify the Convention Secretariat which unlawful acts they had established as criminal offences and submit the text of the relevant legislation. From the discussions held thus far, it seemed that it would not be possible to draw up a list of criminal offences that would be common to all Parties and therefore the approach proposed seemed the most likely to be accepted. It would not be necessary to retain the three money laundering provisions originally set out in paragraph 3, since their contents were covered in the United Nations Convention against Transnational Organized Crime, which had been ratified by numerous Parties to the WHO FCTC.

It was so agreed.

The CHAIRPERSON invited comments on the amended text of paragraph 2 proposed during the eighth meeting, which read:

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

Mr YOST (Canada), noting the similarity between paragraphs 2 and 3, suggested that the words “contrary to the provisions of this Protocol” in paragraph 2 be replaced by “related to illicit trade in tobacco products”. Paragraph 3 would then become unnecessary.

The CHAIRPERSON asked whether there was agreement to adopt the amendment proposed by Canada and to delete paragraph 3.

Mr HAMANEH (Islamic Republic of Iran) said that paragraph 3 was different from paragraph 2: it allowed States to criminalize certain acts whether or not they were unlawful

acts under the protocol. If the new wording proposed by the representative of Canada was included then it would make paragraph 2 more restrictive.

Mr LEBEPE (South Africa), speaking on behalf of the Parties in the WHO African Region, said that a reference to manufacturing equipment should be retained.

The CHAIRPERSON suggested that paragraph 2 should be amended to refer to “illicit trade in tobacco, tobacco products and manufacturing equipment” in order to be consistent with the first paragraph of Article 12.

Mr SONG (Singapore) said that he supported the proposal by the representative of Canada but also saw merit in retaining the phrase “contrary to the provisions of this Protocol”.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he agreed that the phrase “contrary to the provisions of this Protocol” should be retained, since otherwise the obligation established under the paragraph would be too broad.

Mr HAMANEH (Islamic Republic of Iran) said that he could agree to the amendments proposed.

The CHAIRPERSON said that, in the absence of any objection, he would take it that it was agreed that paragraph 2, as amended, would read:

“Each Party shall, subject to the basic principles of its domestic law, determine which of the unlawful conduct set out in paragraph 1 or any other conduct related to illicit trade in tobacco, tobacco products and manufacturing equipment contrary to the provisions of this Protocol shall be criminal offences and adopt legislative and other measures as may be necessary to give effect to such determination.”

It was so agreed.

The CHAIRPERSON asked whether Parties could agree to delete paragraph 3.

Mr DESIRAJU (India) said that the representative of the Islamic Republic of Iran had raised an important point: there could be unlawful conduct not covered by the protocol that nevertheless had to do with illicit trade in tobacco products, and keeping paragraph 3 would cover those possibilities. However, he would not press for retention of the paragraph if there was consensus among other delegations that it should be deleted.

Mr HAMANEH (Islamic Republic of Iran) reiterated that paragraph 3 would allow Parties to criminalize conduct that was not covered under paragraph 2 and said that its retention would enrich the protocol. However, he was prepared to show flexibility if the majority of delegations felt that paragraph 3 was unnecessary.

The CHAIRPERSON, clarifying the point, said that paragraph 2 referred to conduct that was contrary to the provisions of the protocol, whereas paragraph 3 stated: “Each Party shall adopt other measures, as may be necessary, to establish any other conduct related to illicit trade as criminal offences”. Paragraph 3 was therefore broader in scope and would give Parties a wider range of action.

Mr SONG (Singapore) said that he supported merging paragraphs 2 and 3, which would put the strict obligations of the protocol together in one paragraph. Paragraph 3 was

aspirational in nature and went beyond the scope of the unlawful acts covered in Article 12; its content might be better placed in the preamble with the wording changed to “Each Party may adopt”, or “Each Party may consider adopting”.

Dr NEBLI (Tunisia) said that she was in favour of keeping paragraph 3, as it reinforced the protocol.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he would prefer to delete paragraph 3 since it did not concern matters regulated by the protocol.

The CHAIRPERSON, after ascertaining that the representative of Tunisia would not object, said that he took it that the Intergovernmental Negotiating Body wished to delete paragraph 3, in which case the current paragraph 4 would become paragraph 3.

It was so agreed.

Paragraph 3

The CHAIRPERSON noted that paragraph 3 would now read:

“Parties are encouraged to review their national laws regarding money laundering, mutual legal assistance and extradition, having regard to the United Nations Convention against Transnational Organized Crime, to ensure that they are effective in the enforcement of the provisions of this Protocol.”

As he understood it, that wording had been proposed as a means of making reference to the three provisions of the United Nations Convention against Transnational Organized Crime that had originally been included in Article 12.3 of the draft protocol (as contained in document FCTC/COP/INB-IT/5/4), which were to have been established as criminal offences by all Parties. However, it had not been considered necessary to mention those offences explicitly, as the vast majority of Parties to the WHO FCTC were also Parties to the United Nations Convention against Transnational Organized Crime.

Ms MANSUR (Israel) said that she was in favour of retaining the money laundering provisions in paragraph 3, since it was not clear how, without such explicit provisions, Parties to the protocol would be able to seek legal assistance from other Parties in money laundering cases where the United Nations Convention against Transnational Organized Crime did not apply.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that the paragraph was phrased in the manner of a recommendation, which was not appropriate in a legally binding instrument. In his view, the paragraph should be deleted.

The CHAIRPERSON suggested that the provision might be more fittingly placed in the preamble.

Professor JESSBERGER (Invited expert), speaking at the invitation of the CHAIRPERSON, said that the paragraph was intended to encourage Parties to review their money laundering laws. It did not deal with specific cases and therefore, in his view, would not provide a basis for cooperation.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that he shared the previous speaker’s

interpretation of the language in the provision. Most States in the world had introduced money laundering legislation following adoption of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which had been the first in a number of international agreements and standards covering money laundering. The purpose of the paragraph, as he understood it, was to encourage Member States to review their laws on money laundering, mutual legal assistance and extradition in the light of those agreements in order to ensure that they would be effective in implementing the protocol.

Ms MANSUR (Israel) said that it was true that many States, including her own, had introduced money laundering regulations into domestic legislation and that they had acceded to various international agreements dealing with that subject. However, there might not necessarily be a treaty basis for two countries to cooperate on the money laundering aspects of a specific criminal case involving illicit trade in tobacco products, even if both had domestic legislation concerning money laundering.

The CHAIRPERSON said that there appeared to be a choice to be made between retaining the former version of paragraph 3, which incorporated language concerning money laundering taken from the United Nations Convention on Transnational Organized Crime, or adopting the proposed new wording. He invited comments on which of those options Parties favoured.

Ms MANSUR (Israel) said that it would be acceptable to her delegation to place a reference to money laundering offences in paragraph 1, in which case it would be left to Parties to decide whether to establish them as criminal offences. However, if no money laundering offences were included in paragraphs 1 or 2, there would be no legal basis for cooperation between States in respect of those offences under the protocol.

The CHAIRPERSON invited Parties to consider the proposal by the representative of Israel to include references to money laundering as an unlawful act in paragraph 1; it would then be for States to decide whether money laundering was also a criminal offence.

Mr ALBUQUERQUE E SILVA (Brazil), supported by Mr REGALADO PINEDA (Mexico), speaking also on behalf of Panama, said that the only acceptable option would be to include references to money laundering in paragraph 1. If a provision were included that mandated Parties to criminalize money laundering in connection with illicit trade in tobacco, many Parties would be obliged to amend their criminal codes, which could take years.

The CHAIRPERSON asked whether the wording of former paragraph 3 as it appeared in document FCTC/COP/INB-IT/5/4 could simply be moved to paragraph 1 or whether reference needed to be made to illicit trade in tobacco, tobacco products and manufacturing equipment.

Mr YOST (Canada) suggested the phrase: “converting or transferring property, knowing that such property is the proceeds of crime related to illicit trade in tobacco, tobacco products and manufacturing equipment”.

Mr HAMANEH (Islamic Republic of Iran) said that since money laundering was criminalized in almost all legal systems, identifying it merely as an unlawful act seemed to be a retrograde step. In addition, as subparagraph 3(a) as it appeared in document

FCTC/COP/INB-IT/5/4 made reference to “predicate offence”, it would be necessary to define that term.

The CHAIRPERSON suggested that the words “the proceeds of crime” might be removed; the subparagraph would then read: “knowing that such property is related to illicit trade in tobacco, tobacco products and manufacturing equipment”.

Ms MANSUR (Israel) said that she could accept the proposed amendment although she wished to point out that it would mean that the scope of the paragraph was broader and would encompass not only the proceeds of crime but also money used to make an illicit purchase.

The CHAIRPERSON said that the text might be more closely linked to the proceeds of crime by inserting language such as: “knowing that such property is related to the products of illicit trade in tobacco”.

Mr SONG (Singapore) said that he was uneasy about amending language that had originated from the United Nations Convention against Transnational Organized Crime without thinking through how the modified paragraph would be implemented in domestic legal systems. The amended text might be viewed in the wider world as the latest agreed language on money laundering, superseding in some way the very carefully deliberated text of the United Nations Convention against Transnational Organized Crime.

Ms MANSUR (Israel), concurring with the view expressed by the representative of the Islamic Republic of Iran, said that instead of “predicate offence” it might be preferable to refer to persons “involved in the above-stated illicit trade in tobacco, tobacco products and manufacturing equipment.” The word “or” should replace “and” between “tobacco products” and “manufacturing equipment” in the amended text. She suggested that the Office of the Legal Counsel should be requested to draft suitable language for consideration on the following day.

Mr HAMANEH (Islamic Republic of Iran) said that he supported the view of the representative of Singapore. He would prefer to accept the wording suggested by the representative of Canada during the eighth meeting rather than to move away from the language of the United Nations Convention against Transnational Organized Crime, which might undermine the progress made under that agreement. If reference was to be made to money laundering in the protocol, it should be included under the list of unlawful acts contained in paragraph 1. The relevant subparagraph would thus read: “converting or transferring property knowing that such property is the proceeds of unlawful acts listed in paragraph 1”. It would then be left to Parties to criminalize money laundering or a predicate offence such as smuggling.

The CHAIRPERSON said that he shared the views of the representatives of Singapore and the Islamic Republic of Iran. Since it did not seem possible to reach agreement on subparagraphs 3(a), 3(b) and 3(c) as they appeared in document FCTC/COP/INB-IT/5/4, he suggested that they should be deleted.

It was so agreed.

Paragraph 4

The CHAIRPERSON noted that the version of paragraph 4 appearing in document FCTC/COP/INB-IT/5/4 would mandate the establishment of several criminal offences, which was at odds with the approach that the Intergovernmental Negotiating Body had decided to adopt. That being the case, should the paragraph be retained?

Ms MANSUR (Israel) said that a simple reference to money laundering as unlawful conduct in Article 12.1 should suffice to provide a treaty basis for mutual legal assistance.

Mr YOST (Canada), Dr ABASCAL (Uruguay), Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, and Mr DLAMINI (Swaziland) expressed support for the proposal put forward by the representative of Israel.

Mr HAMANEH (Islamic Republic of Iran) said that he would like WHO's Legal Counsel or the invited expert to explain whether a reference to money laundering in Article 12.1 would add any value to the protocol, given that most Parties had already criminalized it, and what the implications of such a reference would be for the implementation of other parts of the protocol.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that Parties would be able to establish money laundering as an unlawful act, but it was not clear that the term "money laundering" would cover the proceeds of crime as defined under the protocol, since the definition referred to proceeds from criminal offences established under Article 12. Each Party would have to interpret such a provision in accordance with its legal system. The aim of the proposal put forward by the representative of Israel appeared to be that Parties would extend their own legislation on money laundering to cover illicit trade in tobacco.

Mr HAMANEH (Islamic Republic of Iran) said that if the protocol was intended to provide a legal basis for international cooperation, it should make clear reference to laundering of proceeds of unlawful conduct set out in Article 12.1.

Dr SA'A (Cameroon) agreed that link between money laundering and the proceeds of illicit trade in tobacco and tobacco products should be made clear in Article 12.1.

Mr REGALADO PINEDA (Mexico) said that money laundering was already considered unlawful conduct by the vast majority of countries and asked whether any country had not classified it as a crime.

The CHAIRPERSON said that money laundering would certainly be a criminal offence in the 166 countries that were Parties to the United Nations Convention against Transnational Organized Crime and that other Parties to the WHO FCTC had criminalized it under their domestic legislation. That being the case, he took it that the representative of Mexico felt that it was unnecessary to make specific mention of money laundering.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that most countries had some legislation governing money laundering. However, proceeds of criminal offences established under Article 12 of the protocol might not be covered by such legislation unless those offences were considered predicate offences.

The CHAIRPERSON asked whether there would be any adverse consequences for the interpretation of existing treaties if language along the lines proposed by the representative of the Islamic Republic of Iran concerning “laundering of proceeds of unlawful conduct as set out in this Article” were to be included in the protocol.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that there would be no adverse consequences for other treaties, but the Intergovernmental Negotiating Body would have to decide whether the concept was clear enough for inclusion in the protocol.

Ms MANSUR (Israel) said that the suggestion by the representative of the Islamic Republic of Iran improved upon her own. In response to the comment by the representative of Mexico, she explained that making specific reference to the offence in Article 12 would facilitate international cooperation and mutual legal assistance in respect of money laundering.

Mr HAMANEH (Islamic Republic of Iran) noted that his suggestion had not referred to “money laundering” *sensu stricto* but rather to “proceeds of unlawful conduct”. Hence, reference would not be made to any specific criminal offence, which might then have to be defined as a predicate offence. Although the term “proceeds of unlawful conduct” was slightly different from money laundering as defined under the United Nations Convention against Transnational Organized Crime, it would provide a legal tool for international cooperation within the framework of the protocol without having any adverse effect on the definition of “money laundering” under other international conventions.

The CHAIRPERSON asked Parties to consider in their regional groups whether “laundering of proceeds of unlawful conduct as set out in Article 12” would be acceptable. Meanwhile, the phrase would remain in square brackets.

Ms MADRAZO REYNOSO (Mexico) said that she had no objection to the inclusion of the phrase in the Article. The point made earlier by her delegation was that most countries already had legislation that would make money laundering in connection with illicit trade in tobacco, tobacco products and manufacturing equipment a criminal offence, and there was therefore no reason to continue discussing the matter. The fact that the debate had now gone on for more than two hours suggested that some decisions were not being made on legal grounds but rather on political grounds.

The CHAIRPERSON agreed that faster progress should be made and asked whether it was agreed that paragraph 4 of Article 12 as it appeared in document FCTC/COP/INB-IT/5/4 should be deleted.

It was so agreed.

Paragraph 5

The CHAIRPERSON took it that paragraph 5 of Article 12 as it appeared in document FCTC/COP/INB-IT/5/4 could also be deleted.

It was so agreed.

Paragraph 6

The CHAIRPERSON drew attention to paragraph 6 of Article 12 as it appeared in document FCTC/COP/INB-IT/5/4, which would now become paragraph 4, since it had been agreed to delete former paragraphs 4 and 5, and asked whether that paragraph was redundant as it related to a version of paragraph 3 that no longer existed, or whether new language relating to unlawful conduct was required.

Mr YOST (Canada) said that the paragraph would be redundant under Canadian criminal law, but might be required in other countries.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, pointed out that the provision had been included originally in order to ensure that the original paragraph 3, which had also referred to intent, could be implemented.

Mr SONG (Singapore) said that the concept of “knowledge, intent and purpose” in relation to an offence was an important one that should be retained within the Article. He would like to consider the paragraph further in the light of the decisions eventually taken regarding the wording of paragraph 1.

The CHAIRPERSON said that the reference to paragraph 3 could presumably be changed to paragraph 2. Following the comment by the representative of Singapore, the paragraph would be retained pending the finalization of paragraph 1, to which he proposed to return now.

It was so agreed.

Paragraph 1

Turning to subparagraph (a) of Article 12.1, the CHAIRPERSON said that he assumed that, in the absence of any comments to the contrary, the square brackets around “tobacco” could be removed, as it had been decided that a definition of the term was not needed.

It was so agreed.

The CHAIRPERSON said that the question of the definition of “manufacturing equipment”, which was referred to in subparagraph (b)(i) was likely to be resolved at a later meeting. He asked whether there was any objection to the inclusion of the phrase “any other acts of smuggling or attempted smuggling” in subparagraph (b)(ii).

Mr HAMANEH (Islamic Republic of Iran) asked whether it was necessary to define acts of smuggling.

The CHAIRPERSON said that “smuggling” was defined in customs terms as the crossing of a customs border without the payment of the applicable duties and taxes. The phrase “any other acts of smuggling” had been intended to cover the illicit movement of traffic over internal borders. In the absence of further comment, he would take it that the square brackets could be removed from the subparagraph, which would thus read: “any other acts of smuggling or attempted smuggling of tobacco, tobacco products or manufacturing equipment not covered by paragraph (b)(i)”.

It was so agreed.

The CHAIRPERSON noted that the phrase “counterfeiting tobacco products” in subparagraph (c)(i) had been debated at some length and it had been decided that the offence of counterfeiting would not be covered under the protocol. The movement of counterfeit products without the payment of duty would be covered under paragraph 1(b)(i). That being the case, could the reference to counterfeiting be removed?

Mr AAGAARD (Denmark), on behalf of the European Union, said that there should be an explicit reference to counterfeit tobacco products in the protocol since it was explicitly mentioned in Article 15 of the WHO FCTC.

Mr ALBUQUERQUE E SILVA (Brazil) said that, for reasons he had set out in the fifth meeting, he disagreed with the view expressed on behalf of the European Union.

Dr ROSELL-UBIALL (Philippines) said that that a reference to counterfeiting of tobacco products should be included in the subparagraph.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, Mr DESIRAJU (India), speaking on behalf of the Parties in the WHO South-East Asia Region, and Ms MOODLEY (alternate to Ms Matsau, South Africa), speaking on behalf of the Parties in the WHO African Region, reiterated their support for the position taken by the representative of Brazil.

Mr LINDGREN (Norway) said that the Parties in the WHO European Region had not discussed the matter and therefore had not taken a regional position.

Mr HAMANEH (Islamic Republic of Iran) said that the Parties in the Eastern Mediterranean Region would meet to discuss the matter on the following day and would report their view to the plenary after that meeting.

The CHAIRPERSON enquired whether the European Union wished to retain the reference to counterfeiting only in relation to tobacco products or also in relation to tobacco manufacturing equipment and packaging, and whether a reference to “fraudulent fiscal stamps” would be acceptable.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that all references to counterfeiting in the subparagraph should be retained.

Dr ABASCAL (Uruguay), recalling the views expressed previously by his delegation, said that while it was very important that the offence of falsifying fiscal stamps should be established, the term “counterfeiting” related to trademark infringement and other intellectual property issues, and it was inappropriate to continue discussing it in the context of the protocol.

Mr ALBUQUERQUE E SILVA (Brazil) said that he could accept the use of the term “falsified tobacco products”. Certainly, his Government opposed the falsification of tobacco products, but it could not accept the use of the term “counterfeiting”, which had to do with protection of the private rights of tobacco companies, something that had no place in a protocol intended to protect public health. If the European Union insisted on retaining the reference to “counterfeiting” in Article 12, his Government would be obliged to rethink its position on the reference to “legally binding and enforceable agreements” in Article 6.

The CHAIRPERSON asked whether the European Union could accept the phrase “falsifying tobacco products”.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he would prefer to discuss the matter with the representative of Brazil on a bilateral basis before taking a position.

Dr ROA (Panama) said that the views of the representative of Brazil were shared by the Parties in the WHO Region of the Americas.

The CHAIRPERSON urged all Parties to consider using the term “falsifying” in place of “counterfeiting” in the subparagraph. In response to a comment by Mr AL-SARRAY (Iraq) he confirmed that the meaning of the terms “counterfeiting” and “falsifying” were close in the English language.

Turning to subparagraph (c)(ii), he asked whether Parties could accept the introduction of the term “manufacturing” before “wholesaling”. The term “counterfeit” could be removed throughout the paragraph and the last part could be amended to read: “fraudulent fiscal stamps or unique identification markings, or any other markings or labels which are fraudulent”.

Mr COTTERELL (Australia) recalled that his delegation had earlier supported the position adopted by Brazil. He would like advice from the Office of the Legal Counsel on the implications of adopting the term “falsifying” and on whether it would necessitate the development of new offences.

Mr NJOKU (Nigeria) said that he doubted that the term “falsifying” could be an effective replacement for “counterfeiting”; he preferred the alternative, broader phrases “illegal manufacturing” or “illicit manufacturing”, which would cover situations in which an illicit manufacturer made an illicit product, which might not necessarily be a counterfeit trademark product, and evaded the payment of taxes and duties on that product.

Mr DESIRAJU (India) said that it would be helpful if the representatives of the various other regional groups could meet with the representative of Brazil and the representative of the European Union to resolve the issues concerning the use of the word “counterfeiting”.

Mr DLAMINI (Swaziland) supported the suggestion put forward by the representative of Nigeria to use the term “illegal manufacturing”, which would not have intellectual property implications. He found the term “falsifying” obscure.

Mr ASSOGBA (Benin) supported the views expressed by the representatives of Nigeria and Swaziland, observing that the term “falsify” in French could be used in relation to documents but not to products.

Dr ABASCAL (Uruguay) agreed that the term “illegal” would be more appropriate.

The CHAIRPERSON asked the interested Parties to reach agreement on subparagraphs (c)(i) and (c)(ii) bearing in mind the terms suggested at the present meeting. The eleventh meeting would begin with a discussion on the definition of the term “manufacturing equipment” and would continue with discussion of Article 12.

(For continuation of the discussion on Article 12, see summary record of the eleventh meeting.)

The meeting rose at 18:00.

ELEVENTH PLENARY MEETING

Monday, 2 April 2012, at 19:10

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. REPORT OF THE OPEN-ENDED WORKING GROUP ON DEFINITIONS

Mr GORUN (Turkey), speaking in his capacity as Chair of the open-ended working group on definitions, said that the definitions of “manufacturing equipment” and of “any part thereof” which he had presented during the eighth meeting represented a compromise that had been agreed by all members of the working group after lengthy deliberation.

The CHAIRPERSON thanked the working group and its Chair and in the absence of any comment, took it that Parties could agree to the definition of both “manufacturing equipment” and “any part thereof” and to the removal of square brackets wherever they appeared in the draft protocol around those terms. A list of the articles that could be approved as a result would be provided as soon as possible.

It was so agreed.

2. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/INB-IT/5/4, FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4 (continued)

Part IV: Offences (continued)

- **Article 12: Unlawful conduct including criminal offences** (continued from the tenth meeting)

Paragraph 1 (continued)

The CHAIRPERSON invited comments on the various versions of subparagraph (d), which read:

“(d) intermingling tobacco products with non-tobacco products in transportation, importation or exportation with the intention of concealing or disguising tobacco products;

“(d) intermingling tobacco products with non-tobacco products in contravention of this Protocol;

“(d) intermingling tobacco products with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transportation, import or export, for the purpose of concealing or disguising tobacco products.”

Dr ROSELL-UBIAL (Philippines) said that it was important to emphasize the intention to conceal or disguise tobacco products and therefore she preferred the third option.

Mr SONG (Singapore) said that he supported the view of the representative of the Philippines. He would suggest, however, that reference should be made to “duty-unpaid tobacco products” rather than simply to “tobacco products” in order to make it clear that the provision would not apply to tobacco products on which duty had been paid. Responding to a request for clarification from the CHAIRPERSON he confirmed that the purpose of his proposal was to ensure that the provision did not interfere with normal supply chain operations in which duty-paid tobacco products might legitimately be intermingled with non-tobacco products.

Ms MADRAZO REYNOSO (Mexico) said that she did not believe that it was necessary to insert a reference to “non-duty-paid tobacco products” since intermingling was qualified at the end of the paragraph by the phrase “with the intention of concealing or disguising tobacco products.”

Dr BARILLAS (Guatemala) suggested that, in order to place greater emphasis on the idea of illicit trade, which was the focus of the protocol, the first part of the subparagraph should be amended to read: “engaging in illegal trafficking of tobacco products by intermingling tobacco products with non-tobacco products”.

Mr HAMANEH (Islamic Republic of Iran) said that he supported the position taken by those Parties that did not deem it necessary to add the phrase “non-duty-paid”. The purpose of the paragraph was simply to make the intermingling of tobacco products unlawful, whatever their origin.

Mr AAGAARD (Denmark) confirmed that the text proposed by the European Union should end after the words “in contravention of this Protocol”.

Mr ROWAN (European Union) said that he opposed the inclusion of the phrase “non-duty-paid” because a Party could impose duty as low as one cent, and any product on which that amount had been paid would then be considered duty-paid, which would make it possible to circumvent the entire protocol.

Dr ROA (Panama) supported previous speakers in opposing the use of the phrase “non-duty-paid”.

Mr SONG (Singapore) said that, having heard the objections raised by other speakers, he was prepared to withdraw his request to add the phrase “non-duty-paid”, particularly as it had been made clear that it was not necessary, since to conceal or to disguise tobacco products indicated that an illegal act had been attempted or was taking place. He would like to return to a discussion of Article 11, since the concept of intermingling should be applied throughout the supply chain from the point of export through intermediate stages, including movement into and out of free zones.

The CHAIRPERSON noted the agreement to remove the phrase “non-duty-paid” and the request by the representative of Singapore to return to Article 11.2 at a later stage.

Dr COULIBALY (Mali) suggested introducing the phrase “disguising tobacco products by intermingling them with other products” in order to emphasize that the offence was concealing or disguising rather than intermingling.

Dr KUMAKO (Togo) said that he agreed with the representative of Mali but preferred the French term “dissimuler” (conceal) as it carried more legal weight than “déguiser” (disguise).

Mr DLAMINI (Swaziland) said that he preferred the original version of the text, which began “intermingling tobacco products with non-tobacco products”. Since that text also referred to “intermingling” with the intention of “disguising or concealing tobacco products” there was no need to add a further reference to “disguising” at the beginning of the sentence.

The CHAIRPERSON agreed that it would be preferable to avoid new formulations if, as in the present case, it seemed possible to accept the existing wording.

Mr LEBEPE (South Africa) said that the shorter version of the text, which ended “in contravention of this Protocol”, was too generic and therefore he preferred the third option.

Ms ALI-HIGO (Djibouti), expressing support for the adoption of the longer version of the text, said that she agreed with the views of the representative of the Philippines.

The CHAIRPERSON asked whether the longer version of the text in the first option would be acceptable to all Parties.

Ms MADRAZO REYNOSO (Mexico) said that she could accept the wording proposed, although it would still be necessary to discuss the definition of the term “supply chain”, which had yet to be agreed.

Mr OOI Poh Keong (Malaysia) said that in his interpretation the scope of the criminal offences established in the subparagraph went beyond that of the corresponding provision in Article 11, which concerned only duty free zones.

The CHAIRPERSON explained that the purpose of Article 12.1 was to set out in broad form the unlawful acts that Parties might determine to be criminal offences. While it was true that intermingling was referred to in relation to the supply chain, it did not prohibit Parties from making other acts of intermingling unlawful.

Mr AAGAARD (Denmark) said that he wished to consult further before confirming whether the longer version of the text would be acceptable to the Parties in the European Union.

Mr SONG (Singapore) said that he could accept the longer text provided that some reference was made to the supply chain in respect of intermingling.

The CHAIRPERSON took it that, if accepted, the longer version of the paragraph would read: “intermingling tobacco products with non-tobacco products during the progression through the supply chain of tobacco products, including during storage, warehousing, transit, transportation, import or export, for the purpose of concealing or disguising tobacco products.” Both that version and the shorter version proposed by the European Union would remain on the table pending consultation among the Parties in the

European Union. However, all Parties had agreed that intermingling for the purpose of concealing or disguising tobacco products would be considered an unlawful act.

Mr LEBEPE (South Africa) said that it was his understanding that the last part of the sentence should read “with the intention of concealing or disguising tobacco products”.

Ms MANSUR (Israel) recalled that, in previous discussions, a number of Parties had expressed a preference for the word “purpose”; the concept was easier to prove under some legal systems while the word “intent” or “intention” could be open to more subjective interpretation.

The CHAIRPERSON took it that Parties could accept the word “purpose”.

It was so agreed.

The CHAIRPERSON noted that subparagraph (e) had already been agreed and invited comments on subparagraph (f).

Mr AAGAARD (Denmark), speaking on behalf of the European Union, recalled that the proposal by the European Union had been to add the phrase: “failure to conduct due diligence in contravention of this Protocol” to subparagraph (f). Given that the application of due diligence in Article 6 was not clear in relation to the present paragraph, he proposed to add new wording: “for a natural or legal person licensed in accordance with Article 5, having a business relationship with a natural or legal person contrary to the licence requirements of the licensee.”

The CHAIRPERSON, while noting the proposal made on behalf of the European Union, said that he was reluctant to make the text more complicated than it was at present.

Mr DLAMINI (Swaziland), supported by Dr COULIBALY (Mali), said that he preferred the original wording contained in document FCTC/COP/INB-IT/5/4, since he found the wording proposed by the representative of Denmark on behalf of the European Union confusing. The original wording more clearly conveyed the nature of the unlawful conduct in question.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he could agree to retain the original wording.

Mr BELTRÁN PRADO (Colombia) said that including a reference to “a natural or legal person” could create implementation problems for Parties in Latin America because in many of their domestic legal systems a legal person could not be held criminally liable for an offence. His comment would also apply to other articles in which criminal offences were mentioned, such as Article 13. It would be preferable in such cases to refer simply to “persons”. In response to a question from the CHAIRPERSON, he stated that he preferred the original wording of subparagraph (f).

The CHAIRPERSON asked whether all Parties could accept the original wording: “obtaining, by a person licensed in accordance with Article 5, tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed in accordance with Article 5”.

Mr NGEYWO MASUDI (Kenya) said that the original text was deficient, as it did not address the supply side of the transaction, only the demand side. While the language proposed on behalf of the European Union was complicated, it did deal with both sides. The subparagraph should prohibit both the purchase and the sale of products in the situation envisaged.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that a licence obtained by a person in accordance with Article 5 could not be transferred to a third party.

Dr COULIBALY (Mali) said that the purpose of the subparagraph was to prohibit the purchase of tobacco from a person who had not obtained a licence in accordance with Article 5. The subparagraph could be simplified by re-phrasing it to read: “obtaining tobacco products or manufacturing equipment from a person who is not licensed in accordance with Article 5”.

The CHAIRPERSON noted that the representative of Kenya favoured the proposal by the European Union since it covered both the buying and selling of tobacco. His concern might be addressed by a phrase such as “obtaining tobacco products or manufacturing equipment by or from a person who is not licensed”, but he believed that it would be preferable to retain the original wording.

Ms MANSUR (Israel) agreed that, at first sight, subparagraph (f) appeared unbalanced. However, the issue of selling was already covered under subparagraph (a) of Article 12.1. That being the case, subparagraph (f) might be removed altogether if the word “obtaining” was inserted in subparagraph (a). Otherwise, the original wording of subparagraph (f) should suffice.

The CHAIRPERSON said that, as there had been broad consensus on the original wording of subparagraph (f), he took it that Parties could accept that wording.

It was so agreed.

The CHAIRPERSON said that, since the definition of “manufacturing equipment” had been agreed, he also took it that there was consensus on the wording of subparagraphs 1(g) and 1(h).

It was so agreed.

The CHAIRPERSON said that he further took it that the square brackets could be removed from around the words “manufacturing equipment” in subparagraph 1(a). Turning to the *chapeau* (introductory paragraph) of paragraph 1, he asked whether Parties could agree to remove the square brackets from around the words “subject to the basic principles of its domestic law”.

It was so agreed.

The CHAIRPERSON asked whether Parties were ready to discuss the use of the word “counterfeiting” in subparagraph 1(c) or whether consultations were still taking place.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that discussions were continuing.

Dr COULIBALY (Mali) said that a high proportion of counterfeit products of dubious quality were sold on unregulated markets and it was therefore essential that a reference to counterfeiting should be maintained.

The CHAIRMAN said that further discussion of subparagraphs (c) and (d) and of the proposed new subparagraph (i), which concerned the laundering of proceeds of unlawful conduct, would be postponed pending the conclusion of consultations among Parties.

Paragraphs 2, 3 and 4

The CHAIRPERSON said that he took it that paragraphs 2 and 3, as amended, were now agreed, and enquired whether there was also agreement on paragraph 4, which had formerly been paragraph 6 in document FCTC/COP/INB-IT/5/4.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that paragraph 4 could be deleted since it was linked to criminal offences that were no longer referred to in the current versions of paragraphs 2 and 3.

Mr HAMANEH (Islamic Republic of Iran) requested that the reference to the United Nations Convention against Transnational Organized Crime in paragraph 3 should be replaced by “relevant international conventions to which they are Parties”, as not all Parties to the WHO FCTC were also Parties to the United Nations Convention.

Mr YOST (Canada) said that he could accept the wording proposed by the representative of the Islamic Republic of Iran.

Mr DESIRAJU (India) said that he could accept paragraphs 2, 3 and 4, including the amendment proposed to paragraph 3. However, the proposal put forward by the representative of Canada during the eighth meeting in respect of paragraphs 2 and 3 would entail the deletion of Articles 30, 31 and 32, to which he could not give his approval. He therefore asked that those paragraphs should not be marked as consensus text until that matter had been resolved.

Dr ROA (Panama) said that she would prefer to delete the word “relevant” and to refer simply to “international conventions to which they are parties”, since it was not clear which conventions might be judged to be relevant.

Mr HAMANEH (Islamic Republic of Iran) said that, if “relevant” were deleted, it would be unclear that the international conventions referred to were those related to money laundering, mutual legal assistance and extradition or that would facilitate cooperation in those areas.

Dr ROA (Panama), having heard the explanation provided by the representative of the Islamic Republic of Iran, suggested that the word “applicable” might replace “relevant”.

The CHAIRPERSON said that “relevant” would be the correct word in English and undertook to ensure that the correct word was found in Spanish.

Mr DLAMINI (Swaziland) said that he would prefer to see paragraph 4 deleted, as its reference to “knowledge, intent or purpose required as an element of an offence established in accordance with paragraph 2” appeared to prescribe to judges how they would establish intent or purpose as set out in paragraph 2.

Mr SONG (Singapore) said that, having heard the explanations given, he could agree to the deletion of paragraph 4. Article 11 should subsequently be reviewed and brought into line with Article 12.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, supported the proposal to delete paragraph 4.

Ms ALI-HIGO (Djibouti) said that, since paragraph 3 contained a statement of principle and encouragement, it would be more appropriate to place it in the preamble.

The CHAIRPERSON said that he would ask the Convention Secretariat to assist in redrafting paragraph 3, bearing in mind also the comments by the representative of India.

Mr DONBE (Chad) said that he was in favour of retaining paragraph 4 since it clarified and reinforced paragraphs 2 and 3.

Mr CISSE (Senegal) said that in principle he had no objection to the deletion of paragraph 4. However, whether or not it was deleted, States would need to introduce legislation establishing that participating in or conspiring to commit an offence, attempting to commit an offence, and aiding, abetting or inciting the commission of an offence were criminal offences, as outlined in paragraph 4 of Article 12 as it appeared in document FCTC/COP/INB-IT/5/4.

The CHAIRPERSON asked whether Parties could agree to the deletion of paragraph 4.

Mr DONBE (Chad) reiterated his objection to the deletion of paragraph 4 for the reasons he had already stated.

Professor JESSBERGER (Invited expert), speaking at the request of the CHAIRPERSON, said that no damage would be done to the protocol by deleting paragraph 4, since the notions of knowledge, intent and purpose were not included in the draft text of the protocol as it stood, nor was it mandatory to establish any particular acts as criminal offences.

Mr DONBE (Chad) said that in the light of the remarks by the expert, he would not insist on the retention of paragraph 4.

The CHAIRPERSON said that he took it that there was now consensus to delete paragraph 4.

It was so agreed.

The CHAIRPERSON said that since an accepted definition of “manufacturing equipment” had been agreed, it was assumed that full consensus had now been achieved on Articles 18, 20, 21 and 24. Parties would be asked to review and agree the texts of those articles before the end of the present meeting.

Returning to Article 12, he recalled that during the sixth meeting the representative of Swaziland had suggested that a provision should be added that would require Parties to

provide notification of the unlawful acts that they had established as criminal offences. It was therefore proposed to include the following language in Article 12: “Parties shall declare, in accordance with Article X, which of the unlawful conduct in paragraph 1 that Party classifies as a criminal offence”. The procedure for and effect of the declarations would also be set out in a new Article X. He invited comments on the proposed new text.

Ms LECLAIRE (Canada) asked whether the word “inform” might be more appropriate than “declare”.

Ms LANNAN (Convention Secretariat) said that a declaration would be made to the depositary, who was the Secretary-General of the United Nations, setting out which of the unlawful conduct the Party was classifying as a criminal offence, and a notification would then be sent by the depositary to all Parties. The word “declaration” was a common term in treaty language.

Mr DESIRAJU (India) suggested that the phrase “Parties shall declare” should be replaced by “Each Party shall declare”.

Mr SONG (Singapore) asked whether the proposed text was intended to cover all declarations in respect of the protocol and whether it would be possible to delete the second part of the provision, as he did not recall seeing similar language in other treaties.

Mrs IBEKWE (Nigeria) suggested that a timeframe should be provided for declarations to be submitted.

The CHAIRPERSON noted the request to include a timeframe in the procedure.

Mr DLAMINI (Swaziland) said that the final text should reflect the intention of his proposal, put forward in the sixth meeting, which had been related to the need for each Party to notify other Parties of the unlawful conducts that it had classified as criminal offences in order to ensure mutual legal assistance.

The CHAIRPERSON said that the declarations would be made to the depositary, which would post them on a publicly available web site.

Ms LANNAN (Convention Secretariat) confirmed that, as soon as the depositary received a notification from a Party, it would be communicated to all other Parties and placed on the website.

Mr FISCH BERREDO MENEZES (Brazil), supported by Mr COTTERELL (Australia), suggested that it might be preferable to borrow language similar to that used in the United Nations Convention against Transnational Organized Crime, paragraph 2(d) of Article 6 of which stated: “Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations”.

The CHAIRPERSON said that the paragraph should also make clear that Parties should notify any subsequent changes in order to ensure that the information was always up to date. He asked whether Parties had any objection to the new paragraph as initially drafted or whether there was a strong preference to use wording similar to that contained in Article 6 of the United Nations Convention against Transnational Organized Crime.

Mr FISCH BERREDO MENEZES (Brazil) said that more time would be required to study the new paragraph and that it might be simpler to borrow the language used in the United Nations Convention against Transnational Organized Crime.

Mr YOST (Canada) said that he had difficulty in accepting the word “declaration”. In Canada, offences were criminalized by amending the Criminal Code, and such amendments took effect when the corresponding legislation was enacted.

Mr COTTERELL (Australia) said that he, too, had difficulty with the idea that the updating of laws would require a new declaration each time. The procedure laid out in the United Nations Convention against Transnational Organized Crime seemed much simpler.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that while the term “declaration” was not used in the United Nations Convention against Transnational Organized Crime, it was used in other treaties, and in any case the term “notification” was equivalent to “declaration” in public international law. Under the United Nations Convention against Transnational Organized Crime, Parties were required to furnish the full text of their laws to the depositary, which in turn circulated the information submitted to other Parties.

Mr SONG (Singapore), supported by Mr DLAMINI (Swaziland), said that he preferred the term “notification”, since the term “declaration” had a precise meaning in treaty language and its use could lead to confusion.

The CHAIRPERSON said that there seemed to be a strong preference to use the word “notification” rather than “declaration”. Responding to a question by Mr DESIRAJU (India), he agreed that reference should be made not only to the unlawful conducts in paragraph 1 but also to the provisions of paragraph 2.

Mr SONG (Singapore) said that if “declarations” was replaced by “notifications” and the second sentence in paragraph 1 were to read “no other notification is permitted under this Protocol” then he could agree to remove the square brackets from the text.

The CHAIRPERSON said that it was his understanding that, if the word “declaration” were replaced by “notification” then the second sentence could be deleted. The text would be revised to reflect the issues raised during the discussion and provided in writing to Parties. The matter would be revisited once informal consultations had taken place.

(For continuation of the discussion on Article 12, see summary record of the thirteenth meeting.)

Part V: International Cooperation (continued from the ninth meeting)

- **Article 30: Mutual legal assistance** (continued from the ninth meeting)

The CHAIRPERSON, recalling previous discussions, asked Parties to consider the link between offences, mutual legal assistance and extradition with a view to completing their deliberations on the relevant articles. It had been agreed that a set of unlawful acts would be set out in paragraphs 1 and 2 of Article 12 and that each Party would decide which of those acts would be classified as criminal offences. In the light of that decision, he asked Parties to

consider the text of Article 30 as it appeared in document FCTC/COP/INB-IT/5/4 and whether they could accept the inclusion of an article on mutual legal assistance.

Mr YOST (Canada) said that his Government's acceptance of such an article would depend on its content and, in particular, on the inclusion of a requirement that the crime in question must carry a maximum penalty of at least four years' imprisonment.

The CHAIRPERSON, noting that subparagraph 14(d) of Article 30 referred to *de minimis* conditions, asked whether any Party would object to the proposal that, where the request involved a crime for which the penalty was less than four years, mutual legal assistance might be refused.

Mr FISCH BERREDO MENEZES (Brazil) said that many crimes relating to illicit trade in tobacco products in Brazil had penalties of less than four years and therefore Brazil would not be able to collaborate in matters of mutual legal assistance if that clause remained.

The CHAIRPERSON enquired whether, if a Party asked Brazil for mutual legal assistance in respect of a crime which in the requesting Party had a maximum penalty of four years, Brazil would not be able to cooperate with it.

Mr FISCH BERREDO MENEZES (Brazil) said that money laundering, for example, carried a maximum penalty of three years in Brazil and therefore Brazil would not be able to offer mutual legal assistance under the protocol in cases involving money laundering if a four-year requirement were included. However, it would be able to provide assistance to States that were also Parties to the Inter-American Convention on Mutual Assistance in Criminal Matters, which provided that it was necessary for the act that gave rise to the request to be punishable by one year or more of imprisonment in the requesting State.

Mr DESIRAJU (India) asked whether instead of defining a threshold in terms of the penalty, a threshold could be defined in terms of volume or quantity in order to get around the problem of the same crime carrying different penalties in different countries.

Mr NGEYWO MASUDI (Kenya) said that Kenya would not be able to provide mutual legal assistance if a threshold of four years was established, since the maximum penalty for most relevant crimes in Kenya was three years.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand) said that the maximum penalty for many of the crimes under consideration in her country was one year. Having ascertained from the CHAIRPERSON that her Government would be refused mutual legal assistance by a country having a higher threshold, she said that she would find it difficult to accept the inclusion of a higher threshold.

Mr YOST (Canada) pointed out that the text read "may" be refused and not "shall" be refused, thereby allowing Parties to consider requests on a case-by-case basis.

Mr HAMANEH (Islamic Republic of Iran) said that he wished to retain the *de minimis* concept in the paragraph. It was important to recognize the distinction between mutual legal assistance and extradition: while it was understandable that maximum and minimum penalties would apply in extradition cases, he was doubtful whether applying similar standards in cases that involved mutual legal assistance would serve the purposes of the protocol. The issue should also be considered in light of paragraph 18, which stated that a

Party might provide assistance at its discretion “irrespective of whether the conduct would constitute an offence under the domestic law of the requested Party”.

Mr BELTRÁN PRADO (Colombia), supporting the comment of the representative of Canada, said that the current wording of the protocol would allow a Party to choose whether to provide assistance.

Mr DLAMINI (Swaziland) agreed that the current wording provided flexibility concerning the provision of mutual legal assistance and therefore perhaps it was not necessary to establish a specific *de minimis* threshold.

Mr SONG (Singapore) said that he supported the inclusion of a four-year penalty threshold, consistent with the United Nations Convention against Transnational Organized Crime. In general, the offences covered under the protocol might not be considered “serious crimes”, as defined under the United Nations Convention against Transnational Organized Crime. Nevertheless, it was still open to States to raise the penalties for offences under their own laws so as to enable cooperation to take place. He pointed out that a semicolon and the word “or” should be inserted at the end of subparagraph 14(d).

Mr DE LA GUARDIA CUETO (Mexico) said that Mexico had signed a number of bilateral treaties on extradition that established a two-year penalty threshold. He did not understand the need to stipulate any time limit concerning mutual legal assistance, which mainly entailed information-sharing to enable the requesting State to investigate a crime. The protocol should not establish any threshold but rather should establish that the conditions and procedures for mutual legal assistance would be governed by the relevant international and bilateral agreements existing between the Parties.

The CHAIRPERSON said that it was important to remember that paragraph 14 would allow countries the possibility of providing mutual legal assistance, although there were circumstances in which it would be refused.

Ms MANSUR (Israel) suggested that a compromise solution might be to retain the *de minimis* element of the paragraph, but to qualify it with a provision to the effect that the requested Party would determine whether the *de minimis* threshold had been met. That approach would achieve the aim sought by Parties that favoured a four-year minimum penalty, which was to prevent Parties being overwhelmed by requests for assistance concerning minor cases.

Mr YOST (Canada) said that some of the assistance enumerated in Article 30 would not entail a great deal of administrative time, while other elements, such as obtaining search warrants or bank records, could require significant judicial resources. For that reason, he wished to retain a four-year penalty requirement rather than referring simply to a *de minimis* threshold.

Mr PUSP (India) supported the compromise solution proposed by the representative of Israel. The *de minimis* provision might be further clarified by adding that the request might be refused “where the request is such that provision of the assistance, in the judgment of the requested Party, would impose an excessive burden on the resources of the requested Party”.

Mr DLAMINI (Swaziland) said that he supported the proposal by the representative of Israel as modified by the representative of India. However, he questioned the application of the same threshold to both extradition and mutual legal assistance.

The CHAIRPERSON, recalling that there was flexibility concerning the circumstances in which a Party could interpret a request for assistance from another Party, asked the representative of Thailand whether she would refuse to accept a four-year threshold.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand) said that the use of the word “may”, such that requests “may” be refused rather than “shall” be refused, provided no comfort since it offered no certainty that one Party would assist another. She favoured the proposal by the representative of Israel as modified by the representative of India.

The CHAIRPERSON said that he would recommend a definition of the de minimis condition as suggested by the representative of Canada, since the alternative would not provide any certainty that assistance would be received, even for cases of major importance to the requesting Party.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that a four-year threshold would not offer sufficient flexibility and therefore, although consultations were ongoing, he believed that the Parties in the European Union would prefer the compromise solution proposed by the representatives of Israel and India.

Ms MANSUR (Israel) said that she had considerable practical experience of mutual legal assistance requests and had come across cases where an offence that would receive a minor penalty in her own country had received a penalty of more than five years’ imprisonment in another. Hence, she believed that establishing a four-year penalty cut-off point would be unlikely to solve the problem of countries potentially being overburdened with requests for assistance in minor cases.

Ms KIPTUI (Kenya) said that although it would be appropriate to maintain a four-year threshold in respect of extradition, she would prefer not to impose a specific threshold for mutual legal assistance, as doing so might mean that a simple request for information would be denied.

Dr ABASCAL (Uruguay) said that a possible solution might be to establish that mutual legal assistance could be provided in respect of criminal offences warranting a prison sentence, regardless of the length.

Ms EVISON (New Zealand), supporting the comments of the CHAIRPERSON, noted that the four-year threshold had been agreed during the lengthy negotiations by experts on the text of the United Nations Convention against Transnational Organized Crime, and the Intergovernmental Negotiating Body should perhaps defer to the views of those experts.

Mr HAMANEH (Islamic Republic of Iran) said that the de minimis concept worked well in many international agreements and he did not see the need to qualify it with any time limit, since it was clear that the requested Party could judge whether a request met the de minimis standard for the provision of mutual legal assistance. The proposal by the representative of India, however, would introduce greater subjectivity and set a legal precedent that might not be desirable.

Mr COTTERELL (Australia) said that his first preference would be to accept the proposal by the representative of Brazil to introduce a minimum one-year imprisonment threshold, but the proposal by the representative of India also had merit.

Mr YOST (Canada) said that, although Canada would have difficulty accepting Article 30 without the four-year threshold, the proposal by the representative of India might also prove acceptable if linked to a two-year threshold.

Mr NJOKU (Nigeria) said that he concurred with the view of the representative of Kenya. He understood that it might be important to set a penalty threshold in extradition cases, but not in respect of requests for mutual legal assistance, since many involved only requests for information.

The CHAIRPERSON asked that the representatives of Canada, India and others should consult during the next break between meetings to see whether a compromise text might be agreed.

Part IV: Offences (resumed)

- **Article 18: Disposal or Destruction** (continued from the seventh meeting)

The CHAIRPERSON read out the proposed text for Article 18: “All confiscated tobacco, tobacco products and manufacturing equipment shall be destroyed using environmentally friendly methods to the greatest extent possible or disposed of according to national law.” The definition of “manufacturing equipment” having been agreed, he took that the proposed text was acceptable.

It was so agreed.

(For continuation of the discussion on Article 18, see summary record of the thirteenth meeting.)

Part V: International Cooperation (resumed)

- **Article 20: General information sharing** (continued from the fourth meeting)

The CHAIRPERSON noted that, in addition to having agreed upon the definition of “manufacturing equipment”, Parties had agreed to replace all references to “national law” with “domestic law” and all references to “the Parties” with “Parties”. He enquired whether there was now consensus on Article 20, with those editorial amendments.

Mr COTTERELL (Australia) pointed out that “counterfeit and genuine” in subparagraph 1(a) remained bracketed.

The CHAIRPERSON, recalling earlier discussions on use of the word “counterfeit”, suggested that the words “counterfeit and genuine” before “brands” might simply be deleted.

Mr NEVES SILVA (Brazil), reaffirming his delegation’s opposition to the use of the word “counterfeit” anywhere in the protocol, agreed that “counterfeit and genuine” should be deleted.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he could accept the deletion of the phrase.

Dr ROA (Panama) said that she supported the view of the representative of Brazil.

Mr CISSE (Senegal) said that since the word “counterfeit” was used in the WHO FCTC there was no reason that it should not appear in the protocol.

The CHAIRMAN observed that thinking on the matter had evolved since the adoption of the WHO FCTC, and it was now generally agreed that reference to counterfeiting should be avoided in health-related instruments in order to avoid giving the impression that the instrument afforded any protection for intellectual property rights. He would therefore recommend that “counterfeit and genuine” be deleted.

Mr CISSE (Senegal) said that terminology agreed under the WHO FCTC, which formed the basis for the protocol, should not now be called into question.

Mr ALBUQUERQUE E SILVA (Brazil) emphasized that the aim of both the WHO FCTC and the protocol was to protect public health, not to protect private interests.

The CHAIRPERSON pointed out that no information or detail would be lost by removing the reference to “genuine and counterfeit” brands from subparagraph 1(a) of Article 20.

Dr SA’A (Cameroon) said that he agreed that protection of public health should be the foremost concern in the discussions. He did not believe that use of the term “counterfeit” would be tantamount to protecting the private interests of the tobacco industry. However, since the term had caused problems, reference could be made instead to illegally manufactured products, as had been proposed in the discussions on Article 12.

The CHAIRPERSON said that as Article 20 concerned information sharing, not illicit trade in tobacco products per se, there was no need for a reference to “counterfeit and genuine” brands.

Dr COULIBALY (Mali) said that protection of public health and counterfeiting were interrelated since poor populations often consumed counterfeit products that were cheaper than, and of inferior quality to, the genuine articles.

Ms ALI-HIGO (Djibouti) said that as counterfeit products involved the use of illicit methods, the word “illicit” could be used instead. Like the representative of Brazil, she opposed use of the term “counterfeit” in the protocol.

Ms KIPTUI (Kenya) and Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, supported the views put forward by the representative of Brazil.

The CHAIRPERSON said that the matter would be taken up again at the start of the twelfth meeting, at which time he proposed to delete the words “counterfeit and genuine”. Any Party that objected should be prepared to explain its position.

(For continuation of the discussion on Article 20, see summary record of the twelfth meeting.)

- **Article 21: Enforcement information sharing** (continued from the fourth meeting)

The CHAIRPERSON said that references to “national law” in Article 21 would be replaced with “domestic law” “legal or natural persons” would be replaced with “natural or legal persons” and that the words “provisions of” would be removed from the introductory paragraph. Noting that the definition of “manufacturing equipment” had been agreed, he enquired whether the text was now acceptable to all Parties.

Mr HAMANEH (Islamic Republic of Iran) requested that the word “should” be maintained in the introductory paragraph, pending receipt of his Government’s agreement to the word “shall”.

(For continuation of the discussion on Article 21, see summary record of the thirteenth meeting.)

- **Article 24: Assistance and cooperation: investigation and prosecution of offences** (continued from the fourth meeting)

The CHAIRPERSON drew attention to the revised text of Article 24, in which “the” had been removed before “Parties”; “national law” had been replaced with “domestic law”; “legal or natural persons” had been replaced with “natural or legal persons”; and the square brackets had been removed from “manufacturing equipment”. In the absence of any objection, he would take it that there was now full consensus on Article 24.

It was so agreed.

The meeting rose at 22.05.

TWELFTH PLENARY MEETING

Monday, 2 April 2012, at 22:35

Chairperson: Mr I. WALTON-GEORGE (European Union)

DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents /COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4 (continued)

Part V: International Cooperation (continued from the eleventh meeting)

- **Article 20: General information sharing** (continued from the eleventh meeting)

The CHAIRPERSON recalled that, in the previous meeting, he had asked Parties to reflect on whether they could accept the deletion of the words “counterfeit and genuine brands” from subparagraph 1(a) of Article 20.

Mr NDAO (Senegal) said that, having consulted with other Parties, his delegation would withdraw its objection to the deletion of the term “counterfeit” since its meaning was covered in the broader reference to “illicit trade”.

Dr SA’A (Cameroon) said that the removal of the words “counterfeit and genuine brands” would not prevent the general information sharing that was the object of the Article.

The CHAIRPERSON said that, with the agreement to delete “counterfeit and other brands”, he would take it that there was now consensus on Article 20.

It was so agreed.

- **Article 30: Mutual legal assistance** (continued from the eleventh meeting)

The CHAIRPERSON invited those Parties that had consulted informally on the formulation of subparagraph 14(d) of Article 30 to report the outcome to the plenary.

Mr YOST (Canada), supported by Mr DESIRAJU (India), said that his delegation had agreed with the delegation of India on new wording: “where the request involves matters for which the maximum penalty in the requested country is less than two years”. Canada had dropped its insistence on a maximum penalty of at least four years. It was also proposed that subparagraph 14(e) should become 14(f) and that a new subparagraph 14(e) be inserted, to read: “if, in the judgment of the requested Party, the provision of the assistance would impose a burden on its resources that is disproportionate to the seriousness of the crime”.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand) expressed gratitude to the delegation of Canada for its flexibility and willingness to relinquish its previous position.

Since the phrase “disproportionate to the seriousness of the crime” had been included, she could accept the amendments proposed.

The CHAIRPERSON asked whether any Party objected to either of the proposed amendments.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he preferred to retain the *de minimis* rule since it allowed the most flexibility. The proposal to reduce the maximum penalty to at least two years still set the threshold too high and would mean that Member States could refuse mutual legal assistance in respect of too many possible criminal offences.

Mr SONG (Singapore) said that he had received instructions from his Government to request that the maximum penalty threshold be fixed at four years. Nevertheless, with the addition of the new subparagraph 14(e), he could accept the lower threshold of two years, provided that additional text restoring the *de minimis* principle could be agreed.

The CHAIRPERSON said that the words “disproportionate to the seriousness of the crime”, or words to that effect, could be interpreted as allowing Parties to set their own *de minimis* limit. He asked whether the representative of Singapore could accept that interpretation.

Mr SONG (Singapore) said that he would prefer the *de minimis* principle to be included explicitly in subparagraph 14(e), since without it, Parties might find it difficult to provide explanations in some cases where they deemed it necessary to refuse requests for mutual legal assistance.

Mr HAMANEH (Islamic Republic of Iran) said that *de minimis* was a recognized legal principle; it might not be appropriate to replace it with the idea in the newly worded subparagraph 14(e), particularly as it was unclear that the latter had any precedent in criminal law. He requested legal advice on that point.

Professor JESSBERGER (Invited expert), speaking at the invitation of the CHAIRPERSON, said that the *de minimis* language in the draft protocol was taken from the United Nations Convention against Corruption. He did not know of any precedent under international law for the proposal put forward as a new subparagraph (e), although it was true that there was little precedent relating to *de minimis* clauses on legal assistance under international law.

The CHAIRPERSON said that conventions broke new ground from time to time by introducing new legal provisions; that had been the case when the United Nations Convention against Corruption had introduced a *de minimis* threshold. In principle, there was no reason why the Parties should not introduce a new provision if it achieved the objectives of the protocol.

Ms MANSUR (Israel) said that the term “disproportionate burden” had been used either in multilateral conventions or in reports in relation to those conventions explaining the meaning of the term; it was usually described as something that imposes a disproportionate burden on the resources of the requested party.

Mr AAGAARD (Denmark), speaking on behalf of the European Union and in response to a question from the CHAIRPERSON, said that he would be prepared to discuss the matter further with the Parties in the European Union with the aim of finding a compromise solution. He had misgivings concerning the proposal put forward by the representative of Canada, since the combination of the two-year penalty threshold and the new wording in paragraph 14(e) would make it more likely that legal assistance would be refused.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that the former version of subparagraph (e) that appeared in document FCTC/COP/INB-IT/5/4 might prove more acceptable to all Parties than the proposal by the representative of Canada.

The CHAIRPERSON, while noting the reservations voiced by the representative of Denmark, said that it was a positive development that none of the Parties had rejected the amendment to subparagraph 14(d) or the new subparagraph 14(e). He proposed leaving those provisions in place on the assumption that they would be agreed after further consultation, so that the Intergovernmental Negotiating Body could consider whether the rest of article 30 was acceptable with those provisions in it. Subject to that agreement, he took it that no Party would argue for the deletion of Article 30, on most of which provisional consensus had already been reached.

It was so agreed.

Noting that provisional consensus had already been reached on paragraphs 1 to 4 of Article 30, he invited Parties to resume their discussion of the remaining paragraphs.

It was so agreed.

Paragraph 5

Mr SONG (Singapore) said that the principle of reciprocity appeared to be widely accepted and understood. Following consultations among Parties, it had been agreed that the concept could be included in paragraph 5; alternatively, in keeping with the United Nations Convention against Transnational Organized Crime, the word “reciprocally” could be introduced after “shall” in paragraph 1.

The CHAIRPERSON, having ascertained that there were no objections to adding the principle of reciprocity to Article 30, suggested that it might be included in paragraph 5 as follows: “paragraphs 6 to 24 of this Article shall, on the basis of reciprocity, apply to requests made”.

Mr YOST (Canada) requested that the first sentence of paragraph 5 refer to “a treaty or international agreement of mutual legal assistance” as the term “international agreement” would cover international laws that were not treaties.

Mr AAGAARD (Denmark), speaking on behalf of the Parties in the European Union, said that it would be useful to broaden the scope of the provision by using the term “international agreement” since it might then cover European Union legal instruments on mutual legal assistance such as conventions and directives.

Mr ALBUQUERQUE E SILVA (Brazil) said that he saw no objection to the use of the words “or international agreement” but he would like them to remain in square brackets until he had received instructions from national authorities on the matter.

The CHAIRPERSON said that he took it that the words “or international agreement” should be inserted in square brackets, where appropriate, after the word “treaty” in paragraph 5.

It was so agreed.

Paragraph 6

The CHAIRPERSON recalled that there had been a suggestion to change “appropriate international organizations” in the last sentence of paragraph 6 to “the International Criminal Police Organization (INTERPOL)”. Bearing in mind the request by the representative of Denmark that the Parties in the European Union would like to continue to use organizations of mutual legal assistance such as the European Police Office (Europol) and the European Union’s Judicial Cooperation Unit (Eurojust), he took it that the more flexible term “appropriate international organizations” would be acceptable.

It was so agreed.

Paragraphs 7 to 13 and 15 to 24

The CHAIRPERSON, noting the absence of comments on paragraphs 7 to 13 and 15 to 24, took it that they had been provisionally agreed. The remaining questions on Article 30 would be taken up the following day.

It was so agreed.

(For continuation of the discussion on Article 30, see summary record of the thirteenth meeting.)

- **Article 31: Extradition**

Paragraph 1

The CHAIRPERSON recalled that the first paragraph of Article 31 had been drafted in two different forms, pending agreement on Article 12. The question of whether or not to include the subject of extradition in the protocol had been raised. He asked for comments on the first version of Article 31 appearing in document FCTC/COP/INB-IT/5/4, in particular on the time frame mentioned in that version. In the absence of any comments, he took it that subparagraphs 1(a) and 1(b) were acceptable.

It was so agreed.

The CHAIRPERSON asked whether there were any objections to including a reference to a period of deprivation of liberty of four years in paragraph 1(c).

Mr AAGAARD (Denmark), speaking on behalf of the European Union, supported by Mr GORUN (Turkey), said that he would prefer a one-year threshold.

The CHAIRPERSON asked whether all Parties could accept a one-year threshold.

Ms EVISON (New Zealand), supported by Mr SONG (Singapore) and Mr YOST (Canada), said that she could only accept a reference to a penalty of four years.

Ms MATSAU (South Africa), speaking on behalf of the Parties in the WHO African Region, supported by Mrs IBEKWE (Nigeria), Mr DONBE (Chad), Dr COULIBALY (Mali) and Dr SA'A (Cameroon), agreed that the threshold should be a minimum of four years.

Mr HAMANEH (Islamic Republic of Iran) said that he would also prefer a threshold of four years.

Mr SINGH (India) said that he supported a reference to a one-year period, since most of India's extradition treaties provided for a threshold of one year.

Mr COTTERELL (Australia) said that he preferred a one-year threshold. In response to a question from the CHAIRPERSON, he confirmed that his delegation could show flexibility.

The CHAIRPERSON asked whether any delegation could not accept a period of four years.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, emphasized his preference for a one-year period since many extradition cases would not be possible under a four-year threshold and the protocol would be weakened as a result.

Ms SEGNON-AGUEH (Benin) said that her delegation preferred the reference to a four-year threshold since it was compatible with the definition of "serious crime" as set out in Article 1 of the protocol.

The CHAIRPERSON asked whether any other Party supported the position put forward by the representative of Denmark on behalf of the European Union.

Mr GORUN (Turkey) said that an effective extradition mechanism would require a minimum one-year prison term, and he had received written instructions from his capital that that provision must be preserved.

Mr YOST (Canada) suggested that, in order to meet the concerns of Parties that required a one-year threshold, language similar to that drafted in respect of mutual legal assistance could be inserted, to the effect that Parties could apply other treaties or international agreements to which they were party.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that wording such as that suggested by the representative of Canada would be helpful for member States of the European Union when they were cooperating within the European Union, but not in cooperating with Parties outside the European Union where the four-year threshold would still apply.

The CHAIRPERSON said that, if the extradition clauses were removed from the protocol, then the prevailing treaty for many Parties would be the United Nations Convention against Transnational Organized Crime. He asked whether the protocol would be significantly damaged if the extradition provisions were removed.

Mr DESIRAJU (India) said that the protocol would be damaged substantively if the extradition provisions were removed.

The CHAIRPERSON, responding to a question by Ms MATSAU (South Africa), said that, in order to move the negotiations forward, he wished to establish whether there was a preference for retaining or deleting the provisions on extradition

Professor JESSBERGER (Invited expert), speaking at the invitation of the CHAIRPERSON, said that if the provisions on extradition were removed from the protocol, then those in other multilateral and bilateral treaties would apply. As a result, extradition for the purposes of tobacco control would be neither more nor less difficult than it was at present.

Ms MANSUR (Israel) said that there were certain conditions preventing the application of extradition provisions in other treaties: for instance, the United Nations Convention against Transnational Organized Crime would apply only in situations in which three or more people were involved. She agreed with the representative of India that the removal of the extradition clauses would weaken the protocol.

The CHAIRPERSON asked whether a compromise could be achieved by introducing language similar to that in Article 12 concerning criminal offences, which would allow Parties to notify other Parties of their extradition terms.

Mr ALBUQUERQUE E SILVA (Brazil) said that it would be acceptable to remove the provisions in question since extradition could be exercised through bilateral agreements.

Ms MANSUR (Israel) said that although she could accept the position of the representative of Brazil, she still believed that it would be preferable to retain the extradition provisions. She would support the compromise solution put forward by the Chairperson, provided that Parties were allowed to decide each specific request for extradition on a case-by-case basis.

Dr COULIBALY (Mali) said that it would be a mistake to delete Article 31, given that the question of the penalty threshold was the only point on which Parties had not been able to agree. It would be preferable to find a compromise on that point.

Mr DLAMINI (Swaziland) said that he thought there was a general understanding that extradition provisions were required in the protocol. He asked whether it was usual for an international treaty to omit extradition provisions in favour of reliance on other international treaties. If so, how would an extradition process be triggered with non-parties to those other agreements?

Professor JESSBERGER (Invited expert), speaking at the invitation of the CHAIRPERSON, said that most international agreements contained provisions that covered extradition and mutual legal assistance. Nevertheless, the protocol already departed from most international agreements in that they usually included provisions for mandatory criminalization of certain acts, whereas under Article 12 of the draft protocol it would be left to Parties to determine which acts would be criminal offences.

Mr AAGAARD (Denmark) said that he would discuss acceptance of a higher threshold with the Parties in the European Union, but that any agreement to such a threshold would be contingent on those Parties retaining the possibility to apply national rules on extradition.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, in response to a question by Mr DLAMINI (Swaziland), explained that, as was evident from paragraph 24 of Article 30 of the draft protocol, the United Nations Convention against Transnational Organized Crime had been drafted so that it did not exclude the possibility of concluding bilateral or multilateral agreements that would enable Parties to carry out extradition. Parties would be able to notify other Parties whether they would take the protocol as the legal basis for cooperation on extradition, since some Parties made extradition conditional on the existence of a treaty while others recognized domestic law as the basis for cooperation. The purpose of the provisions in the draft protocol was to make extradition more efficient by ensuring that Parties covered the relevant offences in their national legislation.

Mr REGALADO PINEDA (Mexico) said that the bilateral treaties covering extradition to which his country was a Party contained maximum penalty thresholds of two years and he would have difficulty accepting anything less than that.

Mr SONG (Singapore) said that he was concerned by the far-reaching nature of the extradition provisions proposed in the draft protocol, particularly in relation to existing bilateral treaties.

Mr DESIRAJU (India) suggested that subparagraph 1(c) might be reformulated to read: “the offence is punishable by a maximum period of imprisonment or other forms of deprivation of liberty of at least two years or by a more severe penalty, if so agreed between the Parties”.

Mr HOZA (Central African Republic) said that the conditions for extradition could be “in accordance with the laws of the State Party or in accordance with bilateral or international agreements” thus removing the need to refer to a maximum period of imprisonment of either one or four years.

The CHAIRPERSON, summarizing the negotiations, said that there appeared to be two main options under consideration: Parties could opt to include a period of deprivation of liberty of two years and to retain a reference to other international agreements in order to meet the concerns of the Parties in the European Union and others. Alternatively, the two articles on extradition could be removed on the grounds that the protocol did not contain a list of agreed criminal offences for which extradition would be required; in that case, existing international provisions on extradition could be applied instead.

Mr SONG (Singapore), supported by Mr REGALADO PINEDA (Mexico), said that he favoured the second option, given that there was no concrete list of criminal offences for which extradition would apply.

Mr GORUN (Turkey) said that he preferred the first option, as it would enhance the comprehensive nature of the protocol.

Mr DESIRAJU (India) said that one way to establish the criminality of tobacco-related offences was to ensure that extradition provisions were available and therefore he strongly supported the first option.

Mr YOST (Canada) said that, of the two options proposed, he would prefer to remove Articles 31 and 32.

Ms MANSUR (Israel) said that she believed the protocol would be stronger if the paragraphs on extradition were maintained. The absence of an agreed list of crimes was not particularly problematic, given that the protocol required double criminality (in Article 31.1(b), i.e. that both the requesting and requested Parties involved in an extradition proceeding must recognize the conduct in question as a criminal offence.

Dr SA'A (Cameroon) said that he was not convinced that Parties would be able to reach an agreement on the wording of subparagraph 1(c). He would prefer the discussion to be suspended until a later meeting or that the two articles on extradition should be deleted.

Ms KIPTUI (Kenya) supported the proposal to retain the articles and to adopt a threshold of two years.

Ms MATSAU (South Africa) said that it would be unwise to delete the provisions on extradition since it was possible that specific criminal offences could be defined at a later stage. She favoured the retention of Article 31 and the adoption of a two-year threshold.

Dr KUMAKO (Togo) preferred that the reference to a fixed number of years should be removed altogether and that extraditable offences should be those established under bilateral agreements between Parties.

Dr COULIBALY (Mali) said that he favoured a compromise solution that referred to a period of deprivation of liberty of at least two years.

The CHAIRPERSON proposed that representatives should continue to reflect on the two the options and come back to the matter on the following day.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, suggested that the wording in Article 16.5 of the United Nations Convention against Transnational Organized Crime might provide a useful basis for formulating the text.

Dr ROSELL-UBIAL (Philippines) suggested that the first option should refer to “an offence punishable by a period of imprisonment of a maximum of two years and other forms of deprivation of liberty or by a more severe penalty or whatever period is applicable based on existing international treaties entered into by the Parties”.

Mr HAMANEH (Islamic Republic of Iran) said that, in accordance with bilateral agreements on mutual legal assistance entered into by his country, he preferred the option of a period of imprisonment of one year.

Mr BELTRÁN PRADO (Colombia) requested that the text of any option to be considered should be provided in time for the regional meetings on the following day.

Mr MOHAMED (Maldives) recalled that the informal working group on the protocol that had met between the fourth and fifth sessions of the Intergovernmental Negotiating Body had recommended that the articles on extradition should be retained. He added that he would favour the adoption of a compromise text.

The CHAIRPERSON requested Parties to consider the matter further overnight and in the following morning's regional meetings. They would return to the discussion in a future meeting.

(For continuation of the discussion on Article 30, see summary record of the thirteenth meeting.)

- **Article 26: Jurisdiction** (continued from the eighth meeting)

The CHAIRPERSON asked whether the Article was still relevant given that Parties had already agreed that mutual legal assistance would remain the protocol but that no such decision had been taken in regard to extradition.

Mr YOST (Canada) said that he did not believe that it was necessary to retain a provision on jurisdiction in the protocol.

(For continuation of the discussion on Article 26, see summary record of the thirteenth meeting.)

The meeting rose at 24.05.

THIRTEENTH PLENARY MEETING

Tuesday, 3 April 2012, at 10:20

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. ORGANIZATION OF WORK

The CHAIRPERSON said that his aim was for the Intergovernmental Negotiating Body to have agreed the text of the draft protocol by the end of the day, and to that end he urged Parties to be brief and only to intervene if absolutely necessary. He noted that key outstanding issues included the provisions on supply chain control (Articles 5 to 11bis), Article 12.1(c), notably the references to the term “counterfeit”, arrangements for States to notify which unlawful acts they considered to be criminal offences (perhaps in a new article to follow Article 12) and extradition (Articles 31 and 32). If detailed discussions on extradition were required, Parties might wish to establish a working group to draft text acceptable to all Parties.

Mr COTTERELL (Australia), speaking on behalf of Parties in the WHO Western Pacific Region, said that he supported the establishment of a working group on extradition. The group should start work immediately, in parallel with the plenary. He proposed that the working group be asked to consider subparagraph 1(i) of Article 12, which dealt with money laundering, as well as Articles 31 and 32 on extradition.

Mr REGALADO PINEDA (Mexico) said that he supported the proposal to establish a working group.

The CHAIRPERSON said that he took it that Parties wished to establish an open-ended working group on extradition. The informal working group could begin work at 11:00, with interpretation. He encouraged Parties to coordinate within regions in order to keep interventions to a minimum.

It was so agreed.

2. REPORT OF THE OPEN-ENDED WORKING GROUP ON DEFINITIONS

Mr GORUN (Turkey), speaking as Chair of the open-ended working group on definitions, said that the working group had considered the definitions included in the two versions of Article 1 – the version in document FCTC/COP/INB-IT/5/4 and that proposed by the open-ended working group on definitions established by the Intergovernmental Negotiating Body at its fourth session and contained in Annex 2 of document FCTC/COP/4/4 – and had decided to consider the terms defined in the latter. The working group had agreed that the terms “blocked customer”, “primary processing”, “processing of personal data”, “property”, and “secure exchange of information” did not require definition. He noted that

definitions of “manufacturing equipment”, “supply chain” and “personal data” had been contained in an earlier report of the working group.

The working group proposed the following definitions:

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

“Cigarette” means any product, other than cigars, cigarillos, pipe tobacco and water pipe tobacco, that contains tobacco and is intended to be burned or heated under ordinary conditions of use, and which may include, where appropriate, “roll-your-own” tobacco which, because of its appearance, type, packaging or labelling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.

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

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

“Free zone” means a part of the territory of a Party where any goods introduced are generally regarded, in so far as import duties and taxes are concerned, as being outside the Customs territory. (Moved to the definitions section from the footnote to Article 11)

“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.

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

“Party” means, unless the context indicates otherwise, a Party to this Protocol.

“Regional economic integration organization” 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 authority to make decisions binding on its Member States in respect of those matters.* Footnote: (*Where appropriate, national [or domestic] will refer equally to regional economic integration organizations.)

[Note: reference should be made to either national or domestic, depending on which term is used consistently throughout the Protocol.]

“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.

“Tracking and tracing” means systematic monitoring and re-creation by competent authorities or any other person acting on their behalf of the route or movement taken by items through the supply chain, as outlined in Article 7.

The working group had also reached provisional agreement on definitions of the terms “proceeds of crime”, “freezing or seizure” and “smuggling”, pending consensus on the provisions in which those terms appeared:

“Proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of an offence.

“Freezing or seizure” means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

“Smuggling” means customs fraud consisting in the movement of goods across a customs frontier in any clandestine manner.

The working group had not had time to discuss other terms, such as “due diligence”, “fraud” or “fraudulent practices”.

The CHAIRPERSON said he took it that Parties wished to accept the definitions recommended by the working group.

Mr SONG (Singapore) said that he did not object to the proposed definition of the term “free zone” but wished to have clarification of the legal implications of such zones being designated using different terminology under States’ domestic laws. The domestic legislation of Singapore referred to “Free trade zones”, for example.

Ms LANNAN (Convention Secretariat) said that the important factor was whether the term used domestically met the definition of free zones as used in the protocol, rather than the term itself.

Mr ROWAN (European Union) said that he had a query regarding the proposed definition of the term “cigarette” but suggested that, in view of time constraints, it might be more appropriate to reconvene the working group on definitions so that he could raise his concerns there.

Mr PUSP (India) supported the suggestion to reconvene the working group on definitions.

The CHAIRPERSON said that the working group on definitions could be reconvened without interpretation immediately, or with interpretation after the working group on extradition had completed its work.

Mr GORUN (Turkey), speaking as Chair of the working group on definitions, said that it was important for the working group to have interpretation so that that all interested Parties could take part in the discussions.

Mr COTTERELL (Australia) said that he supported the position of the Chair of the working group on definitions.

The CHAIRPERSON said that the working group on definitions would meet, with interpretation, after the open-ended working group on extradition had completed its work, to resolve concerns relating to the proposed definition of the term “cigarette”. He encouraged

Parties to consult informally beforehand in order to facilitate the swift completion of those negotiations. He then invited the Intergovernmental Negotiating Body to review the text of the draft protocol, article by article.

3. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/INB-IT/5/4, FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part III: Supply chain control (continued from the eighth meeting)

- Article 11: Free zones (continued from the fourth meeting)

Mr SONG (Singapore) said that the issue of intermingling of tobacco products with non-tobacco products was of fundamental importance to his country. He supported the inclusion of measures to prevent intermingling where a criminal element was involved, and if the measures applied to the whole supply chain, as was the case in subparagraph 1(d) of Article 12. The risk of the diversion of goods, including by way of intermingling, for criminal purposes was a genuine concern for all States, which was why Article 7 on tracking and tracing applied to the whole supply chain. However, it was not logical to tackle intermingling for criminal purposes only at the point at which goods were removed from free zones. Article 11, as drafted, would impose an unfair, impractical and illogical burden on States with free zones, in that it required tobacco and non-tobacco goods which had entered a free zone legally intermingled within a single container to be repacked into separate containers before the same goods could legally leave the free zone. It was also an issue of sovereignty for States to be able to determine for themselves how they would implement controls over the various transactions that occurred within free zones. His Government already diligently checked containers entering the country for illicit drugs, firearms, duty unpaid tobacco products etc., and that system worked well.

For those reasons, he would prefer that both paragraphs of Article 11 be deleted. However, in a spirit of compromise he was willing to retain paragraph 1 if the word “endeavour” was inserted after “shall”. He also suggested that the words “within three years of” in the first paragraph of Article 11 be replaced by the word “upon”.

The CHAIRPERSON, noting the statement made by the representative of Singapore, said that bilateral consultations on the matter might facilitate final negotiations on the supply chain provisions later in the day.

Mr ALBUQUERQUE E SILVA (Brazil) said that although he respected Singapore’s position, time was too short for Parties to make such long interventions. There was no longer time to seek unanimity, and the Intergovernmental Negotiating Body should seek to complete its work on the basis of a qualified majority where necessary.

The CHAIRPERSON said that he had already sought guidance on the possibility of sending to the Conference of the Parties, if necessary, text on which there was not unanimous agreement but that did have the support of an overwhelming majority of Parties.

Mr SONG (Singapore) requested that his intervention be noted in the record of the meeting and said that the goal of negotiations was a text that was acceptable to all delegations.

- Part 1: introduction (continued from the tenth meeting)
- **Article 1: Use of terms**

The CHAIRPERSON noted that the definition of the term “cigarette” would be marked as provisional pending the outcome of discussions in the working group on definitions, and the definitions of “proceeds of crime”, “freezing or seizure” and “smuggling” would remain in square brackets pending the outcome of negotiations on Article 12. He took it that Article 1 was otherwise acceptable.

It was so agreed.

- **Article 2: Relationship between the Protocol and other agreements and legal instruments** (continued from the tenth meeting)

The CHAIRPERSON noted that consensus had been reached at the ninth meeting on paragraphs 1 and 2 and that there was provisional consensus on paragraph 3 as agreed at the tenth meeting. Having recalled that two paragraphs were proposed for inclusion in the preamble, he asked whether any Party could not accept the inclusion of the words “United Nations Convention against Transnational Organized Crime” in the preambular part of the protocol.

Mr HAMANEH (Islamic Republic of Iran) said that he could accept the inclusion of the proposed preambular paragraph that began with the words “Recalling and emphasizing”, which appeared as an option under paragraph 3 in document FCTC/COP/INB-IT/5/4. As his country was a party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was closely related to the protocol – in particular with regard to money laundering – he wished to propose incorporating a reference to that Convention also.

The CHAIRPERSON said that he was reluctant to reopen negotiations to that extent at such a late stage but invited the views of other Parties on the proposal.

Mr COTTERELL (Australia) said that discussions on the matter were likely to prove time-consuming and that he would prefer that discussion of issues related to Article 2 be deferred until after the working group on extradition had reported.

The CHAIRPERSON said he was prepared to agree to that proposal after obtaining Parties’ views on paragraph 4.

Mr HAMANEH (Islamic Republic of Iran) said that he was ready to show flexibility on paragraph 4, provided that his proposal to refer to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in the preamble was accepted.

The CHAIRPERSON said that paragraph 4 would therefore be marked “provisional consensus”.

Part II: General obligations (continued from the seventh meeting)

- **Article 4: General obligations**

The CHAIRPERSON said that in paragraph 1 the words “the provisions of” could be removed as they were redundant.

Ms KIPTUI (Kenya) said that a paragraph on transparency that her country had proposed for inclusion in Article 4 was missing from the text displayed on the screen, as was the reference in the preamble to Article 5.3 of the WHO FCTC. At the invitation of the CHAIRPERSON, and in response to a request by Dr ASQUETA (Uruguay), she read out her proposals. The new paragraph to be inserted in Article 4 would read: “In implementing their obligations under this Protocol, Parties shall ensure the maximum possible transparency with respect to any interactions they may have with tobacco industry, including, inter alia, any relevant activities, agreements, understandings or undertakings.” The new preambular paragraph would read: “Mindful of Article 5.3 of the WHO Framework Convention on Tobacco Control, in which Parties agree that in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law”.

The CHAIRPERSON said that he would allow delegations time to consider the proposals put forward by the representative of Kenya and would defer discussion of Articles 5 to 11*bis* pending indications that progress had been made in the informal consultations taking place on the supply chain provisions.

Part IV: Offences (continued from the eleventh meeting)

- **Article 12: Unlawful conduct including criminal offences** (continued from the eleventh meeting)

Paragraph 1

The CHAIRPERSON said that agreement had not yet been reached on paragraph 1, subparagraphs (c)(i) and (ii), and subparagraph (d). The discussions in regard to subparagraph (c) were still in progress. He asked whether any Party could not accept the removal of the square brackets around the words “for the purpose of concealing or disguising tobacco products” in subparagraph (d).

Mr LEBEPE (South Africa) said that his recollection of the discussions was that there had been agreement, pending approval from the European Union.

Mr AAGAARD (Denmark) said that discussions were continuing. Once they had concluded he would inform the plenary of the result

The CHAIRPERSON said that he would make Article 12.1 the first item on the agenda at the fourteenth meeting. He noted that the subparagraph on laundering of proceeds of crime would have to remain in square brackets as it was linked to extradition.

Ms KIPTUI (Kenya) recalled that she had proposed the deletion of subparagraph 1(c)(i).

The CHAIRPERSON confirmed that the option of deletion remained.

Paragraph 2bis

The CHAIRPERSON noted that there was consensus on paragraph 2 as drafted. Paragraph 2bis gave effect to the proposal by Swaziland that Parties should be required to notify the Secretariat which of the unlawful conduct set out in paragraphs 1 and 2 they had determined to be a criminal offence. In the absence of any objection, he would take it that Parties could accept the wording “Each Party shall notify, in accordance with Article xx, which of the unlawful conduct in Articles 1 and 2 that Party classifies as a criminal offence and of any subsequent changes to that classification”.

Following an exchange with Mr LEGUERRIER (Canada) and Mr FISCH BERREDO MENEZES (Brazil), he read out an alternative version of paragraph 2bis, which read: “Each Party shall notify the Secretariat of this Protocol which of the unlawful conduct established in paragraphs 1 and 2 that Party has determined to be a criminal offence and shall furnish to the Secretariat copies of its laws that give effect to paragraph 2 and of any subsequent changes to such laws”. He noted that the alternative proposal had the merit of avoiding the need for a separate article establishing a notification procedure.

Mr HAMANEH (Islamic Republic of Iran) sought clarification as to whether Parties were to notify the Secretary-General of the United Nations, as the depositary, or the Secretariat of the Protocol, which would presumably be the Secretariat of the WHO FCTC. Requiring Parties to furnish copies of their laws would place an undue burden on countries whose national language was not one of the official languages of the United Nations, and the second part of the paragraph should therefore be non-mandatory.

The CHAIRPERSON confirmed Parties would be required to notify the Secretariat of the Protocol, which would indeed be the Secretariat of the WHO FCTC.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, asked for time for consultations on the proposal. He questioned the necessity of including the final clause on notification of subsequent changes. He also asked whether it was correct that the text referred to both paragraphs 1 and 2.

The CHAIRPERSON said that unlawful conduct was established in paragraph 1, and so the paragraph should probably refer only to paragraph 1.

Mr COTTERELL (Australia) supported the proposed new text, but agreed that the relevant reference was paragraph 1.

Mr DESIRAJU (India) explained that he had proposed also referencing paragraph 2, as it allowed for conduct not listed in paragraph 1 to be declared unlawful.

Mr SONG (Singapore) said that he agreed that it was not necessary to refer to paragraph 2. It was also self-evident that a requirement to furnish copies of laws would include subsequent changes to them.

Mr LEGUERRIER (Canada) suggested that the concerns raised by the representative of the Islamic Republic of Iran might be addressed by inserting the words “or a description thereof” after the words “a copy of its laws”.

The CHAIRPERSON agreed that allowing Parties to provide a description of their legislation might be acceptable. He asked whether Parties wished to refer to paragraph 2 as well as to paragraph 1.

Mr COTTERELL (Australia) said that, rather than referring to paragraph 2, which might be interpreted to refer paragraph 2 in its entirety, the text should be amended by inserting the phrase “and/or other conduct contrary to the provisions of this protocol” after the words “in paragraph 1”.

The CHAIRPERSON said that, amended in line with the proposal by the representative of Australia, the paragraph would read: “Each Party shall notify the Secretariat of this Protocol which of the unlawful conduct established in paragraph 1 and/or other conduct contrary to the provisions of this Protocol that Party has determined to be a criminal offence and shall furnish to the Secretariat copies of its laws or a description thereof, and of any subsequent changes to those laws.” He asked whether the amendment proposed by Australia should begin with the word “or” or the word “and”.

Mr SONG (Singapore) said that he wished to consider the implications of the amendment proposed by the representative of Australia in relation to other provisions in the protocol, especially those in Article 11, in order to ensure that the new wording did not bring into play elements unintended by the original proposal.

The CHAIRPERSON asked whether any other Party could not accept the paragraph as amended. Hearing no comments, he asked the representative of Singapore to consider whether he could join the consensus. The matter would be discussed again later. He took it also that reference to “Article xx” would no longer be needed given the simplified text that had now been agreed.

It was so agreed.

Paragraph 3

The CHAIRPERSON noted that it was once again the reference to the United Nations Convention against Transnational Organized Crime that was hindering the achievement of consensus.

Mr HAMANEH (Islamic Republic of Iran) said that it was his impression that there had been near agreement on the phrase “relevant international conventions to which they are Party”.

The CHAIRPERSON said that if no Party objected to that wording, he would take it that there was consensus on paragraph 3.

It was so agreed.

Mr BELTRÁN PRADO (Colombia) said that in the title of Article 12 in the Spanish version, the word “delitos” should be replaced with the words “conductas ilícitas”.

The CHAIRPERSON said that the Chair of the advisory committee on language would be notified of the comment by the representative of Colombia.

- **Article 13: Liability of legal persons**

The CHAIRPERSON said that the consistency review undertaken by the Convention Secretariat prior to the current session had resulted in the deletion of the plurals of “laws and regulations”. As part of the agreed language, however, the plurals should be restored.

It was so agreed.

Mr BELTRÁN PRADO (Colombia) said that it would facilitate implementation of the protocol in his country and others with similar legal systems if the word “legal” were deleted before the word “persons” in Articles 13.1 and 14. Under his country’s legal system, legal persons could not be prosecuted for crimes against natural persons.

Mr ALBUQUERQUE E SILVA (Brazil) requested the opinion of the WHO Legal Counsel as to whether the phrase “consistent with its legal principles” would be sufficient to address the concerns expressed by the representative of Colombia.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) said that the phrase “consistent with its legal principles” was indeed intended to address such concerns. It was clear that the provisions of Article 13 applied to legal persons, as paragraph 3 noted that the liability of natural persons would not be prejudiced. The distinction between legal and natural persons was made within the Article, and removing reference to the nature of the person being addressed would change the Article entirely. It had perhaps been to accommodate countries’ varying treatment of legal personality that the phrase “consistent with its legal principles” had originally been placed in paragraph 1, the point being to ensure appropriate coverage of both legal and natural persons.

Mr BELTRÁN PRADO (Colombia) said that he would like to be certain that the provision would not be ruled unconstitutional or make implementation impossible.

Mr PÉREZ AVID (Paraguay) suggested that redrafting paragraphs 1 and 2 might allow the deletion of paragraph 3, which was causing concern for the delegation of Colombia and to a certain extent his own.

The CHAIRPERSON said that it would be preferable to avoid extensive reworking of the text at such a late stage, and asked the representatives of Colombia and Paraguay to consider whether they could accept the paragraph as currently drafted.

Mr HAMANEH (Islamic Republic of Iran) said that the provision was not a new one: similar provisions existed in the United Nations Convention against Transnational Organized

Crime and the United Nations Convention against Corruption. Almost all Parties to the WHO FCTC were also Parties to at least one of those two Conventions.

The CHAIRPERSON said that he would consider there to be provisional consensus on the Article, pending approval from the representatives of Colombia and Paraguay.

Mr PÉREZ AVID (Paraguay) said that he could accept the text.

• **Article 16 Seizure and confiscation (continued from the sixth meeting)**

The CHAIRPERSON said that discussions at previous sessions of the Intergovernmental Negotiating Body had resulted in a number of options. There would need to be a link to the proceeds of crime from criminal offences established under Article 12.

Mr LEGUERRIER (Canada) suggested that the discussions on Article 16 be deferred, given the involvement of many members of delegations with the necessary legal expertise in the working group on extradition.

Mr LOM (Observer, United States of America)¹ suggested that the words “as appropriate” be added after the word “or” in the text at the end of paragraph 6 that was currently in square brackets. Without that amendment the provision effectively called for a ban on the common law revenue rule, which if it remained would prevent his country from ever ratifying the protocol.

The CHAIRPERSON said that discussions on Article 16 would be resumed at a later stage.

• **Article 19: Special investigative techniques**

The CHAIRPERSON said that the term “manufacturing equipment” could now be accepted, as the relevant definition had been agreed.

Mr AAGAARD (Denmark) proposed amending paragraph 2 by adding the word “criminal” before the word “offences” for consistency with the language used throughout the protocol.

The CHAIRPERSON said that he took it that Parties could accept that proposal.

It was so agreed.

• **Article 21: Enforcement information sharing**

The CHAIRPERSON, on receiving confirmation from the representative of the Islamic Republic of Iran that he could accept the word “shall” in the introductory paragraph, took it that there was now consensus on Article 21.

It was so agreed.

¹ Participating by virtue of Rule 29 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

- **Article 22: Information sharing: confidentiality and protection of information**

The CHAIRPERSON, noting that editorial changes for the sake of consistency of language would be made, said that he took it that there was consensus on Article 22.

It was so agreed.

- **Article 23: Assistance and cooperation: training, technical assistance and cooperation in scientific, technical and technological matters**
- **Article 24: Assistance and cooperation: investigation and prosecution of offences**
- **Article 25: Protection of and respect for sovereignty**
- **Article 26: Jurisdiction**
- **Article 27: Joint investigations**
- **Article 28: Law enforcement cooperation**

The CHAIRPERSON, proceeding article by article, said that in Article 23, the word “the” could be removed from the beginning of paragraph one. There was complete consensus on Article 23, as well as on Article 24 and Article 25. Full consensus on Article 26 was pending the outcome of the discussions in the working group on extradition. It had been agreed to delete Article 27. There was consensus on Article 28.

It was so agreed.

- **Article 29 Mutual administrative assistance**

The CHAIRPERSON recalled that the representative of the Islamic Republic of Iran had sought to replace the word “shall” with the word “should” in Article 29; he asked whether he would, however, accept the word “shall.”

Mr VALIZADEH (Islamic Republic of Iran) asked to defer that decision until he had conferred with his delegation’s legal expert, who was participating in the working group on extradition.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that in a spirit of compromise he could put aside his reservations and accept the inclusion of subparagraph (d).

The CHAIRPERSON said that the square brackets could therefore be removed from around subparagraph (d), although square brackets remained around some elements therein. He took it that Parties could accept the proposed wording of subparagraph (b), which read “new trends, means or methods of engaging in illicit trade in tobacco, tobacco products and manufacturing equipment”. He also took it that Parties wished to use the same formulation – “tobacco, tobacco products and manufacturing equipment” – in subparagraph (c). With

regard to subparagraph (d), he took that Parties could accept the wording “natural or legal persons” at the beginning of subparagraph (d).

It was so agreed.

Drawing attention to the various options that had been proposed for the second part of subparagraph (d), he asked whether any Party could not accept the option that read: “known to have engaged in illicit trade in tobacco, tobacco products and manufacturing equipment”.

Mr SONG (Singapore) said that he would prefer the option that read: “known to have committed or been a party to an offence in Article 12”, which in his opinion was more precise.

Mr ALBUQUERQUE E SILVA (Brazil) sought clarification as to the legal ramifications of providing assistance about persons on the grounds that they were “known” to have committed an offence. The person might later be acquitted, showing that knowledge to have been inaccurate.

The CHAIRPERSON said that he would request legal clarification on that point. He asked whether any Party could not accept the wording “known to have committed or to be a party to an offence listed in Article 12”.

Mr AAGAARD (Denmark) said that he could accept that formulation, but suggested that for the sake of accuracy the paragraph should refer to either “unlawful conduct listed in Article 12” or “an offence established under Article 12”. His preference was for the latter.

The CHAIRPERSON said that the subparagraph, as amended, would read: “(d) natural or legal persons known to have committed or to be a party to an offence established in accordance with Article 12.”

Mr SONG (Singapore) asked whether, for the sake of consistency, the word “criminal” should be inserted before the word “offence”.

Mr AAGAARD (Denmark) said that as the provision concerned information sharing, he thought that it should not refer only to criminal offences but be broader in scope.

The CHAIRPERSON said that he took it that Parties would prefer to retain the term “offence” without the qualification “criminal”.

Mr BELTRÁN PRADO (Colombia) said that he supported the comments made by the representative of Brazil. He proposed wording such as “who are involved in legal proceedings”.

The CHAIRPERSON asked whether any Party objected to the wording “natural or legal persons known to have committed or to be a party to an offence established in accordance with Article 12”.

Ms LECLAIRE (alternate to Mr Leguerrier, Canada) said she would prefer to retain the focus on offences and not unlawful conduct, which could be highly administrative in nature.

The CHAIRPERSON confirmed that the wording used would be “an offence”. He then asked Parties to comment on the second part of the subparagraph, which read “or suspected of being about to commit such an offence”.

Mr ABASCAL (Uruguay) said that a formulation such as “involved in criminal proceedings” would be acceptable.

Ms MADRAZO REYNOSO (Mexico) said that the provision might infringe on the presumption of innocence. It would not be possible to proceed on the basis of suspicion, nor on the basis of court proceedings, as it would still be unknown whether the person was guilty or innocent. She therefore proposed ending the subparagraph after the words “in accordance with Article 12”. She said that Brazil, Canada, Colombia, Mexico and Panama all associated themselves with her statement.

Ms BEAUVOGUI (Guinea) expressed concern with about the wording used in Article 29(d), which referred to “one of the offences listed in Article 12”, when Article 12 listed not offences but “unlawful conduct”.

The CHAIRPERSON recalled that Article 12, paragraph 2, stipulated that Parties would determine which of the unlawful conduct listed in paragraph 1 of that Article would become criminal offences, and noted that the wording of the paragraph had for that reason already been amended to read “an offence established in accordance with Article 12”.

Ms BEAUVOGUI (Guinea) said that Parties would be required to notify the Secretariat of the unlawful conduct they had established, but there was not a list of offences established under Article 12.

The CHAIRPERSON, noting that the same formulation was used elsewhere in the text and that it seemed to have been accepted by other Parties, encouraged the representative of Guinea to discuss her concerns informally with the representatives of other Parties in her region.

The CHAIRPERSON said that he took it that Parties could agree to the proposed deletion and noted that that there was complete consensus on Article 29, pending approval from the representative of the Islamic Republic of Iran on the use of “shall” rather than “should”.

It was so agreed.

- **Article 30: Mutual legal assistance** (continued from the twelfth meeting)

The CHAIRPERSON, noting that there was provisional consensus on almost all paragraphs of Article 30, asked whether any Party objected to the addition of the words “or international agreement” after the word “treaty” in paragraph 5, which would then read: “Paragraphs 6 to 24 shall on the basis of reciprocity apply to requests made pursuant to this Article if the Parties in question are not bound by a treaty or international agreement of mutual legal assistance”. He took it that the words “or international agreement” should also be added after the word treaty at the beginning of the second sentence of paragraph 5.

Mr COTTERELL (Australia) observed that the work of the plenary was being hampered by the absence of members of delegations with legal expertise, who were participating in the working group on extradition. He said that he would prefer to return to the matter after the working group had finished its work, as the two articles were closely related.

Mr SONG (Singapore) said that the phrase “or intergovernmental agreement” might better capture the situation in the European Union, which had been the source of the proposed amendment.

The CHAIRPERSON said that a decision on the matter would be deferred. Turning again to Article 30, paragraph 14, which governed situations in which mutual legal assistance could be refused, he recalled that subparagraphs (d) and (e) had been the subject of ongoing discussions.

The CHAIRPERSON recalled that the approach being considered had been to cover separately the idea of the two-year penalty threshold, in subparagraph (d), and the de minimis provision, in subparagraph (e). He asked Parties to consider wording proposed for a new subparagraph (f), which would read: “if in the judgement of the requested Party the provision of the assistance would pose a burden on its resources that is disproportionate to the seriousness of the crime”. He invited views on whether the de minimis provision in subparagraph (e) made it unnecessary to refer to the concept of an excessive burden on resources in subparagraph (f).

Mr AAGAARD (Denmark) said that he could accept the wording that had been proposed for subparagraphs (d) and (e) in a spirit of compromise.

Mr SONG (Singapore) suggested that the concept of “the seriousness of the crime”, if clarified by means of a footnote or by making use of the existing definition of “serious crime”, might serve to obviate the need for subparagraph (d). Its deletion would go some way towards satisfying the concerns of those Parties that regarded the United Nations Convention against Transnational Organized Crime as the standard.

The CHAIRPERSON asked whether agreement could rather be reached on the wording for subparagraphs (d) and (f) proposed during the previous meeting.

Mr SONG (Singapore) said that although his strong preference was for a threshold of four years, he could accept that wording. He proposed combining both ideas in a single subparagraph, by adding the text of subparagraph (e) to the end of subparagraph (d), linked by the word “or”.

Mr COTTERELL (Australia) said that although he supported the proposed wording in principle, he noted that the concept of imprisonment was missing from the formulation; he suggested that the Secretariat be asked to assist in drafting specific wording.

The CHAIRPERSON said that the Secretariat would be requested to incorporate the phrasing used in the United Nations Convention against Transnational Organized Crime with respect to the concept of imprisonment.

It was so agreed.

The CHAIRPERSON noted that, except for those small outstanding elements, there was consensus on Article 30. Discussion of Articles 31 to 32 would be deferred pending the outcome of the discussions in the working group on extradition. He noted that Article 33 on extradition had been deleted and that the Intergovernmental Negotiating Body had achieved consensus on Article 34 on reporting and exchange of information at its fourth session.

Part VI: Reporting**• Article 35: Meeting of the Parties**

The CHAIRPERSON noted that the words “to this Protocol” could be removed and that the appropriate paragraph numbers would be inserted in paragraph 3(d).

Mr COTTERELL (Australia), speaking on behalf of Parties in the WHO Western Pacific Region, said that the Meeting of Parties and the Conference of the Parties should not be held in parallel, so that all delegations could attend both. It should be made clear that “in conjunction with” meant “end-to-end”.

Ms BERNER (European Union) said that she agreed with the representative of Australia regarding the phrase “in conjunction with”. On financing, she said that in a spirit of compromise the European Union was ready to change its previous position. She proposed the addition of two new paragraphs 6 and 7, to read:

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

“7. At each ordinary session, the Meeting of the Parties shall by consensus adopt a budget and workplan for the financial period until the next ordinary session, which shall be distinct from the Framework Convention on Tobacco Control budget and workplans.”

The CHAIRPERSON took note of the proposal, to which he would return when the financing of the protocol was discussed.

Ms HERNANDEZ (Canada) expressed concern that the provision in paragraph 4 of Article 35, which allowed the Meeting of the Parties to decide to deviate from the rules of procedure and financial rules of the WHO FCTC, would jeopardize the harmonization of those rules with the budget and reporting cycles of WHO, and thus put the Convention Secretariat in a difficult position. She requested clarification from the Secretariat in that regard.

Dr NIKOGOSIAN (Head, Convention Secretariat) said that there was a synergy between the financial cycles of the Conference of the Parties and of WHO. If the Intergovernmental Negotiating Body wished to ensure the maintenance of that synergy in respect of the Meeting of the Parties, it could advise the Meeting of Parties accordingly, or else could deprive the Meeting of Parties of the right to determine its own rules and procedures, because the Conference of the Parties would not have authority over the Meeting of Parties in that regard. However, if the Conference of the Parties and the Meeting of Parties were to be served by the same secretariat, there would be no reason for the Meeting of Parties to not to maintain that synergy.

Mr ALBUQUERQUE E SILVA (Brazil) said that he shared the concerns expressed about the phrase “in conjunction with”, which could be misinterpreted. Less ambiguous wording should be found, not least to facilitate the translation of the protocol into many languages.

The CHAIRPERSON suggested that the words “in conjunction with” be replaced with the words “immediately before or immediately after”.

Mr ALBUQUERQUE E SILVA (Brazil) asked whether it would not be advisable to use more flexible language, so as not to exclude the possibility that the two meetings be held at separate times.

The CHAIRPERSON said that the phrase “immediately before or immediately after” provided sufficient flexibility in the first paragraph, which governed only the first session of the Meeting of Parties. He said that greater flexibility might be desirable in the second paragraph, which governed the timing of subsequent sessions.

Mr VECINO (Spain), speaking as Chair of the advisory committee on language, said that the committee had found that the phrase “in conjunction with” caused translation difficulties as it could be interpreted to mean “concurrently” or “together with”. It had been proposed that it be replaced with the phrase suggested by the Chairperson. In Spanish the phrase “con ocasión de” (at the time of, on the occasion of) would provide the necessary flexibility, as it would encompass but not be restricted to the idea of “immediately before or immediately after”.

Mr DESIRAJU (India), speaking on behalf of Parties in the WHO South-East Asia Region, said that he supported the comments made by the representative of Australia and expressed support for the wording “immediately before or immediately after”.

The CHAIRPERSON asked whether any Party could not accept the paragraph, as amended. In response to a question from Ms ALI-HIGO (Djibouti), he confirmed that paragraph 1 applied only to the first session.

Ms KIPTUI (Kenya), speaking on behalf of Parties in WHO African Region, said that she was happy with the proposed amendment to paragraph 1 and would like the phrase “in conjunction with” to be clarified in paragraph 2 as well. She supported the proposal made by the European Union in respect of financing.

Ms ALI-HIGO (Djibouti) suggested that it should be left to the Meeting of Parties to decide at its first session how and when it would schedule its subsequent sessions. She also requested further information about overlap and cooperation between the officers of the Meeting of the Parties and those of the Conference of the Parties, and how such arrangements would operate in practice.

Dr NIKOGOSIAN (Head, Convention Secretariat) said that it was his understanding that the Conference of the Parties would have no formal authority over the Meeting of Parties, which meant that the two bodies would have different officers. With regard to the timing of the Meetings of Parties in relation to the Conferences of the Parties, not only for reasons of economic efficiency but also in order to maintain the links between the two bodies, Parties might wish to consider adding wording such as “preferably” or “when possible”, if they wished to make the arrangement non-binding.

Dr SA’A (Cameroon) said that he wished to draw attention to the difficulty caused by meetings being held simultaneously for Parties with small delegations that wished to be able to participate effectively in both. Regardless of the wording used, it was important to ensure that the meetings were not held concurrently.

Ms ALI-HIGO (Djibouti) added her support for the phrase “immediately before or immediately after” and asked whether a paragraph was needed to the effect that the Meeting of Parties would elect its officers at its first session.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) said that Parties might deem the election of officers to be sufficiently provided for in Rule 21 of the Rules of Procedure of the Conference of the Parties, which, under paragraph 4 of Article 35, of the protocol would apply, *mutatis mutandis*, to the Meeting of the Parties, unless it decided otherwise.

Dr BEKBASAROVA (Kyrgyzstan) said that the rendering of the phrase “in conjunction with” in the Russian version of the draft protocol was confusing, and she therefore suggested that it be replaced.

Ms HERNANDEZ (Canada) proposed that the words “immediately before or immediately after” replace the words “in conjunction with” in paragraph 2 as well as in paragraph 1. It was important for sessions of the Conference of the Parties and of the Meeting of Parties to be convened back to back for continuity and to enhance coordination, reduce expenses and facilitate participation. The language of paragraph 2 did not need to be flexible in that regard, as sufficient flexibility was already provided by paragraph 3, which afforded Parties the possibility of convening extraordinary sessions at such other times as might be deemed necessary.

The CHAIRPERSON asked whether other Parties shared the interpretation that paragraph 3 provided sufficient flexibility to convene Meetings of Parties at other time if Parties so decided.

Ms MADRAZO REYNOSO (Mexico) said that she disagreed with that interpretation. Paragraph 2 referred to the timing of regular sessions, whereas paragraph 3 covered the possibility of extraordinary sessions. She proposed inserting the word “preferably” before the words “immediately before or immediately after”, which would provide the necessary flexibility.

Ms KIPTUI (Kenya), speaking on behalf of Parties in the WHO African Region, noted that Article 36.1 of the protocol stipulated that the Convention Secretariat would be the Secretariat of the Protocol and asked how it was, then, that Meetings of the Parties and Conferences of the Parties would have different officers.

Dr NIKOGOSIAN (Head, Convention Secretariat) said that the each body would have its own officers, but share the same Secretariat.

Ms KIPTUI (Kenya) asked whether she understood correctly that the protocol would have officers separate from those of the Convention, and that the Convention Secretariat would serve both the officers of the Convention and of the Protocol.

Dr NIKOGOSIAN (Head, Convention Secretariat) confirmed that her understanding was correct.

Ms BERNER (European Union) said that she supported the proposal to amend paragraph 2 by including the words “immediately before and immediately after”, but that she was not in favour of adding the word “preferably”.

The meeting rose at 13:00.

FOURTEENTH PLENARY MEETING

Tuesday, 3 April 2012, at 15:20

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. REPORT OF THE ADVISORY COMMITTEE ON LANGUAGE

The CHAIRPERSON invited the Chair of the advisory committee on language to present his report.

Dr VECINO QUINTANA (Spain), speaking in his capacity as Chair of the advisory committee on language, said that three main issues were hindering translation of the draft protocol into the five other languages. First, the word “offences” in Article 4.4 should be amended in the English to read “criminal offences”, to bring it into line with Articles 13.1, 14.2 and 13.3. Secondly, definitions were required for the terms “unit packs”, “packages”, “packets” and “cartons”. Thirdly, clarification was needed with regard to the word “disposal”, which had more than one meaning in some languages. With regard to the difference between “subject to” and “in accordance with” national law, some delegations had suggested using just one of those terms.

The CHAIRPERSON said that he had taken note of the points raised and would consult the Convention Secretariat with a view to providing further guidance, including references to similar language in other instruments. In the meantime, Parties should feel free to consider those points and submit their comments. The word “disposal”, in particular, most probably meant “discarding”, but he would verify that definition with the appropriate experts. The working group on definitions might be able to consider it, should it have time, at the end of its meeting that afternoon.

2. REPORT OF THE WORKING GROUP ON EXTRADITION

The CHAIRPERSON invited the Chair of the working group on extradition to present her report.

Ms EVISON (New Zealand), speaking in her capacity as Chair of the working group on extradition, said that significant progress had been made towards an agreement on the articles in question, and that more information should be ready for the substantive discussion at end of the day.

3. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/INB-IT/5/4, FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part IV: Offences

• **Article 12: Unlawful conduct including criminal offences** (continued from the thirteenth meeting)

The CHAIRPERSON invited the Chair of the working group on subparagraph 1(c) of Article 12 to present her report.

Ms FAERCH (European Union), speaking in her capacity as Chair of the working group on subparagraph 1(c) of Article 12, drew attention to two key amendments to the text proposed by the working group: the word “counterfeit” had been replaced by “illicit”, at the suggestion of the delegation of Nigeria; and subparagraph 1(c)(iii) had been deleted, with the production-specific content incorporated into subparagraph 1(c)(i) and the trade-specific content into subparagraph 1(c)(ii).

The CHAIRPERSON said that copies of the text would be circulated to the Parties ahead of the substantive discussion on Article 12 and the issue of extradition later in the day.

Part VII: Institutional arrangements and financial resources (continued from the thirteenth meeting)

• **Article 35: Meeting of the Parties** (continued from the thirteenth meeting)

Paragraph 2

The CHAIRPERSON recalled that consensus had been reached on amending paragraph 2 to read: “Thereafter, regular sessions of the Meeting of the Parties shall be convened by the Convention Secretariat immediately before or immediately after regular sessions of the Conference of the Parties”. All that remained was to decide whether to approve the proposal by the representative of Mexico to add the word “preferably” or “normally” before “shall”.

Mr DESIRAJU (India) said that the text did not appear to reflect the point made earlier in the day that the Intergovernmental Negotiating Body could decide on the date of the first session of the Meeting of the Parties but that the decision with regard to subsequent sessions should be left to the Meeting itself.

The CHAIRPERSON said that the morning’s discussion had centred on the fact that paragraph 1 dealt with the first session of the Meeting of the Parties and paragraph 2 with regular sessions thereafter, both of which should be convened immediately before or after a regular session of the Conference of the Parties, while paragraph 3 dealt with extraordinary sessions.

Ms HERNANDEZ (Canada) stressed the importance of aligning regular sessions of the Meeting of the Parties and the Conference of the Parties in order to allow the Convention Secretariat to bring the adoption of workplans and budgets into line with the WHO cycle. As for the proposal to add the word “preferably”, her delegation supported the position of the European Union. It recognized the need for flexibility but believed consecutive regular sessions of the Meeting and Conference of the Parties to be in keeping with the general effort within the United Nations system to promote greater synergy, savings and efficiency.

Mr LINDGREN (Norway), supported by Mr HAMANEH (Islamic Republic of Iran), said that he supported the view expressed by the previous speaker. The word “preferably” should not be included as there were no grounds for deviating from a schedule of holding regular sessions of the Meeting of the Parties immediately before or after those of the Conference of the Parties.

Ms MADRAZO REYNOSO (Mexico) withdrew her request to add the word “preferably”.

Ms MOODLEY (alternate to Ms Matsau, South Africa) said that owing to concerns that limited resources might undermine her country’s ability to send sufficient numbers of experts to consecutive sessions of the Meeting and Conference of the Parties, it would be preferable to convene the sessions separately and at different times. Nevertheless, after consulting the other Parties in the WHO African Region, she was willing to accept paragraph 2 as it stood.

The CHAIRPERSON said that, in the absence of any further objection, he took it that the Intergovernmental Negotiating Body wished to approve paragraph 2 as amended.

It was so agreed.

Paragraph 3

The CHAIRPERSON said that, in the absence of any objection, he took it that the Intergovernmental Negotiating Body wished to approve paragraph 3.

It was so agreed.

Paragraph 4

The CHAIRPERSON asked the Parties for advice on whether to delete or retain the text in square brackets at the end of paragraph 4 as currently drafted, which read: “until the Meeting of the Parties decides otherwise”.

Ms KIPTUI (Kenya), speaking on behalf of the Parties in the WHO African Region, drew attention to the fact that many Parties in the Region had been unable to attend the present session owing to the decision on travel support policy adopted by the Conference of the Parties at its fourth session. Given that the decision might similarly affect participation in future sessions of the Conference of the Parties, and even the first session of the Meeting of the Parties, she requested that the provision be reviewed.

Dr NIKOGOSIAN (Head, Convention Secretariat), speaking at the invitation of the CHAIRPERSON, explained that the decision on travel support policy had not affected the Rules of Procedure and Financial Rules of the Conference of the Parties, which, unless it was decided otherwise, would also apply to the Meeting of the Parties.

Ms KIPTUI (Kenya), speaking on behalf of the Parties in the WHO African Region, withdrew her request.

Mr DONBE (Chad), supporting the views expressed by the representatives of South Africa and Kenya, said that travel support and the convening of regular sessions of the Meeting of the Parties immediately before or after regular sessions of the Conference of the Parties were matters of the utmost importance to Parties in the WHO African Region. He

suggested that the relevant text should be placed in square brackets pending a regional consultation.

The CHAIRPERSON agreed to place the text in question in square brackets and urged Parties in the WHO African Region to consult rapidly on the matter so that the discussion could be completed by the end of the day.

Mr COTTERELL (Australia) suggested that the word “until” should be replaced by “unless”, which was more common in legal parlance and would remove any underlying connotations of inevitability.

Mr LINDGREN (Norway), supporting the previous speaker’s comments, said that the word “until” implied that the Meeting of the Parties would be expected to adopt a separate set of rules.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that she concurred with the need to synchronize financial cycles, but asked how deleting the phrase “unless the Meeting of the Parties decides otherwise” might affect the capacity of the Meeting of the Parties to adopt new rules in response to circumstances unforeseen at the present time.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) explained that as the Rules of Procedure of the Conference of the Parties would apply, *mutatis mutandis*, to the Meeting of the Parties, the latter would have the flexibility to amend them under Rule 66, even if the phrase in square-brackets “unless the Meeting of the Parties decides otherwise” were deleted. The implications with respect to amendments to the Financial Rules would take longer to assess, although retaining the phrase, as amended by Australia, would clearly allow for that option.

Mr ALMOSAYTEER (Saudi Arabia) asked whether there might be any contradiction between paragraph 4 and Article 38 (*Financial resources*) and Article 40 (*Amendments to this Protocol*) of the draft protocol.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) explained that the Financial Rules referred to in paragraph 4 would be adopted at the Meeting of the Parties as a governance matter, by means of a resolution. Should they need changing within the context of the Conference of the Parties, for example, another decision could be adopted. The Financial Rules were generally regarded as implementing modalities, while the parent instrument itself would remain untouched, which meant that there was no conflict between paragraph 4 of Article 35 and the provisions under Articles 38 and 40 of the protocol.

The CHAIRPERSON said that, in the absence of any further objection, he took it that the Intergovernmental Negotiating Body wished to keep the whole of paragraph 4 in square brackets, including the final phrase as amended by Australia, and to return to it later.

It was so agreed.

Paragraph 5

The CHAIRPERSON said that, in the absence of any objection, he would take it that paragraph 5 could be approved as it stood.

It was so agreed.

The CHAIRPERSON informed the Parties that a draft outline of the Chairperson's report to the Conference of the Parties would be circulated the following morning. Parties were requested to submit to the Bureau any points that they considered it important to include in the report, especially those relating to the financing of the protocol; the new paragraphs 6 and 7 proposed by the European Union; and the recommendations of the informal working group contained in document FCTC/INB-IT/5/3.

New paragraphs 6 and 7

The CHAIRPERSON asked the Head of the Convention Secretariat to provide some background information concerning the process for deciding how the protocol would be financed. That would help to structure the discussion on the new paragraphs 6 and 7 proposed by the European Union.

Dr NIKOGOSIAN (Head, Convention Secretariat) said that the new paragraph 7 echoed some of the provisions under Article 23 of the WHO FCTC relating to the budget and workplan of the Conference of the Parties. Paragraph 6, on the other hand, dealt with a subject not addressed in the Convention, namely voluntary assessed contributions: it was up to the Conference of the Parties to adopt a decision to establish the relevant mechanism. Even if paragraph 6 were not included in the protocol, the matter of the scale of that mechanism could be considered later by the Meeting of the Parties itself.

The CHAIRPERSON invited comments on paragraph 7 first, as it dealt with a procedural issue. The text in question read: "At each ordinary session, the Meeting of the Parties shall, by consensus, adopt a budget and workplan for the financial period until the next ordinary session, which shall be distinct from the WHO Framework Convention on Tobacco Control budget and workplan".

Dr KONUMA (Japan) expressed concern about the financial implications of that paragraph which, as it stood, would allow the Meeting of the Parties to seek funding from Parties to the Convention that were non-Parties to the protocol, and to decide how such funding would be used.

Ms ALI-HIGO (Djibouti) asked whether it was appropriate to recommend separating the terms of reference of the two governing bodies at that stage, or whether it was a matter that should be left to the Meeting of the Parties.

Mr ALMOSAYTEER (Saudi Arabia) said that since paragraph 7 dealt with the key question of financial obligations, it would be important to verify that it was in harmony with the provisions of the WHO FCTC, Article 26.5(d) of which made reference to the setting up of a voluntary global fund or other mechanisms for securing any necessary additional funding.

Mr COTTERELL (Australia) requested clarification from the European Union as to whether the intention of the new paragraphs was to ensure that the implementation and operation of the protocol were funded by the Meeting of the Parties. If so, he approved.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that all Parties to the WHO FCTC should finance the protocol until its entry into force, up to and including the first session of the Meeting of the Parties, and that its subsequent

implementation should be financed only by Parties to the protocol. Paragraphs 6 and 7 were intended to provide that certainty to future signatories.

Dr KONUMA (Japan) asked whether it would be possible to include in paragraph 6 a reference to voluntary contributions from Parties to the protocol for the operation of the protocol, to clarify the matter.

The CHAIRPERSON reminded Parties to take into account the recommendations of the informal working group, as contained in document FCTC/INB-IT/5/3, when making their statements.

Ms HERNANDEZ (Canada) suggested that the words “voluntary assessed contributions” should be included in paragraph 6 in order to align the language with that of the Convention.

Mr DESIRAJU (India) asked whether paragraph 7, which covered a procedural matter, might pre-empt paragraph 4.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) said that paragraphs 4 and 7 dealt with two distinct issues: the latter with the adoption of the budget of the Meeting of the Parties and the former with the Financial Rules governing how it was spent.

Ms ALI-HIGO (Djibouti) suggested that, for the sake of overall consistency, paragraph 6 should be incorporated into Article 38 of the protocol.

The CHAIRPERSON said that paragraph 6 could either be moved to Article 38 or remain in Article 35; it was a matter of choice.

Mr LINDGREN (Norway) said that he had no objection to paragraph 7 since it corresponded exactly to Article 23.4 of the WHO FCTC. Paragraph 6, on the other hand, might already be covered by the Financial Rules of the Conference of the Parties. In that case it might be better to delete it.

Mr DESIRAJU (India) said that there should be no reference in paragraph 7 to the budget adoption process, which was governed by the Rules of Procedure. The key point in paragraph 7 was the stipulation that the budget of the Meeting of the Parties would be distinct from that of the WHO FCTC.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) agreed that it was not strictly necessary for paragraph 7 to refer to the procedure for the adoption of the budget as that was laid down in Rule 50 of the Rules of Procedure of the Conference of the Parties, which would also apply to the Meeting of the Parties.

Mr ALMOSAYTEER (Saudi Arabia), supporting the comments by the representatives of Norway and India, said that it might be possible to delete paragraph 6 as well, since it dealt with a question that could, according to the Head of the Convention Secretariat, be tackled at a later stage.

Dr KONUMA (Japan) said that paragraph 6 should not be deleted as it stipulated clearly that non-Parties to the protocol had no obligations with regard to its financing.

Ms HERNANDEZ (Canada) stressed the importance of the distinction drawn in paragraph 7 between the budget and workplan of the Meeting of the Parties and those of the WHO FCTC.

Dr KONUMA (Japan) said that if paragraph 7 meant that contributions would go towards the activities of the Meeting of the Parties, it was unacceptable and should be deleted.

Ms ALI-HIGO (Djibouti) said that she did not object to retaining paragraph 7 as long as it did not impose restrictions on the Meeting of the Parties, as it was a sovereign governing body.

The CHAIRPERSON said that, in view of the lack of consensus, paragraphs 6 and 7 could be removed from Article 35 and presented as recommendations, together with those of the informal working group, in his report to the Conference of the Parties. It would then up to the Conference of the Parties to decide on the best way forward.

Ms BERNER (Denmark), speaking on behalf of the European Union, maintained her request to have the two paragraphs included in Article 35. Paragraph 6, for which there appeared to be some support among Parties, was designed to eliminate any uncertainty as to who would be financing the protocol; and paragraph 7 was intended to reassure new Parties to the protocol that funding would be received from a variety of sources.

Ms HERNANDEZ (Canada) said that, having seen no opposition to the principle underlying the two new paragraphs, she expected that they could be accepted by consensus as recommendations to the Conference of the Parties, which had the final say on how the protocol was to be financed.

Dr KONUMA (Japan), responding to a query from the CHAIRPERSON as to whether retaining paragraph 6, in particular, would prevent his country from ratifying the protocol, said that he could accept the inclusion of both paragraphs in the protocol provided that paragraph 6 made a reference to voluntary contributions.

The CHAIRPERSON said that he took it that the Intergovernmental Negotiating Body wished to incorporate paragraphs 6 and 7 into Article 35.

It was so agreed.

The CHAIRPERSON urged Parties that had expressed doubts about paragraph 4 to conclude their deliberations as quickly as possible so that the square brackets could be removed and Article 35 approved in its entirety.

(For continuation of the discussion on Article 35, see summary record of the fifteenth meeting.)

• Article 36: Secretariat

Subparagraph 2(b)

Ms BERNER (Denmark), speaking on behalf of the European Union, suggested that subparagraph 2(b) should be divided into two separate subparagraphs. The first would read: “analyse as appropriate and transmit reports received by it pursuant to this Protocol”, which reflected Article 24.3(b) of the WHO FCTC. The second, a new subparagraph 2(b)bis, would

read: “establish and maintain the global information sharing focal point referred to in Article 7 of this Protocol in a manner to be decided by the Meeting of the Parties”. Responding to a query by the CHAIRPERSON as to whether the European Union believed the focal point and the clearing-house mechanism referred to in the original version of subparagraph 2(b) to be one and the same, she asked at what other point in the draft protocol was there reference to such a mechanism.

Mr COTTERELL (Australia) welcomed the new subparagraph but preferred not to see the reference to the global information sharing focal point, which was described in Article 7. The matter was already covered adequately in subparagraph 2(h).

Ms MOODLEY (alternate to Ms Matsau, South Africa) and Mr SONG (Singapore) supported the previous speaker’s comments.

Mr ALBUQUERQUE E SILVA (Brazil) said that a key element was missing from the new text proposed by the European Union: it failed to mention that the Secretariat, in order to fulfil its function of facilitating information exchange among the Parties, should provide Parties with feedback on the reports it received. That feedback was crucial in order to ensure the most effective implementation of the protocol. His delegation could not accept the proposed text without a guarantee that words to that effect would be included.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that, assuming subparagraph 2(b)bis were rejected, adding the words “and provide feedback to the Parties as requested” to the proposed subparagraph 2(b) might help to address the concerns raised by the representative of Brazil.

Dr NIKOGOSIAN (Head, Convention Secretariat), responding to a request for clarification from Mr ALBUQUERQUE E SILVA (Brazil), explained that Parties submitted their reports once every two years, as required under the reporting mechanism established by the Conference of the Parties. Pursuant to the request of the Conference of the Parties, the Convention Secretariat provided feedback on various aspects of the reports; posted the information on the web site of the WHO FCTC to ensure that it was widely shared; produced a series of analytical reports; and submitted a global implementation report to the Conference of the Parties. The entire procedure was underpinned by decisions of the Conference of the Parties, and Parties’ reports were kept in a regularly updated database.

The idea of establishing a clearing-house mechanism concerned general information sharing and, as he recalled, had nothing to do with the global information sharing focal point mentioned in Article 7 of the draft protocol.

Mr ALBUQUERQUE E SILVA (Brazil) suggested the deletion of the words “as appropriate” and “as requested” in the amended version of subparagraph 2(b) proposed by the European Union, which would then read: “analyse and transmit reports received by it pursuant to this Protocol, and provide feedback to the Parties”.

Ms BERNER (Denmark), speaking on behalf of the European Union, stressed that the Convention Secretariat must not be compelled systematically to provide feedback; not all reports required analysis and, besides, there was no mention of feedback in the Convention itself. She suggested that the last part of the subparagraph should be amended to read: “and provide feedback to the Parties as needed” and that the words “as appropriate” be retained.

Responding to a query by the CHAIRPERSON, however, she agreed to withdraw the latter suggestion.

Dr NEBLI (Tunisia) drew attention to the fact that the new version of the subparagraph did not refer to the Convention Secretariat's role in facilitating the exchange of information among Parties.

Ms MOODLEY (alternate to Ms Matsau, South Africa) asked whether the phrase "transmit reports received" meant that only reports received would be transmitted.

Ms ALI-HIGO (Djibouti) said that the subparagraph should also require that feedback be provided to the Meeting of the Parties.

Dr NIKOGOSIAN (Head, Convention Secretariat), responding to a query from the CHAIRPERSON as to how the Convention Secretariat's activities might differ if the shorter version of subparagraph 2(b) were approved, said that the only difference was that the shorter version did not refer explicitly to the task of facilitating information exchange among Parties. That, however, had always been a key role that the Secretariat was expected to perform. While the Convention made no mention of feedback and analysis, the Conference of the Parties had adopted decisions at its first and second sessions specifically requesting two kinds of feedback: first to the Parties, on the reports received, and second to the Conference of the Parties, in the form of a global implementation report.

Dr ABASCAL (Uruguay) suggested that the first part of original text, which required feedback to be provided both to the Parties and to the Meeting of the Parties, should also appear in the new version.

The CHAIRPERSON recalled that the original version of subparagraph 2(b) covered the key elements of what the Convention Secretariat would do with information received from the Parties to ensure that they were kept abreast of the latest developments. He asked whether the European Union could reconsider its position and accept the original version.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that the original version was not acceptable because it established a clearing-house mechanism that had not yet been agreed on. She suggested that the words "facilitating exchange of information among Parties" should be added to the end of the new proposed version.

Ms MADRAZO REYNOSO (Mexico), supported by Ms ALI-HIGO (Djibouti), suggested reverting to the original version of the subparagraph and simply deleting the phrase "and to establish and maintain a clearing-house mechanism in a manner to be decided by the Meeting of the Parties".

Ms BERNER (Denmark), speaking on behalf of the European Union, said that she could accept the previous speaker's suggestion, provided that the words "as needed" were inserted after "feedback to Parties concerned" in the first line.

The CHAIRPERSON said that, in the absence of any further objection, he would take it that subparagraph 2(b), as amended, was approved.

It was so agreed.

Article 36, subparagraph 2(c) and Article 38.6, subparagraphs (a) and (b)

Ms BERNER (Denmark), speaking on behalf of the European Union, supported by Ms HERNANDEZ (Canada), suggested replacing the text of subparagraph 2(c) with the language of Article 24.3(c) of the WHO FCTC.

Ms ALI-HIGO (Djibouti), supported by Ms MOODLEY (alternate to Ms Matsau, South Africa), said that Article 24.3(c) of the WHO FCTC made no mention of support to Parties for the exchange of information and the identification of resources to facilitate implementation of their obligations under the protocol. Subparagraph 2(c) should include that kind of support.

The CHAIRPERSON, recalling the comment by Ms BERNER (Denmark) about not deviating from the agreed language, said that, as Ms HAMILTON (Canada) had pointed out, the matter of identification of resources was covered by Article 38.6(b), which was already agreed.

Ms ALI-HIGO (Djibouti), supported by Ms MOODLEY (alternate to Ms Matsau, South Africa), suggested that the word “advise” in Article 38.6(b) should be replaced by “support”.

Ms HAMILTON (Canada), supported by Mr DONBE (Chad), said that the notion of “support” was already contained in Article 38.6(a), when considered in combination with Article 38.6(b).

The CHAIRPERSON said that Article 38.6(a) covered the concept of support, while the wording of paragraph 38.6(b) meant that such support could be limited to advice.

Ms ALI-HIGO (Djibouti) noted that Article 38.6(a) appeared to call for a commitment from the Parties themselves to provide the assistance needed. That raised the question of what role the Convention Secretariat would play beyond advising developing country Parties and Parties with economies in transition on how to offset a lack of resources. The reference to support for those Parties should remain in Article 38.6(b).

Ms HAMILTON (Canada) said that her delegation regarded subparagraphs (a) and (b) of Article 38.6 as two complementary yet separate parts of a whole: the Parties would mobilize funding pursuant to the first; and the Convention Secretariat, pursuant to the second, would ensure that developing country Parties and Parties with economies in transition had access to such funding by advising them on available sources. Her delegation preferred to limit the Secretariat’s role to providing advice rather than support.

Ms BERNER (Denmark), speaking on behalf of the European Union, supporting the previous speaker’s comments, said that the word “support” made little sense in the context of subparagraph (b), which concerned advice on available sources.

Mr DONBE (Chad) noted that the cause of the current predicament appeared to lie in a tautology stemming from the French translation of the word “facilitate” in Article 36.2(c).

Ms MOODLEY (alternate to Ms Matsau, South Africa) suggested that the problem with the word “support” might be that it needed to be defined as going beyond a financial commitment.

Ms ALI-HIGO (Djibouti) said that, while it might be somewhat redundant to use the word “support” in Article 38.6(b) with regard to assisting certain countries in implementing their obligations under the protocol, there was no such redundancy in the actual concept of support.

The CHAIRPERSON said that, assuming that under subparagraph (b) of Article 38.6, the Convention Secretariat would be expected to direct Parties towards available sources of funding, as opposed to actually giving them the money, the text might be amended to read: “the Convention Secretariat shall assist developing-country Parties and Parties with economies in transition, on request, in identifying available sources of funding”.

Ms MADRAZO REYNOSO (Mexico) asked why representatives were wasting so much effort when the original version of Article 36.2(c), which had already been agreed at the previous session, contained exactly the same wording as Article 26.5(b) of the Convention.

The CHAIRPERSON said that a solution must be found to reflect the concerns of the representatives of Djibouti and South Africa. To that end, he suggested that subparagraph (c) of Article 36.2 should be amended to read: “provide support to the Parties, particularly developing-country Parties and Parties with economies in transition, on request, in the compilation, communication and exchange of information required in accordance with the provisions of this Protocol, and assistance in the identification of available resources”. Assistance, in that context, could be understood to mean support, help and/or aid. If agreement could be reached on his proposed text, the consensus language in Article 38.6(b) would not need to be reopened for debate.

Ms MOODLEY (alternate to Ms Matsau, South Africa) suggested adding the words “to facilitate implementation of the obligations of this Protocol” to the end of the Chairperson’s proposed text.

The CHAIRPERSON said that, in the absence of any further comment, he took it that the meeting wished to approve the version of Article 36.2(c) that he had just proposed, as amended by the representative of South Africa.

It was so agreed.

Subparagraphs 2(d), (e) and (f)

The CHAIRPERSON said that, if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to approve subparagraphs (d), (e) and (f) of Article 36.2 as they stood.

It was so agreed.

Subparagraph 2(g)

Ms HERNANDEZ (Canada) said that the first option in square brackets, namely “to be accredited as observers to”, was preferable.

Ms BERNER (Denmark), speaking on behalf of the European Union, suggested that, in order to bring the text further into line with the language in the WHO FCTC, especially

Article 5.3, the words “to protect the implementation of the Protocol from commercial or other vested interests, especially from the tobacco industry, and” should be inserted following the words “in order”. In addition, the word “reviewed” should be inserted before the words “applications to the Meeting of the Parties”.

Ms HERNANDEZ (Canada) said that the amendment proposed by the European Union was confusing, as it appeared to imply that the review of applications from prospective observers was intended specifically to protect the implementation of the protocol from commercial or vested interests.

Mr HAMANEH (Islamic Republic of Iran) asked whether it was the task of nongovernmental organizations to protect the implementation of the protocol from those interests.

The CHAIRPERSON agreed that the proposed amendment was confusing, and even inaccurate. He suggested that it should be withdrawn.

Ms BERNER (Denmark), speaking on behalf of the European Union, said that the words “in order to” could be replaced with “keeping in mind the need to”.

The CHAIRPERSON suggested replacing the entire phrase with “taking into account Article 5.3 of the WHO Framework Convention on Tobacco Control, in order to present the reviewed applications”.

Mr HAMANEH (Islamic Republic of Iran) said that he failed to see the connection between Article 5.3, which dealt with the general obligations of the Parties to the Convention and an article under the protocol that established a mandate for the Convention Secretariat.

Mr DLAMINI (Swaziland) said that he failed to see the point of the reference to Article 5.3.

The CHAIRPERSON said that a reference to Article 5.3 was not strictly necessary but would serve to emphasize that the Parties were trying to protect the protocol from the influence of the tobacco industry. Given the reactions from the floor, however, it might be best to remove the reference.

Mr HAMANEH (Islamic Republic of Iran) said that the point did need to be reflected in subparagraph 2(g). It could be made more explicit, however, by replacing the text proposed by the European Union with language borrowed from the seventeenth preambular paragraph of the WHO FCTC: “in order to make sure that they are not affiliated with the tobacco industry”. That would clarify the fact that the receipt and review of applications would not be undertaken to present them to the Meeting of the Parties, but rather to ensure that potential observers were not affiliated with the tobacco industry.

The CHAIRPERSON said that the content of the subparagraph was covered in the Rules of Procedure of the Conference of the Parties, which would also apply to the protocol, and that the entire subparagraph could be deleted. He asked the representative of the European Union whether her request to include a reference to Article 5.3 of the Convention could be withdrawn.

Ms BERNER (Denmark), speaking on behalf of the European Union, reiterated the conviction of her Party that the content of its proposal, which had already been unanimously agreed under the WHO FCTC, should remain in the protocol.

Ms ALI-HIGO (Djibouti) said that Parties were fully aware of what the tobacco industry had to gain from undermining effective implementation of the protocol and, hence, it was important to retain subparagraph 2(g) as well as the reference to Article 5.3 of the Convention.

Dr BEKBASAROVA (Kyrgyzstan) said that Article 5.3 gave the Parties a clear mandate to protect their health policies from interference by the tobacco industry. The pernicious nature of that industry needed to be reflected in subparagraph (g).

Ms KIPTUI (Kenya), speaking on behalf of the Parties in the WHO African Region, said that the contents of an already proposed preambular paragraph should help to ensure that organizations accredited as observers were not affiliated with the tobacco industry. It might not be necessary to repeat the point in subparagraph (g).

The CHAIRPERSON requested the representative of the European Union to meet informally with the representatives of Djibouti, the Islamic Republic of Iran and other interested Parties in order to come up with an acceptable text, taking into account the relevant rules in the Rules of Procedure. Subparagraph (g) would be placed in square brackets pending the outcome of that discussion.

Subparagraph 2(h)

The CHAIRPERSON said that, in the absence of any objection, he would take it that subparagraph 2(h) could be approved as it stood.

It was so agreed.

• Article 37: Relations between the Meeting of the Parties and intergovernmental organizations

The CHAIRPERSON said that, in the absence of any objection, he would take it that the Intergovernmental Negotiating Body wished to approve Article 37 as it stood.

It was so agreed.

• Article 38: Financial resources

Dr CALLE PLATA (Plurinational State of Bolivia), referring to subparagraph 6(b) of Article 38, asked the Convention Secretariat how it intended to help developing countries, such as his own, to find available sources of funding.

The CHAIRPERSON took note of the question and promised a reply at the beginning of the next meeting.

(For continuation of the discussion on Article 38, see summary record of the fifteenth meeting.)

The meeting rose at 18:05.

FIFTEENTH PLENARY MEETING

Tuesday, 3 April 2012, at 19:10

Chairperson: Mr I. WALTON-GEORGE (European Union)

DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/INB-IT/5/4, FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part VII: Institutional arrangements and financial resources (continued)

- **Article 38: Financial resources** (continued from the fourteenth meeting)

Dr CALLE PLATA (Plurinational State of Bolivia), referring to subparagraph (b) of Article 38.6, requested clarification from the Convention Secretariat as to how it would assist developing country Parties such as his own in finding available sources of funding to facilitate implementation of their obligations under the protocol.

Dr NIKOGOSIAN (Head, Convention Secretariat) said that there were three ways in which the Convention Secretariat could meet its obligation to respond to a Party's request for assistance. First, it could give the Party access to its database of resources available for implementation of the Convention; the database would, moreover, be updated to include donors and partners specifically interested in supporting implementation of the protocol. Secondly, it could dispatch an international mission to the country to conduct a needs assessment and identify sources of funding specific to that country in addition to the sources identified in the database. Thirdly, any Party could request help in identifying resources for a particular implementation project. In that case, the Convention Secretariat, drawing on its knowledge of – and contacts in – the donor community, would match the project's specific needs with the appropriate resources, and facilitate access to them.

The CHAIRPERSON observed that a consensus had been reached on all but paragraph 4 of Article 38, which remained in square brackets and would be revisited later. Parties should refrain from reopening the discussion on any text that the Intergovernmental Negotiating Body had already approved by consensus, unless it was a matter of national importance.

For continuation of the discussion on Article 38, see summary record of the sixteenth meeting.)

- **Article 39: Settlement of disputes**
- **Article 40: Amendments to this Protocol**
- **Article 41: Adoption and amendment of annexes to this Protocol**

Part X: Final provisions

- **Article 42: Reservations**

- **Article 43: Withdrawal**

The CHAIRPERSON said that, in the absence of any objections, he took it that the meeting wished to confirm the consensus achieved previously on Articles 39, 40, and 43; approve Article 41 and leave Article 42, which was quite sensitive, until last.

It was so agreed.

- **Article 44: Right to vote**

Paragraph 2

Mr HAMANEH (Islamic Republic of Iran) suggested that, to avoid any ambiguity, the words “to this Protocol” should be inserted after “Member States that are Parties” in paragraph 2.

The CHAIRPERSON said that he agreed with Mr SONG (Singapore) that the distinction could be made throughout by using a lower- or upper-case first letter for the word “Parties”, but preferred to leave that task aside for the time being. If he saw no objection, he would take it that the meeting wished to approve paragraph 2, as amended by the Islamic Republic of Iran.

It was so agreed.

- **Article 45: Signature**

Ms LANNAN (Convention Secretariat), speaking at the invitation of the Chairperson, said that the question of the places where, and dates on which, the protocol would be opened for signature could be decided by the Parties, as in the case of the WHO FCTC. On the advice of the United Nations Treaty Section, she suggested that Article 45 should read: “The Protocol shall be open for signature by all Parties to the WHO Framework Convention on Tobacco Control at WHO headquarters in Geneva from [date to be determined] to [date to be determined], and thereafter at United Nations Headquarters in New York from [date to be determined] to [date to be determined]”. Typically, it would be open for signature for a few days in Geneva and approximately one year in New York. The Treaty Section had further advised Parties to allow for a four- to six-week period between the two.

The CHAIRPERSON estimated that the protocol could be open for signature from early February 2013.

Dr CALLE PLATA (Plurinational State of Bolivia) asked asked askasked which national authorities would be considered eligible to sign the protocol.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) explained that any authority with plenipotentiary powers could sign on behalf of its government. It was not standard practice to state which national authority in particular in the instrument itself.

The CHAIRPERSON said that, having heard no objection, he took it that the Intergovernmental Negotiating Body wished to approve by consensus the wording proposed by the Convention Secretariat for Article 45.

It was so agreed.

- Article 46: Ratification, acceptance, approval, formal confirmation or accession
- Article 47: Entry into force

The CHAIRPERSON said that, if he saw no objection, he would take it that the Intergovernmental Negotiating Body wish to confirm the consensus reached on Articles 46 and 47 at its third session.

- Article 48: Depositary

The CHAIRPERSON said that, according to the United Nations Treaty Section, there was no need for Article 48 to refer to amendments, annexes or other articles of the protocol. The Treaty Section had suggested that the text should be amended to read: “The Secretary-General of the United Nations shall be the Depositary of this Protocol”. In the absence of any objection, he took it that Article 48, as amended, was approved by consensus.

It was so agreed.

- Article 49: Authentic texts

The CHAIRPERSON said that, if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to confirm the consensus that had been reached at its third session on Article 49.

It was so agreed.**Part V: International cooperation** (continued from the twelfth meeting)

- Article 31: Extradition (**continued from the twelfth meeting**)
- Article 32: Measures to ensure extradition

Ms EVISON (New Zealand), speaking in her capacity as Chair of the open-ended working group on extradition,¹ said that all of the Parties involved in its work had shown considerable flexibility in achieving agreement on Articles 31 and 32.

Regarding Article 31, the group had agreed to revert to the original version of paragraph 1, as proposed by the informal working group. After lengthy discussion, it had decided that the end of subparagraph (c) should be amended to read: “deprivation of liberty of at least four years or by a more severe penalty or such lesser period as agreed by the Parties concerned pursuant to bilateral and multilateral treaties or other international agreements”. Paragraph 2 had been deleted and paragraphs 3 to 14 approved as they stood. Lastly, to allow Parties to maintain current agreements that they believed were useful, a second sentence had been added to paragraph 15, which read: “Where Parties are bound by an existing treaty or intergovernmental arrangement the corresponding provisions of that treaty or intergovernmental arrangement shall apply unless the Parties agree to apply paragraph [number to be determined] in lieu thereof”. All that remained was to identify the relevant paragraph in the treaty. The group had not amended Article 32.

¹ See summary record of the thirteenth meeting (establishment of the working group), and summary record of the fourteenth meeting (first report of the working group).

The CHAIRPERSON said that, if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to approve Articles 31 and 32, as agreed by the working group on extradition.

It was so agreed.

Part IV: Offences

- Article 12: Unlawful conduct including criminal offences (**continued from the fourteenth meeting**)

Subparagraph 1(i) (continued)

Ms EVISON (New Zealand), speaking in her capacity as Chair of the open-ended working group on extradition, said that in its discussion of subparagraph 1(i), the group had gone to great lengths to achieve agreement and major concessions had been made, especially by the many Parties that wanted to see the subparagraph deleted on the grounds that it had no place in the part of the protocol dealing with unlawful conduct. One difficult issue had been whether to have the laundering of the proceeds of unlawful conduct “recognized”, “notified” or “established” as a criminal offence in the light of paragraph 2bis. Further to a query from the CHAIRPERSON as to which word the group had generally felt to be the most appropriate, she said that no strong preference had been expressed but that she personally would opt for “established”.

She strongly recommended that the plenary refrain from reopening for debate the thorny issue of whether subparagraph (i) should be kept in Article 12.1. The advice from the group’s external experts had been that it would not adversely affect those Parties that had already classed laundering as a criminal offence.

The CHAIRPERSON drew attention to the text, as amended by the working group, which read: “laundering of proceeds of unlawful conduct established as a criminal offence under paragraph 2”.

Mr COTTERELL (Australia) said that he was uncomfortable with the expression “proceeds of unlawful conduct”. The usual expression was “proceeds of crime”. The laundering of proceeds of crime was always a criminal offence; and the content of subparagraph (i) should be subsumed under paragraph 2 or presented in a separate paragraph. In the interest of achieving a consensus, however, Australia was prepared to set aside its reservations and support the working group’s choice.

Mr DESIRAJU (India) drew attention to the fact that subparagraph (i) was the last of a list of examples of conduct that each Party, pursuant to the introductory sentence in Article 12.1, must establish as unlawful under its national law. In other words, Parties were expected to establish the laundering of proceeds of unlawful conduct as unlawful conduct.

Ms EVISON (New Zealand), speaking in her capacity as Chair of the working group on extradition, said that the group had examined the wording of Article 12.1 very closely in order to arrive at a solution, albeit imperfect, on which all of its members, especially Australia and others that were opposed to keeping subparagraph (i), could agree.

The CHAIRPERSON said that, if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to approve by consensus subparagraph (i) of Article 12.1, as amended by the working group on extradition.

It was so agreed.

(Resumed below, following discussion of Article 26.)

Part V: International cooperation (resumed)

• **Article 26: Jurisdiction** (continued)

The CHAIRPERSON suggested that in paragraphs 1 and 2, the words “Article 12.1” should read “Article 12”. He further suggested that the square brackets should be removed from the first part of subparagraph 1(b), which read: “the offence is committed on board a vessel that is flying the flag of that Party”.

Mr YOST (Canada) said that he could not see the basis under Canadian law for his Government having jurisdiction over an offence simply because it had been committed on board an Air Canada flight, for example, or a ship sailing under the Canadian flag outside his country’s territorial waters.

Ms MANSUR (Israel) said that such a provision was found in customary international law. If there were States that had not adopted, or could not adopt, the relevant measures under their domestic law, then the subparagraph would need to be deleted.

Mr YOST (Canada) withdrew his objection.

Dr CALLE PLATA (Plurinational State of Bolivia) said that subparagraph (b) posed a problem in that his country did not have any territorial waters.

Mr HAMANEH (Islamic Republic of Iran) questioned the inclusion of subparagraph 2(c)(i) in Article 26, as the text had been taken from the United Nations Convention against Transnational Organized Crime, which dealt with serious crime – and crime in general – as opposed to unlawful conduct.

Mr YOST (Canada), noting that the United Nations Convention against Transnational Organized Crime had separate subparagraphs for different types of crimes, said that only one was needed at that point in the draft protocol.

The CHAIRPERSON suggested that subparagraph 2(c)(i) should be deleted and the remaining subparagraph 2(c)(ii) renumbered as subparagraph 2(c). He further suggested deleting the reference to Article 33 in paragraph 3, as the Article itself had already been deleted.

Mr HAMANEH (Islamic Republic of Iran), drawing attention to the phrase “criminal offences covered by this Protocol” in paragraph 4, pointed out that, for the time being, the draft protocol did not cover any such offences. To avoid any ambiguity, that phrase should be amended.

The CHAIRPERSON suggested replacing the phrase in question with “criminal offences established in accordance with Article 12”. He suggested that the same change should be made in paragraph 3.

Mr XINMIN (China), drawing attention to the absence of a definition of the terms “criminal offence” and “jurisdiction” in Article 1, said that it had been left to individual Parties to decide what those terms meant, which rendered the provisions redundant. Article 26 should be deleted in its entirety. At the request of the CHAIRPERSON, given that China was the only Party objecting to the Article, he agreed to withdraw his proposal.

The CHAIRPERSON said that, if he heard no objection, he would take it that Article 26 as a whole could be approved by consensus.

It was so agreed.

Part IV: Offences (resumed)

• **Article 12: Unlawful conduct including criminal offences** (resumed)

Subparagraph 1(c)

The CHAIRPERSON said that a number of Parties, in the course of informal exchanges, had drafted alternative wording that avoided any reference to counterfeiting, and that might provide the basis for agreement on subparagraph 1(c). First, it had been suggested that subparagraph 1(c)(i) should read: “any other form of illicit manufacture of tobacco, tobacco products or manufacturing equipment, or tobacco packaging bearing false fiscal stamps, unique identification markings, or any other required markings or labels”. Secondly, subparagraph 1(c)(ii) should read: “wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting of illicitly manufactured tobacco, illicit tobacco products, products bearing false fiscal stamps and/or other required markings or labels, or illicit manufacturing equipment”.

Ms FAERCH (European Union), speaking in her capacity as Chair of the working group on subparagraph 1(c) of Article 12, explained that the new version of that subparagraph was a compromise text to accommodate the views expressed by the representatives of Brazil and India. The European Union would have preferred to retain the word “counterfeiting”.

Mr COTTERELL (Australia), speaking on behalf of the Parties in the WHO Western Pacific Region, which had favoured the removal of the word “counterfeiting”, thanked the European Union for the constructive proposal but expressed reservations about the formulation. He suggested that an additional paragraph should be added to the preamble, to read: “Considering that this Protocol does not seek to address issues concerning intellectual property rights”.

Mr ALBUQUERQUE E SILVA (Brazil) said that although wording such as “illicit manufacturing of tobacco” and the reference to “tobacco packaging”, for example, might be misleading, Brazil was grateful to the European Union for the compromise text and, in a spirit of flexibility, would agree to accept it; the compromise was being made on both sides. He also supported the proposal by the representative of Australia.

Mr DESIRAJU (India) said that the text proposed by the European Union was acceptable, and supported the proposal by the representative of Australia.

Dr KONUMA (Japan) suggested adding the phrase “which fall under the authority of other international organizations” to the end of the new preambular paragraph, which would take into account the position expressed by the representative of Brazil in the previous discussion on subparagraph (c).

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that he supported the proposed new language for Article 12.1(c) and the preamble. It might also be useful to emphasize the underlying purpose of the protocol, namely to protect public health.

Subparagraph 1(d) (continued)

The CHAIRPERSON reopened discussion on subparagraph 1(d), on which a decision had yet to be reached as to which of the two options to adopt.

Mr ROWAN (European Union) explained the reasoning behind the proposal to divide subparagraph (d) into two separate subparagraphs. The new subparagraph (d) covered the intermingling of tobacco with non-tobacco products throughout the supply chain, the word “mixing” having been used to avoid repetition, whereas subparagraph (d)bis drew attention to the need to prohibit the intermingling that specifically took place in free zones. It had been considered important to highlight that problem in view of the large number of Parties that had expressed concerns about it.

Dr ROA (Panama) said that she supported the proposal made by the representative of the European Union.

Mr SONG (Singapore) said that he understood and appreciated the reasons for the European Union’s proposal, but preferred to revert to the original text. The core concern was the intermingling of tobacco with non-tobacco products, and it should be addressed throughout the supply chain. Given the European Union’s emphasis on the word “illicit” in the compromise text Article 12.1(c), and its place in the title of the protocol itself, it might be a good compromise to refer to “illicit intermingling”.

Ms MOODLEY (alternate to Ms Matsau, South Africa), Ms OBILLOS-MAPA (Philippines) and Dr NEBLI (Tunisia) supported the proposal by the representative of Singapore.

Mr HAMANEH (Islamic Republic of Iran) queried the addition of the word “illicit” as the purpose of the intermingling, namely to conceal or disguise tobacco products, was in itself illicit.

The CHAIRPERSON asked the representative of the European Union whether he could agree to keeping the original version of subparagraph (d) while adding the proposed subparagraph (d)bis.

Mr ROWAN (European Union) said that the European Union had included the term “supply chain” in its proposed version of subparagraph (d) because that term was defined in Article 1.

The CHAIRPERSON asked Singapore and the other Parties supporting its proposal whether they could accept subparagraph (d) as proposed by the European Union, given that the term “supply chain”, as defined in Article 1, could be regarded as shorthand for “storage, warehousing, transit, transportation, import or export”.

Mr SONG (Singapore) said that he could be flexible on the matter of shortening the text, in the light of the definition of “supply chain”, but preferred to revert to the original version because the term “intermingling” must be understood to cover the entire chain. As for the word “illicit”, he pointed out that products might be intermingled for an entirely innocent purpose. It was important that subparagraph (d) should include the word “illicit”, in the first line for example, so that it read “intermingling of illicit tobacco products”, which should also apply to the whole supply chain.

The CHAIRPERSON suspended the discussion on subparagraph (d) pending the outcome of the work on Articles 5 to 11bis, which might provide guidance as to a possible solution.

Paragraph 2bis (continued)

The CHAIRPERSON, turning to paragraph 2bis, recalled the reasons why there were square brackets within the paragraph itself. First, the words “and a description thereof” had been inserted to take account of countries whose official language was not one of the United Nations official languages. Secondly, the phrase “established in accordance with paragraphs 1 and 2” had been added in view of the fact that those two paragraphs covered different types of conduct. Thirdly, it had been considered important for each Party to supply the Convention Secretariat with copies of its national laws.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) sought clarification as to what action could be taken, pursuant to Article 5.3 of the United Nations Convention against Transnational Organized Crime, against a Party failing to notify the Convention Secretariat of which unlawful conduct it had established as a criminal offence under its national law, and what penalties would be imposed.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the CHAIRPERSON, said that the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, or any other treaty for which the Office he represented had responsibility, could discuss particular cases and, if deemed necessary, encourage or require the Party concerned, through the adoption of resolutions, to comply with the provision.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that a Party that had not notified the depositary of its laws and the associated penalties could also refuse to submit to an enquiry. What could be done in that case? In general, paragraph 2bis should be made more forceful and binding.

Mr CORACINI (Invited expert, United Nations Office on Drugs and Crime), speaking at the invitation of the Chairperson, drew attention to a separate obligation in subparagraph 8(g) of Article 30 of the draft protocol, which required Parties applying for mutual legal assistance to include in their application copies of the provisions in domestic law relevant to the criminal offence and its associated punishment.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that he would prefer to see an additional measure introduced, setting a deadline for Parties to notify the Secretariat of the conduct they had determined to be criminal offences, thereby making it an obligation with which they must comply. Otherwise, the provision would remain non-binding.

The CHAIRPERSON said that, while he understood the previous speaker's concern, the text had been modelled on the United Nations Convention against Transnational Organized Crime and he was reluctant to begin any new drafting at present. It might be possible to return to the matter, should there be time, once everything else in the protocol had been agreed.

Mr COTTERELL (Australia) said that he agreed with the spirit of new paragraph 2bis but expressed concern about the drafting and asked whether there might be a better legal formulation.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) explained that the proposed paragraph was a hybrid of language from the United Nations Convention against Transnational Organized Crime and new wording.

The CHAIRPERSON said that the text was long and unwieldy but might prove difficult to reformulate. He asked the representative of Australia either to accept it as it stood, or to propose an alternative. The discussion on paragraph 2bis was suspended.

Part I: Introduction (continued)

• Article 1: Use of terms (continued)

The CHAIRPERSON drew attention to the recommendations of the working group on definitions, namely that a definition was needed in Article 1 for the term “cigarette” but not for the terms “due diligence”, “fraud”, “fraudulent” or “disposal”; the latter, as he had pointed out that afternoon, should be understood to mean “to get rid of”. After lengthy discussion, the group had agreed on a two-part definition for “cigarette”. The first would read: “‘Cigarette’ means a roll of cut tobacco for smoking, enclosed in cigarette paper. This excludes specific regional products such as bidis, ang hoon, or other similar products which can be wrapped in paper or leaves”. The second would read: “For the purpose of Article 7, ‘cigarette’ also includes fine cut ‘roll your own’ tobacco for the purposes of making a cigarette”.

Mr NGEYWO MASUDI (Kenya) said that he supported the definition of “cigarette” but suggested that it should be extended to encompass electronic cigarettes, which were increasingly popular.

The CHAIRPERSON pointed out that since electronic cigarettes did not actually contain any tobacco, they did not fall within the definition of tobacco products. However, the issue was currently being discussed as part of the general public health debate in various forums, and would be included in the agenda of the next session of the Conference of the Parties. It might be possible to amend the protocol at a later stage, depending on the outcome of those discussions.

Mr NGEYWO MASUDI (Kenya) withdrew his suggestion.

Dr BEKBASAROVA (Kyrgyzstan) drew attention to the fact that electronic cigarettes contained nicotine, the main active constituent found in tobacco leaves, which served to maintain tobacco dependence. They could therefore be included in the definition as one type of tobacco product and be subject to the same controls in national and international legislation.

The CHAIRPERSON said that that might well be the conclusion arrived at in the other forums, but it was too early to reflect it in the protocol. It was too vast a subject and should be left to the Conference of the Parties or Meeting of the Parties.

Dr ROA (Panama), supported by Dr ASQUETA (Uruguay), speaking on behalf of Brazil and Mexico, said that she shared the views expressed by the Chairperson. Electronic cigarettes had been banned in Panama and could not be subject to the same regulations as tobacco products.

Ms BASTOS DE ANDRADE (Brazil) pointed out that the subject also tied in with the discussion on Articles 9 (Security and preventive measures) and 10 (Sale by Internet, telecommunication or any other evolving technology).

The CHAIRPERSON said that, in the absence of any objections, he took it that the Intergovernmental Negotiating Body approved the inclusion in Article 1 of the definition of the term “cigarette”, as proposed by the working group.

Mr HAMANEH (Islamic Republic of Iran) requested clarification as to whether tobacco for water pipes, the use of which was a problem in most of the countries of the WHO Eastern Mediterranean Region, could be defined as a tobacco product within the scope of the protocol.

Mr IBRAHIM (Sudan) asked whether the protocol also covered smokeless tobacco products, which were a particular problem in his country.

Ms MADRAZO REYNOSO (Mexico) suggested that the matter could be resolved by referring to the definition of “tobacco products” in Article 1(f) of the WHO FCTC.

The CHAIRPERSON said that he agreed with the suggestion made by the representative of Mexico.

Part III: Supply chain control (continued)

• Article 5: License, equivalent approval or control system (continued)

Mr NGEYWO MASUDI (Kenya), speaking on behalf of the Parties of the WHO African Region, said that the Parties in his Region and the European Union wished to propose that the beginning of Article 5.5 should revert to the original text, which read: “Five years following the entry into force of this Protocol”.

Mr HAMANEH (Islamic Republic of Iran), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, agreed to withdraw the proposed amendment for Article 5.5 and to revert to the original language.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, and Mr DESIRAJU (India), speaking on behalf of the Parties in the

WHO South-East Asia Region, said that they supported the suggestion by the representative of Kenya.

Mr COTTERELL (Australia), speaking on behalf of the Parties in the WHO Western Pacific Region, said that he supported the proposal by the Parties in the WHO African Region and the European Union.

The CHAIRPERSON said that, if he heard no objection, he would take it that full consensus had been reached on Article 5.

It was so agreed.

- **Article 6: Due diligence** (continued from the eighth meeting)
- **Article 7: Tracking and tracing**
- **Article 8: Record-keeping**
- **Article 9: Security and preventive measures** (continued from the second meeting)

The CHAIRPERSON invited the representative of Kenya to report on the outcome of the informal consultations that had taken place on outstanding issues in Article 6 (Due diligence) and Article 9 (Security and preventive measures).

Mr NGEYWO MASUDI (Kenya), speaking on behalf of the Parties in the WHO African Region, said that the Parties had been concerned about the emphasis in Articles 6 and 9 on “legally binding and enforceable agreements”, and the risk of it resulting in a proliferation of such agreements that could derail implementation of the protocol by developing countries. At the same time, Canada and the European Union had been keen to ensure that any amendments that were made would not put the protocol at variance with their existing agreements with tobacco companies and vice versa. The informal consultations – moderated by Thailand with the assistance of Brazil and advice from the Convention Secretariat and the Office of the Legal Counsel – had given rise to a mutually acceptable solution that also met the common concern of protecting the protocol and the Convention. It had been agreed that the phrase “in accordance with its national laws or legally binding and enforceable agreements”, in the first two paragraphs of Articles 6 and 9, should be replaced with “consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control”.

Mr LINDGREN (Norway), speaking on behalf of the Parties in the WHO European Region, said that the proposed amendments to Articles 6 and 9 were satisfactory.

Mr DESIRAJU (India), speaking on behalf of the Parties in the WHO South-East Asia Region, said that he also supported the amendments.

The CHAIRPERSON read out the introductory sentence to paragraph 2 of Article 6, which had been amended to read: “Due diligence pursuant to paragraph 1 shall, as appropriate, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, include, inter alia, requirements for customer identification, such as obtaining and updating information relating to the following”.

Responding to a query from Mr AZOFF (Israel), the Chairperson said that it would be best to keep to the compromise language, namely “national” as opposed to “domestic” law.

Mr HAMANEH (Islamic Republic of Iran), speaking on behalf of the Parties in the WHO Eastern Mediterranean Region, said that the Parties wished to join the consensus on Articles 6.1 and 6.2.

The CHAIRPERSON said that, in the absence of any objections, he would take it that full consensus had been reached on Articles 6, 7 and 8.

It was so agreed.

The CHAIRPERSON, turning to Article 9, said that the introductory sentence in paragraph 1 should be amended to read: “Each Party shall, where appropriate, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, require that all natural and legal persons subject to Article 5 take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, *inter alia*”.

The beginning of paragraph 2 should be amended to read: “Each Party shall, where appropriate, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, require that payments for transactions carried out by natural or legal persons”. The paragraph should remain where it was.

In the absence of any objection, he took it that full consensus had been reached on Articles 9 and 10.

It was so agreed.

• Article 11: Free zones and international transit (continued)

The CHAIRPERSON said that all outstanding issues in Part III of the draft protocol had been settled except for that of consistency in relation to the terms “unit packs”, “packages”, “packets” and “packaging” in Article 11.

Mr SONG (Singapore) said that he was prepared to show some flexibility with regard to the proposal to insert the words “endeavour to” after “Each Party shall” at the beginning of paragraph 1. He suggested that the beginning of paragraph 1 should be amended to read: “Each Party shall, to the greatest extent possible, within three years”. Furthermore, the words “on all” after “effective controls” should be replaced with “to combat the illicit”.

Having noted the importance attached to free zones with respect to the intermingling of tobacco and non-tobacco products in the discussion on Article 12.1(d), Singapore had decided to withdraw its proposal to delete paragraph 2 and to suggest instead that it should be amended to read: “In addition, each Party shall, to the greatest extent possible, prohibit the illicit intermingling of tobacco products with non-tobacco products in a single container or any other such similar transportation unit at the time of removal from and/or bringing into free zones for the purpose of concealing or disguising tobacco products”.

Mr FISCH BERREDO MENEZES (Brazil) requested clarification on the phrase “prohibit the illicit intermingling”. If something was illicit then it was already prohibited.

Mr ROWAN (European Union) stressed that the Parties had come together to negotiate a protocol to eliminate illicit tobacco products. Free zones were one of the greatest problems in that area. Entire regions were losing vast amounts of money every year, and there was evidence to show that the profits were being used to fund terrorism and organized crime. The words “to the greatest extent possible” and, indeed, the rest of the text proposed by Singapore were therefore unacceptable.

Dr ROA (Panama) said that amending the consensus text produced by the informal working group was unacceptable, as it had been the result of four sessions of intense work and reflected the needs of the majority of Parties.

Ms EKEMAN (Turkey) said that Article 11 must be as strongly worded as possible in order to protect free zones from abuse; the words “to the greatest extent possible” were far too subjective. She understood the concerns expressed by Singapore but was unwilling to enter into any further discussion on the matter.

Mr REGALADO PINEDA (Mexico), speaking on behalf of Brazil, Canada, Mexico, Nicaragua and Uruguay, said that he supported the comments made by the previous three speakers.

Mr LINDGREN (Norway) said that he supported the statement made by the representative of the European Union.

Mr ALBUQUERQUE E SILVA (Brazil) expressed disappointment at the attempt to introduce so much new text into the draft protocol at such a late stage. It reflected a lack of understanding of the long history of negotiations on the subject of free zones. It would be counterproductive to discuss the proposed amendments, both of which were unacceptable.

The CHAIRPERSON thanked the representative of Singapore for his attempt to find a solution. In view of the consistently negative reaction of other Parties around the room, however, he suspended the discussion on Article 11.

(For continuation of the discussion on Article 11, see summary record of the sixteenth meeting.)

The meeting rose at 21:50.

SIXTEENTH PLENARY MEETING

Tuesday, 3 April 2012, at 22:30

Chairperson: Mr I. WALTON-GEORGE (European Union)

DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/4/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued)

Part IV: Offences

- **Article 16:** [*Confiscation and seizure of assets*]/[*Seizure and confiscation*] (continued from the sixth meeting)

The CHAIRPERSON, in response to the suggestion by Ms MANSUR (Israel) that Article 16 should be deleted in order to lighten the workload for the present meeting, requested Parties to bear the proposal in mind when that Article came up for discussion .

- **Article 18:** [*Destruction*]/[*Disposal*] (continued from the thirteenth meeting)

Dr VECINO QUINTANA (Spain), speaking as Chair of the advisory committee on language, requested further clarification on the meaning of the term “disposal”, with specific reference to Article 18. French-, Russian- and Spanish-speaking members of the committee wished to know whether the term simply meant “elimination” or whether it was broader in scope, so that they could translate it accurately into their respective languages.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel), speaking at the invitation of the CHAIRPERSON, said that the term “disposal” could be interpreted in a number of ways, even in English. However, the use of the word “destruction” in the second sentence of Article 18.1 suggested a certain context which could limit its meaning to that of elimination.

Mr COTTERELL (Australia), supported by Mr DAS (India), suggested that the advisory committee on language should refer to subparagraph (c) of Article 15.4 of the WHO FCTC as the starting point when considering how the term should be translated.

Dr VECINO QUINTANA (Spain), speaking as Chair of the advisory committee on language and supported by Dr ABASCAL (Uruguay), agreed that Article 15.4 of the WHO FCTC made clear the meaning of the term “disposal” and, in response to the query by the CHAIRPERSON confirmed that it had been translated into Spanish as “eliminación”.

Mr NEVES SILVA (Brazil) observed that in the title of the Spanish version of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the word “eliminación” had been used to translate “Disposal”.

Mr HAMANEH (Islamic Republic of Iran) drew attention to the fact that that Article 57.1 of the United Nations Convention against Corruption extended the scope of the

term “disposal” to the return of confiscated property to its legitimate owners. The term “disposal” did not therefore necessarily mean “destruction”.

The CHAIRPERSON requested the Chair of the advisory committee on language simply to use the word that appeared in the Spanish version of the WHO FCTC.

Part III: Supply chain control (continued from the fifteenth meeting)

• **Article 11: Free zones and international transit** (continued from the fifteenth meeting)

The CHAIRPERSON invited the representative of Singapore to comment on the majority view expressed at the end of the previous meeting that his proposed amendments to Article 11 were not acceptable, and that the text should remain as it stood in the original.

Mr SONG (Singapore) requested more time to allow for the drafting of alternative amendments.

Part II: General obligations (continued from the thirteenth meeting)

• **Article 4: General obligations** (continued from the thirteenth meeting)

The CHAIRPERSON invited the representative of Kenya to explain the reasons for the proposal to add a new paragraph to Article 4 that would refer to the provisions of Article 5.

Mr NGEYWO MASUDI (alternate to Dr Mboya Okeyo, Kenya) requested more time to complete the drafting of the proposed text.

(Resumed below, following discussion of Article 2.)

Part I: Introduction (continued from the fifteenth meeting)

• **Article 2: Relationship between the Protocol and other agreements and legal instruments** (continued from the thirteenth meeting)

The CHAIRPERSON asked whether the Intergovernmental Negotiating Body wished to confirm the provisional consensus reached on paragraph 3 of Article 2.

Mr COTTERELL (Australia) said that, having noted a significant overlap between paragraphs 3 and 4, he would prefer not to include both. Should the International Negotiating Body choose to keep the former, he would prefer to work on the second option and would have a number of amendments to propose. Paragraph 4, on the other hand, could remain unchanged if it were chosen.

Mr HAMANEH (Islamic Republic of Iran), responding to the question from CHAIRPERSON as to whether the Parties could agree to the deletion of paragraph 3, said that paragraphs 3 and 4 did not cover exactly the same points.

Mr DESIRAJU (India) said that paragraph 3 contained an important provision missing from paragraph 4, namely that it allowed Parties to look beyond the protocol and to invoke provisions in other agreements that might be more conducive to the elimination of illicit trade in tobacco products.

The CHAIRPERSON invited the representative of Australia to present his suggested amendments to paragraph 3.

Mr COTTERELL (Australia) said that paragraph 3 should be amended to read: "Nothing in the Protocol shall affect the rights and obligations of any Party under international law, including any international convention, treaty or international agreement (in force for that Party) that is more conducive to the achievement of the elimination of illicit trade in tobacco products, in particular under, but not limited to, the United Nations Convention against Transnational Organized Crime". Responding to a query by the CHAIRPERSON as to whether Australia could accept the existing text and avoid such a radical redrafting, he said that his instructions were to propose a straight choice between that amended version of paragraph 3 and paragraph 4 as it stood.

Mr HAMANEH (Islamic Republic of Iran) said that the proposed changes created some confusion and that he might need to consult with his Government.

The CHAIRPERSON, in the absence of any support for the proposed amendment to paragraph 3, requested the representative of Australia to ask his Government to reconsider its position. In the meantime, he asked whether any Parties would insist on keeping paragraph 4 in the event of a decision to revert to the original version of paragraph 3.

Ms EVISON (New Zealand), noting that the intent of the two paragraphs was very different, said that her Government attached some importance to paragraph 4 because it did not wish to see any of the agreements in the draft protocol adversely affecting, or overriding, those made in previous treaty negotiations. Both paragraphs should remain in place.

The CHAIRPERSON asked whether any Parties would object to accepting paragraph 4 as it stood, pending a response from the Government of Australia.

Mr HAMANEH (Islamic Republic of Iran) said that paragraph 4 should not single out any particular convention because it covered the rights, responsibilities and obligations of Parties under international law in general. In response to a query from the CHAIRPERSON, he said that he would not necessarily object to specific references to the United Nations Convention against Transnational Organized Crime throughout the rest of the draft protocol.

The CHAIRPERSON suggested deleting the words "in particular under, but not limited to, the United Nations Convention against Transnational Organized Crime" in paragraph 4.

Mr COTTERELL (Australia) said that it would be difficult for his Government to agree to the retention of paragraph 4 if no reference was made to that Convention.

Mr HAMANEH (Islamic Republic of Iran), responding to a question from the CHAIRPERSON as to whether he could accept the wording of paragraph 4 as it stood, said that he would need to check with his Government.

The CHAIRPERSON said that, if he saw no objection, he would take it that provisional consensus had been reached on paragraph 3, subject to consultations by the Australian delegation with its Government, and on paragraph 4, subject to consultations by the Australian and Iranian delegations with their respective Governments.

It was so agreed.

(For continuation of the discussion on Article 2, see summary record of the seventeenth meeting)

Part II: General obligations (resumed)

• **Article 4: General obligations** (resumed)

Mr MASUDI (Kenya) introduced a new paragraph, which read: “In implementing their obligations under this Protocol, Parties shall ensure the maximum possible transparency with respect to any interactions they may have with the tobacco industry, including inter alia, any relevant activities, agreements, understandings or undertakings”. The proposed new paragraph was intended to promote the greatest possible transparency and accountability by Parties with regard to informing other Parties and the Convention Secretariat of their relationships and interactions with the tobacco industry.

Mr ALBUQUERQUE E SILVA (Brazil) suggested that the words “maximum possible”, preceding “transparency” should be deleted and that the sentence should end with the words “tobacco industry”.

Mr ROWAN (European Union) said that he would prefer to retain the phrase “maximum possible”.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) suggested that “interactions they may have with” should be replaced by “interference by”. This was because of cases where the tobacco industry had obtained permission to review legislation that affected it and had succeeded in making substantive changes.

The CHAIRPERSON said that, while no one denied the importance of preventing interference by the tobacco industry, the paragraph was intended to emphasize the need for transparency in all interactions between Parties and the tobacco industry, including entirely legitimate transactions such as the collection of taxes owed by tobacco companies.

Mr COTTERELL (Australia) noted that the terms “interaction” and “transparency” were taken from the guidelines on implementation of Article 5.3 of the WHO FCTC.

Ms ALI-HIGO (Djibouti) suggested that the term “professional relations” be used, rather than “interactions”, as the latter implied the possibility of a cordial relationship between Parties and the tobacco industry, in which both sides were actively involved. She would also prefer to end the paragraph with the words “tobacco industry”.

Ms ROA (Panama), supported by Dr ASQUETA (Uruguay), said that the text should finish at the words “tobacco industry”, which made the scope of the Article broader and clearer.

The CHAIRPERSON, in response to a point raised by Ms ALI-HIGO (Djibouti), suggested the wording: “Parties shall ensure, in accordance with Article 5.3 of the WHO FCTC, the maximum possible transparency”.

Ms MOODLEY (alternate to Ms Matsau, South Africa) pointed out that a generic reference to Article 5.3 of the WHO FCTC was currently included in the preamble to the protocol, which made a further reference in Article 4 unnecessary. She suggested that

paragraphs 2 to 6 of the Article should be converted into subparagraphs under paragraph 1 and that the new paragraph on transparency proposed by Kenya should become paragraph 2.

The CHAIRPERSON said that the paragraph would now read “Parties shall ensure the maximum possible transparency” and end with the words “tobacco industry”. The paragraphs would be renumbered as suggested by the representative of South Africa. If he saw no objection, he would take it that consensus had been achieved on Article 4.

It was so agreed.

Part III: Supply chain control (resumed)

- **Article 11: Free zones and international transit** (resumed)

Mr SONG (Singapore) said that, while many delegations had expressed their position on free zones, they had not commented on the substantive issues involved. He was surprised that the wording currently proposed had not met with strong opposition. He expected the negotiations on the protocol to be conducted in a free and fair manner. He had already provided a number of well-founded reasons why the current text did not meet his country’s needs, and remained open to any suggestions that might enable the concerns of all Parties to be accommodated. However, he said that he was puzzled by the apparent lack of willingness to negotiate.

His country had serious reservations with regard to paragraphs 1 and 2, but had nevertheless demonstrated its genuine interest in achieving a solution that would enable it to accede to the protocol. He suggested that the entire article should be placed in square brackets when submitted to the fifth session of the Conference of the Parties in November 2012. By that time, his country would have consulted its own authorities and other States that operated free zones, and would have arrived at a definitive position.

The CHAIRPERSON acknowledged the position taken by the representative of Singapore. However, in the light of the views expressed by an overwhelming majority of other Parties, he would revert to the original text of Article 11, as agreed by the informal working group. The mandate of the Intergovernmental Negotiating Body was to submit an agreed text to the Conference of the Parties, and he was unwilling to place text in square brackets at that stage of the proceedings.

Mr SONG (Singapore) said that his country was unable to accept the current wording of paragraphs 1 and 2. He suggested that a footnote reflecting its concerns should be added to the text of the draft protocol that would be submitted to the Conference of the Parties.

The CHAIRPERSON suggested that a paragraph reflecting Singapore’s concerns could be included in his report to the Conference of the Parties.

Mr SONG (Singapore) accepted the Chairperson’s suggestion and asked to be involved in the drafting of the paragraph, although the final wording would, of course, be a decision for the Chairperson himself.

Mr ALBUQUERQUE E SILVA (Brazil) said that, while he fully respected the position taken by the representative of Singapore, it was important to submit a consensus text to the Conference of the Parties after more than four years of negotiations. He supported the

suggestion that a paragraph reflecting Singapore's concerns should be included in the Chairperson's report.

Mr CATIBAYAN (Philippines) said that the Philippines shared the concerns of Singapore and wished to have that reflected in the Chairperson's report to the Conference of the Parties.

The CHAIRPERSON thanked the representatives of Singapore and the Philippines for their flexibility. If he heard no objection, he would take it that consensus had been reached on paragraphs 1 and 2.

It was so agreed.

Part IV: Offences (resumed)

- **Article 12: Unlawful conduct including criminal offences (continued)**

Subparagraph 1(d) (continued)

The CHAIRPERSON asked whether the representative of Singapore could agree to having his concerns about subparagraph 1(d) reflected in the Chairperson's report to the Conference of the Parties, even if the text ultimately agreed upon was not to his liking.

Mr SONG (Singapore) recalled that Singapore was not the only Party to have expressed concerns. The provision was perfectly adequate as it stood: it covered intermingling of tobacco and non-tobacco products throughout the supply chain and would strengthen the protocol.

Mr ROWAN (European Union) pointed out that the European Union was not against controls on the mixing of tobacco products with non-tobacco products. However, now that Article 11.2 had been agreed, he felt that subparagraph 1(d) should be divided into two parts. The first part, subparagraph 1(d), would cover the issue of mixing in relation to the supply chain and the second part, subparagraph 1(d)bis as proposed by the European Union, would relate specifically to and reinforce Article 11.2.

Dr ROA (Panama) said that she supported the European Union's suggestion to divide the subparagraph into two parts. She did not see how an action that was not prohibited under the protocol could be established as an offence. It was important to cover all potentially unlawful aspects of intermingling under Article 12 and she therefore welcomed the explicit reference to Article 11.2 in the proposed new subparagraph,

Mr SONG (Singapore), recalling that the working group on definitions had decided not to define the term "intermingling", said that some difficulties might arise if both "intermingling" and "mixing" were used in the protocol. He asked whether the European Union would be prepared to revert to its original proposal, namely to delete subparagraph 1(d).

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that, in the light of the discussions on Article 11, the proposed new paragraph should be included.

The CHAIRPERSON asked whether the European Union would consider replacing the word "mixing" with "intermingling" in its proposed new paragraph.

Mr ROWAN (European Union) said that would be acceptable.

Mr SONG (Singapore) said that, if the term “intermingling” were understood to apply to the whole supply chain and his country’s position were set out in the Chairperson’s report, he could accept the proposed amendments.

Mr OOI POH KEONG (Malaysia) said that his country was not willing to move the “unlawful conduct” of intermingling out of the free zone and into the domestic arena and would therefore prefer the term “mixing”.

Mr SONG (Singapore) pointed out that, under paragraph 2, Parties could decide which of the unlawful conduct set out in paragraph 1 should be established as criminal offences. Perhaps that would make it easier for the representative of Malaysia to accept subparagraph 1(d).

Ms WONG MEE LING (Malaysia) said that it was not her intention to hinder progress on the protocol. However, until she had received instructions from her customs authorities regarding intermingling outside free zones, she would request that the provision be placed in square brackets.

The CHAIRPERSON said that, if he heard no further comments, he would take it that the meeting wished to divide subparagraph 1(d) into two parts and to replace the term “mixing” with “intermingling” in subparagraph 1(d)bis. Subparagraphs 1(d) and 1(d)bis would be placed in square brackets pending the response from Malaysia.

It was so agreed.

Paragraph 2 (continued)

Mr COTTERELL (Australia) suggested that, in the interest of greater clarity, the text of paragraph 2bis proposed by the Chairperson might be amended to read as follows: “Each Party shall notify the Secretariat of this Protocol which of the unlawful conduct set out in paragraphs 1 and 2 that the Party has determined to be a criminal offence in accordance with paragraph 2, and shall furnish to the Secretariat copies of its laws, or a description thereof, that give effect to paragraph 2, and of any subsequent changes to such laws”.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that the provision should also specify a timeframe for notification.

The CHAIRPERSON said that such language did not appear in previous instruments. Given the late hour and the limited time available, it might not be possible to reach agreement on any further amendments to paragraph 2 and he preferred to close the debate. He said that, if he heard no objections, he would take it that paragraph 2bis was acceptable as amended.

It was so agreed.

(For continuation of the discussion on Article 12, see summary record of the seventeenth meeting.)

Part V: International cooperation (continued from the fifteenth meeting)

- **Article 29: Mutual administrative assistance** (continued from the thirteenth meeting)

The CHAIRPERSON asked whether the Islamic Republic of Iran was prepared to accept the word “shall” and join the majority view.

Mr HAMANEH (Islamic Republic of Iran) said that use of the word “shall” would be acceptable provided that the words “either on request or on their own initiative,” were replaced with “where appropriate”.

The CHAIRPERSON said that he would be reluctant to embark on further substantive changes. The phrase “where appropriate” offered less clarity than the current formulation.

Mr HAMANEH (Islamic Republic of Iran) requested that consideration of Article 29 be deferred until the following morning.

(For continuation of the discussion on Article 29, see summary record of the seventeenth meeting.)

- **Article 30: Mutual legal assistance** (continued)

Paragraph 5

The CHAIRPERSON said that, if he saw no objection, he would take it that the words “or intergovernmental agreement” should follow the word “treaty” each time it appeared in the paragraph.

It was so agreed.

Paragraph 14(d)

The CHAIRPERSON asked whether representatives could accept use of the phrase “of imprisonment or other forms of deprivation of liberty”, which was drawn from the United Nations Convention against Transnational Organized Crime.

Ms MANSUR (Israel) said that she could accept the paragraph but for the sake of consistency the word “country” should be replaced with the word “Party”.

The CHAIRPERSON said that the replacement would be made, as suggested by the representative of Israel, and that if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to remove the square brackets around subparagraph 14(d) and, further, that it wished to accept Article 14 as a whole.

It was so agreed.

Part VI: Reporting

- **Article 36: Secretariat**

Subparagraph 2(g)

Ms BERNER (Denmark), speaking on behalf of the European Union, said that a small informal group including representatives of Canada, the European Union, the Islamic Republic of Iran and Kyrgyzstan had met to redraft subparagraph 2(g) and now wished to amend it to read: “receive and review applications by intergovernmental and nongovernmental organizations wishing to be accredited as observers to the Meeting of the Parties while ensuring that they are not affiliated with the tobacco industry, and present the reviewed applications to the Meeting of the Parties for its consideration”. The proposed amendment drew on language from the WHO FCTC, notably the preamble and Article 12(e).

The CHAIRPERSON said that if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to accept subparagraph 2(g) as amended.

It was so agreed.

- **Article 38: Financial resources** (continued from the fifteenth meeting)

Paragraph 6

Dr SA’A (Cameroon) said that under subparagraph 6(b), the Convention Secretariat should not be mandated to provide advice, as that was not its job, but rather to assist developing country Parties and Parties with economies in transition to obtain funding for implementation activities. Indeed, the major issue was whether the protocol could actually be implemented or whether it would remain a dead letter owing to lack of resources. Subparagraph 6(a) dealt with the mobilization of resources for activities related to the protocol. Had consideration been given to the contribution that the tobacco industry might make in that respect?

The CHAIRPERSON said that the language of Article 38.6 was part of a compromise solution and should not be amended at such a late stage.

Paragraph 7

Mr ABASCAL (Uruguay) said that in paragraph 7 it was unclear whether the tobacco industry was responsible for the costs of implementing the protocol or the costs associated with a Party’s implementation of it.

The CHAIRPERSON suggested that the problem might be with the Spanish translation: in the English version it was clear that Parties could make the tobacco industry bear the costs associated with tracking and tracing. Those responsible for checking the accuracy of the translations would be duly notified of the problem.

Part IV: Offences (resumed)

- **Article 16:** [*Confiscation and seizure of assets*] / [*Seizure and confiscation*] (continued)

The CHAIRPERSON asked whether Parties could accept the deletion of Article 16 from the protocol.

Mr ALBUQUERQUE E SILVA (Brazil), Mr YOST (Canada) and Mr REGALADO PINEDA (Mexico), speaking also on behalf of Uruguay, said that they supported the proposal to delete Article 16.

The CHAIRPERSON said that if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to delete Article 16.

It was so agreed.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) asked how his country should proceed in the matter of seizure and confiscation now that Article 16 had been deleted from the draft protocol.

The CHAIRPERSON said that Parties could use their national legislation to achieve the objectives of the deleted Article.

Mr DESIRAJU (India) asked whether the deletion of Article 16 made Article 17 unnecessary.

The CHAIRPERSON said that Article 17 should be retained because it covered seizures of tobacco products in relation to smuggling activities.

(For continuation of the discussion on Article 16, see summary record of the seventeenth meeting.)

RECOMMENDATIONS OF THE ADVISORY COMMITTEE ON LANGUAGE REGARDING CONSISTENCY OF THE ENGLISH TEXT

The CHAIRPERSON said that the advisory committee on language had called attention to certain inconsistencies in the protocol. Firstly, the standard phrase “including criminal offences established in accordance with Article 12” should be used consistently throughout the text. For example, in Article 4.4, the phrase “to combat the offences covered by this Protocol” would be replaced by “to combat the offences established in accordance with Article 12”. He asked whether Parties were ready to accept as a general principle that, where phraseology of that kind appeared in the text, it should be made consistent with that standard language.

Ms GRANZIERA (WHO Secretariat, Office of the Legal Counsel) said that the wording that had featured in Articles 14.2, 13.1, and 13.3, which could be considered to be the standard formulation used in the protocol, was “unlawful conduct, including criminal offences established in accordance with Article 12 of this Protocol”. She said that if the Intergovernmental Negotiating Body approved, Article 14.4, would be amended to incorporate that standard wording.

The CHAIRPERSON said that Article 7 on tracking and tracing, referred inconsistently in paragraph 3 to “unit packets, packages and any outside packaging of cigarettes”, and in paragraph 11(c) to “unit packs and packets of tobacco products”. He said that the correct term was “unit packets and packages”, as that was the term used in the WHO FCTC, in Article 15.2(a). He took it that Parties could accept the amendment of those paragraphs to achieve consistency.

Mr SONG (Singapore) asked for the standard text on unlawful conduct to be displayed on screen once again.

The CHAIRPERSON, reading from Article 4.4, which was displayed on screen, said that the paragraph would end: “enforcement action to combat the unlawful conduct including criminal offences established in accordance with Article 12”.

Mr SONG (Singapore) sought confirmation that all Parties were comfortable with extending cooperation to all the unlawful conduct listed in Article 12.1, and not just criminal offences.

Dr NIKOGOSIAN (Head, Convention Secretariat) said that the second report of the advisory committee on language, which had just been distributed, contained the changes recommended in separate annexes for each language. The report covered the articles that had already been agreed by the Intergovernmental Negotiating Body. He sought guidance on when the report would be reviewed and when the language issues relating to the remaining articles would be dealt with.

The CHAIRPERSON invited Parties to consider the report and to inform the Secretariat of any comments thereon by the following day. The Intergovernmental Negotiating Body could decide the following morning whether it wished to mandate the Secretariat to resolve any further issues relating to other articles not dealt with in the report, or whether Parties could be given two, or possibly four, weeks to consult with their authorities before sending any comments to the Secretariat.

- **Article 17: Seizure payments** (continued)

Mr DESIRAJU (India), supported by Mr CISSE (Senegal), requested an amendment to Article 17 that would strengthen the capacity of Parties to effect seizures of illicit tobacco, in accordance with their domestic law. To that end, the words “to effect seizure of illicit tobacco products and” should be inserted between “to authorize competent authorities” and “to levy an amount”.

The CHAIRPERSON said that the proposed amendment might create confusion since Parties in most cases had a customs or other authorized service to effect seizures.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that he supported the proposal by the representative of India; furthermore, he was in favour of retaining Article 16, which provided justification for the content of Article 17.

Ms MADRAZO REYNOSO (Mexico) said that she could accept the proposed amendment since her country had a competent authority to undertake seizures. However, for the sake of harmony with the other articles of the protocol, she would prefer the amendment to refer to the “seizure of illicit tobacco, tobacco products and machinery”.

Mr AAGAARD (Denmark), speaking on behalf of the European Union, said that he could not support the proposal since it had been agreed that references to seizure should be deleted from the protocol.

The CHAIRPERSON asked whether, in the interests of consensus, all Parties could agree to set aside the proposal by the representative of India and to accept the previously agreed wording of Article 17.

It was so agreed.

Part VI: Reporting

- **Article 34: Reporting and exchange of information** (continued)

The CHAIRPERSON requested Parties to consider which articles should be referred to in subparagraph 3(d) and paragraph 4 of Article 34 and to communicate their views on the matter the following morning.

Part I: Introduction (continued)

- **Article 2: Relationship between the Protocol and other agreements and legal instruments** (continued)

Mr COTTERELL (Australia) said that, having consulted with his capital, he could agree to the consensus reached on paragraphs 3 and 4 of Article 2.

The CHAIRPERSON noted that consensus had been reached on paragraph 3 and that the Intergovernmental Negotiating Body was awaiting the views of the Islamic Republic of Iran before confirming its provisional consensus on paragraph 4.

Preamble

The CHAIRPERSON said that, if he heard no objection, he would take it that Parties agreed to the wording of the first paragraph of the preamble, which began with the words “Considering that on 21 May 2003”.

It was so agreed.

Second preambular paragraph

The CHAIRPERSON said that, if he heard no objection, he would take it that the Parties agreed to the wording of the second preambular paragraph, which began with the words “Recognizing that the WHO Framework Convention on Tobacco Control”.

It was so agreed.

Third preambular paragraph

Ms HERNANDEZ (Canada) proposed that the third preambular paragraph, beginning with the words “Noting that at the first session of the Conference of the Parties”, should be deleted.

Mr HAMANEH (Islamic Republic of Iran) supported the proposed deletion of that paragraph.

The CHAIRPERSON said that, in the absence of any further comments, he would take it that representatives agreed that the third preambular paragraph should be deleted.

It was so agreed.

Fourth preambular paragraph

Ms FAERCH (Denmark), speaking on behalf of the European Union, proposed that the fourth paragraph of the preamble should be aligned with the twentieth preambular paragraph of the WHO FCTC and begin with the words: “Recalling the preamble to the Constitution of the World Health Assembly, which states that”.

The CHAIRPERSON said that, if he heard no objection, he would take it that representatives could accept the proposed wording.

It was so agreed.

Fifth preambular paragraph

The CHAIRPERSON drew attention to the fifth preambular paragraph which began with the words “Determined also to give priority and security”.

Ms HERNANDEZ (Canada) said that the paragraph should refer to public health but not to security.

Ms FAERCH (Denmark), speaking on behalf of the European Union, suggested that the text should be aligned with the first preambular paragraph of the WHO FCTC by removing the words “and security”.

The CHAIRPERSON, responding to a query by Mr DESIRAJU (India), suggested that the words “their right” could be replaced by “the rights of Parties”.

Ms LANNAN (WHO Secretariat) said that all the paragraphs of the preamble were governed by the opening phrase, “The Parties to this Protocol”, so that no repetition of the word “Parties” was needed.

Mr COTTERELL (Australia) said that he supported the deletion of the words “and security”.

The CHAIRPERSON said that he took it that the Parties could accept the text of the fifth preambular paragraph, as amended.

It was so agreed.

Sixth preambular paragraph

The CHAIRPERSON invited comments on the sixth preambular paragraph that began with the words “Deeply concerned”.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) requested that the words “magnitude and pervasiveness of” should be deleted.

Ms MADRAZO REYNOSO (Mexico) said that her country recognized that illegal trade in tobacco products was growing; however, in the absence of any reference to relevant data, it might be preferable to remove the words “magnitude and pervasiveness”.

The CHAIRPERSON said that he took it that Parties could accept the sixth paragraph as amended.

It was so agreed.

Seventh preambular paragraph

The CHAIRPERSON drew attention to the seventh preambular paragraph, which began with the words “Recognizing further”.

Mr COTTERELL (Australia) said that he supported the inclusion of the seventh paragraph.

Mr DLAMINI (Swaziland), speaking on behalf of the Parties in the WHO African Region, said that he could accept the retention of the paragraph.

The CHAIRPERSON said that, in the absence of any further comments, he took it that the paragraph was acceptable as it stood.

It was so agreed.

(For continuation of the discussion on the preamble, see summary record of the seventeenth meeting.)

The meeting rose at 01:00

SEVENTEENTH PLENARY MEETING

Wednesday, 4 April 2012, at 10:20

Chairperson: Mr I. WALTON-GEORGE (European Union)

1. REPORT ON CREDENTIALS: Item 1.3 of the Agenda (Document FCTC/COP/INB-IT/5/2) (continued from the first meeting)

The CHAIRPERSON said that, since the adoption of the report on credentials, formal credentials had been received from six Parties that had previously submitted advance copies: Barbados, Jordan, Kuwait, Micronesia (Federated States of), Pakistan and Suriname. In addition, formal credentials had been submitted by Ecuador, and three Parties had submitted their regrets: Kiribati, Papua New Guinea and Tonga. The Bureau had not yet examined them, but he had done so and found them to be in conformity with the Rules of Procedure of the Conference of the Parties. He therefore recommended that Barbados, Ecuador, Jordan, Kuwait, Micronesia (Federated States of), Pakistan and Suriname be accepted as having submitted formal credentials.

It was so agreed.

2. DRAFTING AND NEGOTIATION OF A PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS: Item 3 of the Agenda (Documents FCTC/COP/4/4, FCTC/COP/4/5, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/4, FCTC/COP/INB-IT/5/3, FCTC/COP/INB-IT/5/INF.DOC./1, FCTC/COP/INB-IT/5/INF.DOC./2, FCTC/COP/INB-IT/5/INF.DOC./3 and FCTC/COP/INB-IT/5/INF.DOC./4) (continued from the sixteenth meeting)

Second report of the advisory committee on language

The CHAIRPERSON said that, in the absence of any objection, he took it that the Parties accepted the recommendations contained in the report.

It was so agreed.

The CHAIRPERSON said that a procedure was needed for approving translations of articles agreed subsequent to the deliberations of the advisory committee on language and hence not included in the reports of the committee.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) said that one solution would be to give Parties a short period of time after the session for submitting language amendments to the Convention Secretariat, which would then compile the amendments and submit them to the Conference of the Parties for approval and subsequent inclusion in the draft protocol. Alternatively, the Intergovernmental Negotiating Body could mandate the Bureau and the Chair of the advisory committee to review any proposed language amendments and to incorporate them, as appropriate, into the final text of the draft protocol before its submission to the Conference of the Parties.

The CHAIRPERSON pointed out that the second option would yield a finalized, linguistically correct version of the draft protocol in all languages that could be submitted to the Conference of the Parties. If he heard no objection, he would take it that the Intergovernmental Negotiating Body approved of the second option.

It was so agreed.

Preamble (continued from the sixteenth meeting)

The CHAIRPERSON, inviting Parties to resume consideration of the preamble, drew attention to the screen on which was displayed the preamble to the draft protocol, as it had appeared at the close of the sixteenth meeting¹ and which read:

Preamble

The Parties to this Protocol,

[1.] *Considering* that on 21 May 2003, the Fifty-sixth World Health Assembly adopted by consensus the WHO Framework Convention on Tobacco Control, which came into force on 27 February 2005; (*Consensus*)

[2.] *Recognizing* that the WHO Framework Convention on Tobacco Control is one of the United Nations' most rapidly ratified treaties and a fundamental tool for attaining the objectives of the World Health Organization; (*Consensus*)

[4.] *Recalling* the Preamble to the Constitution of the World Health Organization, which states that 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; (*Consensus*)

[5.] *Determined also* to give priority to their right to protect public health; (*Consensus*)

[6.] *Deeply concerned* that the illicit trade in tobacco products is contributing to the spread of the tobacco epidemic, which is a global problem with serious consequences for public health that calls for effective, appropriate and comprehensive domestic and international responses; (*Consensus*)

[7.] *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; (*Consensus*)

[8.] **[Seriously]** *Concerned* by the adverse effects that the increase in accessibility and affordability of illicitly traded tobacco products has on the health [and well-being]/**[in particular]** of young people, the poor and other [vulnerable groups]/**[people in vulnerable situations]**;

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

[10.] *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;

¹ For purposes of clarity, the preambular paragraphs have been numbered to correspond to the debate at the seventeenth meeting.

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

[12.] *Acknowledging also* that, although [free-trade areas]/[**free zones**] are established to facilitate legal trade, they have been used to facilitate the globalization of illicit trade in tobacco products, both in relation to the illicit transit of smuggled products and in the manufacture of illicit tobacco products;

[13.] *Recognizing also* that illicit trade in tobacco products undermines and adversely affects the economies of Parties and threatens their stability, security and sovereignty;

[14.] *Also aware* that illicit trade in tobacco products generates huge financial profits that are used to fund transnational criminal activity, which penetrates, contaminates and corrupts government objectives and legitimate commercial and financial businesses at all levels;

[Recognising that the illicit trade in tobacco products undermines health objectives; impose additional strain on health systems and causes losses of revenue to the economies of the Parties.]

[15.] *Emphasizing* the need to be alert to any efforts by the tobacco industry to undermine or subvert strategies to combat illicit trade in tobacco products and the need to be informed of activities of the tobacco industry that have a negative impact on strategies to combat illicit trade in tobacco products;

[16.] *Mindful* of Article 6.2 of the WHO Framework Convention on Tobacco Control, which encourages Parties to prohibit or restrict, as appropriate, sales to and/or importation by international travellers of tax- and duty-free tobacco products[, which are often diverted into illicit trade];

[17.] *Recognizing in addition* that tobacco and tobacco products in transit find a channel for illicit trade;

[18.] *Recalling and emphasizing* the importance of other relevant international agreements such as the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the obligations that Parties to these Conventions have to apply, as appropriate, the relevant provisions of these Conventions to illicit trade in tobacco, tobacco products and manufacturing equipment and *encouraging* those Parties that have not yet become Parties to these agreements to consider doing so.
(*Consensus*)

[19.] *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;

[20.] *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]/[**manufacturing**] and counterfeiting, is an essential component of tobacco control; and

[21.] *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;

[22.] *“Considering* that this Protocol does not seek to address issues concerning intellectual property rights which fall under the authority of other international organizations”.

Eighth preambular paragraph

The CHAIRPERSON, drawing attention to the eighth preambular paragraph, said that a suggestion had been made to add the word “seriously” before “concerned”. Another suggestion had been made to remove the square brackets from the words “and well-being”. He asked whether the words “in particular”, following “health and well-being” should be retained.

Dr AL TARKAIT (Kuwait) said that he was not in favour of using the words “in particular” after “health and well-being” since tobacco was harmful to all categories of persons and not just the young, the poor and other vulnerable groups.

Mr HAMANEH (Islamic Republic of Iran), supporting the position of the representative of Kuwait, said that the purpose of the paragraph would be better reflected if the word “public” were placed before “health” and the remainder of the text deleted.

Dr ABASCAL (Uruguay) said that the lower prices of illicitly traded tobacco products made them particularly attractive to young people and the poor. He would therefore prefer to retain the reference to those groups.

Dr ALEPENDAVA (Solomon Islands) said that he agreed with the representatives of Kuwait and the Islamic Republic of Iran that the words “in particular” should be removed, since smoking and secondary smoke were dangerous for all groups.

Mr DESIRAJU (India), supporting the statement by the representative of Uruguay, said that the availability of illicitly traded tobacco products, often at lower prices, made it more likely that poor people would buy them.

Mr CISSE (Senegal) said that he would prefer the phrase “young people and other vulnerable groups” since poor people already belonged to the latter category.

Ms BERNER (Denmark), speaking on behalf of the Parties in the European Union, said that she agreed that tobacco was harmful to all, but the fact that illicitly traded products were cheaper made them particularly harmful to the young, the poor and those in vulnerable situations.

Mr PÉREZ AVID (Paraguay) said that the reference to young people should be retained since it echoed the deep concern about the escalation in tobacco consumption by children and adolescents worldwide expressed in the preamble to the WHO FCTC.

The CHAIRPERSON asked whether the Intergovernmental Negotiating Body could accept the paragraph with a reference to public health in the first part, and to young people, the poor and other vulnerable groups in the second part, as that would reflect the preoccupation with health in general as well as with the availability of cheaper products to certain groups.

Ms BERNER (Denmark), speaking on behalf of the Parties in the European Union and supported by Mr DESIRAJU (India), said that the Parties could agree to the proposal provided that the paragraph made reference to the young, the poor and other people in vulnerable situations.

Mr HAMANEH (Islamic Republic of Iran) said that he could accept the reference to the young and the poor but the meaning of the term “vulnerable situations” was unclear and, since it did not appear in the WHO FCTC, he would prefer not to use it in the protocol. Nevertheless, he would not block consensus if the majority preferred that language.

The CHAIRPERSON asked whether representatives could agree to the wording “in particular of young people, the poor and people in vulnerable situations”.

Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region and supported by Ms ALI-HIGO (Djibouti), said that the term “vulnerable groups” would cover people in vulnerable situations and was more likely to be acceptable to most Parties.

The CHAIRPERSON said that, in the absence of further comments, he would take it that the Intergovernmental Negotiating Body could accept the preambular paragraph, as amended to read: “Seriously concerned by the adverse effects that the increase in accessibility and affordability of illicitly traded tobacco products has on public health and well-being, in particular of young people, the poor and other vulnerable groups”.

It was so agreed.

Ninth preambular paragraph

The CHAIRPERSON said that, if he heard no objections, he would take it that the ninth preambular paragraph was acceptable as it stood.

It was so agreed.

Tenth preambular paragraph

The CHAIRPERSON said that, in the absence of any objection, he would take it that the tenth preambular paragraph was acceptable as it stood.

It was so agreed.

Eleventh preambular paragraph

The CHAIRPERSON said that, in the absence of any objection, he would take it that the eleventh preambular paragraph was acceptable as it stood.

It was so agreed.

Twelfth preambular paragraph

The CHAIRPERSON drew attention to the twelfth preambular paragraph. In response to the concerns raised by Mr SONG (Singapore) with regard to the second half of the paragraph, he said that they would be reflected in the Chairperson’s report. He suggested that the term “free-trade areas” in the first line should be replaced by “free zones” since that was the language used in Article 11. If he heard no objections, he would take it that the twelfth preambular paragraph was acceptable as amended.

It was so agreed.

Thirteenth preambular paragraph

Mr HAMANEH (Islamic Republic of Iran) said that the word “threatens” perhaps overstated the case; he suggested that the words “adversely affects” should be deleted from the first part of the sentence and should replace the word “threatens” in the second part of the sentence.

Mr ALBUQUERQUE E SILVA (Brazil) said that the paragraph would be more balanced if the word “sovereignty” were removed.

The CHAIRPERSON said that, in the absence of further comments, he would take it that meeting could accept the twelfth preambular paragraph, as amended by the representatives of Brazil and the Islamic Republic of Iran.

It was so agreed.

Fourteenth preambular paragraph

Mr COTTERELL (Australia) said that some of the language in the paragraph was immoderate. He suggested that, in line with the proposal of the representative of Canada, the word “huge” should be deleted, as well as the rest of the paragraph after the words “criminal activity”. Australia wished to discourage the use of emotive language by the tobacco industry and felt that the protocol should set an example.

Mr BELTRÁN-PRADO (Colombia), endorsing the position of the representative of Australia, said that in order to align the preamble with the rest of the protocol, the language should be objective rather than emotional.

Mr HAMANEH (Islamic Republic of Iran) said that he could accept the proposed amendments if that would lead to consensus.

Ms MADRAZO REYNOSO (Mexico) suggested that words following “criminal activity, which” should be replaced by “undermines government objectives”.

Dr ABASCAL (Uruguay) agreed that the more strongly worded text should be removed or that it should be made conditional by inserting the word “could” after “criminal activity, which”.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand) suggested that, rather than “undermines”, the term “interferes” might correspond more closely to Article 5.3 of the WHO FCTC, which dealt with interference.

The CHAIRPERSON said that, in the absence of further comments, he would take it that the Intergovernmental Negotiating Body could accept the fourteenth preambular paragraph, as amended, which read: “Also aware that illicit trade in tobacco products generates financial profits that are used to fund transnational criminal activity, which interferes with government objectives”.

It was so agreed.

Proposed additional paragraph

Ms FAERCH (European Union) introduced the paragraph which read: “Recognising that the illicit trade in tobacco products undermines health objectives; imposes additional strain on health systems and causes losses of revenue to the economies of the Parties”. The paragraph had been formulated in order to emphasize the consequences of illicit trade for both health and economies.

The CHAIRPERSON said that, in the absence of any objection, he would take it that the paragraph was acceptable.

It was so agreed.

Proposed new paragraph

The CHAIRPERSON said that a new paragraph had been proposed by the representative of Kenya, which read: “Mindful of Article 5.3 of the WHO FCTC on Tobacco Control, in which Parties agree that, in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law”. In the absence of any objection, he would take it that the Parties could accept the new paragraph.

It was so agreed.

Fifteenth preambular paragraph

The CHAIRPERSON said that, in the absence of any objection, he would take it that the paragraph was acceptable.

It was so agreed.

Sixteenth preambular paragraph

The CHAIRPERSON asked whether Parties could accept the text in square brackets, which read: “which are often diverted into illicit trade”.

Ms FAERCH (European Union) suggested that, in order to align the paragraph with Article 6.3 of the WHO FCTC, the words in square brackets should be removed.

Professor NUNTAVARN VICHIT-VADAKAN (Thailand) said that, for the sake of consistency, the words “which are often diverted into illicit trade” should be retained.

The CHAIRPERSON, in the absence of any support for retaining the phrase, asked the representative of Thailand to join the consensus. On receiving her agreement, he said that he took it that the paragraph could now be accepted by the Intergovernmental Negotiating Body with those words removed.

It was so agreed.

Seventeenth preambular paragraph

Ms FAERCH (European Union) suggested that, in order to align the paragraph with Article 11 of the protocol, the words “in transit” should be replaced by “in international transit or transshipment”.

Mr SONG (Singapore) said that the phrase “find a channel” was unclear,

Mr ROWAN (European Union) suggested that the phrase might be replaced with “is a conduit”.

Mr SONG (Singapore) said that he would prefer the wording “could be used as a conduit”.

The CHAIRPERSON asked whether there were any objections to the revised version, which read: “Recognizing in addition that tobacco and tobacco products in international transit and transshipment could be used as a conduit for illicit trade”.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that the text should be amended to read: “Recognizing in addition that the international transit and transshipment of tobacco and tobacco products could be used as a conduit for illicit trade”.

Mr ROWAN (European Union) pointed out that the word “could” implied a possibility whereas international transit and transshipment actually were being used as a conduit for illicit trade. The words “could be used” should therefore be replaced with “is often used”.

Mr SONG (Singapore) said that if the intention was to recognize the possibility of legitimate trading practices being subject to abuse rather than to prohibit those practices, the previous speaker’s proposal was unacceptable and the words “could be used” should be retained.

Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region, suggested that it might help to meet both Parties’ concerns if the word “often” were replaced with “also” in the amendment proposed by the European Union. Another alternative might be to replace the word “conduit” with “gateway”.

Mr SONG (Singapore) said that, as time was too short for a full and frank discussion, his delegation was willing, in a spirit of compromise, to accept the original version on which a consensus had been reached. Its concerns about the wording, however, should be noted.

The CHAIRPERSON said that he took it that the original version of the paragraph was acceptable.

It was so agreed.

Eighteenth preambular paragraph

The CHAIRPERSON drew attention to the eighteenth paragraph, and the possibility of combining what were in fact two sets of text.

Ms MOODLEY (South Africa) asked whether the paragraph expressed an obligation and whether wording of that nature should appear in the preamble.

The CHAIRPERSON pointed out that the first part of the paragraph merely recalled the importance of other international agreements, while the second encouraged Parties that had not signed up to those agreements to consider doing so and to endeavour to apply the relevant provisions to cases of illicit trade in tobacco and tobacco products.

Ms ALI-HIGO (Djibouti) suggested that additional wording, such as “to that end” or “within that framework”, should be inserted before “encouraging” in order better to link the two parts.

Mr HAMANEH (Islamic Republic of Iran) suggested inserting a full stop after the words “to consider doing so” and deleting the rest. His delegation supported the proposal by Kuwait to include a reference to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as its provision on money-laundering might be useful to the protocol.

Mr COTTERELL (Australia) said that, in view of the length and complexity of the new formulation, he supported the proposal to end the paragraph after the words “to consider doing so”.

Ms BERNER (European Union), recalling that the deleted phrase had been included as part of the compromise reached on Article 2.3 of the draft protocol, said that it should be retained. The second part, however, could be abbreviated to read: “and encouraging those Parties that have not yet become Parties to these agreements to endeavour to apply, as appropriate, the relevant provisions to cases of illicit trade in tobacco products”.

Mr DESIRAJU (India) said the words “to consider doing so and” must be reinserted before “to endeavour to”. Otherwise, it would mean that the Parties to the protocol were being asked to apply provisions from other agreements to which they were not necessarily a party.

Mr COTTERELL (Australia) said that he was willing to consider the proposal by the European Union, but that it should be revisited once Article 2 had been finalized.

The CHAIRPERSON suspended the discussion on the eighteenth paragraph pending the finalization of Article 2. In view of its unwieldy formulation, however, it might be advisable to reconsider the proposal to combine the two sets of text.

The discussion on the eighteenth preambular paragraph was suspended.

Nineteenth preambular paragraph

Mr HAMANEH (Islamic Republic of Iran) noted that the words “strong links” in the nineteenth paragraph connoted a formal administrative relationship, whereas the intention of the paragraph appeared to be to promote interaction on technical issues relevant to the work of the bodies concerned. Those words should therefore be replaced with “enhanced cooperation”. He further suggested adding a reference to the World Customs Organization.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) said that it would not suffice simply to “intend” to build cooperation with other United Nations agencies. The beginning of the paragraph should be amended to read: “Given the need to build strong links”.

The CHAIRPERSON suggested further amending the previous speaker’s proposal to read: “Recognizing the need to build enhanced cooperation”.

Mr NJOKU (Nigeria) asked why the Intergovernmental Negotiating Body was wasting time on an elaborate redrafting of the preamble when so much work remained to be done on the rest of the draft protocol. The preamble was supposed to be brief and to the point.

The CHAIRPERSON said that he concurred with the previous speaker's comment and reiterated his request to delegations to raise objections only if they had a serious problem with the text. In the absence of any further comments, he would take it that the paragraph was approved by consensus.

It was so agreed.

Twentieth preambular paragraph

The CHAIRPERSON suggested deleting the word “counterfeiting”, which was covered by “illicit manufacturing”. The twentieth paragraph would therefore read: “*Recalling* Article 15 of the WHO FCTC, in which Parties recognize, inter alia, that the elimination of all forms of illicit trade in tobacco products, including smuggling and illicit manufacturing, is an essential component of tobacco control;”. Seeing no objection, he declared the paragraph approved by consensus.

Twenty-first preambular paragraph

The CHAIRPERSON said that, if he heard no objection, he would take it that the paragraph was approved.

It was so agreed.

Twenty-second preambular paragraph

The CHAIRPERSON drew attention to the new final paragraph of the preamble, which contained text proposed during the discussion on Article 12.1(c) and which read: “Considering that this Protocol does not seek to address issues concerning intellectual property rights which fall under the authority of other international organizations”.

Dr KONUMA (Japan) recalled that the proposal to add the phrase “which fall under the authority of other international organizations” had been his, and that one delegation had objected to the lack of clarity in that language. He therefore suggested replacing “other international organizations” with “the World Intellectual Property Organization and World Trade Organization” since those two organizations dealt with issues that sometimes overlapped with the concerns of WHO with regard to tobacco control.

Mr ALBUQUERQUE E SILVA (Brazil), supported by Ms MOODLEY (South Africa) and Mr HAMANEH (Islamic Republic of Iran), said that the new paragraph should end with the words “concerning intellectual property rights”. There was no need to refer to other international organizations and naming two in particular would exclude the others.

Mr NGEYWO MASUD (Kenya) said that the entire paragraph was irrelevant and should be deleted, as it referred to something that did not appear in the draft protocol.

The CHAIRPERSON said that its inclusion was part of the hard-won compromise reached in relation to the reference to counterfeiting in Article 12.1(c). Deleting it would create a problem with that subparagraph.

Dr KONUMA (Japan) agreed to withdraw his proposal and said that he supported that of the representative of Brazil.

Mr COTTERELL (Australia), thanking the delegation of Japan for its flexibility, suggested changing the order of the last two paragraphs so as to end the preamble on a positive note.

The CHAIRPERSON agreed and, in the absence of any objection, said that he took it that the new paragraph could be approved by consensus.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo), referring back to the fifteenth preambular paragraph, said that it must explicitly recognize tax free and duty sales as a channel for illicit trade in tobacco products. Furthermore, the scope of the ban must be extended to include the abusive importation of such products not only by international travellers but also by diplomats, which was a real problem in his country.

The CHAIRPERSON refused to reopen the discussion on that paragraph as introducing new concepts at that late stage would jeopardize the Intergovernmental Negotiating Body's chances of completing its work. He urged the previous speaker to accept the text as it stood and promised to return to it, should there be time, at the end of the day. Responding to the assertion by Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) that his delegation would raise the matter at the next session of the Conference of the Parties, he said that that was its right but that it was his responsibility to keep the current negotiations on track or there would be no draft protocol for the Conference to discuss at its next session.

Part I: Introduction (continued from the sixteenth meeting)

- **Article 2: Relationship between the Protocol and other agreements and legal instruments** (continued from the sixteenth meeting)

The CHAIRPERSON drew attention to the outstanding issue of whether paragraph 4 of Article 2 should include the phrase "in particular under, but not limited to, the United Nations Convention against Transnational Organized Crime".

Mr HAMANEH (Islamic Republic of Iran) reiterated his view that there was no need to mention a particular convention after the words "international law". However, he said that the full text would be acceptable as long as the name of the particular convention was deleted and replaced with "other international conventions".

Ms MANSUR (Israel) stressed that States clearly had rights, obligations and responsibilities under customary international law that were not necessarily spelled out in a particular convention, and the protocol had to affirm that they would be preserved. The words "international law" must remain in the text.

The CHAIRPERSON asked the representative of the Islamic Republic of Iran whether he would agree to join the consensus on the matter.

Mr HAMANEH (Islamic Republic of Iran) agreed to join the consensus but requested that the words "in particular under, but not limited to" be replaced with "including". He asked for clarification from the Office of the Legal Counsel as to whether States non-Parties to the

United Nations Convention against Transnational Organized Crime had rights and obligations under that Convention.

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) said that international law, as he understood it, embodied all conventions as a general matter. The mention in Article 2 of the United Nations Convention against Transnational Organized Crime did not mean that it pertained to non-Parties. It was simply a general reference to one specific aspect of international law.

Mr HAMANEH (Islamic Republic of Iran), although not entirely satisfied with the explanation, maintained his agreement to join the consensus.

The CHAIRPERSON said that, in the absence of any further objection, he would take it that Article 2 could be approved by consensus.

Resumption of the discussion on the eighteenth preambular paragraph

Mr COTTERELL (Australia) supported the CHAIRPERSON's proposal that the second part of the paragraph should be amended to read: "and encouraging those Parties that have not yet become Parties to these agreements to consider doing so".

The CHAIRPERSON said that, if he heard no objection, he would take it that the Intergovernmental Negotiating Body wished to approve the paragraph and the entire preamble by consensus.

It was so agreed.

Part IV: Offences (continued from the sixteenth meeting)

- **Article 12: Unlawful conduct including criminal offences** (continued from the sixteenth meeting)

Subparagraph 1(d) (continued)

Mr OOI POH KEONG (Malaysia), speaking at the invitation of the CHAIRPERSON, informed the Intergovernmental Negotiating Body that his delegation, in consultation with the delegations of Brunei Darussalam, Cambodia, the Philippines and Singapore, had agreed that the language in subparagraph 1(d) should, for the purposes of clarity and consistency, revert back to the original version proposed by the European Union, with the word "mixing" being used in place of "intermingling".

The CHAIRPERSON said that, in the absence of any objection, he would take it that Article 12 could be approved by consensus.

It was so agreed.

Part V: International cooperation (continued from the sixteenth meeting)

- **Article 29: Mutual administrative assistance** (continued from the sixteenth meeting)

Mr HAMANEH (Islamic Republic of Iran), speaking at the invitation of the CHAIRPERSON, informed the Intergovernmental Negotiating Body that his Government

had instructed him to withdraw his delegation's objection to the word "shall" in the first line of paragraph 1 of Article 29, and to join the consensus.

The CHAIRPERSON said that, in the absence of any objection, he would take it that Article 29 could be approved by consensus.

It was so agreed.

- **Article 31: Extradition** (continued)

Paragraph 14 (continued)

Mr AAGAARD (European Union), speaking at the invitation of the CHAIRPERSON, suggested that the end of paragraph 14 should be amended to read: "unless the Parties agree to apply paragraphs 1 to 13 in lieu thereof".

The CHAIRPERSON said that in the absence of any objection, he would take it that Article 31 had been approved by consensus.

It was so agreed.

Part VI: Reporting (continued)

- **Article 34: Reporting and exchange of information** (continued)

The CHAIRPERSON, drawing attention to the missing article numbers in subparagraph 3(d) and paragraph 4 of Article 34, said that the Convention Secretariat had suggested inserting "Articles 8.6, 12.2bis, 20, 21.1, 28.1(f) and (g), 29 and 30.23(a) and (b)" into the former, and "Article 38" into the latter.

Mr COTTERELL (Australia) said that the reference to Article 20 was the only one that was relevant to the subject matter of paragraph 3, namely the periodic reporting by Parties on their implementation of the protocol. The remaining references dealt with other issues and should be deleted.

Mr COULOMBE (Canada) and Ms BERNER (European Union) said that they agreed with the proposal by the representative of Australia.

Ms LANNAN (Convention Secretariat) suggested that paragraph 4 should also include a reference to Article 35, as it referred to the Financial Rules of the Conference of the Parties to the WHO FCTC applying, *mutatis mutandis*, to the Meeting of the Parties to the protocol.

The CHAIRPERSON said that, in the absence of any objection, he took it that Article 34, as amended, was approved by consensus.

It was so agreed.

Part VII: Institutional arrangements and financial resources (continued)• **Article 35: Meeting of the Parties** (continued)

The CHAIRPERSON said that, in the absence of any objection, he would take it that the square brackets could be removed from paragraph 4 and that Article 35 was approved by consensus.

It was so agreed.

Part X: Final provisions (continued)• **Article 42: Reservations**

The CHAIRPERSON drew attention to Article 42, which the Intergovernmental Negotiating Body had decided to leave until work on the rest of the draft protocol had been completed, and which read: “No reservations may be made to this Protocol”.

Mr SAMAR (Algeria) requested clarification from the Office of the Legal Counsel as to what a Party could do, assuming that no reservations were permitted, if it received a request for mutual legal assistance or extradition pursuant to the provisions in the protocol from another Party with which it did not have, or had severed, diplomatic relations. Could the requested Party issue an interpretative declaration?

Mr SOLOMON (WHO Secretariat, Office of the Legal Counsel) said that there was, as he understood it, enough flexibility to allow a Party to refuse such a request from another Party with which it had severed diplomatic relations. It could, for example, refer to Article 30.14(b), which was exactly the same as Article 18.21(b) of the United Nations Convention against Transnational Organized Crime. As for the matter of interpretative declarations, every State had the sovereign right to make such a declaration but it would only be received and accepted if it did not purport to change the terms of the protocol and, hence, constitute a reservation.

Mr SONG (Singapore) acknowledged that inclusion of Article 42 would make for a stronger protocol. Its removal, however, would increase the chances of wider participation in the protocol, especially by States with fundamental concerns about some of its provisions. He therefore suggested that the Article should be deleted.

Mr NJOKU (Nigeria) stressed that Article 42 had been included to prevent Parties from picking and choosing the provisions they wished to comply with, which would render the protocol irrelevant and ineffective.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, said that Article 42 should be retained as it stood because it would ensure that a coherent structure existed for combating the global illicit trade in tobacco products. Allowing Parties to adhere to one part but not to others would weaken the protocol.

Mr KAZI (Bangladesh), speaking on behalf of the Parties in the WHO South-East Asia Region, said that he supported the retention of Article 42 as it stood.

Mr LEBEPE (South Africa), joining the previous speaker in supporting the retention of the Article, said that commitment to the protocol should be unconditional.

Mr DLAMINI (Swaziland) said that Article 42 must be retained because illicit trade in tobacco products was a growing and complex global problem that not only impinged on national budgets, owing to losses through unpaid taxes, but also supported criminal organizations and undermined public health policies. States had the right to make choices but once they became Parties to the protocol, no reservations would be possible.

Mr SONG (Singapore) noted the feelings expressed by previous speakers, which he shared. In order to be fully effective, however, the mechanisms provided in the draft protocol for tracking and tracing and cooperation relied on the participation of all those involved in the supply chain and Article 42 would regrettably limit that participation. He nonetheless agreed to withdraw his proposal and join the consensus.

The CHAIRPERSON thanked the representative of Singapore for his flexibility. He said that if he heard no objection, he would take it that Article 42 was approved by consensus.

It was so agreed.

Part VII: Institutional arrangements and financial resources (continued)

• Article 38: Financial resources (continued)

The CHAIRPERSON, in response to an earlier request by Dr ROA (Panama), confirmed that the Spanish translation of the words “in compliance with” in paragraph 7 would be corrected to reflect the English text.

Ms MADRAZO REYNOSO (Mexico) observed that the problem appeared to lie in the second part of the sentence and suggested replacing the word “of” with “for” in the phrase “as well as other proceeds of the implementation”.

Mr COTTERELL (Australia) said that there were still two outstanding matters of consistency to be dealt with. The first concerned paragraph 4, which no longer appeared to make any sense. The representative of Mexico had correctly identified the part of the sentence causing the difficulty, but the real problem lay in the fact that the provision had originally been cross-referenced with Article 16 (Seizure and confiscation), which had since been deleted.

The CHAIRPERSON agreed that without Article 16 in the draft protocol there no longer appeared to be a basis for the Parties to act in accordance with paragraph 4, and he wondered whether that Article was still applicable.

Ms MANSUR (Israel) said that the deletion of Article 16 had removed specific provisions for asset forfeiture from the draft protocol, but individual Parties could still confiscate the proceeds of crime in accordance with their domestic asset forfeiture legislation. It would therefore be entirely reasonable to recommend or encourage them to use those proceeds to help to finance their implementation of the protocol. Paragraph 4 of Article 38 could be retained if the second part were amended to read: “to use the proceeds of crime for the implementation of this Protocol”.

Mr RAMÍREZ CAMPOS (Colombia) said that paragraph 4 would encourage Parties to make the necessary resources available to combat illicit trade in tobacco.

Dr ROA (Panama) supported the proposal by the representative of Israel. If paragraph 4 were deleted, then there would be no reason to retain Articles 17 and 18.

The CHAIRPERSON suggested amending the paragraph to read: “Without prejudice to Article 18, Parties are encouraged, subject to national laws and policies, and where appropriate, to use any confiscated proceeds of crime deriving from the illicit trade in tobacco, tobacco products and manufacturing equipment to achieve the objectives set out in this Protocol”.

Mr HAMANEH (Islamic Republic of Iran) said that the proposal by the Chairperson was acceptable but questioned the retention of the words “of crime”.

The CHAIRPERSON pointed out that deleting those words would broaden the scope of the provision to cover proceeds deriving from unlawful acts not classified as crimes.

Mr AAGAARD (European Union) said that it would be preferable to keep the words “of crime” in the provision.

Mr COTTERELL (Australia) said that he would also prefer to retain the wording “proceeds of crime”. Furthermore, the reference to Article 18 was no longer appropriate since that Article concerned the disposal or destruction of confiscated equipment, rather than the confiscated proceeds of crime.

The CHAIRPERSON said that, if he heard no objection, he would take it that the meeting wished to approve his proposed text for paragraph 4.

Mr COTTERELL (Australia) drew attention to the other outstanding matter of consistency, which concerned Article 19.2. The phrase “the offences covered by this Protocol” in that Article should be amended in line with the changes made to Articles 26, 30 and 31, to read: “the criminal offences established in accordance with Article 12”. Similar changes should be made to subparagraphs 1(a), (c) and (g) of Article 28.

The CHAIRPERSON, seeing no further objection, declared that a consensus had been achieved on the entire draft protocol to eliminate illicit trade in tobacco products.

(Applause)

Mr SAMAR (Algeria) asked for the comments of the Office of the Legal Counsel on the acceptability of interpretative declarations that did not affect the substance of the protocol to be recorded in the proceedings of the current session.

The CHAIRPERSON said that he had taken note of the request.

Dr KONUMA (Japan), speaking for the record, expressed Japan’s concern that the penultimate preambular paragraph might leave a loophole for the free movement of counterfeit or illicitly manufactured tobacco, since customs cooperation established to protect intellectual property rights only covered the time that exported goods spent at a country’s border.

The CHAIRPERSON assured the previous speaker that preambular paragraphs had no legal impact.

3. TEXT OF THE DRAFT PROTOCOL AND REPORT OF THE INTERGOVERNMENTAL NEGOTIATING BODY TO THE FIFTH SESSION OF THE CONFERENCE OF THE PARTIES: Item 4 of the Agenda

The CHAIRPERSON informed the Intergovernmental Negotiating Body that a small committee would be set up to ensure the accuracy of the translations of the English text. It would enjoy the full support of the Convention Secretariat, including legal and translation services. Parties were requested to submit their comments within the next three weeks.

Dr VECINO QUINTANA (Spain), speaking as the Chair of the advisory committee on language, expressed appreciation for the support the committee had received from the Convention Secretariat and the Office of the Legal Counsel.

Dr NIKOGOSIAN (Head, Convention Secretariat), responding to a question from Mr HAMANEH (Islamic Republic of Iran), said that the finalized text of the draft protocol would be made available to the Parties by the official deadline of 11 May 2011. By that time, the committee mentioned by the Chairperson would have ensured that all of the necessary corrections had been incorporated into all of the different language versions.

The CHAIRPERSON, turning to the matter of his report to the Conference of the Parties, said that it currently contained three key points that he and the Convention Secretariat believed should be brought to the attention of the Conference at its next session: the status of Article 11 on free zones and international transit, with which the Philippines and Singapore would be assisting in the drafting; the financing of the protocol, for which the informal working group had proposed recommendations; and the opening of the protocol for signature under Article 45, for which the Conference had to set the dates and venues. He invited comments from the Parties on those proposals and any other points they might wish to include in the report.

Ms HAMILTON (Canada), referring to the matter of the financing of the protocol, recalled that the European Union had tabled a single text that had garnered some support, and suggested including it in the report in place of the three recommendations proposed by the informal working group.

Mr COTTERELL (Australia), speaking on behalf of the Parties in the WHO Western Pacific Region, said that he supported the previous speaker's suggestion. The European Union's very clear text had been agreed by consensus and should be included in the report.

Ms BERNER (European Union), expressing the view that the conclusions of the Intergovernmental Negotiating Body superseded the recommendations of the informal working group, drew attention to the text in question, which read: "All Parties to the WHO Framework Convention on Tobacco Control will finance the Protocol until its entry into force, up to and including the first session of the Meeting of the Parties, and only Parties to the Protocol will finance its implementation after the first session of the Meeting of the Parties".

The CHAIRPERSON requested the representative of the European Union to submit that text in writing to the Convention Secretariat.

Ms EVISON (New Zealand) expressed serious concern about the European Union's proposal being the only financing option included in the report. The Convention Secretariat

had provided a cost estimate for the period leading up to the protocol's entry into force but not for the following period, up to and including the first session of the Meeting of the Parties. A huge amount of work would need to be done in that period and New Zealand could not accept the proposal without an idea of the significant up-front expenditure required, inter alia, to establish the global information sharing focal point.

Dr KONUMA (Japan) said that he supported the comments by the previous speaker.

The CHAIRPERSON assured the representative of New Zealand that her point would be reflected in the report.

Ms KIPTUI (Kenya), speaking on behalf of the Parties in the WHO African Region, said that the report should highlight the issues of technical assistance and capacity building for implementation of the protocol. Detailed information on the Parties' needs in those areas would be required to facilitate decision-making on such matters as governance and budgetary issues at the sixth session of the Conference of the Parties or the first session of the Meeting of the Parties. The Parties in her Region would submit their proposals in writing to the Convention Secretariat.

Mr REGALADO PINEDA (Mexico), speaking on behalf of the Parties in the WHO Region of the Americas, Mr HAMANEH (Islamic Republic of Iran) and Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region, said that they supported the suggestion by the representative of Kenya that the report should highlight the subject of technical assistance and capacity building.

Mr MOHAMED (Maldives), speaking on behalf of the Parties in the WHO South-East Asia Region, said that the report should also reflect the view expressed by many Parties that the evidence-based research referred to in Article 5.5 and paragraph 2 of Article 11bis could begin much earlier than the stipulated deadlines. Time should not be a factor.

Dr SA'A (Cameroon) asked the Chairperson to ensure that the report reflected the fact that countries such as his needed not only technical but also financial assistance in implementing the protocol. Without such assistance the challenges could prove too great and create a vacuum that the tobacco companies were only too capable of filling.

Mr MBUYU MUTEBA YAMBELE (Democratic Republic of the Congo) urged the Parties, the Convention Secretariat and WHO to provide support, including technical assistance and support for the harmonization of regulations, to his country and others in the WHO African Region to assist them in complying with their obligations under the protocol.

Ms SY (Senegal), speaking on behalf of the Parties in the WHO African Region, drew attention to four key points. First, the current rules regarding travel arrangements had prevented several delegations from her Region from taking part in the final session of the Intergovernmental Negotiating Body; the rules must be revised so as to provide support to any delegation that required it. Secondly, the Conference of the Parties should mandate a group of experts to report to the first session of the Meeting of the Parties on the needs that developing country Parties had for assistance with regard to incorporating the protocol into their domestic legislation and ensuring its implementation through the establishment of tracking and tracing systems. Thirdly, evidence-based research on key factors of production should be prioritized so as to ensure that the appropriate measures were taken in accordance with Article 5.5 of the draft protocol. Lastly, it was important to note that implementation of

the protocol relied on close cooperation with the World Customs Organization and other relevant bodies.

The CHAIRPERSON requested the Parties wishing to add to or expand on the concepts mentioned thus far to send their suggestions in writing to the Convention Secretariat as soon as possible. He and the Convention Secretariat would then draft the full report to the Conference of the Parties and, in keeping with the procedure applied before the previous session of the Intergovernmental Negotiating Body, submit it to the Bureau for approval.

4. CLOSURE OF THE SESSION: Item 5 of the Agenda

Mr DESIRAJU (India), Ms SY (Senegal), Mr LINDGREN (Norway), Mr RASHED (United Arab Emirates), Mr REGALADO PINEDA (Mexico) and Mr COTTERELL (Australia), speaking on behalf of the Parties in the WHO South-East Asia Region, African Region, European Region, Eastern Mediterranean Region, Region of the Americas and Western Pacific Region respectively, hailed the successful conclusion to the negotiations on the draft protocol as a landmark in the fight to combat illicit trade in tobacco products. It was the culmination of a long and difficult process in which the various Parties had come to understand each other's problems and concerns, and in which they had developed cross-regional relations that would ultimately assist in the protocol's implementation. All those involved were to be congratulated on the achievement.

Dr COULIBALY (Mali) joined the previous speakers in congratulating all those involved in bringing the negotiations to a successful conclusion. Drawing attention to the armed conflict and social upheaval currently afflicting his country, he asked all present to pray for his delegation as they tried to find their way back to their families.

The CHAIRPERSON assured the representative of Mali that he and his delegation had the full support and a place in the thoughts of every person in the room. He hoped that they and their families would remain safe so that they could continue to contribute to the construction of the country in the interests of its citizens.

Mr VON KESSEL (Observer, Switzerland)¹ welcomed the outcome to the negotiations and stressed the importance of national capacity-building and global cooperation in combating illicit trade in tobacco products. The protocol would help to secure State revenues and to bolster the preventive effects of taxation. Switzerland was planning to ratify the WHO FCTC as part of its legislative programme for 2011–2015, which would call for changes in its domestic law, such as the bill currently being drafted on tobacco products.

The CHAIRPERSON said that he looked forward to Switzerland's assistance in ensuring the free flow of information needed for investigations into illicit trade.

Mr LOM (Observer, United States of America)² said that his Government was striving to ratify the WHO FCTC, having passed the legislation required to comply fully with its provisions, and that there was other legislation pending for future compliance with the protocol. Initial steps had been taken to provide technical assistance to any Parties in need of

¹ Participating by virtue of Rule 29 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

² Participating by virtue of Rule 29 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

support in their efforts to control the tobacco supply chain, and the United States of America looked forward to playing a more active role.

The CHAIRPERSON said that he looked forward to the United States of America joining the Convention and contributing to efforts to combat illicit trade.

Ms JOHNS (Observer, Framework Convention Alliance on Tobacco Control)¹ congratulated the Intergovernmental Negotiating Body on having produced a new tool with which to counter efforts to undermine the most effective means of tobacco control, namely pricing and taxation. It sent a clear message that the goal was to protect public health as opposed to the commercial interests of the tobacco industry. The groundwork for implementation must begin as soon as possible. Parties should decide on the next steps in terms of research, technical assistance and capacity-building at the next session of the Conference of the Parties rather than waiting for the first session of the Meeting of the Parties. The Alliance would continue to provide support and technical advice, while championing the objectives of the WHO FCTC at the global, regional and country levels.

Mr SINCOVICH (Observer, World Customs Organization)² welcomed the historic achievement of the Intergovernmental Negotiating Body in finalizing the draft protocol. Aware of the new challenges and the amount of work to be done, the World Customs Organization would continue seeking to identify and promote synergies with the Convention Secretariat and others so that they complemented each other in their respective fields of competence, with a view to ensuring the smooth implementation of the protocol.

The CHAIRPERSON, bringing the proceedings to a conclusion, paid tribute to the spirit, dedication and energy shown by all those whose tireless efforts over the previous week of intensive negotiations had resulted in an agreed text for a new international treaty. It was an outstanding achievement and everybody should feel proud at having contributed to the draft protocol. The message was that solutions could be found by working together towards a common objective, namely to protect the health of citizens from illicit trade in tobacco and tobacco products. Extending his personal thanks to all those involved for having facilitated his work, he said that he looked forward to joining them in Seoul, Republic of Korea, to see the protocol adopted by the Conference of the Parties.

(Applause)

Dr NIKOGOSIAN (Head, Convention Secretariat) said that it had been a privilege for the Convention Secretariat to serve the historic negotiations and expressed his appreciation to the Chairperson for his leadership over the previous four years; to the Bureau and the Parties for their guidance and support; to the States non-Parties and others that had participated and contributed as observers; to WHO and its staff and all those working behind the scenes; and to the European Union for its generous contributions without which the final session of the Intergovernmental Negotiating Body would not have been possible. The Intergovernmental Negotiating Body had just completed the final draft of the first protocol to the first ever public health treaty. It was a momentous occasion and a fine gift to members of the public health community in a week when they were celebrating World Health Day 2012.

¹ Participating by virtue of Rule 31 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

² Participating by virtue of Rule 30 of the Rules of Procedure of the Conference of the Parties to the WHO Framework Convention on Tobacco Control.

(Applause)

The CHAIRPERSON declared the final session of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products formally closed.

The meeting rose at 13:35.

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